SRI LANKA SUPREME COURT **Judgements Delivered (2016)**

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Judgments Delivered in 2016

15/12/16	S.C.Appeal No.07/2016	Perakum Dissanayakage Jayasuriya No.147, Kurunegala Road Rambukkana 1st Defendant-Respondent-Petitioner Vs. K. M. Tharanganee Mallika Kumari Kadawattiya, Walpola Watta, Kotawella Plaintiff-Appellant-Respondent Dissanayake Mudiyanselage Gunathilaka No.147, Kurunegala Road, Rambukkana Presently at “Tilaka Stores”, Wahawa Junction, Rambukkana 2ndDefendant-Respondent-Respondent
15/12/16	S.C. F.R. Application No. 476/2012	Gamlakshage Sunil Seneviratne Dikhena, Pitigala. PETITIONER Vs. 1. Shelton Gunasekera Assistant Investigation Officer Ceylon Electricity Board Head Office Colombo 02 2. H.A.A. Perera Electrician, Ceylon Electricity Board Head Office Colombo 02 3. Divisional Electrical Engineer, Ceylon electricity Board Ambalangoda 4. Electrical Engineer Ceylon electricity Board Piliyandala 5. Ceylon Electricity Board Piliyandala Branch Piliyandala 6. Ceylon Electricity Board Head Office Colombo 02 7. Inspector of Police Udayakumara Police Station Pitigala 8. Police Constable 12911 Jayalath Police Station Pitigala 9. Police Constable 20616 Ananda Police Station Pitigala 10. Sergeant 24672 Lal Ananda Police Station Pitigala 11.Deputy Inspector General of Police Southern Province Galle 12.Inspector General of Police Police Headquarters Colombo 01 13.Hon. Attorney General Attorney General‟s Department Colombo 12 14.Director General,. Public Utilities Commission 06th Floor, B.O.C. Merchant Tower St. Michael‟s Road Colombo 03 RESPONDENTS

13/ 12/ 16	SC / Appeal / 207/2014	In the matter of the intestate property of the late J.M. Ukkubanda of Alawwa. J. M. Appuhamy, No. 89, Main Street, Alawwa. Petitioner Vs. 1. M. M. Bandaramenike, No. 89, Main Street, Alawwa. 2. J. M. Yasapala, 'Yasasiri', Indigaha Dowa, Lunuwatta, Bandarawela. 3. J. M. Sudu Menike, DIV Rampitiye Gedara, Idamegama, Bambarapana, Bandarawela. 4. J. M. Sudu Banda, Suduwatura Ara, Kumbukkana, Monaragala. 5. J. M. Jayasekera, No. 107, Sewwandi Textiles, Main Street, Alawwa. 6. J. M. Gunathilake, No. 89, Main Street, Alawwa. 7. J. M. Punchi Banda, Bandarawela Textiles, Main Street, Alawwa. Respondents AND BETWEEN J. M. Gunathilake, No. 89, Main Street, Alawwa. 6th Respondent Petitioner Vs. J. M. Appuhamy, No. 89, Main Street, Alawwa. Petitioner Respondent 1. M. M. Bandaramenike, No. 89, Main Street, Alawwa. 2. J. M. Yasapala, 'Yasasiri', Indigaha Dowa, Lunuwatta, Bandarawela. 3. J. M. Sudu Menike, DIV Rampitiye Gedara, Idamegama, Bambarapana, Bandarawela. 4. J. M. Sudu Banda, Suduwatura Ara, Kumbukkana, Monaragala. 5. J. M. Jayasekera, No. 107, Sewwandi Textiles, Main Street, Alawwa. 7. J. M. Punchi Banda, Bandarawela Textiles, Main Street, Alawwa. 1st to 5th and 7th Respondent- Respondents AND NOW BETWEEN 2. J. M. Yasapala, 'Yasasiri', Indigaha Dowa, Lunuwatta, Bandarawela. 5. J. M. Jayasekera, No. 107, Sewwandi Textiles, Main Street, Alawwa. 2nd and 5th Respondent Respondent Appellants Vs. J. M. Gunathilake, No. 89, Main Street, Alawwa. 6th Respondent Petitioner Respondent J. M. Appuhamy, No. 89, Main Street, Alawwa. Petitioner Respondent-Respondent 1. M. M. Bandaramenike, No. 89, Main Street, Alawwa. 3. J. M. Sudu Menike, DIV Rampitiye Gedara, Idamegama, Bambarapana, Bandarawela. 4. J. M. Sudu Banda, Suduwatura Ara, Kumbukkana, Monaragala. 7. J. M. Punchi Banda, Bandarawela Textiles, Main Street, Alawwa. 1st 3rd 4th 7th Respondent Respondent- Respondents
13/ 12/ 16	S.C. Appeal 27A/2009	Sri Lanka Insurance Corporation Limited No. 21, Vauxhall Street, Colombo 2. PETITIONER Vs. 1. Commissioner of Labour Labour Department, Colombo 05. 2. S.K.S. Rathnayake Asst. Commissioner of Labour Colombo South Office, Labour Department, Colombo 5. 3. C.H. Senevirathne No. 73, Pepiliyana, Boralesgamuwa. RESPONDENTS AND NOW BETWEEN Sri Lanka Insurance Corporation Limited No. 21, Vauxhall Street, Colombo 2. PETITIONER-PETITIONER Vs. 1. Commissioner of Labour Labour Department, Colombo 05. 2. S.K.S. Rathnayake Asst. Commissioner of Labour Colombo South Office, Labour Department, Colombo 5. 3. C.H. Senevirathne No. 73, Pepiliyana, Boralesgamuwa. RESPONDENTS-RESPONDENTS

13/ 12/ 16	SC APPEAL No. 178/2013	PathirennehelageSwarnasiriNimal, Of Batuwatta, Helamada. (Deceased) Plaintiff GangodaMudiyanselageWijewathi Podimenike of Mahawelegedara, Batuwatta, Helamada. Substituted Plaintiff Vs 1. PathirennehelageLeelawathie, Of Mahawelegedara, Batuwatta, Helamada. 2. VidanarallageGunarathMenike, Of Mahawelegedara, Batuwatta, Helamada. Defendants AND BETWEEN GangodaMudiyanselageWijewathi Podimenike of Mahawelegedara, Batuwatta, Helamada. SubstitutedPlaintiff Appellant Vs 1. PathirennehelageLeelawathie, Of Mahawelegedara, Batuwatta, Helamada. 2. VidanarallageGunarathMenike, Of Mahawelegedara, Batuwatta, Helamada. Defendants Respondents AND NOW BETWEEN GangodaMudiyanselageWijewathi Podimenike of Mahawelegedara, Batuwatta, Helamada. Substituted Plaintiff Appellant Appellant Vs PathirennehelageLeelawathie Of Mahawelgedera, Batuwatta, Helamada. Defendant Respondent Respondent

08/ 12/ 16	S.C F.R. 206/2008	1. DEMUNI SRIYANI DE SOYZA No.8, 6th Lane, Jambugasmulla Mawatha, Nugegoda. 2. S.M.SRIYALATHA No. 515, Kuruppu Junction, Polonnaruwa. 3. Y.H. SANATILAKE No. 309/1/A, BOP 316, Thalpothe, Polonnaruwa. 4. C.A.P. DE SILVA No.7, Ela Hingurakgoda, Minneriya. 5. K.K.U.J.N. PERERA Merlin Mawatha, Horagolla, Maravila. 6. P.A.J.S. SAMARAKOON No. 40, Dewala Mawatha, Nattandiya. 7. D.M. GUNATHILAKE Baddegama, Kosdeniya. 8. J.A.G.S. BANDARA No.554 3/4, 6th Lane, Bandaranayake Mawatha, Gonahena, Kadawatha. 9. P.G. DIAS No. 12, Sadananda Mawatha, Panadura. 10. H.D. WIMALASENA Kudirippuwa, Galmuruwa. 11. W.A. ARIYARATNE Kalawana, Metikumbura. 12. W.D. PERERA No. 125, Temple Road, Maharagama. 13. J.M. PEMADASA Ihalagama, Gampaha. 14. I.M.M. KUMARIHAMI Dela Walauwa, Pussella, Parakaduwa. 15. H.M.L.S.B. HERATH No. 46 E, Hendeniya, Peradeniya. 16.M.A.MANURATHNA No.11, Ganga Mawatha, Panadura. 17. M.K.G.MUDIYANSE No. 451, Zone 4, Nawanagaraya, Medirigiriya. 18. A.M.P.I.M.K. HERATH No.77/7, Ihalakaragahamuna, Kadawatha. 19. H.N. CHANDRALATHA No. 955/5, 1st Lane, Gothatuwa, Angoda. 20. W.M. CHANDRALATHA No.8, Irrigation Quarters, Kundasale. 21. J.WICKRAMASINGHE Palapathwala, Totagamuwa, Weliwatte. 22. C. RUPASINGHE, “Shanthi”,Talatuoya, Mudunkada. 23. H.C.S. WATHULANDA No.7 F/1,Hendeniya, Peradeniya. 24. H.B.DENIYAWATTE No. 16, Dharmashoka Mawatha, Aruppola, Kandy. 25. D.M.D. KODIPPILI No. 24, Uyankele Road, Panadura. 26. C.WITHANAWASAM No. 49/3, Wekanda Road, Homagama. 27. M.P.L.DE SILVA, No. 145/3, Old Nawala Road,Nawala, Rajagiriya. PETITIONERS VS. 1(b). DHARMASENA DISSANAYAKE Chairman. 2(b). A.SALAM ABDUL WAID Member. 3(b). DR.PRATHAP RAMANUJAM Member. 4(b). MS.D.SHIRANTHA WIJAYATILAKA Member. 5(b). MRS.V. JEGARASINGHAM Member. 6(b).SANTI NIHAL SENEVIRATHNE Member. 7(b). S.RANNUGGE Member. 8(b). D.L.MENDIS Member. 9.(b).SARATH JAYATHILAKE Member. All of the Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 5. 10(b).H.M.G. SENEVIRATHNE Secretary, Public Service Commission, No.177,NawalaRoad, Narahenpita. 11. D.DISSANAYAKE Secretary, Ministry of Public Administration and Home Affairs. 12. HON.ATTORNEY GENERAL Attorney-General‟s Department, Colombo 12. RESPONDENTS

08/12/16	S.C Appeal No.111/2010	DR. DARSHANA WICKRAMASINGHE “Lions Paradise” Wewala, Hikkaduwa. PETITIONER VS. 01. UNIVERSITY OF RUHUNA 02. PROF. SUSIRITH MENDIS Vice Chancellor 03. PROF. GAMINI SENANAYAKE Deputy Vice Chancellor 04. PROF. S.W. AMARASINGHE Dean-Humanities & Social Sciences 05. PROF.MRS. R.T. SERASINGHE Dean-Agriculture 06. PROF.P.L. ARIYANANDA Dean-Medicine 07. PROF.R.N. PATHIRANA Dean-Science 08. PROF.P.R.T. CUMARANATUNGE Dean-Fisheries and Marine Sciences and Technology 09. MRS.H.S.C. PERERA Dean-Management and Finance 10. DR. A.M.N. ALAGIYAWANNA Dean-Engineering 11. PROF.T.R. WEERASOORIYA 12. PROF.W.D.G. DHARMARATHNE 13. REV. WALIPITIYE RATNASIRI 14. MR. M.A. THASIM 15. MR. SUNIL JAYARATHNE 16. MR. RASIK SAROOK 17. MR.C. MALIYADDA 18. MR. KULATUNGE RAJAPAKSE 19. MR.CHULA DE SILVA 20. MR. RAJA HEWABOWALA 21. MR.H.G.S.JAYASEKERA 22. MR. D.W. PRATHAPASINGHE 23. MR.W.K.K. KUMARASIRI 24. MR. THILAK JAYARATHNE 25. MR.O.V.L.P. ANURA Assistant Internal Auditor All of the University of Ruhuna 26. MR.GODAHEWA Inquiry Officer, “Prasad”, Talpawila, Kakanadura. 27. PROF.(MRS) MIRANI WEERASOORIYA Faculty of Medicine, Karapitiya, Galle. RESPONDENTS AND NOW BETWEEN 01. UNIVERSITY OF RUHUNA 02. PROF. SUSIRITH MENDIS Vice Chancellor 03. PROF. GAMINI SENANAYAKE Deputy Vice Chancellor 10. DR. A.M.N. ALAGIYAWANNA Dean-Engineering 12. PROF.W.D.G. DHARMARATHNE 15. MR. SUNIL JAYARATHNE 21. MR.H.G.S.JAYASEKERA 25. MR.O.V.L.P. ANURA Assistant Internal Auditor All of the University of Ruhuna 27. PROF.(MRS) MIRANI WEERASOORIYA Faculty of Medicine, Karapitiya, Galle. RESPONDENTS- PETITIONERS 1. PROF.R.M. RANAWEERA BANDA 2. PROF.MANGALA SOYZA 3. PROF.T.R.WEERASOORIYA 4. DR.P.A.JAYANTHA 5. .DR.TILAK P.D.GAMAGE 6. M.W. INDRANI 7. PROF.R.N.PATHIRANA 8. REV. MALIMBODA GNANALOKA THERO 9. KAPUGAMA SARANTHISSA THERO 10. K.A.J.ABEYGUNAWARDENE 11. BUDDHAPRIYA NIGAMUNI 12. H.G.GUNASOMA 13. CHANDRASIRI HEWAKANDAMBI 14. M.G. PUNCHIHEWA (All of University of Ruhuna) ADDED-PETITIONERS VS. DR.DARSHANA WICKRAMASINGHE “Lion‟s Paradise”, Wewala, Hikkaduwa PETITIONER- RESPONDENT 4. PROF. S.W.AMARASINGHE Dean-Humanities & Social Sciences 5. PROF.MRS.R.T. SERASINGHE Dean-Agriculture 6. PROF.P.L. ARIYANANDA Dean-Medicine 7. PROF.R.N. PATHIRANA Dean-Science 8. PROF.P.R.T. CUMARANATUNGE Dean- Fisheries and Marine Sciences and Technology 9. MRS.H.S.C.PERERA Dean-Management and Finance 11. PROF.T.R.WEERASOORIYA 13. REV.WALIPITIYE RATNASIRI 14. MR.M.A.THASIM 16. MR.RASIK SAROOK 17. MR.C. MALIYADDA 18. MR.KULATUNGE RAJAPAKSE 19. MR. CHULA DE SILVA 20. MR.RAJA HEWABOWALA 22. MR.D.W. PRATHAPASINGHE 23. MR.W.K.K.KUMARASIRI 24. MR.THILAK JAYARATHNE All of the University of Ruhuna 26. MR. GODAHEWA Inquiry Officer, “Prasad”, Talpawila, Kakanadura. RESPONDENTS- RESPONDENTS

07/ 12/ 16	SC Appeal No. TAB/ 1/2015	1. Mazur Ivegen 2. Iana Bereznah No. 130, Tanganrogskay Divisu 5, Mariupol Ukrain (presently at Welikada Remand) Accused - Appellants Vs. The Hon. Attorney General Attorney General's Department Colombo 12. Respondent
07/ 12/ 16	S.C. Appeal No. 01/2005	Victor Perera Of 45/2, Jubilee Road, Walana, Panadura. APPLICANT Ranliya Garment Industries Ltd., Of No. 116, Poorvarama Road, Colombo 6. RESPONDENT Ranliya Garment Industries Ltd., Of No. 116, Poorvarama Road, Colombo 6. RESPONDENT-APPELLANT Vs. Victor Perera Of 45/2, Jubilee Road, Walana, Panadura. APPLICANT-RESPONDENT AND NOW Ranliya Garment Industries Ltd., Of No. 116, Poorvarama Road, Colombo 6. RESPONDENT-APPELLANT-PETITIONER Vs. Victor Perera Of 45/2, Jubilee Road, Walana, Panadura. APPLICANT-RESPONDENT-RESPONDENT
01/ 12/ 16	S.C Appeal No. 40/2004	1. Talawakelle Plantations Limited Mount Mary Road, Nuwara Eliya. RESPONDENT-RESPONDENT-PETITIONER Vs. Ceylon Estates Staff Union 6, Aloye Mawatha, Colombo 3. On behalf of R. Rajendran Assistant Field Officers Quarters, Coombewood Division, Logie Estate Talawakelle. APPLICANT-APPELLANT-RESPONDENT 2. The Superintendent Logie Estate Talawakelle. 3. Hayleys Plantation Services Limited 400, Deans Road, Colombo 10. 4. Sri Lanka State Plantations Corporation Gregory's Road, Colombo 7. 5. The Land Reform Commission C82, Gregory's Road, Colombo 7. RESPONDENT-RESPONDENT- RESPONDENTS
01/ 12/ 16	SC / Appeal / 12/2012	Bridget Premalatha Perera, No. 520, Ranmuthugala, Kadawatha. Plaintiff Vs. 1. Balasooriyage Anton Nimal Perera, 2. Denipitiya Manikkuge Ramani Kumari, Both of No. 115/A, Ihalakaragahamuna, Kdawatha. Defendants AND BETWEEN 1. Balasooriyage Anton Nimal Perera, 2. Denipitiya Manikkuge Ramani Kumari, Both of No. 115/A, Ihalakaragahamuna, Kdawatha. Defendant Appellants Vs. Bridget Premalatha Perera, No. 520, Ranmuthugala,, Kadawatha. Plaintiff Respondent AND NOW BETWEEN Bridget Premalatha Perera, No. 520, Ranmuthugala,, Kadawatha. Plaintiff Respondent Appellant Vs. 1. Balasooriyage Anton Nimal Perera, 2. Denipitiya Manikkuge Ramani Kumari, Both of No. 115/A, Ihalakaragahamuna, Kdawatha. Defendant Appellant Respondents

29/11/16	SC Appeal No. 95/2010	WeligalleWedarallageDevarAshoka Gunawardena of Weligalla Road, Mawanella. Plaintiff Vs PradeshiyaSabhava of Mawanella Defendant AND WeligalleWedarallageDevarAshoka Gunawardena of Weligalla Road, Mawanella. Plaintiff Appellant Vs PradeshiyaSabhava of Mawanella Defendant Respondent AND NOW BETWEEN PradeshiyaSabhava of Mawanella Defendant Respondent Appellant Vs WeligalleWedarallageDevarAshoka Gunawardena of Weligalla Road, Mawanella Plaintiff Appellant Respondent In the matter of an Appeal from a judgment of the Civil Appellate High Court of the Sabaragamuwa Province holden in Kegalle. WeligalleWedarallageMadhawaSisira Kumara, Of No. 527, Anwarama, Mawanella. Plaintiff Vs PradeshiyaSabhava, Mawanella Defendant AND WeligalleWedarallageMadhawaSisira Kumara, of No. 527, Anwarama, Mawanella. Plaintiff Appellant Vs PradeshiyaSabhava of Mawanella Defendant Respondent AND NOW BETWEEN PradeshiyaSabhava of Mawanella Defendant Respondent Appellant Vs WeligalleWedarallageMadhawaSisira Kumara, of No. 527, Anwarama, Mawanella. Plaintiff Appellant Respondent

29/11/16	S.C.F.R. No. 396/2010	U.W. Seneriratne, no. 48/7, 2ndLane, Sunshine Gardens, Karapitiya PETITIONER Vs. 1. Mahinda Balasooriya, Inspector General of Police, Police Headquarters, Colombo 01. 1A. Pujith Jayasundera, Inspector General of Police, Police Headquarters, Colombo 01. 2. Gotabhaya Rajapaksha, Secretary, Ministry of Defense, No. 15/5, BaladakshaMawatha, Colombo 03. 2A. Karunasena Hettiarachchi, Secretary, Ministry of Defense, No. 15/5, BaladakshaMawatha, Colombo 03. 3. K.C.Logeswaran, Secretary, National Police Commission, Rotunda Tower, Level 3,No. 109, Galle Road, Colombo 03 4.N. D. Daluwatta, Deputy Inspector General of Police Southern Province, (South),Tangalle DIG's Office, Tangalle. 5.Daya Samaraweera, Deputy Inspector General of Police Southern Province – Galle, DIG's Office, Galle. 6. A.D.J. Chandrakumara, Superintendent of Police, SP Office, Tangalle Division, Tangalle. 7. Hon. Attorney General, Attorney General's Office, Colombo 12. RESPONDENTS 8. Vidyajothi Dr. Dayasiri Fernando, Chairman 8A Justice SathyaHettige PC, Chairman 9.S.C.Mannapperuma, Member 10. AnandaSeneviratne, Member 11.N.H.Pathirana 12.Palitha M Kumarasinghe,Member 12A. KanthiWijetunge, Member 13.SirimavoA.Wijetatne,Member 13A Sunil S.Sirisena, Member 14. S.Thillanadarajah, Member 15.A.MohamedNahiya,Member 16.M.D.W.Ariyawansa, Member 16A I.M.ZoysaGunasekera,Member 8th to 16A All of Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 17. T.M.L.C.Senaratne, Secretary, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 05. 18. N.K.Illangakoon, Inspector General of Police, Police Headquarters, Colombo 01. 19. Prof. SiriHettige, Chairman 20. P.H.Manatunga, Member 21. SavithreeWijesekera, Member 22. Y.L.M.Zawahir, Member 23. Anton Jeyanadan, Member 24. TilakCollure, Member 25. F. de Silva, Member National Police Commission, Block No. 3, BMICH Premises, BauddhalokaMawatha, Colombo 07. 26. N.AriyadasaCooray, Secretary, National Police Commission, Block No. 3, BMICH Premises, Bauddhaloka Mawatha, Colombo 07. ADDED RESPONDENTS
29/11/16	SC Appeal No.32/11	Officer-in-Charge. Police Station, Maradana. Complainant. Vs. 01. Galabada Payagalage Sanath Wimalasiri, No.D/1/2, Police Quarters, Gonahena, Kadawatha. 02. R. Jeganathan, No.139, Ericwatte, Galaha Accused. AND BETWEEN Galabada Payagalage Sanath Wimalasiri, No.D/1/2, Police Quarters, Gonahena, Kadawatha. Accused-Appellant. Vs. Officer-in-Charge. Police Station, Maradana. Complainant-Respondent AND NOW BETWEEN Galabada Payagalage Sanath Wimalasiri, No.D/1/2, Police Quarters, Gonahena, Kadawatha. Accused-Appellant-Petitioner Vs. Officer-in-Charge. Police Station, Maradana. Complainant-Respondent-Respondent Honourable Attorney General, Attorney-General‟s Department, Colombo 12. Respondent.

28/11/16	S.C.Appeal No.51/2015	Hettiarachchige Don Nicholas Heliyan No.243. Wilpatha Chilaw Defendant-Appellant-Appellant Vs. Peththaperuma Arachchi Somawathie “Siriniwasa”, Addipala Chilaw Plaintiff-Respondent-Respondent
27/11/16	S.C.F.R. Application No.211/2010	Arabegedera Sanjeewa Ravindra Rajapakse, No.130, Kotakadeniya Road, Weligalla PETITIONER Vs. 1. The University of Peradeniya Peradeniya. 2. Prof. S. B. S. Abayakoon, Vice Chancellor, 3. Prof. K. Premaratne, Deputy Vice Chancellor, 4. Dr. K. Samarasinghe, Dean/ Agriculture, 5. Dr. A. S. P. Abayaratne, Dean/ Arts, 6. Prof. E. A. P. D. Amaratunga, Dean/ Dental Sciences, 7. Prof. W. M. S. B. Weerakoon, Dean/ Engineering, 8. Dr. A. G. Buthpitiya, Dean/ Medicine, 9. Prof. S. H. P. P. Karunaratne Dean/ Sciences, 10. Prof. P. Abeynayake, Dean/ Veterinary Medicine and Animal Science, 11. Prof. N. V. I. Ranatunga, Senate Representative, 12. Prof. R.L. Wijeyeweera, Senate Representative, 13. Prof. B. Hewavitarane, 14. Prof. A. D. P. Kalansooriya, 15. Prof. K. N. O. Dharmadasa, 16. Dr. Kapila Gunawardena, 17. Dr. Dushantha Medagedara, 18. Mr. W. M. Jayawardena, 19. Dr. P. Ramanujam, 20. Dr. S. B. Ekanayake, 21. Mr. D. Mathi Yugarajah, 22. Prof. K. Tennakoon, 23. Mr. W. L. L. Perera, 24. Mr. Lionel Ekanayake, 25. Mr. L. B. Samarakoon, 26. Mr. Mohan Samaranayake, All of University of Peradeniya, Peradeniya. 27. Mr. L. R. K. Perera, Head of Department, Department of Geology, University of Peradeniya, Peradeniya. 28. Mr. Dodanwela Acting Registrar, University of Peradeniya, Peradeniya. 29. Prof. H. M. N. Bandara, Faculty of Science, University of Peradeniya, Peradeniya. 30. Hon. Attorney General, Attorney General‟s Department, Colombo 12. RESPONDENTS
27/11/16	S.C/ FR Application No. 573/2010	1. Asitha Nanayakkara Liyanage No. 1, Iriyavetiya Junction, Kandy Road, Kiribathgoda. PETITIONER Vs. 1. Prasanna Ranaweera, Chairman Pradeshiya Sabha, Kelaniya. 2. Hemapala Hettiarachchi Secretary, Pradeshiya Sabha Kelaniya. 3. Commissioner of Local Government Kachcheri Complex Gampaha. 4. Chief Inspector of Police Kiribathgoda Police Station Kiribathgoda. 5. Hapuarachchige Dilan Lakshitha No. 132/55, Nahena, Hunupitiya, Wattala. 6. Wickramasinghe Arachchige Don Palitha Wickramasinghe No. 554/D, Iriyawetiya Kelaniya. 7. Mervyn Silva Deputy Minister, Ministry of Highways and Road Development 9th Floor, Sethsiripaya, Battaramulla. 8. Hon. Attorney General Attorney General’s Department, Colombo 12. RESPONDENTS

23/11/16	SC / Appeal No. 71/2014	1. HembanapuraSonaliNelunga de Silva, 2. HembanapuraHareshNilanka de Silva, both of, No. 491, High Level Road, Wijerama, Nugegoda. Plaintiffs vs. 1. LalithRohanaEdirisingha, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe. (Deceased) 1A. SunithaNandaniChandrasekera, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe. 2. WaranukuwannaWaduge Don Malrani Iranganie Mala Perera, No. 46, School Lane, Station Road, Dehiwala. 3. SajithThumalPanduwawala, Kumara Oil Mills, Kandy Road, Miriswatta, Imbulgoda. Defendants AND SajithThumalPanduwawala, Kumara Oil Mills, Kandy Road, Miriswatta, Imbulgoda. 3rd Defendant Appellant Vs 1. HembanapuraSonaliNelunga de Silva. 2. HembanapuraHareshNilanka de Silva. Both of No. 491, High Level Road, Wijerama, Nugegoda. Plaintiffs Respondents 1.LalithRohanaEdirisinghe, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe (Dceased) 1A. SunithaNandaniChandrasekera, No. 743/8A, MuwanhelaWatta Road, 4th Lane, Talangama North, Malabe. 2.WaranukuwannaWaduge Don MalraniIranganie Mala Perera, No. 46, School Lane, Station Road, Dehiwala. 1st& 2nd Defendants Respondents AND NOW BETWEEN SajithThumalPanduwawala, Kumara Oil Mills, Kandy Road, Miriswatta, Imbulgoda. 3rd Defendant Appellant Appellant Vs 1. HembapuraSonaliNelunga de Silva, 2. HembapuraHareshNilanka de Silva, Both of No. 491, High Level Road, Wijerama, Nugegoda. 1st and 2nd Plaintiffs Respondents Respondents 1. LalithRohanaEdirisingha, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe. (Deceased) 1A. SunithaNandaniChandrasekera, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe. 2. WaranukuwannaWaduge Don MalraniIranganie Mala Perera, No. 46, School Lane, Station Road, Dehiwala. 1st and 2nd Defendants Respondents Respondents.
22/11/16	SC. Appeal No. 177/2010	YatawatteDhammanandaThero Sri Maha Bodhi MahaVihara Bahirawakanda, Kandy. Plaintiff-Respondent-Petitioner-Appellant Vs. Bahirawakande Dhammawansa Thero, Sri Maha Bodhi Vihara, Bahirawakanda, Kandy. Defendant-Appellant-Respondent-Respondent
22/11/16	SC Appeal 12/2015	Wasala Mudiyanselage Susitna Kumara Dayarathne No. 2, Thalgaswewa, Agbopura, Kanthale. Applicant Vs Onesh Trading (Pvt.) Ltd., No. 61/5, Kent Road, Colombo 09. Respondent AND BETWEEN Onesh Trading (Pvt.) Ltd., No. 61/5, Kent Road, Colombo 09. Respondent-Appellant Wasala Mudiyanselage Susitna Kumara Dayarathne No. 2, Thalgaswewa, Agbopura, Kanthale. Applicant-Respondent AND NOW BETWEEN Wasala Mudiyanselage Susitna Kumara Dayarathne No. 2, Thalgaswewa, Agbopura, Kanthale. Applicant-Respondent-Petitioner Onesh Trading (Pvt.) Ltd., No. 61/5, Kent Road, Colombo 09. Respondent-Appellant-Respondent

22/11/16	S.C. Appeal No. 173/2012	MohedeenPichche Peer Mohomed No.16, Mohomed Building, Holbrook Bazaar, Agarapathana. Plaintiff-Respondent-Petitioner-Appellant Vs. HameedMohomedMusamil No.16/08, Bandaranayake Square, Talawakelle. Defendant-Appellant-Respondent- Respondent
22/11/16	SC Appeal 129/2010	Thajudeen Apukar Phimbiya Ratmale Defendant-Appellant-Petitioner-Appellant Vs Viharadhipathy Jankurawela Siriniwasa Thero Bodhiyanganaramaya, Pihimbiya Plaintiff-Respondent-Respondent-Respondent
22/11/16	S.C. Appeal No. 189/2012	Hatton National Bank PLC. No. 479, T.B. Jayah Mawatha, Colombo 10. PETITIONER Vs. Hikkaduwa Gamage Thejasiri Gunethilake No. 309/55, Gorge E. De Silva Mawatha, Kandy. RESPONDENT AND In the matter of an Appeal in terms of Section 753 of Civil Procedure Code read with Section 5 of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006. Hikkaduwa Gamage Thejasiri Gunethilake No. 309/55, Gorge E. De Silva Mawatha, Kandy. RESPONDENT-PETITONER Vs. Hatton National Bank PLC. No. 479, T.B. Jayah Mawatha, Colombo 10. PETITIONER-RESPONDENT AND NOW In the matter of an Application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) (Amendment Act) No. 54 of 2006 read together with Article 127 of the Constitution. Hatton National Bank PLC. No. 479, T.B. Jayah Mawatha, Colombo 10. PETITIONER-RESPONDENT-PETITIONER Vs. Hikkaduwa Gamage Thejasiri Gunethilake No. 309/55, Gorge E. De Silva Mawatha, Kandy. RESPONDENT-PETITONER-RESPONDENT
14/11/16	SC CHC APPEAL 21/2010	Ispat Corporation (Private) Limited, No. 19/27, Millagahawatta, Siwaramulla Road, Nedungamuwa, Weliweriya, Gampaha. Plaintiff Vs 1. Ceylinco Insurance Company Limited “Ceylinco House”, No. 69, JanadhipathiMawatha, Colombo 01. 2. National Development Bank of Sri Lanka, No. 40, NawamMawatha, Colombo 02. 3. Sampath Bank Limited, No. 110, Sir James PeirisMawatha, Colombo 02. Defendant Ceylinco Insurance PLC, “Ceylinco House”, No. 69, JanadhipathiMawatha, Colombo 01. 1st Defendant Appellant Vs Ispat Corporation (Private) Limited, No. 19/27, Millagahawatta, Siwaralamulla Road, Nedungamuwa, Weliweriya, Gampaha. Now at, No. 101, Pahalawela Road, Pelawatta, Battaramulla. Plaintiff Respondent 2. National Development Bank of Sri Lanka, No. 40, NavamMawatha, Colombo 02. 3.Sampath Bank PLC., No. 110, Sir James PeirisMawatha, Colombo 02. Defendants Respondents

14/11/16	SC Appeal No.49/2011 and SC Appeal No 50/2011	Namal Aracchige Namal Thilakaratne No.134/A Matha Road, Manning Town, Elvitigala Mawatha Colombo 8 Plaintiff Vs. 1. W.V.R.Somaratne Walpola Junction Welagedara, Attanagalle 2. R.P.T.N.H.Ranasinghe Ranssinghe Construction No.15/8 Veediyaratne Road Gampaha Defandants AND 1. W.V.R.Somaratne Walpola Junction Welagedara, Attanagalle 2. R.P.T.N.H.Ranasinghe Ranssinghe Construction No.15/8 Veediyaratne Road Gampaha Defendants-Appellants Namal Aracchige Namal Thilakaratne No.134/A Malta Road, Manning Town, Elvitigala Mawatha Colombo 8 Plaintiff-Respondent AND NOW BETWEEN In the matter of an application for Leve to appeal in terms of section 5C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by Act no.54 of 2006. 1. W.V.R.Somaratne Walpola Junction Welagedara, Attanagalle 2. R.P.T.N.H.Ranasinghe Ranssinghe Construction No.15/8 Veediyaratne Road Gampaha Presently at No.12, Church Road, Gampaha. Defendants-Appellants-Petitioners -Vs- Namal Aracchige Namal Thilakaratne No.134/A Matha Road, Manning Town, Elvitigala Mawatha Colombo 8 Plaintiff-Respondent-Respondent
10/11/16	S.C. Appeal No. 104/2012	Parameshwary Velupillai) of No. 6, Pansala Road, Koddaimunai, Batticaloa, Presently of No. 6, Ediriweera Avenue, Dehiwala. PETITIONER Vs. 1. Savithiri Lokitharajah (nee Savithri Velupillai) Presently of 9A, Hydean Way, Stebanage, Harts, S.G.2, 9XH, United Kingdom. 2 Selvadurai Sivam Ganeshanandham Presently of No.10, Bryn Ogwer, Pearhes Garned Banger Gurnedd, LL-ST-2DX, United Kingdom. 3. Dr. Kandapper Murugupillai of No. 4, Pansala Road, Batticaloa. RESPONDENTS AND NOW BETWEEN Parameshwary Upali De Silva (nee Parameshwary Velupillai) of No. 6, Pansala Road, Koddaimunai, Batticaloa, Presently of No. 6, Ediriweera Avenue, Dehiwala. PETITIONER-APPELLANT Vs. 1. Savithiri Lokitharajah (nee Savithri Velupillai) Presently of 9A, Hydean Way, Stebanage, Harts, S.G.2, 9XH, United Kingdom. (DECEASED) SUBSTITUTED BY Kandappan Lokitharajah No. 33, Cheyney Avenue, Cannors Park, Edgware, Middlesex HA8 6SA, United Kingdom. SUBSTITUTED 1ST RESPONDENT-RESPONDENT 2. Selvadurai Sivam Ganeshanandham Presently of No. Bryn Ogwer, Pearhes Garned Banger Gurnedd, LL-ST-2DX, United Kingdom. 2ND RESPONDENT-RESPONDENT 3. Dr. Kandapper Murugupillai of No. 4, Pansala Road, Batticaloa. (DECEASED) 3RD RESPONDENT-RESPONDENT AND NOW BETWEEN Parameshwary Upali De Silva (nee Parameshwary Velupillai) of No. 6, Pansala Road, Koddaimunai, Batticaloa, Presently of No. 6, Ediriweera Avenue, Dehiwala. PETITIONER-APPELLANT-APPELLANT Vs. 1. Savithiri Lokitharajah (nee Savithri Velupillai) Presently of 9A, Hydean Way, Stebanage, Harts, S.G.2, 9XH, United Kingdom. (DECEASED) SUBSTITUTED BY Kandappan Lokitharajah No. 33, Cheyney Avenue, Cannors Park, Edgware, Middlesex HA8 6SA, United Kingdom. SUBSTITUTED 1ST RESPONDENT-RESPONDENT-RESPONDENT 2. Selvadurai Sivam Ganeshanandham Presently of No. Bryn Ogwer, Pearhes Garned Banger Gurnedd, LL-ST-2DX, United Kingdom. 2ND RESPONDENT-RESPONDENT-RESPONDENT

09/11/16	S.C. F.R. Application No: 136/2015	1. HIKKADUWA LIYANAGE VINUSH LAKNIDU, No 5/2,Heegalduwa Road, Wilegoda, Ambalangoda. 2. LAKSHIKA SAMIDDHI GODELLAGE, No 5/2,Heegalduwa Road, Wilegoda, Ambalangoda. PETITIONERS VS. 1. SUMITH PARAKRAMAWANSA, The Principal and a Member of the Interview Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda. 1A. W.D. RAVINDRA PUSHPAKUMARA, The Principal, Dharmashoka College, Ambalangoda. 2. DIYAGUBANDUGE DAYARATHNE, Member of the Interview Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda. 3. NILENTHI SANTHAKA THAKSALA DE SILVA, (Representative of the School Development Board) Member of the Interview Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda. 4. MALLIYAWADU SHIRLY CHANDRASIRI, (Representative of the Past Pupils' Association) Member of the Interview Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda. 5. REKA NAYANI MALLAWARACHCHI, Secretary of the Interview and the Appeal and Objections Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda. 6. W.T.B. SARATH, Chairman of the Appeal and Objections Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda. 7. K.P. RANJITH, Member of the Appeal and Objections Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda. 8. JAGATH WELLAGE, (Representative of the Past Pupils' Association), Member of the Appeal and Objections Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda. 9. P.D. PATHIRATHNE, (Representative of the School Development Board), Member of the Appeal and Objections Board to admit students to Grade 1, GA/Am/ Dharmashoka College, Ambalangoda. 10. DIRECTOR OF NATIONAL SCHOOLS, Ministry of Education, Isurupaya, Battaramulla. 11. SECRETARY MINISTRY OF EDUCATION, Isurupaya, Battaramulla. 12. R.M.K. DAMINDA, No:34/18, Manimulla, Ambalangoda. 13. R.M.T. NIMSARA, No:34/18, Manimulla, Ambalangoda. 14. M.G.I. NIRANJALA, No.132, D.Santin de Soyza Mawatha, Kuleegoda. 15. K.A.M. PEIRIES, No.132, D.Santin de Soyza Mawatha, Kuleegoda. 16. R.M. MANORI, No. 15/3, Paluwatte Road, Poramba, Ambalangoda. 17. T.S. MIHISARA, No. 15/3, Paluwatte Road, Poramba, Ambalangoda. 18. N.H.T. YASANTHI, No: 43, Pieris Weda Mawatha, Kaluwadumulla, Ambalangoda.19. W.A.M.D. WEERAKOON, No: 43, Pieris Weda Mawatha, Kaluwadumulla, Ambalangoda. 20. HONOURABLE ATTORNEY- GENERAL, Department of Attorney- General, Colombo 12. RESPONDENTS
09/11/16	SC Appeal No. 176/12	S.A. Amitha Ranjani Lakmini Agro Centre, Blackpool, Nuwara Eliya Plaintiff-Respondent-Appellant Vs. Sunil Ratnayake Labuthala No. 185, New Settlement Ruwan Eliya. Defendant-Appellant-Respondent

07/11/16	SC Appeal No. 145/12	W.M. Raymond Peter Fernando, of Karanthippola Kuliyapitiya Plaintiff-Respondent-Appellant Vs. K. Stanley Wilfred, of No. 94, Hettipola Road Kuliyapitiya Defendant-Appellant-Respondent
02/11/16	SC. Appeal No. 138/11	1. Mr. MariyammahSandiyapillai No.16/2, New Chemmani Road, Nallur North, Jaffna. 2. Mr. KarthigesuSivanesan No.16/4, New Chemmani Road, Nallur North, Jaffna. Presently resident abroad (The 2nd Plaintiff appears by his Power of Attorney holder KarthigesuPulendrarajah of the same address) Plaintiff-Appellants-Petitioners Vs. 1. KarunakaranNavartnasingham 2. Mrs. GuneluxumyMaheswaran (Widow) 3. VinayagamoorthyKumaraguru 4. Wife Thanaluxumy All of New Chemmani Road Nallur North, Jaffna. Defendant-Respondents-Respondents
02/11/16	S.C (Appeal) No. 112/2011	Maddumage Chandralatha Perera No. 714/4, Medawala Road, Erawwala, Pannipitiya. PLAINTIFF Vs. Ratmalana Pedige Margaret Fernando No. 168, (Assessment No. 312) Dehiwala Road, Bellanwila, Boralesgamuwa. DEFENDANT AND BETWEEN Maddumage Chandralatha Perera No. 714/4, Medawala Road, Erawwala, Pannipitiya. PLAINTIFF-APPELLANT Vs. Ratmalana Pedige Margaret Fernando No. 168, (Assessment No. 312) Dehiwala Road, Bellanwila, Boralesgamuwa. DEFENDANT-RESPONDENT AND Maddumage Chandralatha Perera No. 714/4, Medawala Road, Erawwala, Pannipitiya. PLAINTIFF-APPELLANT-PETITIONER Vs. Ratmalana Pedige Margaret Fernando No. 168, (Assessment No. 312) Dehiwala Road, Bellanwila, Boralesgamuwa. DEFENDANT-RESPONDNET-RESPONDENT

01/11/16	SC. FR. 170/2008	01. M.M.I. Wilgamuwa, 1038/72, Sri Sumangala Mawatha, Aluvihara, Matale. & 133 others PETITIONERS Vs. 1. Lionel Fernando – Co-Chairman 2. Saliya Mathew- Co-Chairman of National Salaries & Cadres Commission Room, No. 2G, 10, B.M.I.C.H. Bauddaloka Mawatha, Colombo 07. 3. K.L.L. Wijerathne, Secretary, of National Salaries & Cadres Commission Room, No. 2G, 10, B.M.I.C.H. Bauddaloka Mawatha, Colombo 07. 3(a). Don Herbert Neville Piyadigama- Co-Chairman 3(b). Jayalath Anasinghe Vimalasena Dissanayake, Co-Chairman 3(c). Gunesekara Liyanage Wimaladasa Samarasinghe 3(d). Vijeyalakshmy Jegarasasingam 3(e). Ginigaddarage Piyasena 3(f). R.A. Dona Rupa Malini Peiris 3(g). Dyananda Widanagamachchi 3(h). Sembakuttige Swarnajothi 3(i). Benedict Karunajeewa Ulluwishewa 3(k). Sujeeva Rajapaksha 3(l). Prof. Sampath Amaratunga 3(m). Dr. Ravi Liyanage 3(n). W.K.Hemachandra Wegapitiya 3(o). Keerthi Kotagama 3(p). Reyaz Mihular 3(q). Priyantha Fernando 3(r). Leslie Shelton Devendra 3(s). Wijesinghe Wellappili Don Sumith Wijesinghe 3(t). Gampahalage Don Somaweera Chandrasiri 3(u). Walgama Hewamaluwage Piyadasa 3(a) to 3(u) Respondents: all of National Pay Commission Room No. 2-116, BMICH, Bauddhaloka Mawatha, Colombo 07. 4. National Housing Development Authority, 34, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. 5. M.I. Mohamed Rafeek, Chairman, 34, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. 6. W.L.G. Wasantha Wijeratne National Housing Development Authority, 34, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. 7. W.B. Ganegala, Secretary, Ministry of Housing & Common Amenities, 6th & 9th Floor, Sethsiripaya, Battaramulla. 8. P.B. Jayasundera, Secretary, Treasury, Ministry of Finance, Colombo 1. 9. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS
01/11/16	SC FR Application 41/ 2016	

27/ 10/ 16	S.C. F.R. No. 232/2012	DON KARUNASENA ATHUKORALA Batuwatte Mawatha, Hapugala Wakwella. PETITIONER VS. 1. H.M.GUNASEKERA Secretary, Ministry of Education, Isurupaya, Batraramulla. 1A. W.M.BANDUSENA, Secretary, Ministry of Education, Isurupaya, Battaramulla. 2. RADHA NANAYAKKARA, Additional Secretary, Ministry of Education, Isurupaya, Battaramulla. 3. P.B.ABEYKOON Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 7. 3A. J. DADALLAGE, Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 7. 4. DAYASIRI FERNANDO Chairman, 4A. DHARMASENA DISSANAYAKE Chairman, 5. PALITHA M. KUMARASINGHE Member, 5A. A.SALAM ABDUL WAID Member, 6. S.C.MANNAMPERUMA Member, 6A. MS. D.SHIRANTHA WIJEYATHILAKA Member, 7. ANANDA SENEVIRATNE Member, 7A. DR. PRADEEP RAMUNUGAM Member, 8. N.H.PATHIRANA Member, 8A. MRS. V. JEGARAJASINGHAM Member, 9. S. THILLAI NADARAJA Member, 9A. SANTI NIHAL SENEVIRATNE Member, 10. M.D.W.ARIYAWANSHA Member, 10A. S.RANNUGE Member, 11. A.MOHAMED NAHIYA Member, 11A. D.C.MENDIS Member, 12. SIRIMAVO A.WIJERATNE Member, 12A. SARATH JAYATHILAKA Member, The 3rd to 11th Respondents and presently, the 4A to 12A Respondents, all of Public Service Commission No. 177, Nawala Road, Narahenpita, Colombo 5. 13. T.M.L.C.SENEVIRATNE Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 5. 13A. H.M.G.SENEVIRATNE Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 5. 14. PROVINCIAL DIRECTOR OF EDUCATION, (Southern Province), Provincial Educational Department, Galle. 15. K.A.TILAKARATNE Director General of Pensions, Department of Pensions, Maligawatte, 15A. S.S.HETTIARACHCHI Director General of Pensions, Department of Pensions, Maligawatte, 16. HON. ATTORNEY GENERAL Attorney General‟s Department, Colombo 12. RESPONDENTS

26/ 10/ 16	S.C. Appeal No. 78/2013	1. Hettiarachchi Wellaburage Madurawathie Jayasundara 2. Alagiyawanna Mohotti Appuhamilage Pradeep Kumara appearing by his next Friend Alagiyawanna Mohotti Appuhamilage Chandradasa, Both of Walpolawatte, Narangaspitiya, Kirindiwela. PLAINTIFFS Vs. 1. Hettiarachchi Welliamburage Chandrawathhie Jayasundera 2. Hapuarachchige Rupasinghe (Deceased) 2a. Hettiarachchige Weliamburage Chandrawathie Jayasundara of Medawalawita, Meddagama, Kirindiwela. DEFENDANTS AND 1. Hettiarachchi Wellaburage Madurawathie Jayasundara 2. Alagiyawanna Mohotti Appuhamilage Pradeep Kumara appearing by his next Friend Alagiyawanna Mohotti Appuhamilage Chandradasa, Both of Walpolawatte, Narangaspitiya, Kirindiwela. PLAINTIFFS-APPELLANTS Vs. 3. Hettiarachchi Welliamburage Chandrawathhie Jayasundera 4. Hapuarachchige Rupasinghe (Deceased) 2a. Hettiarachchige Weliamburage Chandrawathie Jayasundara of Medawalawita , Meddagama, Kirindiwela. DEFENDANTS-RESPONDENTS AND NOW BETWEEN 1. Hettiarachchi Wellaburage Madurawathie Jayasundara 2. Alagiyawanna Mohotti Appuhamilage Pradeep Kumara (Deceased) 2a. Alagiyawanna Mohotti Appuhamilage Chandradasa 2b. Alagiyawanna Mohotti Appuhamilage Cisna Kumari Both of Walpolawatte, Narangaspitiya, Kirindiwela. PLAINTIFFS-APPELLANTS-PETITIONERS Vs. 1. Hettiarachchi Welliamburage Chandrawathhie Jayasundera 2. Hapuarachchige Rupasinghe (Deceased) 2a. Hettiarachchige Weliamburage Chandrawathie Jayasundara of Medawalawita , Meddagama, Kirindiwela. DEFENDANTS-RESPONDENTS-RESPONDENTS

20/ 10/ 16	SC / Appeal / 87/2002	Singanipurage Kusuma Rajapakse Muttetuwatta, Dompe. Plaintiff Vs. 1. Rajapakse Hunuge Evsa, Giridara, Dompe. 2. Rajapakse Hunuge Alice, Pahala Dompe, Dompe. 3. Rajapakse Hunuge Punyasena Fernando, 4. Singanipurage Dharmasiri, 5. Singanipurage Karunathilake, 6. Rajapakse Hunuge Sarath Rajapakse, 7. Rajapakse Hunuge Wasantha Ramani 8. Rajapakse Hunuge Jayantha Ranjan Rajapakse, 9. Rajapaksage Mahattaya, 10. Hikkaduwage Winsena Rajapakse, All of Muttettuwatta, Dompe. Defendants AND 3. Rajapakse Hunuge Punyasena Fernando, 7. Rajapakse Hunuge Wasantha Ramani Rajapakse, 8. Rajapakse Hunuge Jayantha Ranjan Rajapakse, 3rd 7th & 8th Defendant Petitioners Vs. Rajapakse Huniuge Sarath Rajapakse, Muttettuwatta, Dompe. 6th Defendant Respondent Singanipurage Kusuma Rajapakse, Muttettuwatta, Dompe. Plaintiff Respondent 1. Rajapakse Hunuge Evsa, Giridara, Dompe. 2. Rajapakse Hunuge Alice, Pahala Dompe, Dompe. 4. Singanipurage Dharmasiri, 5. Singanipurage Karunathilake, 9. Rajapaksage Mahattaya, 10. Hikkaduwage Winsena Rajapakse, All of Muttettuwatta, Dompe. Defendant Respondents AND NOW BETWEEN 7. Rajapakse Hunuge Wasantha Ramani Rajapakse, 8. Rajapakse Hunuge Jayantha Ranjan Rajapakse, 7th & 8th Defendant Petitioner Petitioners Vs. Rajapakse Huniuge Sarath Rajapakse, Muttettuwatta, Dompe. 6th Defendant Respondent-Respondent Singanipurage Kusuma Rajapakse, Muttettuwatta, Dompe. Plaintiff Respondent-Respondent 3. Rajapakse Hunuge Evsa, Giridara, Dompe. 4. Rajapakse Hunuge Alice, Pahala Dompe, Dompe. 6. Singanipurage Dharmasiri, 7. Singanipurage Karunathilake, 11. Rajapaksage Mahattaya, 12. Hikkaduwage Winsena Rajapakse, All of Muttettuwatta, Dompe. Defendant Respondent-Respondents
20/ 10/ 16	SC / Appeal / 80/2004	Don Lesley Kannangara, No. 9, Siddhamulla, Piliyandala. Plaintiff Vs. Thanaweera Arachchige Nihal Wijeratne, “Samudra”, Kesbewa, Piliyandala. Defendant AND Don Lesley Kannangara,, No. 9, Siddhamulla, Piliyandala. Plaintiff Appellant Vs. Thanaweera Arachchige Nihal Wijeratne, “Samudra”, Kesbewa, Piliyandala. Defendant Respondent AND NOW BETWEEN Thanaweera Arachchige Nihal Wijeratne, “Samudra”, Kesbewa, Piliyandala. Defendant Respondent Petitioner Vs. Don Lesley Kannangara,, No. 9, Siddhamulla, Piliyandala. Plaintiff Appellant Respondent

18/ 10/ 16	S.C (Spl) L.A. No. 272/2013	The Democratic Socialist Republic of Sri Lanka COMPLAINANT Vs. 1. Lokugalappaththige Cyril 2. Dehiyagoda Pushpalatha Mangalika 3. Karunawathi Weerawarna Wickramatunga All of Prasanna Tea Room Punchi Akurugoda, Tissamaharama. ACCUSED AND BETWEEN 1. Lokugalappaththige Cyril 2. Dehiyagoda Pushpalatha Mangalika 3. Karunawathi Weerawarna Wickramatunga All of Prasanna Tea Room Punchi Akurugoda, Tissamaharama. ACCUSED-APPELLANTS Vs. 1. The Hon. Attorney General Attorney General's Department Colombo 12. 2. The Democratic Socialist Republic of Sri Lanka. COMPLAINANT-RESPONDENTS AND NOW BETWEEN 1. Lokugalappaththige Cyril 2. Dehiyagoda Pushpalatha Mangalika 3. Karunawathi Weerawarna Wickramatunga All of Prasanna Tea Room Punchi Akurugoda, Tissamaharama. ACCUSED-APPELLANTS-PETITIONERS Vs. 1. The Hon. Attorney General Attorney General's Department Colombo 12. 2. The Democratic Socialist Republic of Sri Lanka. COMPLAINANT-RESPONDENTS-RESPONDENTS
13/ 10/ 16	SC / Appeal / 235/2014	Seylan Bank PLC Ceylinco Seylan Towers, No. 90, Galle Road, Colombo 03. Plaintiff Vs. 1. Mullavidanalage Don Padman Hemachandra, No. 7D, South Lane, Badulla. 2. Mullavidanalage Don Amarasiri Hemachandra, No 35 / 2, Bandaranayake Mawatha, Badulla. Defendants AND BETWEEN Mullavidanalage Don Amarasiri Hemachandra, No 35 / 2, Bandaranayake Mawatha, Badulla. 2nd Defendant Appellant Vs. Seylan Bank PLC Ceylinco Seylan Towers, No. 90, Galle Road, Colombo 03. Plaintiff Respondent AND NOW BETWEEN Seylan Bank PLC Ceylinco Seylan Towers, No. 90, Galle Road, Colombo 03. Plaintiff Respondent-Appellant Vs. Mullavidanalage Don Amarasiri Hemachandra, No 35 / 2, Bandaranayake Mawatha, Badulla. 2nd Defendant Appellant-Respondent
12/ 10/ 16	SC/CHC/ 25/2009	Ceylinco Development Bank Limited No. 69, Janadhipathi Mawatha, Colombo 01. PLAINTIFF Vs. 1. Janaka Kumara Elvitigala No. 850, Rukmale Road, Kottawa, Pannipitiya. 2. Gunasinghe Arachchige Jayanthi Mala No. 850, Rukmale Road, Kottawa, Pannipitiya. DEFENDANTS AND NOW BETWEEN 1. Janaka Kumara Elvitigala No. 850, Rukmale Road, Kottawa, Pannipitiya. 2. Gunasinghe Arachchige Jayanthi Mala No. 850, Rukmale Road, Kottawa, Pannipitiya. DEFENDANTS-APPELLANTS Vs. 1. Ceylinco Development Bank Limited No. 69, Janadhipathi Mawatha, Colombo 01. PLAINTIFF-RESPONDENT
11/1 0/1 6	SC APPEAL No. 158/2013	AMERASINGHE ARACHCHIGE DON DHARMARATNE No. 274, Makola North, Makola. PLAINTIFF-RESPONDENT-APPELLANT VS. 1. DODANGODAGE PREMADASA 2A. DODANGODAGE PREMADASA 2B. DODANGODAGE PREMALATHA 2C. DODANGODAGE DAYAWATHI 2D. DODANGODAGE AMARASEELI MALLIKA 2E. DODANGODAGE HARINDRANATHA All of No. 274/4, Makola North, Makola. DEFENDANTS-APPELLANTS-RESPONDENTS

06/ 10/ 16	SC FR Applicatio n No. 194/2016	Sri Lanka Telecom PLC, Lotus Road, P.O. Box 503, Colombo 01. Petitioner Vs. 1. Telecommunications Regulatory Commission of Sri Lanka, 276, Elvitigala Mawatha, Colombo 08. 2. Dialog Broadband Network (Pvt.) Ltd., No. 475, Union Place, Colombo 02. 3. Hon. Attorney General, Attorney General's Department Colombo 12. Respondents
05/ 10/ 16	S.C.Appe al No.43/201 4	Kumaradasa Karunanayake [Deceased] Horagoda, Telijjawela, Matara Original-Plaintiff Vs Suduweli Kondege Helenis Singho [Deceased] No.215, Pallimulla, Matara Original-Defendant Between S. K. Jinadasa Dharmawardene of Walpola, Matara Substituted-Defendant-Appellant Vs. Srinath Karunanayake No.32/1, Jason Flats, Sri Saranankara Road, Dehiwela Substituted-Plaintiff-Respondent Now Between S. K. Jinadasa Dharmawardene of Walpola, Matara Substituted-Defendant-Appellant-Appellant Kaushall Ravinath Kumara Karunayaka Telijjawilla, Matara Substituted-Plaintiff-Respondent- Respondent
04/ 10/ 16	S.C. Appeal 146/2014	Nations Trust Bank PLC No. 242, Union Place, Colombo 2. PLAINTIFF Vs. Pulukkuttige Don Dinesh Shammika Kumara Piyathilake No. 493, Old Kottawa Road, Udahamulla. Nugegoda. DEFENDANT Then In the matter of an application for revision under and in terms of Article 138 and 145 of the Constitution read with Section 5A of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006 of an order of the District Court of Colombo in case No. 1396/DR Nations Trust Bank PLC No. 242, Union Place, Colombo 2. PLAINTIFF-PETITIONER Vs. Pulukkuttige Don Dinesh Shammika Kumara Piyathilake No. 493, Old Kottawa Road, Udahamulla. Nugegoda. DEFENDANT-RESPONDENT AND NOW Nations Trust Bank PLC No. 242, Union Place, Colombo 2. PLAINTIFF-PETITIONER-PETITIONER Vs. Pulukkuttige Don Dinesh Shammika Kumara Piyathilake No. 493, Old Kottawa Road, Udahamulla. Nugegoda. DEFENDANT-RESPONDENT-RESPONDENT

04/10/16	S.C. (F/R) Application No.471/2011	1. Sevanagala Sugar Industries Limited, No.362, Colombo Road, Pepiliyana, Boralasgamuwa. 2. Alankarage Douglas Shanthanayaka, Wickremarathne, No.2/74, Jayapala, Udahamulla, Nugegoda. 3. Kumarasinghage Jayalath Samanthilaka, No.299, Mihindu Pura, Sevanagala. 4. Appuwahandi Gayan Dewapriya, G 02/55, Housing Scheme, Sevanagala. 5. Wasawita Gamage Sirisena, No.932, Mayuragama, Habaraluwewa, Sevanagala. 6. Abeywardena Jayasinhe Arachchilage Gunaratne Lal Kumara, No.68, Nawodagama, Sevanagala. 7. Kodikara Kankanamge Ranjith, No.206, Habaraluwewa, Sevanagala. 8. Ganthota Widanagamage Dilanka, No.11, Sevanagala-North, Sevanagala. 9. Pannila Mohottalalage Suranga, G/2-1, Housing Scheme, Division 01, Katupilagama, Sevanagala. 10.Kumarasinhage Vijitha, No.299, Mihindu Pura, Sevanagala. Petitioners Vs. 1. Inspector Abeysekara, Officer-in-Charge (Acting), Police Station, Sevanagala. 2. Police Sergeant 23882 Sepala, Police Station, Sevanagala. 3. Police Sergeant 23738 Edirisinghe, Police Station, Sevanagala. 4. Police Sergeant 59211 Amarasena, Police Station, Sevanagala. 5. Indika 81248, Civil Security Force, Police Station, Sevanagala. 6. Nilantha Bandara, Officer-in-Charge, Police Station, Sevanagala. 7. The Inspector General of Police, Police Headquarters, Colombo 01. 8. Durage Gnanawathie, No. 859, Sevanagala Gama, Sevanagala. 9. The Honourable Attorney-General, The Attorney-General‟s Department, Colombo 12. Respondents
02/10/16	SC. FR Application No. 350/2013	Amuhenkande Kankanamlage Jayasena, Of No. 587, Lake Road,Borelesgamuwa Now at Colombo Remand Prison with Remand No. 4116 Petitioner Vs. 1. Kamal Perera Chief Inspector of Police, Officer in Charge Unit No 4 – Fraud Bureau Colombo, No. 5, Dharmarama Road, Wellawatta, Colombo 06. 2. Jayarathne, Police Constable 30602, Unit No 4 – Fraud Bureau Colombo, No. 5, Dharmarama Road, Wellawatta, Colombo 06. 3. K.V.P. Fernando, Senior Superintendent of Police Director, Fraud Bureau Colombo, No. 5, Dharmarama Road, Wellawatta, Colombo 06. 4. S.A.D.S. Gunasekara Deputy Inspector General of Police Colombo DIG’s Office, Colombo 11. 5. Anura Senanayake Senior Deputy Inspector General of Police, Colombo Police Headquarters, Colombo 01. 6. N. Illangakoon Inspector General of Police Police Headquarters, Colombo 01. 7. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents

02/ 10/ 16	S.C. (F/R) Applicatio n No. 01/2015	01. Jahangir Sheriffdeen. No. 50A, Edward Lane, Colombo 03. 02. Harshika Samadhi Ranasinghe Sheriffdeen, No. 50A, Edward Lane, Colombo 03. On behalf of their daughter NauyaaSheriffdeen (Minor) of No. 50A, Edward Lane, Colombo 03. PETITIONERS -Vs 01. Sandamali Aviruppola, Principal, VisakhaVidyalaya, No. 133, Vajira Road, Colombo 04. 02. KalaniSuriyapperuma, Deputy Principal, VisakhaVidyalaya, No. 133, Vajira Road, Colombo 04. 03. RanjithChandrasekara, Director of Education for National Schools, Ministry of Education, Isurupaya, Battaramulla. 04. AnuraDissanayake, Secretary, Ministry of Education, Isurupaya, Battaramulla. 05. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS
29/ 09/ 16	S.C. Appeal 89/2010	Seyyadu Mohommaduge Razik Gallenbindunuwewa Horowpotana. PLAINTIFF Vs. 1. Suleiman Adam Kandu Kivul kade, Horowpothana. 2. Abdul Hameed Mahamad Mihilar Fancy Textiles Mahaveediya, Horowpothana. DEFENDANTS Seyyadu Mohommaduge Razi Gallenbindunuwewa Horowpotana. PLAINTIFF-APPELLANT Vs. 1. Suleiman Adam Kandu Kivul kade, Horowpothana. 2. Abdul Hameed Mahamad Mihilar Fancy Textiles Mahaveediya, Horowpothana. DEFENDANTS-RESPONDENTS- AND NOW BETWEEN Seyyadu Mohommaduge Razik Gallenbindunuwewa Horowpotana. PLAINTIFF-APPELLANT-PETITIONER Vs. 1. Suleiman Adam Kandu Kivul kade, Horowpothana. 2. Abdul Hameed Mahamad Mihilar Fancy Textiles Mahaveediya, Horowpothana. DEFENDANTS-RESPONDENTS-RESPONDENTS

29/ 09/ 16	S.C. H.C. C.A. L.A. Applicatio n No.449 / 2014	MUNASIGHE LEELA NANDA SILVA Welpansala Road, Kudawaskaduwa, Waskaduwa. 17th DEFENDANT-APPELLANT-PETITIONER VS. T.G.CHANDRAWATHIE WIJESEKERA Waskadu Methsevena, Waskaduwa. PLAINTIF-RESPONDENT-RESPONDENT 1. JAYALATHGE DON SARATH GUNASEKERA No. 14, 23rd Lane, Colombo 03. 2. WIMALAWATHIE DE SILVA No.51/1, Borupana Road,Ratmalana. 3. R.N.ZOYSA C/O Munasinghe Leelawathie Silva, Kuleegoda, Ambalangoda 3A. ANIL GUNARATNA DE ZOYSA Welibadda,Kuleegoda,Ambalangoda. 4. MUNASINHGE SYRIL PIYARATNA SILVA No.51/1, Borupana Road,Ratmalana. 4A.WALIMUNI DEWAGE LEELAWATHIE No. 75/20, Kanatta Road, Mirihanan, Nugegoda. 5. MUNASINGHE ANULA DE SILVA Pririvana Rathna Sri Road, Pinwatta,Panadura. 6. PERCY KUMARA SILVA Pririvana Road,Rathna Sri, Pinawatta, Panadura. 7. MUNASINGHE SARATHCHANDRA, Rathna Sri, Pririvana Road, Pinawatta, Panadura. 8. M.D.MALALASEKERA No. 513/1, Nalluruwa,Panadura. 9. MUNASINGHE BOID KULASENA Wellawatta, Kuleegoda, Ambalangoda. 10. SRIYANANDA MUNASUNGHE Madawela, Ulpotha, Matale, 11. MUNASINGHE TICKMEN DE SILVA Welpansala Road,Kudawaskaduwa, Waskaduwa. . 12. MUNASINGHE NANCY DE SILVA Welpansala Road,Kudawaskaduwa, Waskaduwa. 13. RANANALINA WICGKRAMATILLAKE Welpansala Road,Kudawaskaduwa, Waskaduwa. 14. MUNASINGHE DAYANANDA DE SILVA Welpansala Road,Kudawaskaduwa, Waskaduwa. 15. MUNASINGHE CHITHRA NANDA DE SILVA Welpansala Road,Kudawaskaduwa, Waskaduwa. 16. MUNASINGHE VIJITHA NANDA DE SILVA Welpansala Road,Kudawaskaduwa, Waskaduwa. 18. S. HARISON SILVA “Shanthi, Peter Place, Leegamuwa. 19. S. WILSON SILVA “Shanthi, Peter Place, Leegamuwa. 20. F. EUGENE SILVA “Shanthi, Peter Place, Leegamuwa. 21. VITHANAGE SUMANADASA Wellamawala, Uduwara, Anuguruwathota. 22. MESSIRI SEEDIN SILVA Welpansala Road,Kudawaskaduwa, Waskaduwa. 23. MASILIN SILVA Welpansala Road,Kudawaskaduwa, Waskaduwa. 24. MESSIRI ALJIN SILVA Bogasa Asala Nainaduwa, Kudawaskaduwa,Waskaduwa. 25. MESSIRI WEWLIN SILVA Sri Subuthi Mawatha, Kudawaskaduwa. 26. CHANDRA PATHMINI DE SILVA Sri Subuthi Mawatha, Kudawaskaduwa. 27. GUNEDRAWATHIE Sri Subuthi Mawatha, Kudawaskaduwa. 28. RANASINGHE ARACHCHIGE ALPI NONA Sri Rahula Mawatha,Maho. 29. GUNENDRA PRIYAWADA Sri Rahula Mawatha,Maho. 30. GUNENTHTHI GAMINI Sri Rahula Mawatha,Maho. 31. GUNENTHTHI SUSANTHA Sri Rahula Mawatha,Maho. DEFENDANTS-RESPONDENTS- RESPONDENTS

27/ 09/ 16	SC/FR/ No. 76/2012	P.S Manohari Pelaketiya of No. 49 Maho Road, Nikaweratiya. PETITIONER Vs. 1. H. M. Gunasekera, Secretatry, Ministry of Education, “Isurupaya”, Sri Jayawardhanapura, Kotte, Battaramuulla. 1A. W. M. Bandusena Secretary, Ministry of Education, “Isurupaya”, Sri Jayawardhanapura, Kotte, Battaramuulla. 2. Dr. Dayasiri Fernando, (Chairman) 2A. Dharmasena Dissanayake, Chairman 3. Palitha Kumarasinghe, Member 3A. A. Salam Abdul Waid, Member 4. Sirimavo A. Wijeratne, Member 4A. D. Shirantha Wijayatilaka, Member 5. S.C Mannapperuma, Member 5A. Prathap Ramanujam, Member 6. Ananada Seneviratne, Member 6A. V. Jegarasasingam, Member 7. N.H. Pathitana, Member 7A. Santi Nihal Seneviratne, Member 8. S. Thillanadarujah, Member 8A. S. Ranuhhe, Member 9. M.D.W. Ariyawansa, Member 9A. D.L. Mendis, Member 10. A. Mohamed Nahiya, Member 10A. Sarath Jayathilaka 2A – 10A Respondents All of the Public Services Commission No. 177, Nawala Road, Narahenpita, Colombo 5. 11. Premalal Kumarasiri, Principal, Mahanama College, Colombo 3. 12. T.T. Malegoda, Mahanama College, Colombo 3. 13. Hon. Attorney General Attorney General’s Department, Colombo 12 RESPONDENTS

22/09/16	SC FR No.284/2013	1. W.K. Samarakoon, 316, Vidyala Mawatha, Kothalawala, Kaduwela. 2. K.S. Ranasinghe, 85, Ihalaaluthela Road, Tholabogaswatta, Badulla. 3. N.W.P. Deshabandu, 02, Kajugahawatta, Gotatuwa New Town. 4. K.A.P. Perera, No. 472/2, Bunt Road, Dutugemunu Mawatha, Thalangama North, Baththaramulla. 6. P. Abeyshantha, 100/41, City Gate, Katana North, Katana. 7. R.M.C.N.K.Madawala, NWSDB Quarters, Water Supply Scheme, Ampitiya. Petitioners Vs. 1. National Water Supply and Drainage Board, Galle Road, Rathmalana. 2. General Manager, National Water Supply and Drainage Board, Galle Road, Rathmalana. 3. Additional General Manager, (Human Resources and Industrial Relations), National Water Supply and Drainage Board, Galle Road, Rathmalana. 4. Deputy General Manager, (Human Resources), National Water Supply and Drainage Board, Galle Road, Rathmalana. 5. K.L.L. Premanath, No. 21,/3, P.B. Alwis Perera Mawatha, Katubedda, Moratuwa. Formerly General Manager, National Water Supply and Drainage Board, Galle Road, Rathmalana. 6. H. Ariyasena, “Senani”, Jalthara, Ranala. Formerly Deputy General Manager, (Human Resources), National Water Supply and Drainage Board, Galle Road, Rathmalana. 7. The Secretary, Ministry of Water Supply and Drainage, 35, New Parliament Road, Pelawatta, Battaramulla. 8. Sarath Chandrasiri Vithana, Additional Secretary (Administration and Finance) Ministry of Water Supply and Drainage, 35, New Parliament Road, Pelawatta, Battaramulla. 9. Commissioner General of Labour, Labour Secretariat, Narahenpita. 10. D.A.Y. Wickramanayake, Regional Support Centre, (Western-South) of the National Water Supply & Drainage Board, Galle Road, Mt. Lavinia. 11. Hon. Attorney General Attorney General’s Department Colombo 12. Respondents 12. A.L.P. Mohomed, No. 151, Allen Avenue, Dehiwala, NWS & DB Scheme, Dehiwala. 13. D.A.D.V. Duwearachchi, No. 83, Main Road, Athurugiriya. 14. R.D. Gunapala, “Pawan”, Goyambokka, Tangalle. 15. S.U.K. Wijeweera, No. 53/9, Polgahawela Road, Kegalle. 16. C.J. Gamage, 100/C, Railway Avenue, Diyathalawa. 17. U.L. Geeganage, No. 52, Weda Mawatha, Gorakana, Keselwatta, Panadura. 18. P.P. Samarathunga, No. 2/7/59, Shanthi Mawatha, Bandarawatta, Gampaha. 19. M.A.D. Gajanayake, “Gajamini”, Agarawela Junction, Akuressa, Matara. 20. P. Gunasinghe, No. 63, Gemunu Mawatha, Bangalawatta, Kottawa, Pannipitiya. 21. H.E.A. Fernando, No. 63/14, Kadawatha Road, Ragama. . 22. P.V.H. Suranga, “Gunadam Sewana”, Siyambalagahawatta, Pepiliyawela. 23. U.W.S.K. Nawarthna, No. 29/1, Aluwiharayagama Para, Aluwiharaya, Matale. 24. C.U.A. Anthony, No. 375, Hekitta Road, Hekitta, Wattala. Added Respondents

21/ 09/ 16	SC/FR 81/2011	OmaththaMudalige Don Gamini 262, Panchawatta, Himbutana, Angoda. Petitioner Vs 1. Nishantha Silva Inspector of Police, Special Unit, Criminal Investigation Department, Colombo 01. 2. Police SergeantMendis 14209 Special Unit, Criminal Investigation Department, Colombo 01. 3. M.A.S. RanjithMunasinghe Inspector of Police, Officer-in-Charge, Special Unit, Criminal Investigation Department, Colombo 01. 4. G.S. Abeysekara Assistant Superintendent of Police, Special Unit, Criminal Investigation Department, Colombo 01. 5. Inspector General of Police Police Head Quarters, Colombo 01. 6. Hon. Attorney General Attorney General's Department, Colombo 12. Respondents
21/ 09/ 16	SC/HC/ LA/ 22/2014	V.V. Ramanathan & Company (Pvt) Ltd. Hospital Circular Road, Vavunia. PLAINTIFF Vs. 1. National Housing Development Authority No. 34, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. 2. The Attorney General Attorney General' Department Colombo 12. DEFENDANTS AND BETWEEN National Housing Development Authority No. 34, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. DEFENDANT-PETITIONER Vs. V.V. Ramanathan & Company (Pvt) Ltd. Hospital Circular Road, Vavunia. PLAINTIFF-RESPONDNETAND NOW National Housing Development Authority No. 34, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. DEFENDANT-PETITIONER-PETITIONER V.V. Ramanathan & Company (Pvt) Ltd. Hospital Circular Road, Vavunia. PLAINTIFF-RESPONDNET-RESPONDENT
20/ 09/ 16	S.C.F.R.A pplication No.612/09	W.N.L.K.Fernando No.6, Kankale Watte Pahala Mawila Naaththandiya Petitioner Vs. 1. Police Inspector Ranjith 2. Police Sergeant Dissanayake (23311) 3. Sub Inspector Chamara P.Wijesinghe 4. A.M.Weerakkodi, Officer-In-Charge All of Police Station, Wennappuwa 5. S.Peters Proprietor Tata Global Engineering Pvt Ltd. Wennappuwa 6. Sunil Appuhamy, Watcher Tata Global Engineering Pvt.Ltd Wennappuwa 7. Hon.Attorney General Attorney General's Department Colombo 12. Respondents

19/ 09/ 16	SC (FR) Applicatio n No. 389/2015	Mohamed Niswer Ismail 102/114, Madara Uyana, 4th Lane, Mattegoda. PETITIONER Vs. 1. Engineer Y. Abdul Majeed Acting Director General of Irrigation Department of Irrigation, 230, P.O. Box 1138 Bauddhaloka Mawatha, Colombo 7. 1A. Engineer Saman S.L. Weerasinghe Director General of Irrigation Department of Irrigation 230, P.O. Box 1138 Bauddhaloka Mawatha, Colombo 7. 2. Engineer R.M.W. Rathnayake Secretary, Ministry of Irrigation and Water Resources Management, No. 11, Jawatte Road, Colombo 5. 3. J. Dadallage Secretary, Ministry of Public Administration & Management Independence Square, Colombo 7. 4. S. S. Hettiarachchi Director General of Pensions Department of Pensions Maligawatte Secretariat, Maligawatte, Colombo 10. 5. Justice Sathya Hettige P.C., 6. Ananda Seneviratne 7. N. H. Pathirana 8. S. Thillandarajah 9. A. Mohamed Nahiya 10. Kanthie Wijetunge 11. Sunil S. Sirisena 12. Dr. I. M. Zoysa Gunasekera (All members of the Public Service Commission) No. 177, Nawala Road, Narahenpita, Colombo 5. 5A. Dharmasena Dissanayake 6A. A. Salam Abdul Waid 7A. D. Shirantha Wijayatilaka 8A. Dr. Prathap Ramanujam 9A. V. Jagarasasingam 10A. Santi Nihal Seneviratne 11A. S. Ranugge 12A. D. L. Mendis 12B. Sarath Jayathilaka (All current members of the Public Service Commission) No. 177, Nawala Road, Narahenpita, Colombo 5. SUBSTITUTED RESPONDENTS (in the room of the 5th – 12th Respondents) 13. Hon. Attorney General Attorney General's Department P. O. Box 502, Colombo 12. RESPONDENTS
14/ 09/ 16	SC Contempt No.04/201 6	Mrs. Dilrukshi Dias Wickramasinghe, P.C., Director General, 36, Malalasekara Mawatha, Colombo 07. Complainant Vs. Hon. Lakshman Namal Rajapaksha, M.P. "Carlton", Tangalle. Respondent
13/ 09/ 16	SC Appeal No. 64/2014	Nawala Rathnayake Mudiyanselage Chandra Ranasinghe, No. 41 and 41/1/1, Anagarika Dharmapala Mawatha, Kandy. Plaintiff Vs 1. Palitha Munasinghe 2. S.M. Munasinghe Both of Official Residence, Bank of Ceylon, Peradeniya. Presently at No. 43, Anagarika Dharmapala Mawatha, Kandy. Defendants AND 1. Palitha Munasinghe 2. S.M.Munasinghe Both of Official Residence, Bank of Ceylon, Peradeniya. Presently at No. 43, Anagarika Dharmapala Mawatha, Kandy. Defendants Appellants Vs Nawala Rathnayake Mudiyanselage Chandra Ranasinghe, No. 41 and 41/1/1, Anagarika Dharmapala Mawatha, Kandy. Plaintiff Respondent AND NOW Nawala Rathnayake Mudiyanselage Chandra Ranasinghe, No. 41 and 41/1/1, Anagarika Dharmapala Mawatha, Kandy. Plaintiff Respondent Appellant Vs 1. Palitha Munasinghe 2.S.M.Munasinghe Both of the Official Residence, Bank of Ceylon,Peradeniya. Presently at No. 43, Anagarika Dharmapala Mawatha, Kandy. Defendants Appellants Respondents

08/09/16	S. C. Appeal 180/2010	T.Somaweera of Yatagama, Walgama, Rambukkana. Plaintiff Vs 1. G. Laisa 2. T. Jamis 3. K. P. Samarakoon All of Yatagama, Walgama, Rambukkana. Defendants AND T. Jamis of Yatagama,Walgama, Rambukkana. 2nd Defendant Appellant Vs 1.G. Laisa and 3.K.P. Samarakoon Both of Yatagama,Walgama, Rambukkana. Defendants Respondents AND NOW BETWEEN T. Jamis of Yatagama,Walgama, Rambukkana 2nd Defendant Appellant Petitioner Vs T. Somaweera of Yatagama, Walgama, Rambukkana. Plaintiff Respondent 1. G. Laisa and 3.K. P. Samarakoon Both of Yatagama, Walgama, Rambukkana 1st and 3rd Defendants Respondents Respondents
07/09/16	S.C.Appeal No.62/2011	Elvitigalage Don Lalith Chandrasiri No.193/136, Maththegoda Polgasowita Plaintiff Vs. 1. Kodithuwakku Kankanamge Dayani Vinitha No.116,Mabulgoda Pannipitiya Original Defendant 2. Kodithuwakku Kankanamge Sarath (Deceased) No.116, Mabulgoda Pannipitiya Added Second Defendant 2A.Kodithuwakku Kankanamge Lalitha Dayangani No.103, Maththegoda Road Polgasovita 2A Defendant AND BETWEEN Kodithuwakku Kankanamge Lalitha Dayangani No.103, Maththegoda Road Polgasovita 2A Defendant-Appellant Elvitigalage Don Lalith Chandrasiri No.193/136, Maththegoda Polgasowita Plaintiff-Respondent AND NOW BETWEEN Elvitigalage Don Lalith Chandrasiri No.193/136, Maththegoda Polgasowita Plaintiff-Respondent-Appellant Kodithuwakku Kankanamge Lalitha Dayangani No.103, Maththegoda Road Polgasovita At present – No.116, Mabulgoda, Pannipitiya 2A Defendant-Appellant-Respondent
06/09/16	SC FR Application No.277/2010	1. Ameer Ismail, 37B,Boswell Place, Colombo 06. 2. Punyadasa Edussuriya, 18/225, Dabare Mawatha, Colombo 05. 3. Indra De Silva, (Expired on 31st December 2015) 398/B Eksath Mawatha, Kalapaluwawa, Rajagiriya. Petitioners Vs. 1. Mrs. Luckshmi Jayawickrama, Former Director-General, Commission to Investigate Allegations of Bribery or Corruption, 36, Malalasekara Mawatha, Colombo 07. 1A Ganesh Rajendra Dharmawardana, Director General, Commission to Investigate Allegations of Bribery or Corruption, 36, Malalasekara Mawatha, Colombo 07. Added 1AA Mrs. Dilrukshi Dias Wickramasinghe, P.C. Director General, Commission to Investigate Allegations of Bribery or Corruption, 36, Malalasekara Mawatha, Colombo 07. 2. Ms. E.D. Kumudu, Deputy Director General, Commission to Investigate Allegations of Bribery or Corruption, 36, Malalasekara Mawatha, Colombo 07. 3. Lalith Weerathunga, Secretary to H.E. the President, Presidential Secretariat, Colombo 01 . ADDED (3A) P.B. Abeykoon, Secretary to H.E. the President, Presidential Secretariat, Colombo 01. 4. Ms. Sudharma Karunarathne Former Director General (Budget) Department of National Budget, Ministry of Finance and Planning, Colombo 01. 5. The Hon. Attorney General, Attorney-General's Department, Colombo 12. 6. Ms. Chandra Ekanayaka Director General (Budget), Department of National Budget, Ministry of Finance and Planning, Colombo 01. Respondents

10/ 08/ 16	SC / Appeal / 197/2011	Keva Fragrances (Private) Limited, Devakaran Mansion, No. 36, Mangaldas Road, Mumbai 400 002. Plaintiff Vs. 1. Bobby Industries (Private) Limited, No. 14, 1st Lane, Mawilmada, Kandy. 2. A. Razaak, Managing Director, Bobby Industries (Private) Limited, No. 14, 1st Lane, Mawilmada, Kandy. Defendants AND Keva Fragrances (Private) Limited, Devakaran Mansion, No. 36, Mangaldas Road, Mumbai 400 002. Plaintiff Appellant Vs. 1. Bobby Industries (Private) Limited, No. 14, 1st Lane, Mawilmada, Kandy. 2. A. Razaak, Managing Director, Bobby Industries (Private) Limited, No. 14, 1st Lane, Mawilmada, Kandy. Defendant Respondents AND NOW BETWEEN Keva Fragrances (Private) Limited, Devakaran Mansion, No. 36, Mangaldas Road, Mumbai 400 002. Plaintiff Appellant-Appellant Vs. 1. Bobby Industries (Private) Limited, No. 14, 1st Lane, Mawilmada, Kandy. 2. A. Razaak, Managing Director, Bobby Industries (Private) Limited, No. 14, 1st Lane, Mawilmada, Kandy. Defendant Respondent-Respondents
08/ 08/ 16	S.C.Case No.SC/ HCCA/LA/ No.492/14	The Attorney General Attorney General's Department Hulftsdorp, Colombo 12 Defendant-Appellant-Petitioner Vs. Ulviti Gamage Dhanapala No.32, Galhena Road Gangodawila, Nugegoda Plaintiff-Respondent-Respondent
08/ 08/ 16	S.C. Appeal 118/2014	Hettiarachchilage Piyadasa Dehiowita, Atalugama. PLAINTIFF Vs. 1. Hettiarachchilage Piyaseeli 2. G. R. Piyaseeli 3. Hettiarachchilage Nandawathie 4. Hettiarachchilage Piyawathie 5. G.K. Jane (DECEASED) 5A. Hettiarachchilage Piyadasa 5B. Hettiarachchilage Piyaseeli 5C. Hettiarachchilage Nandawathie 5D. Hettiarachchilage Piyawathie All of Dehiowita, Atalugama 1 – 4TH AND 5A – 5D SUBSTITUTED DEFENDANTS AND Hettiarachchilage Piyadasa Dehiowita, Atalugama. 1ST AND 5B SUBSTITUTED-DEFENDANT-APPELLANT-RESPONDENT Vs. Hettiarachchilage Piyadasa Dehiowita, Atalugama. PLAINTIFF-RESPONDENT 2. G. R. Piyaseeli 3. Hettiarachchilage Nandawathie 4. Hettiarachchilage Piyawathie 5A. Hettiarachchilage Piyadasa 5B. Hettiarachchilage Nandawathie 5D. Hettiarachchilage Piyawathie 2ND – 4TH AND 5A, 5C AND 5D SUBSTITUTED DEFENDNATS-RESPONDENTS AND NOW BETWEEN Hettiarachchilage Piyadasa Dehiowita, Atalugama. PLAINTIFF-RESPONDENT-PETITIONER Vs. Hettiarachchilage Piyaseeli Dehiowita, Atalugama. 1ST AND 5B SUBSTITUTED-APPELLANT-RESPONDENTS 5. G. R. Piyaseeli 6. Hettiarachchilage Nandawathie 7. Hettiarachchilage Piyawathie 5A. Hettiarachchilage Piyadasa 5B. Hettiarachchilage Nandawathie 5D. Hettiarachchilage Piyawathie 2ND – 4TH AND 5A, 5C AND 5D SUBSTITUTED-DEFENDANTS-RESPONDNETS-RESPONDNETS

07/08/16	S.C. Appeal 105/2013	Daya Jayaratne,(nee Agampodi Silva), No. 24, Vanderwert Place, Dehiwela. Plaintiff Vs 1.Singha Arachchige Ajith Thilaksiri 2.Weerasinghe Mudiyanselage Dayawathie 3.Kuranage Densil Anton Perera 4.Adhikari Mudiyanselage Seneviratne 5.Suduwa Dewage Ranjith Gunaratne 6. Wijesuriya Arachchilage Lionel 7. Suduwa Dewage Nimal Rathne 8.Asarappulige Lalith Mahinda 9.Dapanage Chandana Pradeep Appuhamy 10.Hewawasam Hakgalage Karalinahamy 11.Ranepura Hewage Gunajeeva 12. Hikkaduge Sunil Fernando 13. Jayasuriya Arachchige Don Lakshman Jayantha 14. Jayasuriya Arachchige Don Asoka Jayasinghe 15. Sebastian Lawrence 16. N.Joseph Michael Royala 17. Doresamy Kandasamy 18. Suriya Arachchige Sampath Appuhamy 19. Mutthai Waduwei Sarawanamuttu 20. Jayasuriya Arachchige Pelician Perera 21. Suduwa Dewage Lushan Fernando 22. Muthugalage Sisira Sarath 23. Sebesthian Pulle Selwaniathi 24. Hewabattage Premadasa Ediriweera 25.Madurasinghage Don Grace Ethala 26. Chakrawarthige Lal Fernando 27. Deepal Aravinda Suduwa Dewage 28. Kanvedige Velupille 29. W. Magrat 30.Ranathunga Arachchi Rohan Ajith Kumara 31. Ranathunga Arachchi Shantha Jagath 32.Dissanayakage Karunaratne 33. Suduwa Dewage Wijeratne 34. Kandai Shantha Kumaran 35. Peter Neville Patrick 36. Maheepala Mudalige Somaweera Chandradasa 37. Udunuwara Kankanamage Upali Ranjith 38. Polwatte Wickramasinghalage Siriwardena 39. Sethunga Mudalige Berti Joseph Perera 40.Ramasamy Kumaraswamy Selvadorai 41. Amarasingha Arachchige Keerthirathne 42. Nishanka Arachchige Janaka Chaminda Lal 43. Mattusamy Kanagaratnum 44. Kurana Arachchi Stanly Rodrigo 45. Kuruppu Arachchige Mary Agnes Rodrigo 46. Allimuttu Jeganathan 47. Warnakulasuriya Jude Nilantha Fernando All of Musafar Estate alias Ebert Silva Estate, Chilaw. Defendants AND 1.Singha Arachchige Ajith Thilaksiri 2.Weerasinghe Mudiyanselage Dayawathie 3.Kuranage Densil Anton Perera 4.Adhikari Mudiyanselage Seneviratne 5.Suduwa Dewage Ranjith Gunaratne 6. Wijesuriya Arachchilage Lionel 7. Suduwa Dewage Nimal Rathne 8.Asarappulige Lalith Mahinda 9.Dapanage Chandana Pradeep Appuhamy 10.Hewawasam Hakgalage Karalinahamy 11.Ranepura Hewage Gunajeeva 12. Hikkaduge Sunil Fernando 13. Jayasuriya Arachchige Don Lakshman Jayantha 14. Jayasuriya Arachchige Don Asoka Jayasinghe 15. Sebastian Lawrence 16. N.Joseph Michael Royala 17. Doresamy Kandasamy 18. Suriya Arachchige Sampath Appuhamy 19. Mutthai Waduwei Sarawanamuttu 20. Jayasuriya Arachchige Pelician Perera 21. Suduwa Dewage Lushan Fernando 22. Muthugalage Sisira Sarath 23. Sebesthian Pulle Selwaniathi 24. Hewabattage Premadasa Ediriweera 25.Madurasinghage Don Grace Ethala 26. Chakrawarthige Lal Fernando 27. Deepal Aravinda Suduwa Dewage 28. Kanvedige Velupille 29. W. Magrat 30.Ranathunga Arachchi Rohan Ajith Kumara 31. Ranathunga Arachchi Shantha Jagath 32.Dissanayakage Karunaratne 33. Suduwa Dewage Wijeratne 34. Kandai Shantha Kumaran 35. Peter Neville Patrick 36. Maheepala Mudalige Somaweera Chandradasa 37. Udunuwara Kankanamage Upali Ranjith 38. Polwatte Wickramasinghalage Siriwardena 39. Sethunga Mudalige Berti

07/ 08/ 16	S.C Spl. L.A 127/2015	Kuda Banda Dunuwila 55/12, Bawwagama, Nawalapitiya. PLAINTIFF Vs. Menikrama Mudalige Sriya Malani Piyadasa No. 1, Kumarapaya, Meepitiya, Nawalapitiya. DEFENDANT AND BETWEEN Menikrama Mudalige Sriya Malanim Piiyadasa No. 1, Kumarapaya, Meepitiya, Nawalapitiya. DEFENDANT-APPELLANT Vs. Kuda Banda Dunuwila 55/12, Bawwagama, Nawalapitiya. PLAINTIFF-RESPONDENT AND NOW BETWEEN Menikrama Mudalige Sriya Malanim Piiyadasa No. 1, Kumarapaya, Meepitiya, Nawalapitiya. DEFENDANT-APPELLANT-PETITIONER Vs. Kuda Banda Dunuwila 55/12, Bawwagama, Nawalapitiya. PLAINTIFF-RESPONDENT-RESPONDENT
07/ 08/ 16	S.C.[FR] No.108/2016	1. Tirathai Public Co.Ltd., 516/1, Moo 4 Bangpoo Industrial Estate, Praksa Muang Samutprakan 10280 Thailand 2. H.R.Holdings (Pvt) Ltd., 476/10, Galle Road Colombo 03 Petitioners Vs. 1. Ceylon Electricity Board No.50, Sir Chittampalam Gardiner Mawatha, Colombo 2, and 17 others Respondents
02/ 08/ 16	SC APPEAL No. 84/2011	Brown and Company Limited, No. 481, T. B. Jaya Mawatha, Colombo 10. Petitioner Vs 1The Commissioner of Labour, Labour Secretariat, Narahenpita, Colombo 5. 2. A. Dissanayake, Assistant Commissioner of Labour, (Colombo Central), Labour Secretariat, Colombo 5. 3. R. B. Godamunna, Deputy Commissioner of Labour,Industrial Relations Unit, 7th Floor,Labour Sectretariat. Respondents M. V. Thegarajah, 23/2, Independence Avenue, Colombo 7. Complainant Respondent AND NOW BETWEEN Brown and Company Limited, No. 481, T. B. Jaya Mawatha, Colombo 10. Petitioner Appellant Vs 1 The Commissioner of Labour, Labour Secretariat, Narahenpita, Colombo 5. 2. A. Dissanayake, Assistant Commissioner of Labour, (Colombo Central), Labour Secretariat, Colombo 5. 3.R. B. Godamunna, Deputy Commissioner of Labour,Industrial Relations Unit, 7th Floor, Labour Sectretariat, Respondents Respondents M. V. Thegarajah, 23/2, Independence Avenue, Colombo 7. Complainant Respondent Respondent
01/ 08/ 16	SC Appeal No.100/15	U. B. Heenkenda No. 77, Peralanda Road, Pandiwatte, Kundasale. APPLICANT V. H. B. S. Motors (Private) Limited 37, Cross Street, Kandy EMPLOYER H. B. S. Motors (Private) Limited 37, Cross Street, Kandy EMPOYER-PETITIONER- V U. B. Heenkenda No. 77, Peralanda Road, Pandiwatte, Kundasale. APPLICANT-PRESPONDENT B. M. Wipularatna Banda No.106/1 Harnakahawa, Kandy. RESPONDENT And Now Between H. B. S. Motors (Private) Limited 37, Cross Street, EMPLOYER-PETITIONER-APPELLANT V. U.B. Heenkenda, Pandiwatte, Kundasale. APPLICANT-RESPONDENT-RESPONDENTB.M.Wipularatna Banda No.106/1 Harnakahawa, Kandy. RESPONDENT-RESPONDENT

01/ 08/ 16	SCFR Applicatio n No:26/200 9	Dodampe Gamage Asantha Aravinda, No,466, Madawalamulla, Galle. (Presently detained at the Welikada Remand Prison) Petitioner Vs. 1. Atapattu (21899) Police Sergeant, Police Station, Pitabeddara. 2. Bandu Saman (64017) Police Constable, Police Station, Pitabeddara. 3. Jinadasa (24187) Police Sergeant, Police Station, Pitabeddara. 4. Hemachandra (22331) Police Sergeant, Police Station, Pitabeddara. 5. Edirisinghe (25156) Police Sergeant, Police Station, Pitabeddara. 6. Karunarathne (858) Police Sergeant, Police Station, Pitabeddara. 7. Gamini (58881) Police Constable, Police Station, Pitabeddara. 8. Wajira (14705) Police Constable, Police Station, Pitabeddara. 9. Jayawardane (62785) Police Constable, Police Station, Pitabeddara. 10. Sugath (3089) Police Constable, Police Station, Pitabeddara. 11. Officer in Charge, Police Station, Pitabeddara. 12. P.V. Chandrasiri, Naththawila Road, Tennahena, Pitabeddara. 13. Deputy Inspector General of Police of Southern Range, Office of the Deputy Inspector General of Police of the Southern Range, Galle. 14. Inspector General of Police, Sri Lanka Police Head Quarters, Colombo 01. 15. Honourable Attorney General, Department of the Attorney General, Colombo 12. Respondents
27/ 07/ 16	Case No. S.C. (Writ) 01/2014	Balangoda Plantations PLC 110, Norris Canal Road, Colombo 10. PETITIONER Vs. 1. Janaka Bandara Tennakoon Minister of Lands and Land Development, 80/5, “Govijana Mandiraya” Rajamalwatta Mawatha, Battaramulla. 2. C.M. Kottewatte Divisional Secretary Ratnapura Ratnapura Divisional Secretariat Office Ratnapura. 3. H.W. Gunadasa Former District Secretary Ratnapura, District Secretariat, Ratnaprua. 4. Hon. W.D.J. Seneviratne Minister of Public Administration and Home Affairs, Independence Square, Colombo 7 5. Hon. Mahinda Samarasinghe Minister of Plantation Industries Ministry of Plantation Industries 55/75, Vauxhall Lane, Colombo 2. 6. Secretary Ministry of Plantation Industries 55/75, Vauxhall Lane, Colombo 2. 7. Sri Lanka State Plantations Corporation, No. 11, Duke Street, Colombo 1. 8. Hon. Attorney General Attorney General’s Department, Colombo 12. RESPONDENTS
27/ 07/ 16	S.C. Appeal No. 137/2014	Meringnage Rohan Fernando 144, Old Negombo Road, Kanuwana, Ja-Ela. PLAINTIFF Vs. Patikiri Arachchige Dona Indrani Chandralatha Amarasekera No. 52, Weragala, Padukka. DEFENDANT AND Patikiri Arachchige Dona Indrani Chandralatha Amarasekera No. 52, Weragala, Padukka. DEFENDANT-APPELLANT Vs. Meringnage Rohan Fernando 144, Old Negombo Road, Kanuwana, Ja-Ela. PLAINTIFF-RESPONDENT AND NOW BETWEEN Meringnage Rohan Fernando 144, Old Negombo Road, Kanuwana, Ja-Ela. PLAINTIFF-RESPONDENT-PETITIONER Vs. Patikiri Arachchige Dona Indrani Chandralatha Amarasekera No. 52, Weragala, Padukka. DEFENDANT-APPELLANT-RESPONDENT

27/07/16	S.C. (F.R.) Application No.368/2012	1. Mananadewage Shifani, No.34/1, Kolamunna, Piliyandala. 2. Nazreen Nazar, 3. Hazna Nazar, Both minor children presently believed to be residing at No.10, Horton Place, Colombo 07, and appearing by their mother, Custodian and/or Next Friend, Mananadewage Shifani (the 1st Petitioner above-named), of No. 34/1, Kolamunna, Piliyandala. Petitioners Vs. 1. W.A. Somaratne Wijayamuni, Officer-in-Charge, Police Station, Piliyandala. 2. Samanthi Gunasekara, Police Officer (WPC), Women and Children‟s Division, Police Station, Piliyandala. 3. Kattadige Dayananda, Police Officer (PC No.22039), Police Station, Piliyandala. 4. Ellagodage Thushara Rukshan, Police Officer (PC No.72753), Police Station, Piliyandala. 5. Kadiragamar, Officer attached to the Special Police Investigations Unit, National Child Protection Authority, 6. Buddhika Prasad Balachandra, Officer-in-Charge, Special Police Investigations Unit, National Child Protection Authority, 7. R.M.R. Rathnayaka, Officer attached to the Special Police Investigations Unit, National Child Protection Authority, 8. Sarath Kariyapperuma, Officer attached to the Special Police Investigations Unit, National Child Protection Authority, All of the National Child Protection Authority of No.330, Thalawathugoda Road, Madiwela. 9. Ravi Wijayagunawardena, Deputy Inspector General- Crimes and Operations, Sri Lanka Police, Police Headquarters, Colombo 01. 10. P. Jayasundera, Inspector General of Police, Sri Lanka Police, Police Headquarters, Colombo 01. 11. National Child Protection Authority, No.330, Thalawathugoda Road, Madiwela. 12. Natasha Balendra, Chairperson, National Child Protection Authority, No.330, Thalawathugoda Road, Madiwela. 13. J.L.P. Wilson, Registrar, District Court of Colombo, Registry of the District Court of Colombo, Hulftsdorp Street, Colombo 12. 14. H.V. Sarath, Probation Officer, Probation Office (Colombo), No. 375, Dam Street, Colombo 12. 15. Yamuna Perera, Commissioner, Department of Probation and Child Care Services, No.150A, L.H.P. Building, Nawala Road, Nugegoda. 16. Mohamed Ismail Mohamed Nazar, No.10, Horton Place, Colombo 07. 17. Hon. Attorney-General, Attorney-General‟s Department, Hulftsdorp Street, Colombo 12. Respondents
25/07/16	S.C.Appeal No.108/2014	Jayapathma Herath Mudiyanselage Herath Banda In front of Kotawehera Police Station, Kotawehera 4thDefendant-Appellant-Appellant vs. Herath Mudiyanselage Menuhami Andarakatuwa, Mahakirinda, Mahagiriulla Plaintiff-Respondent-Respondent 1. Jayapathma Herath Mudiyanselage Dingiri Menika, Halambe, Monnakulama 1A.RasnayakeMudiyanselageKapuru Bandara Rasnayake, No.279/4, Meda Ela Para, Nikaweratiya 2.KulatungaRanasingheHerath MudiyanselageHerathBandage Somawathie 3. Herath Mudiyanselage Herathhamige Dingiri Amma, Diganna Watta, Digannewa 4. Jayapathma Herath Mudiyanselage Tikiri Banda, Mole Kade, Ihala Agarauda, Monnekulama 5. Jayapathma Herath Mudiyanselage Bandaranayake, In front of Kotawehera Police Station, Kotawehera Defendant-Respondent-Respondents

24/ 07/ 16	SC Appeal 128/ 13	
24/ 07/ 16	SC Appeal 198/ 15	
21/ 07/ 16	SC Appeal 82/2013	

20/ 07/ 16	SC APPEAL No .202 / 2012	BogahawattaDurageChandana Pushpakumara, No. 36/14, Ratnapura Road, Pelmadulla. Vs 1.KottewattaArachchilageYasawathie Nanda Gunawardena,No. 98/5 DharmapalaMawathaPannipitiya. 2.NalinGankanda, UdahaWalawwa, Gallpoththawala, Pelmadulla. 3.Dinesh Rajiv Gankanda, UdahaWalawwa, Galpottawala, Pelmadulla. 4.VijithaGunatileka, No. 105, DharmapalaMawatha, Pelmadulla. 5. IduranPitiyaKankanamalage Ratnaseeli,DharmapalaMawatha, Pelmadulla. 6. IduranPitiyaKankanamalageMangalasiri,DharmapalaMawatha, Pelmadulla. 7. IduranPitiyaKankanamalageThusithananda,DharmapalaMawatha, Pelmadulla. 8. KottawattaArachchilageGunawardena,DharmapalaMawathaPedesa,Pelmadulla. 9. BeligaswattaAkkaranKuruppuMudiyanselageSirinilame, Mudduwa ,Ratnapura. 10.BeligaswattaAkkaranKuruppuMudiyanselageSugathapala, Mudduwa , Ratnapura. 11.LindawatteNandawathie, VidyalayaMawatha, Pelmadulla. 12. G. L. Jinadasa, PahalaBempitiya, Medawatta, Pelmadulla. 13. A.M.M. Kularatne, No. 13, Medawatta,Bopitiya, Pelmadulla. 14. A. M. Dharmawardena, Kutwapitiya, Pelmadulla. 15. G. G. Dharmadasa, VidyalaMawatha, Pelmadulla. 16. S. A. Keerthithilaka, 1/101, Ratnapura Road, Pelmadulla. 17. W. A. AnandaWickremasinghe, 99, Ratnapura Road, Pelmadulla. 18. B. A. M. Abeyratne, 171/3, Pahalawatta,Mudduwa, Ratnapura. 19. W. M. AsithaWijesundera, Ratnapura Road, Pelmadulla. 20.WelwitaLiyanaArachchilageSunderawathieMenike, c/o AnandaHewawasam, Bulugahapitiya, Ehaliyagoda. 21. BeligaswattaAkkaranKuruppu MudiyanselageGaminiKamalaratne Sirinilame, 171/3, Pahalawatta, Mudduwa, Ratnapura. 22.BeligaswattaAkkaranKuruppuMudiyanselageDushmanthaDharmakeerthiSirinilame, Dadadeniya, Ehaliyagoda. 23.BeligaswattaAkkaranKuruppuMudiyanselageDhammikaSirikumari Sirinilame, c/o AnandaHewawasam, Bulugahapitiya, Ehaliyagoda. 24.BeligaswattaAkkaranKuruppuMudiyanselageGnanathilakaThamarakumariSirinilame, 25.BeligaswattaAkkaranKuruppuMudiyanselageGnanathilakaNavaratneSirinilame, 26.BeligaswattaAkkaranKuruppuMudiyanselageGnanathilakaUpulAnuradhaSirinilame, The 24th, 25th, and 26th Defendants above are all of 171/3, PahalaWatta, Mudduwa, Ratnapura. Defendants AND BogahawattaDurageChandana Pushpakumara, No. 36/14, Ratnapura Road, Pelmadulla. Plaintiff Petitioner Vs G. G. Dharmadasa, No. 1, VidyalaMawatha, Pelmadulla. 15th Defendant Respondent AND BETWEEN G. G. Dharmadasa, No. 1, VidyalaMawatha, Pelmadulla. 15th Defendant Respondent Petitioner Vs BogahawattaDurageChandana Pushpakumara, No. 36/14, Ratnapura Road, Pelmadulla. Plaintiff Petitioner Respondent AND NOW BETWEEN BogahawattaDurageChandana Pushpakumara, No. 36/14, Ratnapura Road, Pelmadulla. Plaintiff Petitioner Respondent Appellant Vs G. G. Dharmadasa, No. 1, VidyalaMawatha, Pelmadulla. 15th Defendant Respondent Petitioner Respondent

19/ 07/ 16	SC Appeal 142/ 2012	
19/ 07/ 16	SC FR No. 45/2015	1. T.D. Mataraarachchi, No. 3A, Mawatha II, Sevana, Aruppola, Kandy and 5 others Petitioners vs 1. University Grants Commission, No. 20, Ward Place, Colombo 7. and 18 others Respondents
19/ 07/ 16	SC FR No. 13/2015	1. D.T. Wickramaratna, Green crescent, Godagama, Matara. ad 41 others Petitioners vs 1. University Grants Commission, No. 20, Ward Place, Colombo 7. and 18 others Respondents
19/ 07/ 16	SC FR No. 09/2015	1. R.H.A.S.S. Karunarathna, Na Sevana, Deraniyagala and 34 others Petitioners vs 1. University Grants Commission, No. 20, Ward Place, Colombo 7. 18 others Respondents
17/ 07/ 16	S.C. Appeal 33/2005	Gilbert Samaraweera PLAINTIFF (Deceased) Weerasooriya Arachchige Agnes No. 273/A, North Mulleriyawa, Angoda. SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANT-PETITIONER Vs. Mahadurage Hemapala No. 170, Galle Road, Dehiwela. RESPONDENT-APPELLANT-RESPONDENT (Deceased) AND NOW BETWEEN Weerasooriya Arachchige Agnes No. 273/A, North Mulleriyawa, Angoda. SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANT-PETITIONER Vs. Mahadurage Hemapala No. 170, Galle Road, Dehiwela. RESPONDENT-APPELLANT-RESPONDENT (Deceased) Mahadurage Asantha Senarathna No. 170, Galle Road, Dehiwela. RESPONDENT SOUGHT TO BE SUBSTITUTED 1. Mahadurage Palani Senarathna No. 255/5B/1, Saman Mawatha, Nadimala, Dehiwala 2. Mahadurage Manoja Senarathna No. 237/110, Mahagedara Watta, Arukgoda Road, Alubomulla. 3. Mahadurage Samantha Senarathna No. 437/1/ B, Sama Pedesa, Hokandara North, Hokandara 4. Mahadurage Mahinda Senarathna No. 255/5B/1, Saman Mawatha, Nadimala, Dehiwala. 5. Mahadurage Helaruwan Senarathna No. 277/11A, Quarry Road, Nadimala, Dehiwala. RESPONDENTS-RESPONDENTS
13/ 07/ 16	S.C. (F.R.) Applicatio n . 663/2012	1. M.M. Ravi Perera, No. 56A, Pahalagama, Gampaha. and 3 others Petitioners Vs. 1. Commissioner General of Excise, Department of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02. and 50 others Respondents. 7A. D. Dissanayake, Chairman, 8A. Retired Hon. Justice A.W.A. Salam 9A. V. Jegarajasingham, 10A. Nihal Seneviratne, 11A. Dr. Prathap Ramanujam, 12A. S. Ranugge, 13A. D.L. Mendis, 14A. Sarath Jayathilaka, 15A. Dilhara Wijayatileke, All Members of the Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. Substituted Respondents
13/ 07/ 16	S.C. (F.R.) Applicatio n . 661/2012	1. A.A. Sarath 83/15, Wijithapura Mawatha, Mahakandara, Madapatha. and 23 others Petitioners Vs. 1. Commissioner General of Excise, Department of Excise, No. 34, W.A.D. Ramanayake Mawatha, Colombo 02. and 82 others Respondents

13/07/16	SC / FR 123 / 2015	Mohammed Mukthar Aisha, No 230, Kumaratunga Mawatha, Matara. Petitioner Vs. 1. W.B. Piyatissa, The Principal, (Chairman of the Interview Board) St. Thomas Boys College, Matara. 2. Hon. Akila Viraj Kariyawasam, Minister of Education, Ministry of Education, Isurupaya, Battaramulla. 3. Upali Marasinghe, The Secretary, Ministry of Education, Isurupaya, Battaramulla. 4. The Chairman of the Appeal Board Grade 1 Admission Year 2015, St. Thomas Boys College, Matara. 5. Hon Attorney General, Attorney General's Department, Colombo 12. Respondents
11/07/16	SC Appeal 192/14	Wewita Hettige Upul Premalal Perera, No. 209A, Mahawatta, Alubomulla. Petitioner Vs- Kiriwanawattegedara Beatrice Sandya Kumari, Udahawatta, Siyambalagoda, Danture Kandy. Respondent And between Kiriwanawattegedara Beatrice Sandya Kumari, Udahawatta, Siyambalagoda, Danture, Kandy. Respondent-Appellant -Vs- Wewita Hettige Upul Premalal Perera, No. 209A, Mahawatta, Alubomulla. Petitioner-Respondent And now between Wewita Hettige Upul Premalal Perera, No. 209A, Mahawatta, Alubomulla. Petitioner-Respondent-Petitioner -Vs- Kiriwanawattegedara Beatrice Sandya Kumari, Udahawatta, Siyambalagoda, Danture, kandy. Respondent-Appellant-Respondent
10/07/16	SC FR. 19 / 2015	1. Warushamannadi Saman de Silva 2. Yamuna Subhashini Dissanayake Both of : No. 188/7/2, 6th Avenue Apartment, Havelock Road, Thimbirigasyaya, Colombo 05. For and on behalf of : Chathuni Malintha de Silva PETITIONERS Vs 1. S.S.K. Aviruppola, Principal, Visakha Vidyalaya, Colombo 05. 2. Upali Marasinghe, Secretary, Ministry of Education, Isurupaya, Battaramulla. 2(a) W.M.Bandusena, Secretary, Ministry of Education, Isurupaya, Battaramulla. 3. Ranjith Chandrasekera, Director – National Schools, Ministry of Education, Isurupaya, Battaramulla. 3(a)I.A.P.N. Illeperuma, Director – National Schools, Ministry of Education, Isurupaya, Battaramulla. 4.U.M. Prasanna Upasantha, Principal, Mahanama College, Colombo 03. 5.Hon. Attorney General, Attorney General's Department, Colombo 12 RESPONDENTS
10/07/16	S.C. F.R. Application No. 207/2016	Udaya Prabhath Gammanpila, 65/14, Wickremasinghe Mawatha, Kumaragewatta Road, Pelawatta, Battaramulla. Presently at : Magazine Prison, Colombo 08. Petitioner Vs. 1. M.D.C.P. Gunathilake, Inspector of Police, Special Investigation Unit, Police Headquarters, Colombo 01. 2. Mevan Silva, Senior Superintendent of Police, Director, Special Investigation Unit, Police Headquarters, Colombo 01. 3. Pujitha Jayasundara, Inspector General of Police, Police Headquarters, Colombo 01. 4. Brian John Shaddick, 2, Martins Knockrow, New South Wales 2479, Australia. 5. Lasitha Indeewara Perera, 726 Sri Nanda Mawatha, Madinnagoda Road, Rajagiriya. 6. J.C.P. Jayasinghe, 20 Tickell Road, Colombo 08. 7. Bandara, Assistant Superintendent of Police, Special Investigation Unit, Police Headquarters, Colombo 01. 8. The Attorney General, Attorney General's Department, Colombo 12. Respondents.

04/ 07/ 16	SC Appeal No. 74/12	Galkadu Dewage Nandasena, No. 379, Uggalboda West, Gampaha. Plaintiff Vs 1.Walimuni Senadheerage Malini Rupasinghe 2.Handunge Saranapala Both of No. 433, Galwetiya Road, Uggalboda, Gampaha. Defendants AND 1. Walimuni Senadheerage Malini Rupasinghe 2. Handunge Saranapala, Both of No. 433, Galwetiya Road, Uggalboda, Gampaha. Defendant – Appellants Vs Galkadu Dewage Nandasena, No. 379, Uggalboda West, Gampaha Plaintiff - Respondent AND NOW Galkadu Dewage Nandasena, No. 379, Uggalboda West, Gampaha. Plaintiff- Respondent- Appellant Vs 1. Walimuni Senadheerage Malini Rupasinghe 2. HandungeSaranapala Both of No. 433, Galwetiya Road, Uggalboda, Gampaha. Defendant-Appellant-Respondents
26/ 06/ 16	SC. APPEAL No.221/2014	M. Anura Fernando No.116, Bodhirajapura, Werahera, Boralesgamuwa. Applicant-Respondent-Petitioner Vs. Little Lion Associates (Pvt) Limited No.11, A.G. Hiiniappuhamy Mawatha, Colombo 13. Respondent-Appellant-Respondent

26/06/16	S.C. Appeal No.83/2011	1. Merennege Lisi alias Erine Salgado 2. Mahatellage Saman Suranga Pieris 3. Mahatellage Sujith Asanga Pieris All of Nonis Mawatha, Molpe , Moratuwa. 4. Mahatellage Sarath Jayantha Pieris Of No. 19/2, Thapasarama Road, Moratumulla, Moratuwa. 5. Mahatellage Jayantha Pieris Of No. 34/288, Kirikannamulla, Yakkala. 6. Mahatellage Mallika Harriet Pieris Of No. 10/2, Nonis Mawatha, Molpe, Moratuwa. 7. Mahatellage Renuka Nimali Pieris Of Nonis Mawatha, Molpe, Moratuwa. PLAINTIFFS Vs. 1. A.M. A. Kalum Karunaratne Of No. 326/1, Suwarapola, Piliyandala. 2. Hapuhennedige Janet Elizabeth Of Mola Road, Katubedda, Moratuwa. DEFENDANTS AND A.M. A. Kalum Karunaratne Of No. 326/1, Suwarapola, Piliyandala. 1ST DEFENDANT-APPELLANT Vs. 1. Merennege Lisi alias Erine Salgado 2. Mahatellage Saman Suranga Pieris 3. Mahatellage Sujith Asanga Pieris All of Nonis Mawatha, Molpe , Moratuwa. 4. Mahatellage Sarath Jayantha Pieris Of No. 19/2, Thapasarama Road, Moratumulla, Moratuwa. 5. Mahatellage Jayantha Pieris Of No. 34/288, Kirikannamulla, Yakkala. 6. Mahatellage Mallika Harriet Pieris Of No. 10/2, Nonis Mawatha, Molpe, Moratuwa. 7. Mahatellage Renuka Nimali Pieris Of Nonis Mawatha, Molpe, Moratuwa. PLAINTIFFS-RESPONDENTS 8. Hapuhennedige Janet Elizabeth Of Mola Road, Katubedda, Moratuwa. 2ND DEFENDANT-RESPONDENT AND NOW BETWEEN A.M. A. Kalum Karunaratne Of No. 44/10/3, Suwarapola, Piliyandala. 1ST DEFENDANT-APPELLANT-PETITIONER Vs. 1. Merennege Lisi alias Erine Salgado 2. Mahatellage Saman Suranga Peiris 3. Mahatellage Sujith Asanga Pieris All of Nonis Mawatha, Molpe , Moratuwa. 4. Mahatellage Sarath Jayantha Pieris Of No. 19/2, Thapasarama Road, Moratumulla, Moratuwa. 5. Mahatellage Jayantha Pieris Of No. 34/288, Kirikannamulla, Yakkala. 6. Mahatellage Mallika Harriet Pieris Of No. 10/2, Nonis Mawatha, Molpe, Moratuwa. 7. Mahatellage Renuka Nimali Pieris Of Nonis Mawatha, Molpe, Moratuwa. PLAINTIFFS-RESPONDENTS-RESPONDENTS 8. Hapuhennedige Janet Elizabeth Of Mola Road, Katubedda, Moratuwa. 2ND DEFENDANT-RESPONDENT-RESPONDENT (Deceased)
23/06/16	SC FR No. 394/2015	Noble Resources International Pte Limited, No. 60, Anson Road, #19-01, Maple Tree, Anson Singapore 079914 Petitioner Vs. 1. Hon. Ranjith Siyambalapitiya, Minister of Power and Renewable Energy, No. 72, Ananda Coomaraswamy Mawatha, Colombo 07. and 74 others Respondents
21/06/16	SC CHC 01/2011	Selliah Ponnusamy 105, Manning Place, Colombo 6 Defendant-Petitioner-Appellant Vs People’s Bank 75, Chittampalam A Gardiner Mawatha Colombo 2. Plaintiff-Respondent-Respondent

21/ 06/ 16	SC Appeal No. 170/ 14	Brenda Hilda Violet Perera, No. 21, “ Mount Rose “, JambugasmullaMawatha, Nugegoda. Plaintiff IndramalaNelumDhanaratne, No. 17, Rochester Drive, Pinner, Middlesex, United Kingdom Defendant AND BETWEEN IndramalaNelumDhanaratne, No. 17, Rochester Drive, Pinner, Middlesex, United Kingdom Defendant Appellant Vs Brenda Hilda Violet Perera, No. 21, “ Mount Rose “, JambugasmullaMawatha, Nugegoda. Plaintiff Respondent AND NOW BETWEEN IndramalaNelumDhanaratne, No. 17, Rochester Drive, Pinner, Middlesex, United Kingdom Defendant Appellant Appellant Vs Brenda Hilda Violet Perera, No. 21, “ Mount Rose “, JambugasmullaMawatha, Nugegoda. Plaintiff Respondent Respondent

20/06/16	SC FR Application No. 24/2016	Dr. K. Kobindarajah 130. Kannaki Amman Kovil Lake Road, Poompuhar, Batticaloa Petitioner SC FR Application No. 24/2016 Vs. 1. Eastern University, Sri Lanka Vantharumoolai, Chenklady 2. Prof. Uma Coomaraswamy Competent Authority Council Chairman, Eastern University, Sri Lanka Vantharumoolai, Chenkalady 3. Mr. V. Kanagasingam, Rector, Trincomalee Campus Council Member, 4. Dr. K.T. Sundaresan Dean, Faculty of Health –Care Sciences Council Member, 5. Dr. K. Rajendram Dean, Faculty of Arts & Culture Council Member, 6. Mr. R. Uthayakumar, Dean, Faculty of Commerce and Management Council Member, 7. Dr. F.C. Ragel Dean, Faculty of Science Council Member, 8. Dr. P. Sivarajah Dean, Faculty of Agriculture Council Member, 9. Mr. T. Baskar Dean, Faculty of Communication & Business Studies, Trincomalee Campus, Council Member, 10. Dr. K.E. Karunakaran, Senate Nominee, Council Member, 11. Mr. P. Sachithananthan, Senate Nominee, Council Member, 12. Mr. A. Gnanathasan, UGC Appointed Council Member, 13. Rev. Fr. Dr. Paul Robinson, UGC Appointed Council Member, 14. Mr. P. Kannan, UGC Appointed Council Member, 15. Prof. R. Sivakanesan, UGC Appointed Council Member, 16. Dr. H.R. Thabavita, UGC Appointed Council Member, 17. Mrs. P.S.M. Charles, UGC Appointed Council Member, 18. Dr. M.S.M. Ibralebbe, UGC Appointed Council Member, 19. Dr. M. Thamilvannan, UGC Appointed Council Member, 20. Mr. S.M. Hussain, UGC Appointed Council Member, 21. Mr. P.T. Abdul Hassan, UGC Appointed Council Member, 22. Dr. S. Maunaguru, UGC Appointed Council Member, The 3rd to the 22nd Respondents abovenamed all of the Eastern University, Sri Lanka, Vantharumoolai, Chenkalady 23. Mr. A. Paheerathan, Acting Registrar/Secretary to the Governing Council, Eastern University, Sri Lanka, Vantharumoolai, Chenkalady 24. University Grants Commission No. 20, Ward Place, Colombo 7. 25. Prof. Mohan de Silva, Chairman, University Grants Commission No. 20, Ward Place, Colombo 7. 26. Prof. P.S.M. Gunaratne Member, University Grants Commission No. 20, Ward Place, Colombo 7. 27. Prof Malik Ranasinghe Member, University Grants Commission No. 20, Ward Place, Colombo 7. 28. Dr. Wickrama Weerasooriya Member, University Grants Commission No. 20, Ward Place, Colombo 7. 29. Prof Hemantha Senanayake Member, University Grants Commission No. 20, Ward Place, Colombo 7. 30. Dr. Ruvaiz Haniffa Member, University Grants Commission No. 20, Ward Place, Colombo 7. 31. Prof. Kumarvadivel Member, University Grants Commission No. 20, Ward Place, Colombo 7. 32. Dr. Priyantha Premakumara Secretary to the University Grants Commission No. 20, Ward Place, Colombo 7. 33. Hon. Lakshman Kiriella Minister of University Education & Highways Ministry of University Education & Highways No. 18, Ward Place, Colombo 07. 34. Mr. D.C. Dissanayake Secretary to the Ministry of University Education & Highways, Ministry of University Education & Highways, No. 18, Ward Place, Colombo 7. 35. Dr.Thangamuthu Jeyasingam Department of Botany, Eastern University Vantharumoolai Chenkalady 36. Dr. Mylvagaganam Pagthinathan, Department of Animal Science, Eastern University Vantharumoolai Chenkalady 37. Dr. Jeevaretnam Kennedy Department of Languages Eastern University

20/06/16	S.C.APPEAL No.95/2013	Mohammed Abdul Gaffoor No.77/05, Vishaka Mawatha Bandarawela Defendant-Respondent-Appellant Vs Mohamed Jethum Umma No.77/05, Vishaka Mawatha Bandarawela Plaintiff-Appellant-Respondent
09/06/16	S.C. Appeal No. 153/2014	Mohammed Ali Abdul Wadood of Ovitigama, Pugoda. PLAINTIFF (DECEASED) 1A. Mohammed Ashraff Mohammed Aswer 2A. Mohamemed Ashraff Mohammed Shapar Both of Ovitigama, Pugoda. SUBSTITUTED-PLAINTIFFS Vs. A.L. A. Ahamed Lebbe of Ovitigama, Pugoda. DEFENDANT (DECEASED) 1A. Ahamed Lebbe Abuhaneefa 2B. Ahamed Lebbe Sithithi Thamna 3C. Ahamed Lebbe Farida 4D. Mohammed Ali Puwuda Umma SUBSTITUTED – DEFENDANTS AND A.L.A. Ahamed Lebbe of Ovitigama, Pugoda. DEFENDANT-DECEASED 1A. Ahamed Lebbe Abuhaneefa of Ovitigama, Pugoda. SUBSTITUTED 1A DEFENDANT-PETITIONER Vs. Mohammed Ali Abdul Wadood of Ovitigama, Pugoda. PLAINTIFF (DECEASED) 1A. Mohammed Ashraff Mohammed Aswer 2A. Mohamemed Ashraff Mohammed Shapar Both of Ovitigama, Pugoda. SUBSTITUTED-PLAINTIFFS-RESPONDENTS A.L. A. Ahamed Lebbe of Ovitigama, Pugoda. DEFENDANT (DECEASED) 2B. Ahamed Lebbe Sithithi Thamna 3C. Ahamed Lebbe Farida 4D. Mohammed Ali Puwuda Umma All of Ovitigama, Pugoda. SUBSTITUTED–DEFENDANTS-RESPONDENTS AND NOW A.L. A. Ahamed Lebbe of Ovitigama, Pugoda. DEFENDANT (DECEASED) 1A. Ahamed Lebbe Abuhaneefa of Ovitigama, Pugoda. SUBSTITUTED 1A DEFENDANT-PETITIONER- APPELLANT Vs. Mohammed Ali Abdul Wadood of Ovitigama, Pugoda. PLAINTIFF (DECEASED) 1A. Mohammed Ashraff Mohammed Aswer 2A. Mohamemed Ashraff Mohammed Shapar Both of Ovitigama, Pugoda. SUBSTITUTED-PLAINTIFFS-RESPONDENTS-RESPONDENTS A.L. A. Ahamed Lebbe of Ovitigama, Pugoda. DEFENDANT (DECEASED) 2B. Ahamed Lebbe Sithithi Thamna 3C. Ahamed Lebbe Farida 4D. Mohammed Ali Puwuda Umma All of Ovitigama, Pugoda. SUBSTITUTED–DEFENDANTS-RESPONDENTS-RESPONDENTS AND NOW BETWEEN 1A. Ahamed Lebbe Abuhaneefa of Ovitigama, Pugoda. SUBSTITUTED 1A DEFENDANT-PETITIONER- APPELLANT-PETITIONER 1A. Mohammed Ashraff Mohammed Aswer 2A. Mohamemed Ashraff Mohammed Shapar Both of Ovitigama, Pugoda. SUBSTITUTED-PLAINTIFFS-RESPONDENTS-RESPONDENTS-RESPONDENTS 2B. Ahamed Lebbe Sithithi Thamna 3C. Ahamed Lebbe Farida 4D. Mohammed Ali Puwuda Umma All of Ovitigama, Pugoda. SUBSTITUTED–DEFENDANTS-RESPONDENTS-RESPONDENTS-RESPONDENTS

09/06/16	SC.Appeal No.98/2007	1A. Sarath Godagampala 14. Indra Srimathie Godagampala 15. Nandanie Sriyalatha Godagampala 16. G.D. Wijethunga 17. G. D. Chandraratne Wijethunga All of Thalgasmote Veyangoda Defendant-Petitioner-Appellants Vs. W.K.Peter Fernando No.171, Thalgasmote, Veyangoda Plaintiff-Respondent-Respondent 2. G. D. Rosalin 3. G. D. Asilin 4. W.K.Jinadasa 5. W.K.Sunil 6. W.K.Kusumawathie 7. W.K.Vipulasena 8. W.K.Josephin 9. M.H.P.Jinel Nona 10.S.D.Nonis 11.S.D.Guneris 12.S.D.Lionel 13.S. Chandrasiri Udayaratne All of Thalagasmote Veyangoda Defendant-Respondent-Respondents
08/06/16	SC / Appeal / 76/2011	Ahamed Lebbe Hadjiar Athambawa, (Deceased) 1. Mohamed Ismail Alim Suhaihaumma, 2. Athambawa Sulha Beebe, Both of Division 5, Sainthamaruthu. Substituted Plaintiff Vs. 1. Athamlebbe Mohamed Yusuf, 2. Seenimohamed Jemilunnisa, Both of Division 3, Nintavur. Defendants AND 1. Mohamed Ismail Alim Suhaihaumma, 2. Athambawa Sulha Beebe, Both of Division 5, Sainthamaruthu. Substituted Plaintiff Appellant Vs. 1. Athamlebbe Mohamed Yusuf, 2. Seenimohamed Jemilunnisa, Both of Division 3, Nintavur. Defendant Respondents AND NOW BETWEEN 1. Athamlebbe Mohamed Yusuf, 2. Seenimohamed Jemilunnisa, Both of Division 3, Nintavur. Defendant Respondent Appellants Vs. 1. Mohamed Ismail Alim Suhaihaumma, 2. Athambawa Sulha Beebe, Both of Division 5, Sainthamaruthu. Substituted Plaintiff Appellant Respondents

07/06/16	SC APPEAL 174 /10	Maddumaralalage Dona Mary Nona of Galhena, Beruwala. Plaintiff Vs 1.Maddumaralalage Don Justin 2.Maddumaralalage Don Piyadasa 3.BudagodaArachchigeJayasenaWijewarden 4.BudagodaArachchigeSirisenaWijewardena 4a.Gammampila Imiyage DonaKarunawathi 5.Maddumaralalage Susil 6.Maddumaralalage Don Leelarathne 7.Maddumaralalage Don Hemachandra 8.Maddumaralalage Don Asilin 9.Maddumaralalage Don Thilakarathne 10.Maddumaralalage Don Chandrasena 11.Payagala Mudiyanselage alias Payagala Mudalige Nandawathi All of Galhena, Beruwala. 12. Kamburawala Kankanamge Panis Singho Of No. 5, Wickremasinghe Place, Kaluth- -ara South. 13. Hubert Danapala Ranasinghe of Kurun- -duwatta, Indajothi Mawatha, Hirana, Panadura. 14. Dodangoda Liyanage Podinona of Wata- -raka, Gintota. 15. Pitawala Kankanamage Don Poliyar Jayathilaka of Galhena, Beruwala. Defendants And 5, 9A. Maddumaralalage Sucil 9. Maddumaralalage Don Thilakarathne (dead) 11. Payagala Mudiyanselage alias Payagala Mudalige Dona Nandawathi. All of Galhena, Beruwala. 5th, 9th and 11th Defendants Appellants Vs Maddumaralalage Dona Marynona of Galhena, Beruwala. Plaintiff-Respondent and 1a Defendant Respondent 1.Maddumaralalage Don Justin (Dead) 2.Maddumaralalage Don Piyadasa 3.Budagoda Arachchige Jayasena Wijewa- -rdena (Dead) 3A.B.A.D. Kanthi Wijewardena 3B.B.A.D. Dharmasena Wijewardena 4. Budagoda Arachchige Sirisena Wijeward- -ena 4a. Gammampila Imiyage Dona Karunawathi 6.Maddumaralalage Don Leelarathne 7.Maddumaralalage Don Hemachandra 8.Maddumaralalage Dona Asilin 10.Maddumaralalage Don Chandrasena 12.Kamburawala Kankanamge Panis Singho Of No. 51/2, Wickremasinghe Place, Kal- -uthara South 13.Hubert Danapala Ranasinghe of Kurund- -uwatta, Indajothi Mawatha, Hirana, Panadura. 14.Dodangoda Liyanage Podinona of Wata- -raka, Gintota West. 15.Pitawala Kankanamge Don Poliyar Jayat- -hilake of Galhena, Beruwala (Dead) Defendants Respondents And Now Between 5, 9A - MaddumaralalageSucil 11 - PayagalaMudiyanselage alias PayagalaMudalige Dona Nandawathie , All of Galhena, Beruwala. 5th 9A and 11th Defendant Appellants Appellants Vs Maddumaralalage Dona Marynona of Galhena, Beruwala. Plaintiff-Respondent-Respondent and 1A Defendant-Respondent-Respondent 2.Maddumaralalage Don Piyadasa 3.Budagoda Arachchige Jayasena Wijewa- -rdena (Dead) 3A. B.A.D. Kanthi Wijewardena 3B. B.A.D. Dharmasena Wijewardena 4A. Gammampila Imiyage Dona Karunawathi 6. Maddumaralalage Don Leelarathne 7. Maddumaralalage Don Hemachandra (dead) 8. Maddumaralalage Dona Asilin (Dead) 10.Maddumaralalage Don Chandrasena 12.Kamburawala Kankanamage Panis Singho of No. 5, Wickremasinghe Place, Kalutara South. 13. Hubert Danapala Ranasinghe of Kurunduwatta, Indrajothi Mawatha, Hirana, Panadura. 14. Dodangoda Liyanage Podinona of Wataraka, Gintota West. 15. Pitawala Kankanamage Don Poliyar Jayathilake of Galhena, Beruwala (Dead) Defendants Respondents Respondents

Judgments Delivered in 2016

01/06/16	S.C. Appeal No. 50/2010	1. Edirisinghe Mudiyanselage Gunamal Ethana Edirisinghe 2. Samarasinghe Thantrige Chinthaka Samarasinghe Both previously of: No. 22. Hewaheta Road, Illukmodera, Gurudeniya. Presently of: No. 46/1, Tennekumbura, Kandy. PLAINTIFFS Vs. 1. Dharmaratne Perera No. 38, Tennekumbura, Kandy. 2. W. A. P. Perera No. 71, Tennekumbura, Kandy. 3. Nissanka Bandara Sirimalwatte No. 71, Tennekumbura, Kandy. 4. Kurundeniya Seneviratnage Nissanka Seneviratne No. 43/40, Talwatte, Kandy. 5. Nihal Perera No. 48/2, Hewaheta Road, Talwatte, Kandy. 6. Ajith Nanayakkara “Olga Beer Point” No. 229, Srimath Bennet Soysa Street, Kandy. DEFENDANTS AND 2. A. P. Perera No. 71, Tennekumbura, Kandy. 3. Nissanka Bandara Sirimalwatte No. 71, Tennekumbura, Kandy. 4. Kurundeniya Seneviratnage Nissanka Seneviratne No. 43/40, Talwatte, Kandy. 5. Nihal Perera No. 48/2, Hewaheta Road, Talwatte, Kandy. DEFENDENT-PETITIONERS Vs. 1. Edirisinghe Mudiyanselage Gunamal Ethana Edirisinghe 2. Samarasinghe Thantrige Chinthaka Samarasinghe Both previously of: No. 22. Hewaheta Road, Illukmodera, Gurudeniya. PLAINTIFFS-RESPONDENTS AND Presently of: No. 46/1, Tennekumbura, Kandy. PLAINTIFFS 3. Nissanka Bandara Sirimalwatte No. 71, Tennekumbura, Kandy. 4. Kurundeniya Seneviratnage Nissanka Seneviratne No. 43/40, Talwatte, Kandy. 5. Nihal Perera No. 48/2, Hewaheta Road, Talwatte, Kandy. DEFENDENTS-PETITIONERS-APPELLANTS Vs. 1. Edirisinghe Mudiyanselage Gunamal Ethana Edirisinghe 2. Samarasinghe Thantrige Chinthaka Samarasinghe Both previously of: No. 22. Hewaheta Road, Illukmodera, Gurudeniya. Presently of: No. 46/1, Tennekumbura, Kandy. PLAINTIFFS-RESPONDENTS-RESPONDENTS 1. Dharmaratne Perera No. 38, Tennekumbura, Kandy. 1ST DEFENDANT-RESPONDENT 6. Ajith Nanayakkara “Olga Beer Point” No. 229, Srimath Bennet Soysa Street, Kandy. DEFENDANT-RESPONDENT AND NOW BETWEEN 1. Edirisinghe Mudiyanselage Gunamal Ethana Edirisinghe 3. Samarasinghe Thantrige Chinthaka Samarasinghe Both previously of: No. 22. Hewaheta Road, Illukmodera, Gurudeniya. Presently of: No. 46/1, Tennekumbura, Kandy. PLAINTIFFS-RESPONDENTS-RESPONDENTSPETITIONERS Vs 3 Nissanka Bandara Sirimalwatte No. 71, Tennekumbura, Kandy. 4. Kurundeniya Seneviratnage Nissanka Seneviratne No. 43/40, Talwatte, Kandy. 5. Nihal Perera No. 48/2, Hewaheta Road, Talwatte, Kandy. 3rd, 4th & 5th DEFENDENTS-PETITIONERSAPPELLANTS- RESPONDENTS 1. Dharmaratne Perera No. 38, Tennekumbura, Kandy. 1ST DEFENDANT-RESPONDENTRESPONDENT 6. Ajith Nanayakkara “Olga Beer Point” No. 229, Srimath Bennet Soysa Street, Kandy. 6TH DEFENDANT-RESPONDENTRESPONDENT

31/05/16	SC Appeal 95 2012	Kalutara Arachchide Namadasa alias Sumanadasa of Udumulla Kommala Benthota plantif respondent petitioner vs. W.D.Wimalaweera of Wadumulla Kommala Benthota Defendant appelant respondent
29/05/16	S.C. Appeal 04/2012	Gangabada Arachchige Prince Gamini Perera No. 310/8, Pahala Biyanwila, Kadawatha. PLAINTIFF Vs. Madavita Vidanamudalige Don Joseph No. 279, Dalupitiya, Kadawatha. DEFENDANT AND NOW Gangabada Arachchige Prince Gamini Perera No. 310/8, Pahala Biyanwila, Kadawatha. PLAINTIFF-APPELLANT Vs. Madavita Vidanamudalige Don Joseph No. 279, Dalupitiya, Kadawatha. DEFENDANT-RESPONDENT AND NOW BETWEEN Gangabada Arachchige Prince Gamini Perera No. 310/8, Pahala Biyanwila, Kadawatha. Now residing at 221/A, Jayagath Mawatha, Ihala Biyanwila, Kadawatha. PLAINTIFF-APPELLANT-PETITIONER Vs. Madavita Vidanamudalige Don Joseph No. 279, Dalupitiya, Kadawatha. DEFENDANT-RESPONDENT-RESPONDENT
29/05/16	S.C.Appeal No.183/2014	N. H. J. C. Rangajith Dassanayake Galliyedde, Ellawala 18th Defendant-Appellant- Appellant Vs A. Amaratunga Fernando 64/5, Cross Street Colombo 8 Plaintiff-Respondent-Respondent 1. A. Rosalin Fernando 2. A.E.Akman (deceased) 3. A. Swarnalatha 4. K.M.John Fernando (deceased) 5. A.R.Yasapala 6. A.R.Punyawathi 7. A.R.Gnanawathi 8. A.R.Siripala 9. A.R.Piyaseeli of Ellawela, Eheliyagoda 10. A.R.Luciya Fernando (deceased) 10A.V. H. Gunasoma 37, Sri Sumana Mawatha, Mudduwa, Ratnapura 11.A.R.Lewis C/o Ethoya Stores, Ratnapura 12. A.Alensu 317/F, Naiwala Road, Udugampola 13. A.Pedrik 300,Naiwala Road.Udugampola 14. A.Saimon 300,Naiwala Road.Udugampola 15.A.R.Ensa Niripola, Hanwella 16.A.Sunil Ellawela, Eheliyagoda 17.A.Abeywardane Ellawela, Eheliyagoda 19.Weragodage Kamini Chandralatha 20.A.S. Samanthika Abeywardane 21. Nisansala Lakmali Abeywardane Ellawela, Eheliyagoda Defendant-Respondent-Respondents
15/05/16	S.C.Appeal No.23/2010	Ceylinco Insurance Company Ltd Presently known as Ceylinco Insurance PLC 4th Floor, Ceylinco House 69, Janadipathi Mawatha Colombo 01. Defendant-Respondent-Appellant Vs. G.G.N.L.M.Razik Ranatunga Rice Mill Pothanegama Anuradhapura Plaintiff-Appellant-Respondent
04/05/16	S.C.Appeal No.190/2012	V.A.K.Cisilin Nona alias Pesonahamy Moratota Pelmadulla Plaintiff-Respondent-Appellant Vs. Gunasena Jayawardana Moratota Pelmadulla Defendant-Appellant-Respondent

02/ 05/ 16	SC FR No. 18/2015	Ceylon Electricity Board Accountants' Association, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. Petitioner Vs. 1. Hon Patali Champika Ranawaka, Minister of Power and Energy, Ministry of Power and Energy, No. 80, Sir Ernest De Silva Mawatha, Colombo 07. 1a. Hon. Ranjith Siyambalapitiya, Minister of Power and Renewable Energy, Ministry of Power and Renewable Energy, No. 80, Sir Ernest De Silva Mawatha, Colombo 07. 2. Dr. B.M.S. Batagoda, Secretary, Ministry of Power and Energy, No. 80, Sir Ernest De Silva Mawatha, Colombo 07. 3. Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 4. M.C. Wickremasekara, General Manager, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 5. W.D.A.S. Wijayapala, Chairman, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 6. B.N.I.F.A. Wickramasuriya, Vice Chairman, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 6a. W.A. Gamini Wanasekara, Vice Chairman, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 7. N.K.G. Gunatilake, Working Director, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02 7a. W.R.G. Sanath Bandara Working Director, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02 8. Jeevani Kariyawasam, Member, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 9. S.S. Miyanwala, Member, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 9a. T.N.K.B. Tennekoon, Member, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 10. J. Dadallage, Member, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 10a. S.D.A.B. Boralessa, Member, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 11. R. Semasinghe, Member, Ceylon Electricity Board, No. 50, Sir Chiththampalam A. Gardiner Mawatha, Colombo 02. 12. Hon. Attorney General, Attorney General's Department Hulftsdorp, Colombo 12. 13. Ceylon Electricity Board Engineers' Union, Projects and Heavy Maintenance Branch-DD04, Ceylon Electricity Board, Sir Devananda Mawatha, Piliyandala. 14. Neville Piyadagama, Chairman, National Pay Commission, No. 1/116, BMICH, Bauddaloka Mawatha, Colombo 7. 15. B. Wijayarathna, Secretary, National Pay Commission, No. 1/116, BMICH, Bauddaloka Mawatha, Colombo 7. Respondents

01/ 05/ 16	SC/ APPEAL/ 211/2012 amended	Udagepolage Gunasiri Seneviratne ‘Yamuna’, Gulawita, Walallawita. PLAINTIFF Vs. Pattiya Widanage Carmen Premalatha No. 8, Waagouwwa Cross Road, Central Watte, Waagouwwa, Minuwangoda. DEFENDANT-APPELLANT Va. Udagepolage Gunasiri Seneviratne ‘Yamuna’, Gulawita, Walallawita. PLAINTIFF-RESPONDENT AND NOW BETWEEN Udagepolage Gunasiri Seneviratne ‘Yamuna’, Gulawita, Walallawita. PLAINTIFF-RESPONDENT-PETITIONER Vs. Pattiya Widanage Carmen Premalatha No. 8, Waagouwwa Cross Road, Central Watte, Waagouwwa, Minuwangoda. DEFENDANT-APPELLANT-RESPONDENT
28/ 04/ 16	S.C. Appeal 166/2011	ISPAT Corporation (Pvt) Ltd., No. 111-1/C/2, New Parliament Road, Battaramulla. PLAINTIFF Vs. Hiat Steel (Pvt) Limited, Pelahela, Dekatana. DEFENDANT AND People’s Bank, No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. 1ST CLAIMANT-PETITIONER Ismail Abdul Gaffar, No. 20B, Sujatha Mawatha, Kalubowila, Dehiwela. 2ND CLAIMANT-PETITIONER Vs. ISPAT Corporation (Pvt) Ltd., No. 111-1/C/2, New Parliament Road, Battaramulla. PLAINTIFF-RESPONDENT Hiat Steel (Pvt) Limited, Pelahela, Dekatana. DEFENDANT-RESPONDENT AND BETWEEN ISPAT Corporation (Pvt) Ltd., No. 111-1/C/2, New Parliament Road, Battaramulla. PLAINTIFF-RESPONDENT-PETITIONER Vs. Hiat Steel (Pvt) Limited, Pelahela, Dekatana. DEFENDANT-RESPONDENT-RESPONDENT People’s Bank No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. 1ST CLAIMANT-PETITIONER-RESPONDENT Ismail Abdul Gaffar, No. 20B, Sujatha Mawatha, Kalubowila, Dehiwela. 2ND CLAIMANT-PETITIONER-RESPONDENT AND NOW BETWEEN People’s Bank No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. 1ST CLAIMANT-PETITIONER-RESPONDENT-PETITIONER Vs. ISPAT Corporation (Pvt) Ltd., No. 111-1/C/2, New Parliament Road, Battaramulla. PLAINTIFF-RESPONDENT-PETITIONER- RESPONDENT Hiat Steel (Pvt) Limited, Pelahela, Dekatana. DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENT Ismail Abdul Gaffar, No. 20B, Sujatha Mawatha, Kalubowila, Dehiwela. 2ND CLAIMANT-PETITIONER-RESPONDENT-RESPONDENT
31/ 03/ 16	SC FR 260/2011	A.A. Dinesh Priyankara Perera 43/1, Shri Dharmananda Mawatha, Gorakana, Keselwatta. Panadura. Petitioner Vs 1. 6118, Police Constable Police Station, Keselwatta, Panadura-North & 15 Others
31/ 03/ 16	SC. SPL/LA No. 79/2015	Muththusamy Balaganeshan Of 65/138, Crow Island Mattakkuliya Colombo 15 Accused-Appellant-Petitioner Vs. 1. The Officer-in-Charge Police Station Seeduwa. 2. The Attorney General Colombo Respondents-Respondents

31/ 03/ 16	SC.HC CALA 73/2013	LasanthaSamarasiriAnandaWickremasinghe of Kurupetta, Ruwanwella Intervenient-Petitioner Vs. 1. ManikuwalageRosalin 2. RanjithAnandaWickremasinghe (Deceased) 2.ADharmasiriAnandaWickremasinghe OfKurupetta ,Ruwanwella Plaintiffs-Respondents-Petitioners-Respondents 7. AswaththalageJulis 11. ColalmbageDhanapala 12. GalaudageJelin 13. GalaudageGirigoris 14. GalaudageRosalin. All of Kurupetta, Ruwanwella 7th, 11th, 12th, 13th -14th Defendants-Appellants-Respondents-Respondents 1. AmbalanpitiyageBrampi (Deceased) 2. AmbalanpitiyageMarthelis 3. Ambalanpitiyage Simon 4. AmbalanpitiyageSelesthina 5. AmbalanpitiyageEmanis 6. AswaththalageDoisa (Deceased) 8. AmbalanpitiyageLeelawathie 9. AmbalanpitiyagePremawathie 10. AmbalanpitiyageSriyawathie of Kurupetta, Ruwanwella 1st to 6th and 8th to 10th Defendants-Respondents Respondents 1. AmbalanpitiyageWasanthiKalyani 2. AmbalanpitiyageRenukaUdayangani 3. Ambalanpitiyage Padma Irangani 4. AmbalanpitiyageManjulaLalithWijesinghe 5. AmbalanpitiyageThilakPushpakumaraWijesinghe 6. AmbalanpitiyageRanjithWarnakulasiriWijesinghe All of Kurupetta, Ruwanwella Party sought to be substituted in place of the Deceased 6th Defendant-Respondent-Respondent
31/ 03/ 16	SC Appeal No. 41/2012	1. S.M. Heenmenike, 2. S.K.A. Priyanthe Senanayake 3. S.K.A. Chamila Kumari Senanayake All of 1/27, Main Street, Rambukkana. Substituted Defendants-Appellants Appellants Vs. 1. Suraweera Aratchchilage Mangalika Malkanthi 2. Kaluaratchchilage Pushpa Kaluaratchchi Both of “Abaya Niwasa” Walalgoda Rambukkana Plaintiffs-Respondents-Respondents
31/ 03/ 16	SC.Appeal No.131/2012	Shaik Ibrahim Ahamed Kabeer Of No.97 Wattalpola Road, Henamulla Panadura PLAINTIFF Vs. M.I Mohamed Zahir of No. 56D Galle Road Moratuwa DEFENDANTS AND M.I Mohamed Zahir of No. 56D Galle Road Moratuwa DEFENDANT APPELLANT Vs. Shaik Ibrahim Ahamed Kabeer Of No.97 Wattalpola Road, Henamulla Panadura PLAINTIFF- RESPONDENTS AND NOW BETWEEN M.I Mohamed Zahir of No. 56D Galle Road Moratuwa DEFENDANT –APPELLANT-PETITIONER-APELLANT Vs. Shaik Ibrahim Ahamed Kabeer Of No.97 Wattalpola Road, Henamulla Panadura PLAINTIFF- RESPONDENTS-RESPONDENT_RESPONDENT
30/ 03/ 16	SC APPEAL 37 / 2012	Mary Helen Martin Christoffelez (Nee Perera), No. 15A, Pokuna Road, Kawdana, Dehiwela. And Now at No. 54, Broadway Road, Kawdana, Dehiwela. Respondent Respondent Appellant Vs Elrea Joseph Romould Pereira, “Brighton”, 87, Sri Saranankara Road, Kalubowila, Dehiwela. 1st Petitioner Respondent Respondent Archbishop of Colombo, Archbishop’s House, Colombo 08. 2nd Intervenient Petitioner Petitioner Respondent Mary Theresa Bright Kariyawasam (nee Pereira), No. 123, St. Anthony’s Road, Moratumulla, Moratuwa. 3rd Respondent Respondent Respondent

30/ 03/ 16	S.C. F.R. Application No. 891/2009	1. Sithambiralage Martin Sebastian PremalalPerera, P.O. Box 14, Ja-ela. 2. ThelgeChithraratnePeris, 219, VenBaddegamaWimalawansaMawatha, Colombo 10. 3. WerakkodigeChandrasiriAlwis, 123, Wattegedera Road, Maharagama. 4. PinnawalaAppuhamilage Dias Karunaratne, Medical Clinic, Kandy Road, Imbulgoda. 5. NimalGaminiWijethunge, 45/10, Malwatta Road, Maharagama. 6. AlagapanneShantha Kumar, No. 480/151, Roxy Gardens, Colombo 06. PETITIONER Vs 1.Tissa Karalliyadda, Minister of Indigenous Medi cine , Old Kottawa Road, Nawinna , Maharagama. 2.Secretary, Ministry of Indigenous Medicine, Old Kottawa Road, Nawinna, Maharagama. 2a. Dr. D.M.R.B. Dissanayake, Secretary, Ministry of Health and Indigenous Medicine, No. 385, Ven.BaddegamaWimalawansaTheroMawatha, Colombo 10. - Substituted 2a Respondent 3. Homeopathic Council, No. 94, Shelton JayasingheMawatha, Welisara, Ragama. 4.G.G.A.Apponso, No. 82, Galle Road, Colombo 04. 5. K. P. Walisinghe, No. 62/60, Dabare Place, Mirihana, Nugegoda 6 L.M.S. Alagiyawanna, “Anoma”, Meevitagammana, Urapola. 7. H.M.C.J.Herath, Jethawana Road, Colombo 14. 8. M.I. Latiff, No. 23A, 1/1, AmarasekeraMawatha, Colombo 05. 9. L.A. Madhupali, No. 3/1B, Peelipothagama Road, Badulla. 10. C. Weerasekera, No. 12, Braemore Gardens, Matale Road, Katugastota. 11. H.B.S. Keerthisena, No. 8, Hekitta Lane, Wattala. 12. Hon. Attorney General, Attorney General’s Department, Colombo 12. RESPONDENTS 13. SalindaDissanayake, Hon. Minister of Indigenous Medicine, Ministry of Indigenous Medicine, Ayurveda Hospital, Borella, Colombo 08. - Added 13th Respondent. 13.a .Dr. RajithaSenaratne, Hon. Minister of Health and Indigenous Medicine, Ministry of Health and Indigenous Medicine, No. 385, Ven, BaddegamaWimalawansaTheroMawatha, Colombo 10. Substituted 13 a Respondent.

30/ 03/ 16	SC Appeal 6/2011	PinchaDewageHeebatHemachandra No.354V, AbeysekaraMawatha, PolpithiMukalana, Kadana. 12A Defendant-Petitioner-Petitioner-Appellant Vs HewadewageAlpin Nona No. 380A, PolpithiMukalana, Kadana. Plaintiff-Respondent-Respondent-Respondent 1. SuduwaHewagePiyasena No 10, AbeysekaraMawatha, PolpithiMukalana, Kadana 2. PriyanthaNilminiGalabadage AbeysekaraMawatha, PolpithiMukalana, Kadana 3. Galabadadewage Mable AbeysekaraMawatha, PolpithiMukalana, Kadana 4A. HewadewageAlpin Nona alias Alginnona 380A,PolpithiMukalana, Kadana 5A. HewadewageAlpin Nona alias Alginnona 380A, PolpithiMukalana, Kadana 6. SuduwadewageJelin Nona No.642, Paranankara, Wattala. 7. SuduwadewageAjonona C/O, Mr. Bawar, Uggalboda,Polpithi Mukalana, Kadana 8. H.D. Isonona Uggalboda,Polpithi Mukalana, Kadana 9. SD Siriyawathi C/O B.D. Abeysekara, Gonahena, Kadawatha. 10. SD Gunaratne WalpolaBatuwatta. 11A. Pincha Dewage Ratnawathi Polpithi Mukalana, Kadana 12A. P.D. Ariyaratne Polpithi Mukalana, Kadana Defendant-Respondent-Respondent-Respondents
30/ 03/ 16	SC Appeal 118/2011	Karunasinghe Herathge Lalitha Padmini No.91/1Keedagammulla, Gampaha Plaintiff-Appellant-Petitioner-Appellant Vs 1. Wijesinghe Arachchige Wijedasa No.5 Sri Dharmapala Mawatha, Gampaha 2. Bandaranayake Mudiyanselage Bandara Manawatta. No.45, Diyawanna Road, Etul Kotte, Kotte Defendant-Respondent-Respondent-Respondents
30/ 03/ 16	SC Appeal 239/2014	Telephix Technologies (Pvt) Ltd, 185, Peradeniya Road, Kandy Plaintiff Vs R.M. Jinasena, No.47, Sri Dhamma Siddhi Mawatha, Asgiriya, Kandy. Defendant AND Telephix Technologies (Pvt) Ltd, 185, Peradeniya Road, Kandy Plaintiff-Petitioner Vs R.M. Jinasena, No.47, Sri Dhamma Siddhi Mawatha, Asgiriya, Kandy. Defendant-Respondent NOW BETWEEN R.M. Jinasena, No.47, Sri Dhamma Siddhi Mawatha, Asgiriya, Kandy. Defendant-Respondent-Appellant Vs Telephix Technologies (Pvt) Ltd, 185, Peradeniya Road, Kandy Plaintiff-Petitioner-Respondent
30/ 03/ 16	S.C. F.R. No: 138/2007	D.G. Wijotmanna, No.195, Ranawana Road, Katugastota PETITIONER vs 1. Diyakeliyawela, Officer in Charge, Katugastota Police Station, Katugastota & 8 others

29/ 03/ 16	SC / Appeal / 143/2012	Andra Hennedige Chandrarathne, Nakulugamuwa, Kudawella South. Plaintiff Vs. 1. Dayathileke Patabendige Edirisooriya, “Dayani”, Dodampahala, Dickwella. 2. Kusuma Abeysooriya, Dodampahala North, Dickwella. Defendants AND Andra Hennedige Chandrarathne, Nakulugamuwa, Kudawella South. Plaintiff Appellant Vs. 1. Dayathileke Patabendige Edirisooriya, “Dayani”, Dodampahala, Dickwella. 2. Kusuma Abeysooriya, Dodampahala North, Dickwella. Defendant Respondents AND NOW BETWEEN Kusuma Abeysooriya, Dodampahala North, Dickwella. 2nd Defendant Respondent Appellant Vs. Andra Hennedige Chandrarathne, Nakulugamuwa, Kudawella South. Plaintiff Appellant Respondent 1. Dayathileke Patabendige Edirisooriya, “Dayani”, Dodampahala, Dickwella. 1st Defendant Respondent-Respondent
29/ 03/ 16	SC Appeal No. 16/2014	1. Dr. K.M.L. Rathnakumara No. 50A-9, 6th Lane, Hansagiri Road, Gampaha. 2. Dr. A.D.S.R.T. Siriwardhana 3. Dr. R. Indralingam 4. Dr. S. I. V. Dahanayake 5. Dr. S.H. Gunathilaka 6. Dr. K.A.P. Thushantha 7. Dr. A.J. Dharmawansa 8. Dr. V. Athukorala 9. Dr. M.G. Jeevathasan 10. Dr. Nirthasaran Sathiyavanj 11. Dr. N. Gallage 12. Dr. S. Kalaialagan 13. Dr. A.S.Hennanayake 14. Dr. G. T. Gunawardena Petitioners Vs. 1. The Postgraduate Institute of Medicine, No.160, Norris Canal Road, Colombo 07. And 48 others. Respondents AND NOW BETWEEN 1. Dr. K.M.L. Rathnakumara No. 50A-9, 6th Lane, Hansagiri Road, Gampaha. 2. Dr. A.D.S.R.T. Siriwardhana 3. Dr. S.H. Gunathilaka 4. Dr. K.A.P. Thushantha 5. Dr. A.J. Dharmawansa 6. Dr. V. Athukorala 7. Dr. M.G. Jeevathasan 8. Dr. N. Gallage 9. Dr. S. Kalaialagan 10. Dr. A.S.Hennanayake Petitioners – Appellants Vs. 1. The Postgraduate Institute of Medicine, No.160, Norris Canal Road, Colombo 07. And 52 others. Respondents – Respondents
29/ 03/ 16	SC APPEAL No. 176/ 2010	Pattinige Abayadasa, 95/9, Godagamawatte, Godagama. Plaintiff Vs Welisarage Chandrawathie Perera, No. 476/4/A, Arawwala, Pannipitiya. Defendant AND BETWEEN Welisarage Chandrawathie Perera, No. 476/4/A, Arawwala, Pannipitiya Defendant Petitioner Vs Pattinige Abayadasa, 95/9, Godagamawatte, Godagama. Plaintiff Respondent AND BETWEEN Pattinige Abayadasa, 95/9, Godagamawatte, Godagama. Plaintiff Respondent Appellant Vs Welisarage Chandrawathie Perera, No. 476/4/A, Arawwala, Pannipitiya Defendant Petitioner Respondent AND NOW BETWEEN Welisarage Chandrawathie Perera, No. 476/4/A, Arawwala, Pannipitiya Defendant Petitioner Respondent Petitioner Vs Pattinige Abayadasa, 95/9, Godagamawatte, Godagama. Plaintiff Respondent Appellant Respondent

28/ 03/ 16	SC / Appeal / 111/09	D. K.Peiris Wijerathna, R.D. 06, Alapara, Kumburu Niwasa, Kawdulla. Plaintiff Vs. A. Bandara Menike, Gabada Handiya, Kawdulla. Defendant AND A. Bandara Menike, Gabada Handiya, Kawdulla. Defendant Appellant Vs. D. K.Peiris Wijerathna, R.D. 06, Alapara, Kumburu Niwasa, Kawdulla. Plaintiff Respondent AND NOW BETWEEN D. K.Peiris Wijerathna, R.D. 06, Alapara, Kumburu Niwasa, Kawdulla. Plaintiff Respondent Appellant Vs. A. Bandara Menike, Gabada Handiya, Kawdulla. Defendant Appellant Respondent
28/ 03/ 16	S.C. Appeal 112/2015	Dissanayake Hitihamy Mudiyanselage Sarath Kumara Dissanayake 455, Belagama Road, Kelanimulla, Angoda. CLAIMANT Vs. Kanthi Wimala Ratnayake (DECEASED) 62, Kothalawala, Kaduwela. JUDGMENT CREDITOR And Between Dissanayake Hitihamy Mudiyanselage Sarath Kumara Dissanayake 455, Belagama Road, Kelanimulla, Angoda. CLAIMANT-PETITIONER-APPELLANT Vs. Kanthi Wimala Ratnayake (DECEASED) 62, Kothalawala, Kaduwela. JUDGMENT-CREDITOR-RESPONDENT Malin Nivantha Kumarage 17/C/07, Kothalawala, Kaduwela SUBSTITUTED-JUDGMENT-CREDITOR-RESPONDENT Malin Nivantha Kumarage No. 174/C/7, Suhada Mawatha, Kothalawala, Kaduwela New address And now between Dissanayake Hitihamy Mudiyanselage Sarath Kumara Dissanayake 455, Belagama Road, Kelanimulla, Angoda. CLAIMANT-PETITIONER-PETITIONER-APPELLANT Vs. Malin Nivantha Kumarage No. 174/C/7, Suhada Mawatha, Kothalawala, Kaduwela New address SUBSTITUTED-JUDGMENT-CREDITOR-RESPONDENT-RESPONDENT
28/ 03/ 16	SC/ HCCA/ LA/ 445/2014	Kahatapitiya Pathirennahalage Edward Jayasinghe , Ihalagama, Wevaldeniya. Plaintiff Vs. Liyanage Sumudu Niroshan Siri Kumara, No. 51/01, Pahalagama, Wevaldeniya. Defendants AND Liyanage Sumudu Niroshan Siri Kumara, No. 51/01, Pahalagama, Wevaldeniya. Defendant Appellant Kahatapitiya Pathirennahalage Edward Jayasinghe , Ihalagama, Wevaldeniya. Plaintiff Respondents AND NOW BETWEEN Liyanage Sumudu Niroshan Siri Kumara, No. 51/01, Pahalagama, Wevaldeniya. Defendant Appellant Petitioner Vs. Kahatapitiya Pathirennahalage Edward Jayasinghe , Ihalagama, Wevaldeniya. Plaintiff Respondent-Respondent
28/ 03/ 16	S.C.APPEAL No.123/15	1. D. A. Suranga Mojith Kumara 2. L. Nilmini Nirosha Gulankanda, Horangalla, Thalagaswala Defendant-Respondent-Appellants Vs. K. B. Ariyarathna Horangalla, Thalagaswala Plaintiff-Appellant-Respondent

27/ 03/ 16	SC Appeal NO 194/2011	Sarangi Charika Kuruppu of No 3/14, Canbera Avenue, Dandenong , Australia and appearing by her power of attorney holder Gulawattage Don Dayaratana of Ovitigala Road, Munagama, Horana. PLANTIFF Vs. DFCC Bank PLC of No 73/5, Galle Road, Colombo 03. DEFENDANT And Now Sarangi Charika Kuruppu of No 3/14, Canbera Avenue, Dandenong , Australia and appearing by her power of attorney holder Gulawattage Don Dayaratana of Ovitigala Road, Munagama, Horana PLANTIFF-PETITIONER Vs. DFCC Bank PLC of No 73/5, Galle Road, Colombo 03. DEFENDANT-RESPONDENT
27/ 03/ 16	SC Appeal No. 03/2010	Vimal Jayathilake Wijesekara Nikathenna, Puwakdheniya Kegalla APPLICANT Vs. National Institute of Co-operative Development Polgolla RESPONDENT And between National Institute of Co-operative Development Polgolla RESPONDENT-APPELLANT Vs. Vimal Jayathilake Wijesekara Nikathenna, Puwakdheniya Kegalle APPLICANT-RESPONDENT And now between National Institute of Co-operative Development Polgolla RESPONDENT-APPELLANTPETITIONER Vs. Vimal Jayathilake Wijesekara Nikathenna, Puwakdheniya Kegalle APPLICANT-RESPONDENTRESPONDENT
27/ 03/ 16	SC/FR 689/2012	Rajapaksha Pathirage Justin Rajapaksha N.218/A/2, Hiripitiya, Pannipitiya Petitioner Vs 1. Prasanna Rathnayake Inspector of Police, C/o, The Inspector General of Police Police Headquarters, Colombo1. Formerly Headquarters Inspector (HQI) Police Station, Homagama. 2. WPE Fernando Inspector of Police, Police Station Homagama, Homagama. 3. Asanka Nuwan Bandara Police Constable 77517, Police Station Homagama, Homagama. 4. Ranathunga Police Sergeant 22632, Police Station Homagama, Homagama. 5. Gunaratna, Police Constable 60641, Police Station Homagama, Homagama. 6. A.L.M Aseem Sub Inspector of Police Police Station Thalangama, Thalangama. And Now of: 204, Thettawaadi Road, Oluvil, Akkaraipattu. All c/o The Inspector General of Police Police Headquarters, Colombo1. 7. T Chandrasekara Inspector of Police, Officer-in-Charge of the Crimes Investigation Unit, Police Station Homagama, Homagama 8. NK Illangakoon Inspector General of Police Police Headquarters, Colombo1. 9. Head Quarters Inspector Police Station Homagama, Homagama. Homagama. 10. The Attorney General Respondents

27/ 03/ 16	SC APPEAL No. 165/2013 & SC APPEAL 164/13	A.K. Mohammed Illyas , No. 114, Nikagolla, Yatawatte. APPLICANT Vs Agricultural and Agriarian Insurance Board, No. 27, Vauxhall Street, Colombo 02. RESPONDENT AND BETWEEN A.K. Mohammed Illyas. No. 114, Nikagolla, Yatawatte APPLICANT – APPELLANT Vs 1. Agricultural Insurance Board, 267, Union Place, Colombo 02. 1A. Agricultural and Agrarian Insurance Board, Subadrarama Road, Nugegoda. RESPONDENT – RESPONDENT AND BETWEEN A.K. Mohammed Illyas. No. 114, Nikagolla, Yatawatte APPLICANT – APPELLANT Vs 1. Agricultural Insurance Board, 267, Union Place, Colombo 02. 1A. Agricultural and Agrarian Insurance Board, Subadrarama Road, Nugegoda. RESPONDENT – RESPONDENT ,... A.K. Mohammed Illyas , No. 114, Nikagolla, Yatawatte. Vs Agricultural and Agriarian Insurance Board, No. 27, Vauxhall Street, Colombo 02. RESPONDENT AND BETWEEN A.K. Mohammed Illyas. No. 114, Nikagolla, Yatawatte APPLICANT – APPELLANT Vs 1. Agricultural Insurance Board, 267, Union Place, Colombo 02. 1A. Agricultural and Agrarian Insurance Board, Subadrarama Road, Nugegoda. RESPONDENT - RESPONDENT AND NOW BETWEEN 1. Agricultural and Agrarian Insurance Board, No. 27, Vauxhall Street, Colombo 02. 1A. Agricultural and Agrarian Insurance Board,No. 117, Subadrarama Road, Nugegoda. RESPONDENT-RESPONDENT-APPELLANT Vs A.K. Illyas, No. 114, Nikagolla, Yatawatte. APPLICANT-APPELLANT-RESPONDENT
23/ 03/ 16	S.C.Appeal No.133/2014	DFCC Bank (PLC) Head Office, P.O.Box 1397 Colombo 03 Defendant-Appellant Vs. 1. Fathima Ruzana Fakurdeen alias Faleel Ariff Pathuma Rushana alias Fathima Ruzana Ariff No.27, Keththarama Mawatha Grandpass Colombo 14. 2. Mohamed Sarook Mohamed Fakurdeen No. 27, Keththarama Mawatha Grandpass Colombo 14 Plaintiff-Respondents

		Mahawattage Wijayapala of Hathuwa, Piyadigama, Ahangama. PLAINTIFF Vs 1.Suduwelikondage Percy Mahinda Weliwatta 2. Ahangama Vidanage Magilin Silva (Dead) 2A. Wanigathunga Arachchige Ranjith de Silva of Sri Ginananda Mawatha, Karandugoda, Ahangama. 3. Baranage Allis Appu (Dead) of Karandugoda, Ahangama. 3A. B. Peter Appu of Piyadigama, Ahangama. 3B. R.P.Rosalinnona of Sri Ginananda Mawatha, Karandugoda, Ahangama. 4. Parana Rattambige Arlin Nona (Dead),Sri Ginananda Mawatha, Karandugugoda, Ahangama. 5. Akuressa Acharige Bandusena, Sena Jewellers , Ahangama. 6. Uyana Hewage Babunona (Dead) 7. Wellage Nandasiri. 8. Wellage Nandasena. 9. Wellage Padumasena. 10.Wellage Indrani, all of Sri Ginanada Mawatha, Karandugoda, Ahangama. 11. Lanhewage Agnes Silva (Dead) 11A. Wellalage Sumithra Sudharma Gunathilaka of Sri Ginananda Mawatha, Karandugoda, Ahangama. 12. Dikkumburage Nikulas Silva (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama. 12A.Dikkumburage Wijedasa of Piyadigama, Ahangama. 13.Nanayakkara Liyanage Edwin Alwis (Dead) of Weliwatta, Ahangama. 14. Wellalage Pantis Appu (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama. 14A. Wellalage Sumithra Sudharma of Sri Ginanada Mawatha, Karandugoda, Ahangama. 15. Koggala Wellalage Marthenis Appu (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama. 16. Malidurage Wilson of Meegahagoda, Ahangama. 17.L.B.Meena Nona of Sri Ginananda Mawatha, Karandugoda, Ahangama. 18.Bopage Gomis of Kahawathugoda, Ahangama. 19.Koggala Wellalage Sumathiratna of Sri Ginananda Mawatha, Karandugoda, Ahangama. 20. Saldurage Sawneris (Dead) of Kahatagahawatta, Meegahagoda, Ahangama. 21. Saldurage Garlis of Keraminiyawatta, Ahangama. 22. Saldurage Jamis 23. Saldurage Somasiri 24. Saldurage Subaneris 24A. Newtan Dunusingha all of Keraminiya, Ahangama. 25. Olidurage alias Ahangama Gamage Charli of Madagodawatta,Meegahagoda Ahangama. 26. Olidurage Piyasiri alias Piyasiri Dharmage of Madagodawatta, Meegahagoda, Ahangama 27. Paththiniya Durage Shelton of Kahawathugoda, Ahangama. 28. Olidurage Dochchi alias William Somawansa (Dead) of Keraminiyawatta Ahangama. 28A. D. Wilson of Keraminiyawatta, Ahangama 29. Olidurage Isaneris (Dead) 29A. O.D.Wimalasenaof Keraminiyawatta, Ahangama. 30. Olidurage Simon all of Keraminiyawatta Ahangama 31. Olidurage alias Vidanadurage Wilina of Keraminiyawatta, Ahangama 32.Olidurage Simon of Fonsekawatta, Kotegoda, Nugegoda 33. Hewa Rathgamage Wimalasena of Karandugoda, Ahangama 34.Uyanahewage Kulawathie of Dominguwawatta, Hathuwa, Piyadigama, Ahangama. 35. Dulcy Balamana of Piyadigama, Ahangama 36. Baranage Dayaseeli, and 37. Upali Kalupahana , both of Sri Ginananda Mawatha, Karandugoda, DEFENDANTS AND Mahawattage Wijayapala of Hathuwa, Piyadigama, Ahangama. PLAINTIFF – PETITIONER Vs 1. Suduwelikondage Percy Mahinda Weliwatta 2. Ahangama Vidanage Magilin Silva (Dead) 2A. Wanigathunga Arachchige Ranjith de Silva of Sri Ginananda Mawatha, Karandugoda, Ahangama. 3. Baranage Allis

20/ 03/ 16	SC Appeal No. 160 / 2013	Bharatha Wijesundera, No. 116,Negombo Road, Sayakkaramulla, Marandagahamula Plaintiff Vs. 1.Nanedirige Sarath Thilakasiri, “Srimali Rice Mill”, Weyangoda Road, Wegouva, Minuwangoda. 2. Nanedirige Ananda Tilakaratne, No. 427, Dematagolla, Horampella. Defendants AND THEN 1.Nanedirige Sarath Thilakasiri, “Srimali Rice Mill” Weyangoda Road, Wegouwa, Minuwangoda. 2.Nanedirige Ananda Tilakaratne, No. 427, Dematagolla, Horampella. Defendant Appellants Vs. Bharatha Wijesundera, No. 116, Negombo Road, Sayakkaramulla, Marandagahamula. Plaintiff Respondent AND NOW 1. Nanedirige Sarath Thilakasiri, “Shrimali Rice Mill”, Weyangoda Road, Wegouva, Minuwangoda. 2. Nanedirige Ananda Tilakaratne, 2a. Gamage Piyawathi. 2b. Nanedirige Wasantha Lakmali Tilakaratne. 2c. Nanedirige Thilina Lakmal Tilakaratne. 2d. Nanedirige Tharindu Lakmal Tilakaratne. All of No. 427, Dematagolla, Horampella. Defendants Appellants Appellants Vs. Bharatha Wijesundera, No. 116, Negombo Road, Sayakkaramulla, Minuwangoda. Plaintiff Respondent Respondent
15/ 03/ 16	S.C. (CHC) Appeal No. 36/2004	CIC Feeds (Pvt) Limited (formerly) Known as Nutrena (Pvt) Limited of No. 252, Kurunduwatta Road, Ekala. PLAINTIFF Vs. Pan Asia Bank Limited of No. 450, Galle Road, Colombo 3. And having a branch office at 1334, Kotte Road, Rajagiriya. DEFENDANT AND NOW CIC Feeds (Pvt) Limited (formerly) Known as Nutrena (Pvt) Limited of No. 252, Kurunduwatta Road, Ekala. PLAINTIFF-APPELLANT Vs. Pan Asia Bank Limited of No. 450, Galle Road, Colombo 3. And having a branch office at 1334, Kotte Road, Rajagiriya. DEFENDANT-RESPONDENT
09/ 03/ 16	SC Appeal 23/2015	Director General Commission to Investigate Allegations of Bribery or Corruption Complainant Vs 1. Ukwatta Liyanage Colvin Chandrasiri Dias 2. Sangaralingam Navaratnam Accused AND Ukwatta Liyanage Colvin Chandrasiri Dias 1st Accused-Appellant Vs Director General Commission to Investigate Allegations of Bribery or Corruption Complainant-Respondent Hon. Attorney General Respondent AND NOW BETWEEN Ukwatta Liyanage Colvin Chandrasiri Dias Accused-Appellant-Appellant 1. Director General Commission to Investigate Allegations of Bribery or Corruption Complainant-Respondent-Respondent 2. Hon. Attorney General Respondent-Respondent
08/ 03/ 16	SC/Appeal/ 47/2012	W. M. Chandra Kumari Palamakumbura, 06th Post, Hingurakdamana. Plaintiff Vs. P. A. Hema Damayanthie, Layfarm, Hingurakgoda. Defendant AND W. M. Chandra Kumari Palamakumbura, 06th Post, Hingurakdamana. Plaintiff- Appellant Vs. P. A. Hema Damayanthie, Layfarm, Hingurakgoda. Defendant-Respondent AND NOW BETWEEN P. A. Hema Damayanthie, Layfarm, Hingurakgoda. Defendant -Respondent-Petitioner Vs. W. M. Chandra Kumari Palamakumbura, 06th Post, Hingurakdamana. Plaintiff- Appellant- Respondent

08/ 03/ 16	SC Appeal 231/2014	Horathal Pedige Jayathilake also known as Hettiarachchige Jayathilake Plaintiff-Appellant-Petitioner-Appellant Vs 1. Horathal Pedige Jayarathne 2. Wijayalath Pedige Jayawathi Dayawathi 3. Horathal Pedige Upul Priyantha Deepthi 4. Horathal Pedige Jayathissa 5. Yoda Pedige Josi Nona 6. Horathal Pedige Nimalasiri Jayatissa 7. Horathal Pedige Leelaratne Jayatissa 8. Jeevananda Jayatissa 9. HA Keerthi Jayalath Defendant-Respondent-Respondent- Respondents
07/ 03/ 16	S.C. (CHC) Appeal No. 31A/2003	Seylan Bank Limited No. 33, Sir Baron Jayathilake Mawatha, Colombo 1. Presently at Ceylinco - Seylan Towers No. 90, Galle Road, Colombo 03. PLAINTIFF Vs. 1. Cosmacorale Patabendige Ali Asker Anver Cadir 2. Abdul Majeed Faleel Jiffry Both carrying on business in Partnership Under the name, style and firm of Island Operators of No. 37, Nikape Road, Dehiwela. Presently of No. 20, Main Street, Dehiowita. DEFENDANTS AND NOW Seylan Bank Limited No. 33, Sir Baron Jayathilake Mawatha, Colombo 1. Presently at Ceylinco - Seylan Towers No. 90, Galle Road, Colombo 03. PLAINTIFF-APPELLANT Vs. 1. Cosmacorale Patabendige Ali Asker Anver Cadir 2. Abdul Majeed Faleel Jiffry Both carrying on business in Partnership Under the name, style and firm of Island Operators of No. 37, Nikape Road, Dehiwela. Presently of No. 20, Main Street, Dehiowita. DEFENDANTS-RESPONDENTS
03/ 03/ 16	SC Appeal 18A_09	
25/ 02/ 16	S.C. Appeal No. 124/2012	Ranamukadewage Anoris Fernando No. 232, Wanawasala Road, Kelaniya. PLAINTIFF Vs. 1. Hewadewage Peiris Fernando 2. Nammunidewage Martin Fernando DEFENDANTS (DECEASED) 1. Ranamukadewage Emi Nona 1.(a)Hewadewage Chandrani Kusumalatha 2.(b)Hewadewage Chandra Piyaseeli 3. (c)Hewadewage Chandrasiri Jayalath 4.(d)Hewadewage Kamala Kanthi All of No. 243/1, Sirikotha Mawatha, Wanawasala, Kelaniya. SUBSTITUTED-DEFENDANTS AND NOW BETWEEN Ranamukadewage Anoris Fernando No. 232, Wanawasala Road, Kelaniya. PLAINTIFF-APPELLANT (DECEASED) Ranamukadewage Somasiri Karunaratne No. 232, Wanawasala Road, Kelaniya. SUBSTITUTED-PLAINTIFF-APPELLANT Vs. 1. (a)Hewadewage Chandrani Kusumalatha 2.(b)Hewadewage Chandra Piyaseeli 3.(c)Hewadewage Chandrasiri Jayalath 4. (d)Hewadewage Kamala Kanthi All of No. 243/1, Sirikotha Mawatha, Wanawasala, Kelaniya. SUBSTITUTED-DEFENDANTS-RESPONDENTS AND NOW BETWEEN Ranamukadewage Somasiri Karunaratne No. 232, Wanawasala Road, Kelaniya. SUBSTITUTED-PLAINTIFF-APPELLANT-PETITIONER Vs. 1. (a)Hewadewage Chandrani Kusumalatha 2.(b)Hewadewage Chandra Piyaseeli 3.(c)Hewadewage Chandrasiri Jayalath 4. (d)Hewadewage Kamala Kanthi All of No. 243/1, Sirikotha Mawatha, Wanawasala, Kelaniya. SUBSTITUTED-DEFENDANTS-RESPONDENTS-RESPONDENTS

23/ 02/ 16	SC/FR 236/2011	Sehu Allaudeen Fathima Shanaz No.12/16A George Mawatha Keranga Pokuna, Mabola, Wattala Petitioner Vs 1. University of Colombo 2. Prof. (Mrs.) Kanishka Hirimburegama 3. Dr. Tuder Weersainghe 4. Prof. Indralal de Silva 5. Prof. Maria E.S. Perera 6. Prof. N Selvakumaran 7. Prof. Harshalal Senevirathne 8. Dr. PSM Gunarathne 9. Prof. TR Ariyarathne 10. Prof. Sunil Chandrasiri 11. Prof. Nayani Malagoda 12. Prof. Rohan Jayasekara 13. Vidyanidhi NR de Silva 14. Ranjan Asirwardam 15. K. Kanag-Iswaran 16. Thilak Karunarathne 17. Chellaih Thangarajah 18. C. Maliyadda 19. Mahinda Rajapaksha 20. HWN Warakulle 21. PW Senevirathne 22. M Wckramasinghe 23. Leisha de Silva Chandrasena 24. Prof. J Thilakasiri 25. Dr. Cuda Witeratne 26. Prof. Sarath Wijesuriya 27. Rev. Agalakada Sirisumana 28. Dr. (Mrs.) Ajantha Hapuarchchi 29. TLR Silva All are of No.94,Cumarathunga Munidasa Mawatha 30. Hon Attorney General Respondents
22/ 02/ 16	S.C. [SPL] LA No.147/15	Handun Harsha Prabath De Silva 43, Katana Road Thimbirigaskatuwa Negombo Petitioner- Petitioner Vs. Seylan Bank PLC 90, Galle Road Colombo 03. Respondent- Respondent
18/ 02/ 16	SC / Appeal / 141/09	Pahalayaya Nandasena, Kumbaldiwela, Molagoda. Plaintiff Vs. 1. Karunanayaka Hitiralalage Ananda Bandara of Edalla Watta, Suriyagama, Dewalagama. 2. Sunethra Kumari, 3. Mayura Kumari, 4. Abekoon Bandara, 5. Galagoda Bandara, 6. Y. M. Dingiri Kumarihamy, All of Kabaldiwela, Molagoda. Defendants AND Pahalayaya Nandasena, Kumbaldiwela, Molagoda. Plaintiff Appellant Vs. 1. Karunanayaka Hitiralalage Ananda Bandara of Edalla Watta, Suriyagama, Dewalagama. 2. Sunethra Kumari, 3. Mayura Kumari, 4. Abekoon Bandara, 5. Galagoda Bandara, 6. Y. M. Dingiri Kumarihamy, All of Kabaldiwela, Molagoda. Defendant Respondents AND NOW BETWEEN 1. Karunanayaka Hitiralalage Ananda Bandara of Edalla Watta, Suriyagama, Dewalagama. 2. Sunethra Kumari, 3. Mayura Kumari, 4. Abekoon Bandara, 5. Galagoda Bandara, 6. Y. M. Dingiri Kumarihamy, All of Kabaldiwela, Molagoda. Defendant Respondent Appellants Vs. Pahalayaya Nandasena, Kumbaldiwela, Molagoda. Plaintiff Appellant Respondent

18/ 02/ 16	SC / Appeal / 124/11	1. Wathukarage Sirisena 2. Wathukarage Ariyasena (Deceased) 2A.A. Nanda Jayawardena, Both of Maddakanda, Balangoda. Plaintiffs Vs. 1. Wathukarage alias Rantheiyalage Karolis Fernando, 1A.W. Jayasooriya, Wathukarakanda, Maddekanda, Balangoda. 2. Wathukarage Robet, C/o W. Seelawathie, Wathukarakanda, Maddekanda, Balangoda. 3. M. M. A. Haramanis 3A.Muhubada Manik Arachchige Padmalatha 4. Wathukarage Seelawathie, 5. Wathukarage Jayasinghe, 6. Wathukarage Wimalasena, 7. P.A. Karunaratne, All of Wathukarakanda, Maddekanda, Baolangoda. Defendants AND W. Jayasooriya, Wathukarakanda, Maddekanda, Balangoda. Substituted 1A Defendant Appellant Vs. 1. Wathukarage Sirisena 2. Wathukarage Ariyasena (Deceased) 2A.A. Nanda Jayawardena, Both of Maddakanda, Balangoda. Plaintiffs Respondents 2. Wathukarage Robet, C/o W. Seelawathie, Wathukarakanda, Maddekanda, Balangoda. 3. M. M. A. Haramanis 3A.Muhubada Manik Arachchige Padmalatha 4. Wathukarage Seelawathie, 5. Wathukarage Jayasinghe, 6. Wathukarage Wimalasena, 7. P.A. Karunaratne, All of Wathukarakanda, Maddekanda, Baolangoda. Defendant Respondents AND NOW BETWEEN W. Jayasooriya, Wathukarakanda, Maddekanda, Balangoda. Substituted 1A Defendant Appellant Petitioner Vs. 1. Wathukarage Sirisena 2. Wathukarage Ariyasena (Deceased) 2A.A. Nanda Jayawardena, Both of Maddakanda, Balangoda. Plaintiffs Respondents-Respondents 2. Wathukarage Robet, C/o W. Seelawathie, Wathukarakanda, Maddekanda, Balangoda. 3. M. M. A. Haramanis 3A.Muhubada Manik Arachchige Padmalatha 4. Wathukarage Seelawathie, 5. Wathukarage Jayasinghe, 6. Wathukarage Wimalasena, 7. P.A. Karunaratne, All of Wathukarakanda, Maddekanda, Baolangoda. Defendant Respondents-Respondents
17/ 02/ 16	SC/APL/ 50/2015	Dassanayaka Arachchige Jayasekera PLAINTIFF Vs. 1. Alawathura Raalalage Dhanusekera 2. Hapan Thanthrige Pabilis DEFENDENTS Alawathura Raalalage Dhanusekera 1ST DEFENDANT-APPELLANT Vs Dassanayaka Arachchige Jayasekera PLAINTIFF-RESPONDENT Hapan Thanthrige Pabilis 2ND DEFENDANT-RESPONDENT In the matter of an Application for Leave to Appeal made in terms of Section 5C(1) of Act No. 54 of 2006 Alawathura Raalalage Dhanusekera Adjoining Kahatadeniya Boutique Dangalla, Pepiliyawala 1ST DEFENDANT-APPELLANT-PETITIONER Vs. Dassanayaka Arachchige Jayasekera Punchi Horagolla Watta, Ranwala, Meethirigala PLAINTIFF-RESPONDENT-RESPONDENT Hapan Thanthrige Pabilis (Deceased) 2ND DEFENDANT-RESPONDENNT 2a. Aluthge Kankanamalage Alpi Nona 2b. Hapan Thanthrige Dayangani 2c. Hapan Thanthrige Deepani All of No. 97, Vihara Mawatha, Kothalawala, Kaduwela. 2d. Hapn Thanthirige Dayaratna Punchi Horagolla Watta. Ranwala, Devindugama, Meethirigala . SUBSTITUTED 2ND DEFENDANT-RESPONDENT-RESPONDENT

17/ 02/ 16	SC/FR 523/2009	Sandhya Ramani Vithana Petitioner Vs 1. Sri Lanka Ports Authority 2. RM Priyantha Banadarawickrama Chairman, Sri Lanka Ports Authority 3. Nalin Aponso, Deputy General Manager Communication and Public Relations Department, Sri Lanka Ports Authority 4. S Sunanda Gunasekara Communication and Public Relations Assistant, Sri Lanka Ports Authority 5. HSF Farzana Media DivisionSri Lanka Ports Authority. 6. Hon. Attorney General Respondents
16/ 02/ 16	SC/FR 158/2008	1. Muthuwahennadi Roshan Koitex No. 57, Thuduwegodawela, Hikkaduwa 2 . Muthuwahennadi Harison alias Tennyson Opposite Jananandaramaya, Hikkaduwa Petitioner Vs 1. Sub Inspector Sanjeewa Seneviratne Police Station, Hikkaduwa 2. Police Constable Suranga 64244 Police Station Hikkaduwa 3. Officer-in-Charge, Police Station Hikkaduwa 4. Keembiyage Susani Anjala, Opposite Hospital Archchikanda, Hikkaduwa 5. The Inspector General of Police 6. Hon. Attorney General Respondents
16/ 02/ 16	SC/Appeal/ 146/12	Koswatte Gamage Jayanath Kulasiriwardena, "Weerasiri" Pinwatte, Waturagama. Plaintiff Vs. 1. Jayasinghe Arachchige Ranjanie Jayasinghe 2. Ellapperuma Arachchige Shashi Jana Aadarshi Ellapperuma Arachchi. 3. Ellapperuma Arachchige Dayananji Sudakshana Ellaperuma Arachchi 4. Ellaperuma Arachchige Dananja Nilashen Ellaperuma Arachchi All of No.73/3 , Indigolla, Gampaha Defendants Koswatte Gamage Jayanath Kulasiriwardena, "Weerasiri" Pinwatte, Waturagama. Plaintiff-Petitioner Vs. 1. Jayasinghe Arachchige Ranjanie Jayasinghe 2. Ellapperuma Arachchige Shashi Jana Aadarshi Ellapperuma Arachchi. 3. Ellapperuma Arachchige Dayananji Sudakshana Ellaperuma Arachchi 4. Ellaperuma Arachchige Dananja Nilashen Ellaperuma Arachchi All of No.73/3 , Indigolla, Gampaha Defendant-Respondents AND NOW BETWEEN Koswatte Gamage Jayanath Kulasiriwardena, "Weerasiri" Pinwatte, Waturagama. Plaintiff-Petitioner-Petitioner Vs. 1. Jayasinghe Arachchige Ranjanie Jayasinghe 2. Ellapperuma Arachchige Shashi Jana Aadarshi Ellapperuma Arachchi. 3. Ellapperuma Arachchige Dayananji Sudakshana Ellaperuma Arachchi 4. Ellaperuma Arachchige Dananja Nilashen Ellaperuma Arachchi All of No.73/3 , Indigolla, Gampaha Defendant- Respondent- Respondents
16/ 02/ 16	S.C.CHC Appeal No.33/2009	Industrial and Commercial Development [Private] Ltd No.30, Sea View Avenue Colombo 03 1st Defendant-Appellant Vs. International Cement Traders [Pvt] Ltd., No.44/1, New Nugegoda Road Peliyagoda Plaintiff-Respondent Devco Showa [Private] Ltd New Nugegoda Road Peliyagoda 2nd Defendant-Respondent

15/ 02/ 16	SC. CHC. Appeal No. 33/2006	Selvarajah Mahera Kanth of 271, Havelock Road, Colombo 06. Presently carrying on business as a sole proprietor under the name and style of „Marken Enterprises‟ of No. 29, Ground Floor, Lucky Plaza, No. 70, St. Anthony‟s Mawatha, Colombo 03. Plaintiff Vs. MTN Networks (Pvt) Ltd. 475, Union Place, Colombo 04. Defendant And Now Between Selvarajah Mahera Kanth of 271, Havelock Road, Colombo 06. Presently carrying on business as a sole proprietor under the name and style of „Marken Enterprises‟ of No. 29, Ground Floor, Lucky Plaza, No. 70, St. Anthony‟s Mawatha, Colombo 03. Plaintiff-Appellant Vs. MTN Networks (Pvt) Ltd. 475, Union Place, Colombo 04. Defendant-Respondent
14/ 02/ 16	SC Appeal 161/2013	
14/ 02/ 16	S.C. Appeal No. 22/2012	Mercantile Investments Ltd., 236, Galle Road, Colombo 03. Petitioner Vs. 1. J.A. Sumith Adhihetty, No. 1, Cambridge Terrace. Colombo 7. 2. Mahinda Madihahewa, Commissioner General of Labour, Department of Labour, Labour Secretariat, Colombo 05. 3. Minister of Labour Department of Labour, Labour Secretariat, Colombo 05. 4. T. Piyasoma Esq., The Arbitrator, 9th Floor, Industrial Court, Department of Labour, Labour Secretariat, Colombo 05. Respondents And Now Between J.A. Sumith Adhihetty, No. 1, Cambridge Terrace. Colombo 7. Respondent-Appellant Vs. Mercantile Investments Ltd., 236, Galle Road, Colombo 03. Petitioner-Respondent 1. Mahinda Madihahewa, Commissioner General of Labour, Department of Labour, Labour Secretariat, Colombo 05. 2. Minister of Labour Department of Labour, Labour Secretariat, Colombo 05. 3. T. Piyasoma Esq., The Arbitrator, 9th Floor, Industrial Court, Department of Labour, Labour Secretariat, Colombo 05. Respondent-Respondents

14/ 02/ 16	SC. FR. Case No. REF 219/15	1. Lanksakara Kulathunga Mudiyanse Ralahamillage Mohan Anuruddha Bandara Alawala No.117/A, Colombo Road, Wanduragala, Kurunegala. 2. Mohammed Shiffan Ibrahim No.282/01, Modara Road, Egoda Uyana, Moratuwa. 3. Janaka Sampath Kaluarachchi No.50C/2, Vije Mangalarama Road, Kohuwala. 4. Dewarahandi Leel Chanaka De Silva Palathottawatta Main Road, Palathittawatta, Palathotta. 5. Makawita Appuhamlaiye Chathura Kanishka Makawita No.128/91 near to the Medankara Vidyalaya, Horana. 6. Malgalla Liyanage Sajith Dilushan No.72/91, Aleswatta, Kirimatimulla, Thelijjiwila. 7. Diggaha Ranawaka Arachchige Chamila Maduranga Ranawaka Gothatuwa Watta, Baddegama. 8. Liyanage Nayana Dharshaka Molligoda No.130, Dholla Addarawatta, Manikgoda, Nawaththuduwa, Mathugama 9. Veemanage Harshana Gayan Perera No.4, Sisil Uyana, Etavila Road, Nagodawatta, Kaluthara South. 10. Koonthotagedara Ranjan Abeyawansha No.10/10, Dream View, Summerfield Land, Malpana, Kengalla, Kandy 11. Jayamaha Pathiranelage Chaminda Thushara Sampath Jayamaha Viharegama, Narammala. 12. Herath Mudiyanselage Vindika Anuranga No.303-B, Puwakgahawatta, Meegoda. 13. Mawadavilage Dhanushka Jeevantha No.557-D5, Dangettiyawatta, Kuda Arakgoda, Alubomulla, Panadura. 14. Ranjan Sujeewa Munasinghe Rangama, Wellawa, Kurunegala. 15. Pinnagoda Liyana Arachchige Don Tiran Ravindu Tilakarathne Sinhalena Koralaeima, Gonapola Junction, Horana. 16. Demuni Indika Prasad No.15/3B, Degaladoruwa, Gunnapana. 17. Pilan Godakandage Milan Osanda No.15/1, Maitipe, 3rd Lane, Galle. 18. Suduhakure Gedara Chinthaka Pradeep Dissanayake 3rd Mile Post, Parappe, Rambukkana. 19. Vithanage Sumeera Suranjaya Vithanage No.311/01, 21st Lane, Dikkenpura, Horana. Petitioners Vs. 1. The Inspector General of Police Police Headquarters, Colombo1. 2. The Commander Special Task Force Head Quarters No.223, Baudhaloka Mawatha, Colombo 7. 3. R.W.M.C. Ranawana Retired Deputy Inspector General of Police Commander of Special Task Force No.396/2/B, Hokandara South, Hokandara. 4. W.P.Wimalasena Senior Superintendent of Police, Office of Senior Superintendent of Police, Seethawaka, Avissawella. 5. Ms. W.P.G.D.J. Senanayake Assistant Secretary Ministry of Defence, Colombo 3. 6. D.D.K. Hettiarachchi Assistant Superintendent of Police Special Task Force Head Quarters, Gonahena, Kadawatta. 7. M.L.R. Chandrasiri Chief Inspector of Police, Officer in Charge, Special Task Force Head Quarters, Gonahena, Kadawatta. 8. B.S.H. Pieris Inspector of Police STF Head Quarters, No.223, Baudhaloka Mawatha, Colombo 7. 9. T.A.R Nimantha Inspector of Police STF Camp, Horana 10. S.P. Chaminda Inspector of Police, STF Camp, Horana. 11. The Secretary Ministry of Public Peace and Law and Order Floor 13, Sethsiripaya (Stage II), Battaramulla. 12. The Honourable Attorney General Attorney General‟s Department, Colombo 12. Respondents

11/02/16	S.C. Appeal No. 90/2009	1. Mary Leslin Mendis 2. T. Jayendra Mendis Both of No. 193, Chilaw Road, Negombo. PETITIONERS Vs. 1. Land Reform Commission, C 82, Gregory's Road, Colombo 7. 2. A. L. M. Fernando Chairman Land Reform Commission, C 82, Gregory's Road, Colombo 7. 3 Director, Land Ceiling, Land Reform Commission, C 82, Gregory's Road, Colombo 7. 4 Minister of Agriculture and Lands "Sampathpaya", 82, Rajamalwatta Road, Battaramulla. 5. T. Nandana Mendis 68, Temple Road, Negombo. 6. T. Tosathirathna Mendis 68, Temple Road, Negombo. RESPONDENTS AND NOW BETWEEN 1. Mary Leslin Mendis 2. T. Jayendra Mendis Both of No. 193, Chilaw Road, Negombo. PETITIONERS-PETITIONERS Vs. 1. Land Reform Commission, C82, Gregory's Road, Colombo 7. 2. A. L. M. Fernando Chairman Land Reform Commission, C 82, Gregory's Road, Colombo 7. 3 Director, Land Ceiling, Land Reform Commission, C 82, Gregory's Road, Colombo 7. 4 Minister of Agriculture and Lands "Sampathpaya", 82, Rajamawatta Road, Battaramulla. 5. T. Nandana Mendis 68, Temple Road, Negombo. 6. T. Tosathirathna Mendis 68, Temple Road, Negombo. RESPONDENTS-RESPONDENTS
10/02/16	SC. CHC. Appeal No. 06/2003	People‟s Bank, No. 75, Sir Chittampalam A. Gardinar Mawatha, Cololmbo 02. Plaintiff Vs. Ceylinco Insurance Company Limited 2nd Floor, 15 A, Alfred Place, Colombo 3. Formerly of 2nd Floor, Ceylinco House, No. 69, Janadhipathi Mawatha, Colombo 1. Defendant And Now In the matter of an Appeal preferred under and in terms of Section 754 of the Civil Procedure Code read together with Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996. People‟s Bank, No. 75, Sir Chittampalam A. Gardinar Mawatha, Cololmbo 02. Plaintiff-Appellant Vs. Ceylinco Insurance Company Limited 2nd Floor, 15 A, Alfred Place, Colombo 3. Formerly of 2nd Floor, Ceylinco House, No. 69, Janadhipathi Mawatha,Colombo 1. Defendant-Respondent
08/02/16	SC FR Application 267/2010	Dr Mrs Elizabeth Manel Dassanayake, No. 25/10, Thalapathpitiya Road, Nugegoda Vs. K.E.Karunathilake, Secretary to the ministry of Agricultural Development and Agrarian services,No. 80/5, Govijana Mandiraya, Battaramulla and 6 Others Respondents and added respondents

02/02/16	S.C. Appeal No. 100/2013	A.D. Damith Jayantha Applicant-Debtor 1. H.A. Sachintha Perera (Wife of the Debtor) 2. A.D. Supun Sameera (Son of the Debtor) 3. A.D.C. Maduwanthi (Daughter) All 04 of No. 226/1, Bolabotuwana, Bandaragama. Substituted Legal Heirs Vs. W.D. Dharmasiri Karunaratne, 57, Baseline Road, Colombo 08. Creditor And Thereafter in Revision 1. H.A. Sachintha Perera 2. A.D. Supun Sameera 3. A.D.C. Maduwanthi Vs. W.D. Dharmasiri Karunaratne, Respondent- Creditor And in the Court of Appeal 1. W.D. Dharmasiri Karunaratne, 57, Baseline Road, Colombo 08. 2. H.D. Iranganee Wijewardena, 397/3, Kotikawatta, Angoda. Petitioners Vs. 1. Debt Conciliation Board of Colombo 2. Mr. A. Dayantha De Alwis, Chairman of the Debt Conciliation Board 3. Mr. K.A.P. Rajakarua, Member of the Debt Conciliation Board 4. Mr. N. Balaraman. Member of the Debt Conciliation Board 5. The Secretary, The Debt Conciliation Board All 5 of No. 80, Adikarana Mawatha, Colombo 12. 6. H.A. Sachintha Perera 7. A.D. Supun Sameera 8. A.D.C. Maduwanthi All 03 of No. 226/1, Bolabotuwana, Bandaragama. New Members Added 9. Mrs. Malaniee A. Ranathunga. The Chairperson 10. Mr. P. Samararatne 11. Mr. M.A.N.S. Gunawardena 12. Mr. D.M. Sarathchandra Respondents And Now Between 1. W.D. Dharmasiri Karunaratne, 57, Baseline Road, Colombo 08. 2. H.D. Iranganee Wijewardena, 397/3, Kotikawatta, Angoda. Petitioner-Petitioners Vs. 1. Debt Conciliation Board of Colombo 2. Mrs. Malaniee A. Ranathunga. The Chairperson 3. Mr. P. Samararatne 4. Mr. M.A.N.S. Gunawardena 5. Mr. D.M. Sarathchandra All 4 of Debt Conciliation Board, No. 80, Adikarana Mawatha, Colombo 12. New Members of the Board 6. H.A. Sachintha Perera 7. A.D. Supun Sameera 8. A.D.C. Maduwanthi All 03 of No. 226/1, Bolabotuwana, Bandaragama. 9. Mr. K.A.P. Rajakarua, Re-Appointed Member of the Board 10. The Secretary of the Board Both of No. 80, Adikarana Mawatha, Colombo 12. Respondent-Respondents

28/ 01/ 16	S.C. Appeal No. 66/2015 and S.C. Appeal No. 64/2015	1. Galange Kade Chandrawathie Nilagaratne Hawendeniyagama, Pussellewa. 2. Galange Gedera Swarnathilaka Nilagaratne 390, Siyambalagoda, Danthure. Plaintiffs VS. (deceased) 1. Kularatne Wijetileka Galanga, Siyambalagoda, Danthure. 1a. Haddage Prema Wijetileka (correctly read as Haddawage Prema Wijetileka) 1b. Pradeep Lakmal Wijetileka 1c. Wasana Wijetileka (appearing by her Guardian Haddage Prema Wijetileka) (deceased) 2. Suraweera Sumanasinghe 2a. Nishantha Kumarage Galanga, Siyambalagoda, Danthure. (deceased) 3. Galange Kade Sumanasingha 3a. Y.G. Thilakawathie 388, Siyabalagoda, Danthure. 4. Padma Kumari Nilagaratne Shantha Niwasa, Pussellawa. 5. Rupassarage Rohitha Wickramaratne Siyambalagoda, Danthure. 6. Bandula Nishantha Kumarage, Siyambalagoda, Danthure. Defendants AND Haddage Prema Wijetileka (correctly read as Haddawage Prema Wijetileka) Galanga, Siyambalagoda, Danthure. 1a Defendant-Appellant VS. 1. Galange Kade Chandrawathie Nilagaratne Hawendeniyagama, Pussellewa. 2. Galange Gedera Swarnathilaka Nilagaratne 390, Siyambalagoda, Danthure. Plaintiff-Respondents 1b. Pradeep Lakmal Wijetileka 1c. Wasana Wijetileka (appearing by her Guardian Y.B. 2a. Bandula Nishantha Kumarage 392, Siyambalagoda, Danthure. (deceased) 3. Galange Kade Sumanasingha 388, Siyambalagoda, Danthure. 3a. Y.G. Thilakawathie 4. Padma Kumari Nilagaratne Shantha Niwasa, Pussellawa. 5. Rupassarage Rohitha Wickramaratne Siyambalagoda, Danthure. 6. Bandula Nishantha Kumarage, 392, Siyambalagoda, Danthure. Defendant-Respondents AND NOW BETWEEN Galange Gedera Swarnathilaka Nilagaratne 390, Siyambalagoda, Danthure. 2nd Plaintiff-Respondent- Appellant VS. Haddage Prema Wijetileka (correctly read as Haddawage Prema Wijetileka) Galanga, Siyambalagoda, Danthure. 1a Defendant-Appellant- Respondent 1b. Pradeep Lakmal Wijetileka 1c. Wasana Wijetileka (appearing by her Guardian Y.B. Haddage Prema Wijetileka) 2a. Bandula Nishantha Kumarage 392, Siyambalagoda, Danthure. (deceased) 3. Galange Kade Sumanasingha 388, Siyambalagoda, Danthure. 3a. Y.G. Thilakawathie 4. Padma Kumari Nilagaratne Shantha Niwasa, Pussellawa. 5. Rupassarage Rohitha Wickramaratne Siyambalagoda, Danthure. 6. Bandula Nishantha Kumarage, 392, Siyambalagoda, Danthure. Defendant-Respondent- Respondents Galange Kade Chandrawathie Nilagaratne Havendeniyagama, Pussellewa. 1st Plaintiff-Respondent- Respondent & 1. Galange Kade Chandrawathie Nilagaratne Hawendeniyagama, Pussellewa. 2. Galange Gedera Swarnathilaka Nilagaratne 390, Siyambalagoda, Danthure. Plaintiffs VS. (deceased) 1. Kularatne Wijetileka Galanga, Siyambalagoda, Danthure. 1a. Haddage Prema Wijetileka (correctly read as Haddawage Prema Wijetileka) 1b. Pradeep Lakmal Wijetileka 1c. Wasana Wijetileka (appearing by her Guardian Haddage Prema Wijetileka) (deceased) 2. Suraweera Sumanasinghe 2a. Nishantha Kumarage Galanga, Siyambalagoda, Danthure. (deceased) 3. Galange Kade Sumanasingha 3a. Y.G. Thilakawathie 388, Siyambalagoda, Danthure. 4. Padma Kumari Nilagaratne Shantha Niwasa, Pussellawa. 5. Rupassarage Rohitha Wickramaratne

27/ 01/ 16	SC CHC 29/2009	Peoples Bank No.75, Sir Chittampalam A Gardiner Mawatha Colombo2. Plaintiff-Petitioner Vs 1. Ocean Queen Marine(pvt) Ltd, No.227/03, Jampettah Street, Colombo13. 2. Robert Peiris. No.227/03, Jampettah Street, Colombo13. 3. Emmanuel Ranjith Arulanandan No60/20 Church Street, Colombo 15 4. Sivapalan Weerasingham No.70/33, Rock House Lane, Modara, Colombo 15 5. Pothupitiyaga Nandasena Fernando No.70/33, Rock House Lane, Modara, Colombo 15 6. Sellapperumage Mahindasiri Fernando No.29, Jaya mawatha, Keselwatta, Panadura. Defendants-Respondents
27/ 01/ 16	S.C. Appeal 149/2013	1. Sanvara De Ruberu Samaraweera Gunasekera 2. Suranga Madhawa De Ruberu Samaraweera Gunasekera 3. Gerald Mervin De Ruberu Samaraweera Gunasekera All of No. 25/12, De Alwis Road, Mt. Lavinia. Manna Marakkalage Lakshmi Malkanthi Cooray No. 25/12, De Alwis Road, Mt. Lavinia. (By Attorney of the 1st and 2nd Plaintiff) PLAINTIFF Vs. Fathima Thasneem Yusuff nee Nizar No. 174/2 – 12A, Kesbewa Road, Boralesgamuwa DEFENDANT AND BETWEEN 1. Sanvara De Ruberu Samaraweera Gunasekera 2. Suranga Madhawa De Ruberu Samaraweera Gunasekera 3. Gerald Mervin De Ruberu Samaraweera Gunasekera All of No. 25/12, De Alwis Road, Mt. Lavinia. Manna Marakkalage Lakshmi Malkanthi Cooray No. 25/12, De Alwis Road, Mt. Lavinia. (By Attorney of the 1st and 2nd Plaintiff) PLAINTIFF-APPELLANTS Vs. Fathima Thasneem Yusuff nee Nizar No. 174/2 – 12A, Kesbewa Road, Boralesgamuwa DEFENDANT-RESPONDENT AND 1. Sanvara De Ruberu Samaraweera Gunasekera 2. Suranga Madhawa De Ruberu Samaraweera Gunasekera 3. Gerald Mervin De Ruberu Samaraweera Gunasekera All of No. 25/12, De Alwis Road, Mt. Lavinia. Manna Marakkalage Lakshmi Malkanthi Cooray No. 25/12, De Alwis Road, Mt. Lavinia. (By Attorney of the 1st and 2nd Plaintiff) PLAINTIFF-APPELLANT-PETITIONERS Vs. Fathima Thasneem Yusuff nee Nizar No. 174/2 – 12A, Kesbewa Road, Boralesgamuwa DEFENDANT-RESPONDENT-RESPONDENT

27/ 01/ 16	SC (CHC) Appeal No. 09/2009	1. Gunamuni Buddhima Sudantha de Silva of No. 2/6, Galpotha Road, Nawala. 2. Gunamuni Sujeevan Chandranath de Silva of No. 105, Exeter Road, Raynards Lane, Harrow, England PETITIONS Vs. 1. Macarthy Private Hospital Limited of No. 22, Wijerama Mawahta, Colombo 7. 2. Gunamuni Chandima Sudhamma de Silva of No. 22, Wijerama Mawahta, Colombo 7. 3. Gunamuni Subadra Malini de Silva of No. 22, Wijerama Mawahta, Colombo 7. 4. Gunamuni Thusitha Kanthi de Silva of No. 22, Wijerama Mawahta, Colombo 7. 5. Gunamuni Udayi Yasoja de Silva of No. 22, Wijerama Mawahta, Colombo 7. 6. Gunamuni Channa Janaka de Silva of No. 22, Wijerama Mawahta, Colombo 7. 7. Gunamuni Prajapa de Silva of No. 22, Wijerama Mawahta, Colombo 7. RESPONDENTS AND NOW BETWEEN 1. Gunamuni Buddhima Sudantha de Silva of No. 2/6, Galpotha Road, Nawala. 2. Gunamuni Sujeevan Chandranath de Silva of No. 105, Exeter Road, Raynards Lane, Harrow, England PETITIONS-APPELLANTS Vs 1. Macarthy Private Hospital Limited of No. 22, Wijerama Mawahta, Colombo 7. 2. Gunamuni Chandima Sudhamma de Silva of No. 22, Wijerama Mawahta, Colombo 7. 3. Gunamuni Subadra Malini de Silva of No. 22, Wijerama Mawahta, Colombo 7. 4. Gunamuni Thusitha Kanthi de Silva of No. 22, Wijerama Mawahta, Colombo 7. 5. Gunamuni Udayi Yasoja de Silva of No. 22, Wijerama Mawahta, Colombo 7. 6. Gunamuni Channa Janaka de Silva of No. 22, Wijerama Mawahta, Colombo 7. 7. Gunamuni Prajapa de Silva of No. 22, Wijerama Mawahta, Colombo 7. RESPONDENTS-RESPONDENTS AND NOW In the matter of an application for substitution of the deceased 1st Petitioner-Appellant 1. Gunamuni Praneetha Santhoshini de Silva of No. 2/6, Galpotha Road, Nawala. 2. Gunamuni Manthirini Sunanda Mendis of No. 2/5, Gregory's Road, Colombo 7. 3. Chandra Kumudini de Silva of No. 2/6, Galpotha Road, Nawala. APPLICANTS-PETITIONERS AND Gunamuni Sujeevan Chandranath de Silva of No. 105, Exeter Road, Raynards Lane, Harrow, England 2nd PETITION-APPELLANT-PETITIONER Vs. 1. Macarthy Private Hospital Limited of No. 22, Wijerama Mawahta, Colombo 7. 2. Gunamuni Chandima Sudhamma de Silva of No. 22, Wijerama Mawahta, Colombo 7. 3. Gunamuni Subadra Malini de Silva of No. 22, Wijerama Mawahta, Colombo 7. 4. Gunamuni Thusitha Kanthi de Silva of No. 22, Wijerama Mawahta, Colombo 7. 5. Gunamuni Udayi Yasoja de Silva of No. 22, Wijerama Mawahta, Colombo 7. 6. Gunamuni Channa Janaka de Silva of No. 22, Wijerama Mawahta, Colombo 7. 7. Gunamuni Prajapa de Silva of No. 22, Wijerama Mawahta, Colombo 7. RESPONDENTS-RESPONDENTS- RESPONDENTS

13/ 01/ 16	SC/FR No. 578/2011	1. S. G. P. Dilshan Tilekeratne (minor) Appearing through his next friend 2. H. M. Y. Kumarihamy (mother) The Petitioners of No. 31, Urulewaththa, Yatawatta Matale. PETITIONERS Vs. 1. Sergeant Douglas Ellepola 2. Police Inspector Bandara 3. Hettiarachchi 4. R. Nishshanka, Officer-in-Charge The 1st to 4th Respondents of Police Station, Yatawatta. 5. Inspector General of Police, Police Headquarters, Colombo 1. 6. Hon. The Attorney General Attorney General's Department, Hultsdorp, Colombo 12. RESPONDENTS
13/ 01/ 16	S.C. Appeal No. 28/2013	Ambudeniyage Dona Leelawathie No. 132/22, Ramya Place, Matarahenwatta, Weliweriya. PLAINTIFF Vs. Karuna Aratchige Ranjith Ariyaratne No. 09, Lamp Light Way Atwood – 3049, Victoria, Australia. DEFENDANT AND Karuna Aratchige Ariyaratne 17, Quarry Road, Mirihana, Nugegoda. SUBSTITUTED-PLAINTIFF-PETITIONER Vs. Karuna Aratchige Ranjith Ariyaratne No. 09, Lamp Light Way Atwood – 3049, Victoria, Australia. DEFENDANT AND Karuna Aratchige Ariyaratne No. 17, Quarry Road, Mirihana, Nugegoda. SUBSTITUTED-PLAINTIFF-PETITIONER-PETITIONER Vs. Karuna Aratchige Ranjith Ariyaratne No. 09, Lamp Light Way Atwood – 3049, Victoria, Australia. DEFENDAN-RESPONDENT AND NOW BETWEEN Karuna Aratchige Ariyaratne 17, Quarry Road, Mirihana, Nugegoda. SUBSTITUTED-PLAINTIFF-PETITIONER- PETITIONER-PETITIONER-APPELLANT Vs. Karuna Aratchige Ranjith Ariyaratne No. 09, Lamp Light Way Atwood – 3049, Victoria, Australia. DEFENDANT-RESPONDENT-RESPONDENT RESPONDENT-RESPONDENT
10/ 01/ 16	S.C. F/R No. 424/2015	Kaluhath Ananda Sarath De Abrew, No. 4/1, Attidiya Road, Ratmalana. Vs. 1. Chanaka Iddamalgoda, Chief Inspector of Police, Head Quarters Inspector, Police Station, Mount Lavinia. and 6 Others. Respondents

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

In the matter of an application for Leave to Appeal under the Provisions of Section 5C (1) of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

Wewita Hettige Upul Premalal Perera,
No. 209A, Mahawatta,
Alubomulla.

Petitioner

Supreme Court Case No.
SC Appeal 192/14
Civil Appeal High Court – Kalutara,case No.
WP/HCCA/Kal 13/10 (F)
District Court – Panadura, Case No. 4194/D

Vs-

Kiriwanawattegedara Beatrice Sandya Kumari,
Udahawatta,
Siyambalagoda,
Danture
Kandy.

Respondent

And between

Kiriwanawattegedara Beatrice Sandya Kumari,
Udahawatta, Siyambalagoda,
Danture, Kandy.

Respondent-Appellant

-Vs-

Wewita Hettige Upul Premalal Perera,
No. 209A, Mahawatta,
Alubomulla.

Petitioner-Respondent

And now between

Wewita Hettige Upul Premalal Perera,
No. 209A, Mahawatta,
Alubomulla.

Petitioner-Respondent-Petitioner

-Vs-

Kiriwanawattegedara Beatrice Sandya Kumari,
Udahawatta,
Siyambalagoda,
Danture, kandy.

Respondent-Appellant-Respondent

Before: Hon. Buwaneka Aluwihare P.C J

Hon. Upaly Abeyrathne J

Hon. Anil Gooneratne J

Counsel: W. Premathilaka for the Petitioner Respondent Appellant

Rohana Jayawardane For the Respondent –Appellant Respondent

Argued on: 16. 01. 2016

Decided on: 12. 07.2016

Aluwihare PC. J

Petitioner-Respondent-Petitioner-Appellant (hereinafter the Appellant) instituted action in the District Court by way of summary procedure against his wife praying for a divorce a *vinculo matrimonii* on the sole ground that they had been living in separation, a mensa et thoro, for a period of seven years prior to the institution of the action together with malicious desertion, in terms of section 608 (2) of the Civil Procedure code.

The appellant took up the position that he was legally married to the Respondent Appellant Respondent (hereinafter the Respondent) in the year 1994 and brought the Respondent to his residence where they commenced the matrimonial life.

It was the assertion on the part of the Appellant that the Respondent quarrelled with the Appellant and his parents and in the year 1995, she left the matrimonial home with their only child. Appellant asserts further that with the intention of continuing on with the married life he brought back the Respondent and the child to his residence. The Respondent, however had left the matrimonial home with the child for the second time in the year 1997. It is the contention of the Appellant that she did so with the intention of never returning to live with the Appellant. The Appellant has averred that he and the Respondent have been living in separation from bed and board (mensa et thoro) for a period of 10 years, and that the Respondent had maliciously deserted him and she had deprived him from having sexual relationships continuously for the said period.

The learned trial judge having satisfied himself of the material placed before the court on behalf of the Appellant granted a divorce in his favour on the ground of malicious desertion on the part of the Respondent and directed to have the decree nisi served on the Respondent in terms of section 377 of the Civil Procedure Code.

The Respondent filed objections seeking to set aside the judgement of the learned District Judge and she took up the position that the Appellant had previously instituted divorce action in the same district court against the Respondent and the said action had been dismissed by the court. The Respondent, however admitted (paragraph 6 of the objections filed before the District Court) that she and the Appellant lived separately from 1997 to the date of filing the case. It was her position that there was constructive malicious desertion on the part of the Appellant as she was ejected from the matrimonial home.

At the inquiry before the District Court the sole evidence placed by the Respondent was, with regard to the case filed previously (case no 3118 District Court Panadura) by the Appellant for divorce. This evidence was placed through the Registrar of the District Court. The Registrar testified to the

effect that the case filed by the Appellant had been dismissed on15th May 2008 and no steps had been taken to appeal against the said order. From his testimony, it was quite apparent that, the divorce had not been sought in terms of Section 608 of the Civil Procedure Code, in case no 3118.

The learned District Judge in a well-considered judgment, granted a divorce as pleaded for, to the Appellant. The learned trial judge had concluded that the Respondent had committed the matrimonial fault of maliciously deserting the Appellant, depriving him of conjugal relations and had lived in separation *a Mensa et Thoro*, for a period of over 7 years.

The High Court of Civil Appeals, however by its order dated 29th October 2013 reversed the order made by the learned District Judge and aggrieved by the said order the Appellant sought leave from this court against the said order of the High Court of Civil Appeals.

This court granted leave on the questions of law referred to in paragraph 16 of the Petition of the Appellant dated 21st November 2013 which are as follows:-

(a) The judgement is contrary to the Law

(b) The judges have erred in holding that the Petitioner should give oral evidence to corroborate the facts, when the action has been filed under summary procedure, especially where the Respondent herself admits that she continuously lived for more than 10 years, separate from the Petitioner.

(c) The judges have erred in failing to realise that when the decree nisi is entered in favour of the Petitioner, the burden of rebutting the Petitioners' issue shifts to the Respondent.

(d) The honourable judges have failed to realise the practical inability to reunite the parties where the Respondent had left the matrimonial home wilfully and never attempted to return to the matrimonial home for a period of well over 10 years.

(e) The honourable judges have failed to understand the fact, that the acts of the Respondent have deprived the petitioner having conjugal relationships with his wife for a continuous period of over 10 years, which amounts to malicious desertion.

The Learned Judges of the High Court of Civil Appeals held that it is mandatory to prove the matrimonial fault of the opposite party to obtain a decree of divorce in terms of Section 608 (2) of the Civil Procedure Code and cited the following 'head note' in the case of *Tennakoon Vs. Somawathe Perera* 1986 1 SLR pg.90.

> *" It is incumbent on a spouse seeking a divorce under section 608 (2) of the Civil Procedure Code on the ground of separation for a period of seven years to establish matrimonial fault. Only a procedural change enabling summery procedures to be used instead of a regular action was effected by section 608 (2) of the Civil Procedure Code"*

This is the present state of the law as it stands today. The learned judges of the High Court, however, have held that the Appellant had not led any evidence,

but only marked certain documents which the High Court was of the view irrelevant to prove the matrimonial fault, malicious desertion, in this instance.

At the hearing of this appeal it was contended on behalf of the Appellant, that the learned judges of the High Court erred, in holding that the Appellant ought to have given oral evidence at the inquiry and further the High Court failed to appreciate the fact that, once the decree nisi is entered in favour of a party (in the present case the Appellant) the burden of rebutting the position taken up by the party in favour of whom the decree nisi is entered, shifts to the opposite party(the Respondent).

It is to be noted that as referred to earlier, the Respondent did not place any material to rebut the position taken up by the Appellant at the inquiry i.e. that she deserted the Appellant in 1997. Apart from the bare statement in paragraph 6 of her statement of objections where she asserted that they are living in separation since 1997 and that she was maliciously evicted from the matrimonial home by the Petitioner, no other material was placed by the Respondent to substantiate that fact.

It is to be noted that as a general rule the procedure in matrimonial actions is regular procedure in terms of Section 596 of the Civil Procedure Code. Section 608 (1) of the said Code, re-affirms this rule with respect to applications for *a separation a mensa et thoro.*

But the amended section 608 (2) departs from the general rule and stipulates summary procedure for obtaining a decree of divorce founded on separation *a mensa et thoro.*

Unlike in an ordinary regular action, Section. 377 of the Civil Procedure Code casts a burden on the defendant to show sufficient cause against the Order Nisi and if the defendant fails to do so, then the defendant must face the consequences. In the case of *Caderamanpulle vs. Ceylon Paper Sacks Ltd. 2001 3 SLR 112,* Nanayakkara J. Commenting on the importance of an order *nisi* issued in a summary action, observed that, "Unlike in an ordinary regular action, section 377 of the Civil Procedure Code casts a burden on the

defendant to show sufficient cause against the order *nisi* and if he fails to do so he must face the consequences. Summary procedure has been designed with a view to expeditious and quick disposal of action. Therefore a defendant in summary procedure action is expected to act without delay, if he is to obtain relief from Court."

In the instant case the Respondent did not challenge what was asserted by the Petitioner, but merely produced the case record of a previous divorce action which had been dismissed. It should be noted that the grounds for divorce in the action that was dismissed (case no 3811) is different to that of the ground for divorce in the instant case. Hence, the earlier case filed for divorce by the Appellant is no bar to file a subsequent action for divorce, if the grounds for divorce relied upon, are different.

The learned judges of the High Court of Civil Appeals, in my view erred, when they held that the Appellant had failed to establish a matrimonial fault, whereas he had in the affidavit sworn by him had clearly stated that the Respondent left for the second time and never returned. Bertram CJ in the case of *Silva Vs Missinona* 26 NLR 113, held that, "Desertion to be a ground for divorce must be malicious, that is to say, it must be a deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state. It must be *sine animo reverlendi.* Divorce should only be granted if the desertion complained of was a repeated desertion, and the offending spouse contumaciously refused to return to married life"

The above in my view, is exactly what the Appellant asserted when he filed action under summary procedure and on the part of the Respondent she has failed to discharge the burden cast on her to rebut the said assertion. In the circumstances, I am of the view that the learned District Judge was correct in making the order nisi, made against the Respondent, absolute.

The learned judges of the High Court of Civil Appeal had failed to appreciate the fact that, the burden was on the Respondent to show sufficient cause

against the order nisi, if the Respondent was to succeed, when action is filed under summary procedure in terms of the Code of Civil Procedure.

Accordingly, I set aside the order made by the High Court of Civil Appeals dated 29th October 2013 and affirm the order made by the learned District Judge of Panadura made on 5th March 2010

The appeal is allowed, However, in the circumstances of this case, I order no costs.

Judge of the Supreme Court

Justice Upaly Abeyrathne

I agree

Judge of the Supreme Court

Justice Anil Gooneratne

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 fro Leave to Appeal in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC.Appeal No. 95/2012

SC.HC.CALA.No. 507/2011

SP/HC. Civil/ Galle No. 069/2002**.**

DC. Balapitiya. No. 2455/L

Kalutara Acharige Namadasa alias
Sumanapala of Udumulla,
Kommala,
Benthota

presently at

St. Margaret Bazaar,
Udupussellawa.

Plaintiff-Respondent-Petitioner

-Vs-

W.D. Wimalaweera
of Wadumulla,
Kommala,
Benthota.

Defendant-Appellant-Respondent

Before	**:**	**Sisira J.de Abrew, J**
		Anil Gooneratne, J &
		Nalin Perera, J
Counsel:	:	N.Mahendra with D.Pathirana for the Plaintiff-Respondent-Appellant
		Ms. Sajeevi Siriwardhane for the Defendant-Appellant-Respondent.
Argued & Decided on:	:	01.06.2016.

Sisira J.de Abrew, J

Heard both counsel in support of their respective cases. The Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff) filed this case in the District Court of Balapitiya to get a declaration of title to the land described in the plaint and to eject the Defendant. The learned District Judge, by his judgment dated 01.11.2002, granted relief to the Plaintiff. Being aggrieved by the said judgment the Defendant-Appellant-Respondent (hereinafter referred to as the Defendant) filed an appeal in the Civil Appellate High Court. The learned Civil Appellate High Court Judges by their judgment dated 02.11.2011, set aside the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff has appealed to this Court. This Court by its order dated 25.05.2012, granted leave to appeal on the following questions of law.

1) Did the High Court fall into grave error when it held that the Plaintiff had failed to prove the identity of the corpus and his title thereto despite the fact that it has been recorded in the Court Commissioner's report of Plan No. 1532 dated 26.09.1998 (page 118 of the brief) that the Defendant-Appellant-Respondent had admitted that he came into possession of the corpus as licensee of the Petitioner, which is also evidenced by P3-P6, which have been read into evidence without objection ?

2) Did the High Court fall into substantial error when it dismissed the Plaintiff's action when the Defendant had failed to produce any documents and/or evidence to challenge the title of the Plaintiff ?

The case for the Plaintiff is that the Plaintiff granted leave and license to the Defendant to stay in the said land . The Defendant however took up the position that the identity of the land has not been established. But we note when the surveyor, on a commission issued by the District Court, went to survey the land, the Defendant being present at the survey admitted that the Plaintiff granted leave and license to occupy the land. (Vide page 118 of the brief). With this admission, the contention of the Defendant fails.

The Defendant, in letters marked P3, P4, P5 and P6, has very clearly admitted that the Plaintiff had granted leave and license to the Defendant to occupy the the land. These documents were not challenged by the Defendant at the trial. The Defendant failed to give evidence at the trial. The contention that the land has not been properly identified was not established by way of evidence by the Defendant at the trial.

The learned Counsel for the Defendant contended that the Plaintiff has not established the title.

When we consider the documents marked P3- P6, we hold that the Plaintiff has clearly established that the Defendant was a licensee of the Plaintiff. The Defendant, by the said letters, admitted that the Plaintiff was the owner of the land. When a person occupies a land as a licensee of the owner of a land, such a person (licencee), by his own act, accepts the title of the owner. Therefore licencee has no right to challenge the title of the owner. This view is supported by Section 116 of the Evidence Ordinance, which reads as follows:- " No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property: and no person who came upon any immovable property by the licence of the persons in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given ."

We would like to consider the Judgment in the case of ***Gunasinghe Vs Samarasinghe*** *reported in* ***2004 (3) SLR Page 28*** wherein it was held thus:-
"a licensee or a lessee is estopped from denying the title of the licensor of lessor. His duty in such a case is first to restore the property to the licensor or the lessor and then to litigate with him as to the ownership".

In the present case, the Defendant, by his letters marked P3 to P6 has clearly admitted that the Plaintiff is the owner of the land and that he occupies the land as a licencee of the Plaintiff. He has failed to challenge the said letters. Therefore he has no right to challenge the title of the Plaintiff.

The learned High Court Judges have failed to consider the above matters.

The Defendant in this case has failed to challenge the letters sent by him to the Plaintiff admitting that he is the licensee . He has failed to adduce any evidence at the trial.

When we consider all the above matters, we hold that the High Court Judges have erred when they set aside the judgment of the District Judge. In these circumstances we answer the above questions of law in the affirmative. We set aside the judgment of the Civil Appellate High Court and affirm the judgment of the District Judge dated 01.11.2002. Accordingly this appeal is allowed with costs.

JUDGE OF THE SUPREME COURT

Anil Gooneratne, J

I agree.

JUDGE OF THE SUPREME COURT

Nalin Perera, J

I agree.

JUDGE OF THE SUPREME COURT

Kpm/-

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

S.C. Appeal 118/2014
SCHCCALA/ 124/2014
D.C. Avissawella 22089/P

In the matter of an Application for Leave to Appeal

Hettiarachchilage Piyadasa
Dehiowita, Atalugama.

PLAINTIFF

Vs.

1. Hettiarachchilage Piyaseeli
2. G. R. Piyaseeli
3. Hettiarachchilage Nandawathie
4. Hettiarachchilage Piyawathie
5. G.K. Jane **(DECEASED)**

5A. Hettiarachchilage Piyadasa
5B. Hettiarachchilage Piyaseeli
5C. Hettiarachchilage Nandawathie
5D. Hettiarachchilage Piyawathie

All of Dehiowita, Atalugama

1 – 4TH AND 5A – 5D SUBSTITUTED DEFENDANTS

AND

Hettiarachchilage Piyadasa
Dehiowita, Atalugama.

1ST AND 5B SUBSTITUTED-DEFENDANT-APPELLANT-RESPONDENT

Vs.

Hettiarachchilage Piyadasa
Dehiowita, Atalugama.

PLAINTIFF-RESPONDENT

2. G. R. Piyaseeli
3. Hettiarachchilage Nandawathie
4. Hettiarachchilage Piyawathie

5A. Hettiarachchilage Piyadasa
5B. Hettiarachchilage Nandawathie
5D. Hettiarachchilage Piyawathie

2ND – 4TH AND 5A, 5C AND 5D SUBSTITUTED DEFENDNATS-RESPONDENTS

AND NOW BETWEEN

Hettiarachchilage Piyadasa
Dehiowita, Atalugama.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Hettiarachchilage Piyaseeli
Dehiowita, Atalugama.

1ST AND 5B SUBSTITUTED-APPELLANT-RESPONDENTS

5. G. R. Piyaseeli
6. Hettiarachchilage Nandawathie
7. Hettiarachchilage Piyawathie

5A. Hettiarachchilage Piyadasa
5B. Hettiarachchilage Nandawathie
5D. Hettiarachchilage Piyawathie

2ND – 4TH AND 5A, 5C AND 5D SUBSTITUTED-DEFENDANTS-RESPONDNETS-RESPONDNETS

BEFORE: S. E. Wanasundara P.C., J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: Rohan Sahabandu P.C. with Ms. Hasitha Amarasinghe for Plaintiff-Respondents-Petitioner

Colin Amarasinghe for 1st & 5th Substituted Defendant-Appellant-Respondent

Respondents instructed by Mrs. K.A.D.T.C. Kahandawa Arachchci

ARGUED ON: 22.06.2016

DECIDED ON: 09.08.2016

GOONERATNE J.

This was an action to partition a land called 'Punchihena' alias 'Horagollehena' in extent of about 1 acre. At the trial one admission was recorded that the land described in the plaint is 'Punchihena and the original owner was Marthelis. Pedige accepted as in the plaint. Preliminary plan 682 marked 'X' gives an extent of about 2 Roods 35.06 Perches and consists of two lots (1 & 2). The 1st & 2nd Defendants also moved for a commission on the same Surveyor who prepared plan 'X' and the commission plan is marked 'Y'. The said plan 'Y' shows an extent of about 1 Acre, 1 Rood and 31.42 Perches. The main question is on the identity of the corpus and the position of the 1st Defendant

and Substituted 5B Defendants-Appellants-Respondents is that the corpus in plan 'X' is part of land in plan 'Y'. In any event it is their position that on insufficient evidence, corpus is not identified and no decree for partition could be entered.

The 1st Defendant-Appellant-Respondent also relies on Deed No. 1526 marked 1V1. Plan 'Y' was prepared at the instance of the 1st Defendant-Appellant-Respondent. The said Defendant takes up the position that the corpus in plan 'X' (lots 1 & 2) falls within the land in plan 'Y' and claim that lots 1 & 2 in plan 'X' falls within a part of land called Galamunagawahena alias 'Hena' which was purchased by Deed 1V1 of 27.01.1979.

On 14.07.2014 Supreme Court granted leave to appeal on the question of law set out in Paragraph 23(a) of the petition dated 06.03.2014. It reads thus:

> 23 (a) Did the High Court err in holding that there had not been a proper identification of the corpus?

This court observes that as regards plantations and improvements the 1st Defendant-Appellant-Respondent marked and produced documents 1V3 (subsidy) and documents to show receipts of subsidy by document marked 1V4, 1V5 and 1V6. All the said documents were marked subject to proof. The learned trial Judge in his Judgment states that the Defendant party failed to tender these documents to court to enable the trial Judge to consider same in his Judgment.

As such the learned District Judge in his Judgment states he is unable to consider same and takes the view that plantation should be held in common with all concerned.

There is no doubt that documents once marked in evidence become part of the record and should remain in the custody of court. (Section 114(2) of the Civil Procedure Code). As such it is the duty of the trial Judge to take to its custody, and not for convenience sake return same to the Attorneys of the respective parties. The learned District Judge has failed to do so. The record does not clearly indicate as to whether the trial Judge had called for the documents, at the end of the case. Defendant party on the other hand cannot be heard to complain about any aspect of the Judgment of the learned District Judge, having deliberately or negligently failed to make available to court the documents referred to above. I have also considered the Judgments of the Court of Appeal, re *Podiralahamy Vs. Ranbanda 1993 (3) SLR 20* a persuasive Judgment on this aspect, of *H.W. Senanayake J*. In fact learned President's Counsel R. Sahabandu who appeared for the Plaintiff-Respondent-Petitioner also appeared in the above decided case for the Appellant.

I find that matters relevant to the case in hand had been made to take a different turn by the learned High Court Judge, which is certainly not in the best interest of Justice. The learned High Court Judge erred in considering

documents relied upon by the Defendant party, the above documents 1V3, 1V4, 1V5 & 1V6. The said documents were not part of the record in the District Court, though marked subject to proof. The learned District Judge refused to consider the evidentiary value of 1V3 to 1V6 as it was not available to court. Learned District Judge failed to apply his judicial mind and do what he ought to have done, legally. High Court made matters difficult or worse and was misdirected in law. The High Court relied on the 'cursus curiae' of the original court on the premise that there was no objection by the Plaintiff recorded at the closure of the case as regards documents marked subject to proof in the course of the trial. The situation in the case in hand is entirely different as some documents were not part of the record from the stage of the end of the trial, and the learned District Judge and the learned High Court Judge could not have considered such a case in the absence of marked documents in the record.

This is a total misdirection on the part of the learned High Court Judge as the High Court concludes that the 1st Defendant was responsible for the plantation, having considered the above documents as proved, when it is not part of the record and cannot be admitted in law. The High Court on this matter having considered the said documents, if it was legally admissible may have endeavoured to explain possession of the 1st Defendant based on the said documents. If documents were legally admitted one could also infer possession

of 1st Defendant, based on proof of said documents. The only question of law need to be answered as follows. In view of the above matters discussed in this judgment identity could not have been considered by either Court. Such a Judgment could not have been pronounced due to the above lapse. It is not necessary for the Supreme Court to consider the pivotal question of identity of the corpus due to the above lapse. Both the District Court and the High Court have erred and failed to give its judicial mind based on the above documents. For these reasons and in the interest of justice, I set aside both Judgments of the District Court and the High Court and send the case back for Trial De Novo. Judgments set aside. Case sent back for Trial De Novo. This court directs the learned District Judge to conclude the trial as expeditiously as possible.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera P.C., J.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C., J.

JUDGE OF THE SUPREME COURT

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

S.C. Appeal No. 01/2005
SC/Spl/LA/197/2004
HCA/LT 598/2002
LT/01/Addl/12/97

Victor Perera
Of 45/2, Jubilee Road,
Walana, Panadura.

APPLICANT

Ranliya Garment Industries Ltd.,
Of No. 116, Poorvarama Road,
Colombo 6.

RESPONDENT

Ranliya Garment Industries Ltd.,
Of No. 116, Poorvarama Road,
Colombo 6.

RESPONDENT-APPELLANT

Vs.

Victor Perera
Of 45/2, Jubilee Road,
Walana, Panadura.

APPLICANT-RESPONDENT

AND NOW

Ranliya Garment Industries Ltd.,
Of No. 116, Poorvarama Road,
Colombo 6.

RESPONDENT-APPELLANT-PETITIONER

Vs.

Victor Perera
Of 45/2, Jubilee Road,
Walana, Panadura.

APPLICANT-RESPONDENT-RESPONDENT

BEFORE: B.P. Aluwihare P.C., J.
Anil Gooneratne J. &
Prasanna S. Jayawardena P.C., J

COUNSEL: Athula Perera with Chathurani de Silva
For the Respondent-Appellant-Appellant

Applicant-Respondent-Respondent
is absent and unrepresented

WRITTEN SUBMISSIONS OF THE RESPONDENT-APPELLANT-APPELLANT FILED ON:
09.09.2005

WRITTEN SUBMISSIONS OF THE APPLICANT-RESPONDENT-RESPONDENT FILED ON:
04.05.2005

ARGUED ON: 28.10.2016

DECIDED ON: 08.12.2016

GOONERATNE J.

This is an appeal from the Judgment of the High Court dated 28.04.2004 wherein the learned High Court Judge held that the Order of the Labour Tribunal delivered on 19.09.2002, in favour of the Applicant-Respondent-Respondent employee, that his services were unjustly terminated, is affirmed. The High Court dismissed the Employer's appeal from the said Order of the Labour Tribunal with costs fixed at Rs. 10,000/-. This court on 10.01.2005 granted Special Leave to Appeal on questions of law raised in paragraph 8 of the petition dated 04.08.2004. The said questions reads thus:

8. (a) The said order is wrong and contrary to law,

(b) The learned High Court Judge erred in law when she failed to consider the fact that the Respondent was involved in an action which was neither a trade Union action or a strike and/or Labour dispute,

(c) The learned High Court Judge erred in law when she followed the decision in the Judgment of Ceylon Mercantile Union Vs. Cold Stores Ltd & Others 1995 1 SLR 261 when in fact the learned High Court Judge should have distinguished the above case and the facts in the present case,

(d) The learned High Court Judge failed to take into consideration that a probationer employee can canvass his termination only if the probationer employee establishes that the termination of his services were mala fide,

(e) The learned High Court Judge failed to take into consideration that the respondent had failed to establish malice on the part of the petitioner in terminating his services,

(f) The learned High Court Judge failed to take into consideration the law laid down in the case of Brown & Company Ltd Vs. MDK Samarasekara 1996 1 SLR 334 regarding an employer's right to terminate a probationer and the duty cast on the Labour Tribunal when inquiring into such application.

I would briefly set down the facts of this case that led to the termination of the employee concerned. Employee was employed as a driver at Ranliya Garment Industries Limited (Respondent-Appellant-Petitioner). He was a Probationer in the above organisation at the time his services were terminated. Employee was appointed as a driver of the Respondent-Appellant-Petitioner on 01.06.1996 and services terminated on October 1997. Material placed before this court suggest that there was a death reported of another employee of the Respondent-Appellant-Petitioner Company. The death took place as a result of an incident with the security section of the above company. The security unit

was a hired service. The position of the employer is that this employee had created unrest among the other employees, by directly making accusations against the employer for the death of another employee. The position of the employer was that, employee was involved in instigating unrest within the company premises by climbing on top of a lorry and addressing and instigating the other employees to strike. The evidence of Manager, Security and Transport, before the Labour Tribunal was, that the employer had to call the police to curb the unrest situation within the premises and even the police could not control, and a Special Unit of police had to be called to control the situation. Employer's position was that the employee was not involved in any strike action but was the leader of an illegal and unlawful assembly which had to be controlled by the Police Special Unit.

At the recent hearing before the Supreme Court on 28.10.2016 the Applicant-Respondent-Respondent was absent and unrepresented. In fact he was represented on the day Special Leave to Appeal was granted on 10.01.2005 and on 29.07.2005 (the original date of hearing). Thereafter the Applicant-Respondent-Respondent was absent and unrepresented and it was so even on the date of re-hearing though notices were duly despatched.

The learned High Court Judge accepts that the employee was on probation and state further that an employee of that status has the right to

participate in a demonstration with other employees, which is a Trade Union action. The Judgment of the High Court does not consider whether the acts of the employee concerned was a legitimate Trade Union action. To go on strike is a Trade Union action, but to cause disruption in the workplace and instigate others to commit unlawful acts, may be different? High Court Judge's Order does not indicate any 'mala fides' on the part of the employer, regarding termination of services of the employee.

My attention has been drawn to certain items of evidence led before the Labour Tribunal. At Pgs. 42/43 of the brief, the Employee Applicant's evidence in chief, he testifies that he was dismissed as he spoke of the incident of murder. He says he was in possession of evidence and that the Security Division of the Company killed his co-worker. Evidence suggest of police inaction due to bribery. පොලිසියෙන් කටයුතු කරේ නෑ පොලිසියට මුදල් දීලා. ඒ වෙලාවේ මම කථා කලා. At Pg. 45 the Applicant was questioned by the Tribunal as regards the cause of death. His reply is as follows:

ඒ මැරුණු පුද්ගලයාට කිව් තිබුණා. මේ අය ඒක විහිළුවට කළා. මම නැති දවසක ආරක්ෂක අංශයේ කට්ටිය බීලා වැඩ කරන අය සහ වැඩ නොකරන අය කිව් කවා තිබුණා. බීමත් පුද්ගලයෙක් උගුරු දණ්ඩෙන් අල්ලාගෙන ඉන්න විට කිව් කැවිම වැඩි වෙලා උගුර දණ්ඩ කැඩුණා. අපි මේ ගැන කතා කලා.

Employee Applicant in evidence accept the fact the Security Unit of the Company was hired by the company, and suggest that the employer was taking the side of the Security Unit.

One Ranjith Silva, Manager, Security and Transport, gave evidence for the employer. It was his evidence that the deceased employee 'Sugath' and the Security Division had a clash and it resulted in the death of employee 'Sugath'. The company had no hand in it as security of the company was hired from another organization by the company. He further testifies that when he arrived in the company at 7.30 a.m. the Applicant Employee was instigating other employees to bring about unrest within the company and had been spreading a rumour that one Mrs. Wanigasekera, Personal Manager had a hand in it and on her directions the murder was committed by the security officers.

The witness along with other Director of the company explained to the workers that no such act had been done by the Personal Manager and many of them accepted his explanation except the Employee Applicant who continued with his campaign and even addressed the gathering from top of a parked lorry. He further testified that when Mrs. Wanigasekera arrived in the company at 8.00 a.m she had been put into a dangerous situation, by the workers surrounding her and keeping her inside a room without allowing her to move. Police had to

be called but the police could not control the situation and a Special Task Force Unit of the Police was brought to control the situation.

The facts placed before this court no doubt indicate that there had been unrest within the premises of the Employer's Company due to an unfortunate incident which resulted in death of an employee. It is an offence against the society and a matter to be investigated with a view of a criminal prosecution which is in the hands of law enforcement agency and not private individuals or any other involved in private company business, whether it was police inaction or allegations of implicating others for murder or obtaining direct or circumstantial evidence. It is a matter to be ultimately decided by a Competent Court of Criminal Jurisdiction. In the process labour unrest or misconduct of employees or insubordination had taken place. An attempt is made by the Employee Applicant to project victimisation by the employer. If properly established it would be a ground for the Labour Tribunal to interfere with an Order of dismissal. I am unable to support such a decision in the absence of sound proof, against an employer. Mere assertions or accusations against an employer would not suffice as regards a serious offence of murder.

Evidence placed before the Tribunal suggest that an uncontrollable situation arose where the employer was subject to abuses and false accusation of murder by the Applicant Employee which fact need to be proved before a

court of law, by the prosecution. As such mere fact of incrimination is not acceptable in the absence of cogent reasons. This is a case of misconduct, disobedience and insubordination by the Employee Applicant. A threat even if it cannot be carried out, can amount to insolence. A threat to assault a superior officer is gross insubordination warranting dismissal. As a general rule refusal to obey reasonable orders justifies dismissal – The Electoral Equipment and Construction Co. Vs. Cooray (1962) 63 NLR 164; Subramaniam Chetty Vs. Periya C. Chetty (1921) 8 CWR 240. As far as the case in hand is concerned there is evidence that the employee refused to obey orders or refused to accept explanations of the employer whereas other workers obeyed or accepted the explanation of witness Ranjith Silva, Manager Security. It is nothing but grave disobedience which amounts to a breakdown in continuation of good relationship of employer and employee. In these circumstances, it warrants a dismissal.

Abuse of a Superior would justify termination, even if the employee has legitimate grounds of protest (discussed by S.R. De. Silva in his Text Legal Frame Work of Industrial Relations Pg. 546 & 547 on Disobedience and Abuse). Death of a co-worker in the way evidence was recorded was not a wilful act of the employer. Incident occurred as an act of the security section of the company

which was hired by the company for purposes of security. Employee Applicant seems to have taken mere advantage of the situation to project a false image of the employer. He no doubt played a major role to fault the employer and as well as disrupt work in the company. He was also responsible in setting up other workers to harass or harm the Personal Manager Mrs. Wanigasekera. Evidence reveal she was under a severe threat by the workers.

I have considered the case law cited by the Respondent-Appellant-Appellant. I note and observe the following decided cases which are relevant to the case in hand. *Bank of Bikaner Ltd Vs. Indrajith Mehta 1954(1) Labour Law Journal 189 at 191*.

> It was held that where an employee threatens or intimidates with violence a Superior grievance connect with his work, whether it is during office hours or out of office hours or whether it is in the Bank Premises or outside of it, it is misconduct".

The employer also takes up the position that in terms of the letter of appointment the employee was on probation and the company has the right to terminate the services of the applicant without any notice of payment of compensation. In *Brown & Co. Ltd. Vs. Samarasekera*. 1996(1) SLR 334

The principles relating to the service of a probationer are –

1. (i) unless the letter of appointment otherwise provides, a probationer is not entitled to automatic confirmation on completion of the period of probation. If then he is allowed to continue his service, he continues as a probationer.
   (ii) Even in the absence of any additional terms and conditions, a simple probation clause confers on the employer the right to extend the probation.

   (iii) The employer is not bound to show good cause for terminating a probationer's service. The Labour Tribunal may examine the grounds of the decision only for the purpose of finding out whether the termination was mala fide or amounted to victimisation or an unfair labour practice.

   (iv) The question whether the probationer's services were satisfactory is a matter for the employer. If cannot be objectively tested. If the employer decided that the probationer's services were not satisfactory, it would be inequitable and unfair, in the absence of mala fides, to foist the view of the tribunal on the management.

   (v) A suggestion of mala fides is not sufficient. The Tribunal must make a finding that the termination of a probationer's service was actuated by mala fides or ulterior motive.

2. At the time of the impugned termination of services, the Respondent was a probationer. His services were terminated after giving him two extensions of his period of probation. The fact that such an opportunity was given would negative the existence of mala fides. In the circumstances the impugned termination of services was justified and the Respondent is not entitled to compensation.

The above decided case lays down the guidelines to decide whether a probationer could be dismissed from service. If mala fides or ulterior motives could be shown on the part of the employer or that the employee was

victimised, then termination in those circumstances would be unjustifiable, and the employee would be entitled to relief. In the case in hand material available suggests that the issue which led to all the problems in the company was homicide for which the employer company was not responsible. Learned High Court Judge was also misled by her misapplication of the Judgment in CMU Vs. Ceylon Cold Stores Ltd, and Others (1995) (1) SLR 261. It is a case which discuss the aspect of a right to strike, by a probationer. It has no application to the case in hand, in the absence of mala fides, being proved.

The questions of law are answered as follows in favour of the employer as in (a) to (f) in the affirmative. Yes.

In the case in hand the Applicant Employee has not placed any acceptable material to establish that termination of employment was done mala fide or for ulterior motives. Employee's employment was terminated as he was responsible for breach of peace in the Petitioner Company. Employee was responsible for a boisterous/unlawful assembly to create an unrest situation against the management of the Employer Company and certainly his acts are not strike action, acceptable to law. It is nothing but a serious breach of

discipline which was a threat to the lives of the members of the company. The Labour Tribunal as well as the High Court has erred both in fact and in law. I set aside the Judgment of the High Court and the Order of the Labour Tribunal. Appeal allowed without costs.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Prasanna S. 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 Section 31 D D(1) of the Industrial Disputes Act as amended by Act No. 32 of 1990.

Vimal Jayathilake Wijesekara
Nikathenna, Puwakdheniya
Kegalla

APPLICANT

SC Appeal No. 03/2010

SC. Special Leave to Appeal Application No: 187/2009

High Court Kandy Case No. HC Appeal 44/2008

LT. Kandy Case No. 03/118/2003

Vs.

National Institute of Co-operative Development
Polgolla

RESPONDENT

And between

National Institute of Co-operative Development
Polgolla

RESPONDENT-APPELLANT

Vs.

Vimal Jayathilake Wijesekara
Nikathenna, Puwakdheniya
Kegalle

APPLICANT-RESPONDENT

And now between

National Institute of Co-operative
Development
Polgolla

RESPONDENT-APPELLANT-PETITIONER

Vs.

Vimal Jayathilake Wijesekara
Nikathenna, Puwakdheniya
Kegalle

APPLICANT-RESPONDENT-RESPONDENT

Before :- Chandra Ekanayake, J
Wanasundera, PC, J &
Aluwihare, PC, J

Counsel :- M. Gopallawa, SSC for the Respondent-Appellant-Appellant
Manohara de Silva, PC with
A.Wijesurendra for the Applicant-Respondent-Respondent

Written submissions tendered on : By the Respondent-Appellant-Appellant on 27.09.2010.

By the Applicant-Respondent-Respondent on 28.09.2010.

Decided on : 28.03.2016.

CHANDRA EKANAYAKE, J.

The Respondent-Appellant-Petitioner by its petition dated 26.08.2009 (filed together with an affidavit of its Director General) had sought inter alia, Special Leave to appeal against the judgement of the learned High Court Judge dated 23.07.2009 and to set aside the same. When this application was supported on 15.01.2010, this Court had granted special leave to appeal on the questions of law set out in sub paragraphs 10 (I) to (V) of the above petition. At the commencement of the hearing of this appeal a preliminary objection was raised on behalf of the Applicant-Respondent-Respondent with regard to the maintainability of this appeal namely :-

> "This appeal has been filed on the basis that the Respondent-Appellant-Appellant is not the employer of the Applicant-Respondent-Respondent and therefore it lacks status in terms of section 31 DD (1) of the Industrial Dispute Act as amended by Act No: 32/1990 in so far as a right of appeal thereby conferred to a workman, trade union or an employer".

With regard to the above preliminary objection parties have made oral submissions and also tendered written submissions.

The Applicant-Respondent-Respondent (hereinafter sometimes referred to as

'Respondent') had been employed as a lecturer from 15/06/1981 in the Cooperative Development School – (Polgolla) of the Respondent-Appellant-Appellant (hereinafter sometimes referred to as the 'Appellant') on the letter of appointment issued by the Secretary of Food and Co-operatives. After assumption of duties as a lecturer in the Appellant Institute following events appear to have taken place :-

(a) The respondent had been released at the request of the Ministry of Urban Development, Construction and Public Utilities to serve as a Public Relations Officer in that Ministry.

(b) By letter dated 1.10.2001 of the Senior Assistant Secretary on behalf of Secretary to the Ministry of Urban Development Construction and Public Utilities he had been released from the said Ministry with effect from 21-09-2001.

(c) the Appellant Institute was thereafter incorporated as the National Institute of Co-operative Development by Act No: 01 /2001with effect from 21-03 -2001 and by virtue of the provisions of section 2 (1) of the said Act the Appellant Institute was established.

(d) Thereafter a vacation of post notice was issued to the Respondent by the Commissioner and Registrar of Co-operative Development on the basis of having vacated his post from 21-09-2001.

(e) As per the averments in the application to the Labour Tribunal, the Respondent had been sent on compulsory retirement with effect from 21-01-2003 by the Public Service Commission.

The basis of the respondent's application to the Labour Tribunal dated 11-06-2003 had been, that due to sudden illness he suffered on his way when reporting for work at the Appellant-Institute he was unable to report. Although same was brought to the notice of the Head of the Institute by registered post together with relevant medical certificates, the Institute having totally disregarded the documents he submitted, he was considered as having vacated the post with effect from 21.09.2001, (as per the vacation of post notice dated (A 23)). He contends that this amounts to constructive termination of his employment. He had sought the reliefs claimed in the application on the above footing.

The Appellant Institute by its answer dated 26-08-2003 whilst taking up the same preliminary objection raised before this Court among others, had moved for a dismissal of the application of the respondent. Learned President of the Labour Tribunal by the order dated 24-01-2008 having concluded that the termination was unlawful, had proceeded to order a sum of Rs.217,200/-(being 24 months salary) to be paid as compensation in lieu of reinstatement. This order was impugned in the High Court of the Central Province by HC/Appeal No. 44/2008 and HC/Appeal No.45 2008 by both parties. Both appeals were consolidated and heard together. Thereafter Learned High Court Judge by the order dated 23.07.2009-(Y) had proceeded to order reinstatement with back wages. This is the order this special leave to appeal application was preferred from.

In view of the preliminary objection raised it would be pertinent to consider the provisions in Section 31 DD (1) of the Industrial Disputes Act as amended by Act No. 32/1990. The above sub section thus reads as follows:-

> "31DD(1) Any workman, trade union or employer who is aggrieved by any final order of a High Court established under Article 154P of the Constitution, in the exercise of the appellate jurisdiction vested in it by law or in the exercise of its revisionary jurisdiction vested in it by law, in relation to an order of a Labour Tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained."

According to the above sub-section any employer who is aggrieved by any final order of a High Court established under Article –154P of the Constitution, in the exercise of appellate or revisional jurisdiction vested in it, may appeal from an order of a Labour Tribunal to the Supreme Court.

In the case at hand the main basis of the objection raised by the respondent (applicant) is that the appellant was not his employer at the relevant time. Thus the appellant does not have the status in terms of section 31DD(1) of the Industrial Disputes Act (as amended), in so far as a right of appeal thereby conferred to an employer.

To decide whether the appellant was the respondent's employer at the relevant time the entire chain of events that had taken place with regard to the respondent's service has to

be considered. To consider this all the correspondence and other facts pertaining to the same will have to be examined.

In those circumstances I am of the view that in the interest of justice this preliminary objection also should be considered in the main appeal.

The Registrar is directed to list this appeal for hearing in due course with notice to both parties.

Judge of the Supreme Court.

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

S.C. Appeal 04/2012

Leave to Appeal Application
No: SC/HCCA/LA/304/2011

Provincial High Court of Civil Appeal
Application No. WP/HCCA/GPH/73/2002

D.C. Gampaha Case No. 38448/L

Gangabada Arachchige Prince Gamini Perera
No. 310/8, Pahala Biyanwila, Kadawatha.

PLAINTIFF

Vs.

Madavita Vidanamudalige Don Joseph
No. 279, Dalupitiya, Kadawatha.

DEFENDANT

AND NOW

Gangabada Arachchige Prince Gamini Perera
No. 310/8, Pahala Biyanwila, Kadawatha.

PLAINTIFF-APPELLANT

Vs.

Madavita Vidanamudalige Don Joseph
No. 279, Dalupitiya, Kadawatha.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Gangabada Arachchige Prince Gamini Perera
No. 310/8, Pahala Biyanwila, Kadawatha.

Now residing at 221/A, Jayagath Mawatha,
Ihala Biyanwila, Kadawatha.

PLAINTIFF-APPELLANT-PETITIONER

Vs.

Madavita Vidanamudalige Don Joseph
No. 279, Dalupitiya, Kadawatha.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: S. E. Wanasundera P.C., J.
Sisira J. de. Abrew J. &
Anil Gooneratne J.

COUNSEL: K. Asoka Fernando with A. R. N. Siriwardena
for Plaintiff-Appellant-Appellant

Anuruddha Dharmaratne with Indunil Piyadasa
For Defendant-Respondent-Respondent

ARGUED ON: 24.11.2015

DECIDED ON: 30.05.2016

GOONERATNE J.

This is an appeal to the Supreme Court based mainly on the doctrine of 'laesio enormis'. The plaintiff-Appellant relies on the sale price which is grossly disproportionate to its true value. On the other hand the Plaintiff-

Appellant (hereinafter referred to as Plaintiff) argues that the High Court erred by its failure to consider a document (VI) relied upon by the Defendant-Respondent (hereinafter referred to as Defendant) to be an invalid document. This court on or about 12.01.2012 granted leave as per paragraph 10 of the petition which reads thus:

(a) Whether the Hon. Judges of the Provincial High Court of Civil Appeal erred in law by their failure to consider that the document marked 'VI' is a legally inadmissible and/or invalid document in view of Prevention of Frauds Ordinance and/or Notaries Ordinance?

(b) Whether the Hon Judges of the Provincial High Court of Civil Appeal erred in law for their failure to interpret the doctrine of laesio enormis in the correct perspective considering the circumstances of the case?

(c) Whether the Hon. Judges of the Provincial High Court of Civil Appeal erred in law for their inability to consider where a property is sold or where there is an implied sale at a price grossly disproportionate to its true value, the law is on the side of the party who stands to lose by the transaction, and not on the side of the party who stands to make an unconscionable profit and thereby erred in law?

(d) Whether the Hon. Judges of the Provincial High Court of Civil Appeal erred in law for their inability to comprehend that a fraud being perpetrated in the circumstances of the case by an unauthorized money lender and thereby erred in law?

Parties proceeded to trial on 3 admissions and on 14 issues.

Admissions are that a person named in paragraph 6 of the plaint was in occupation of the premises in dispute as a tenant and that the tenant left the said premises. It is also admitted that the Plaintiff complained to the police and the Debt Conciliation Board. Issues of the Plaintiff-Appellant suggest that he wanted to obtain a loan of Rs. 200,000/- from the Defendant-Respondent and parties discussed the transaction and debt agreed to grant the loan on security and as such executed deed No. 11421 of 08.09.1994 for that purpose. It is also in issue that as in paragraph 12 of the plaint the Plaintiff signed the original deed and also placed his signature on two blank sheets (හිස් ඔප්පු පිටපත් දෙකට). Defendant–Respondent forceful entry to the premises is suggested in the issues. Issue (6) and the other issue refer to the fact that the value of the property exceed rupees five hundred thousand, and based on the principle of laesio enormis deed to be declared void. Defendant-Respondent by his issues suggests that the Defendant-Respondent purchased the property on a transfer deed for due consideration. It is also suggested in issues raised by the Defendant that there was no agreement to re-transfer the property and that the plaint does not disclose a legal basis for such a re-transfer. The above being each parties' case, and as such this appeal need to be decided on a careful examination of all the evidence led at the trial.

In the process of establishing Plaintiff's case, the Plaintiff testified that he requested for a loan of rupees Two Hundred Thousand and for that purpose had discussed the matter with the Defendant who agreed to grant a loan for the said sum but insisted on security to ensure repayment of the loan. As such deed P1 was executed but the Plaintiff's position was that his signature was obtained by the Notary on blank forms on the day in question. Plaintiff was given only Rs. 190,000/- which was Rs. 10,000/- less, on the agreed amount which sum had been deducted for interest due on the loan. Plaintiff in order to enter into the transaction came with his wife to Notaries office and both were anxious to get back to their home quickly as they had to attend to an alms giving at home. At this point I note the evidence placed before the original court reveal that the position of the Defendant was that the Plaintiff obtained a sum of Rs. 1 million and to prove same document VI, an informal document had been put to the Plaintiff in cross examination and the signature in VI, was admitted by the Plaintiff.

I would at this point of the Judgment wish to advert to two matters. The learned District Judge disbelieves the Plaintiff's evidence on the position as regards placing Plaintiff's signature on blank forms, and its contents. Trial Judge in arriving at this decision had given certain reasons. The other matter is that the trial Judge's views on the question that by document VI the transaction

contemplated by deeds P1/V2 would be concluded and a sum of Rs. 1 million had been paid to the Plaintiff by the Defendant. This is to explain that the property in dispute was alienated by a transfer deed for valuable consideration, i.e Rs. 1 million.

The above two matters are of some importance for comment. However I find on a perusal of the trial Judge's reasoning, another matter was disbelieved by the trial Judge based on Plaintiff's evidence. Learned District Judge also disbelieved the evidence of Plaintiff on matters he testified on Defendant entering the premises in question by force and breaking the padlocks at a time the Plaintiff was not present in the premises. This item of evidence was once again disbelieved by the trial Judge.

All primary facts and truth of the matters in dispute are best to be left in the hands of the trial Judge. (signature obtained on blank sheets) This court does not wish to interfere with the findings of the trial Judge on primary facts as above on that question of fact. (1993(1) SLR 119) It is the trial Judge who hears evidence, sees the witness in the witness box and observe the witness's demeanour at all times in court. As such the learned District Judge's views on disbelieving the Plaintiff on items of evidence as above need not be interfered by this court. However before I get on to the other important matter

concerning document VI and its legal implications, I prefer to consider the following authorities on questions of facts.

Questions of fact

> The expression comprises three distinct issues. In the first place what facts are proved. In the second place what are the proper inferences to be drawn from facts which are either proved or admitted. And in the third place what witnesses are to be believed. In the first two questions no special sanctity attaches to the conclusion of a Court of first instance. 1 A.C.R 126. A Court of Appeal will not interfere with findings of a trial Judge on questions of fact. 20 N.L.R. 282, except where the facts are of such complication that their rights interpretation depends not only on the impression formed by listening to witnesses but also upon documentary evidence and upon the inferences to be drawn from the behaviour of these witnesses both before and after the matters on which they gave evidence. 20 N.L.R. 332, or where the trial Judge fails to discuss the evidence in his judgment. 26 N.L.R. 497. The tests to be applied by an Appeal Court are three. Was the verdict of the Judge unreasonably against the weight of the evidence. Was there a misdirection either on the law or on the evidence. Has the Court of trial drawn the wrong inferences from matters in evidence. 14 Law Rec. 144.

In the manner stated by the above authorities as far as the case in hand is concerned, even if the trial Judge disbelieves the evidence of Plaintiff, what I wish to focus is whether there was a misdirection either on law or on the evidence.

The important document relied upon by the Defendant was document marked VI (folio 199). It is an informal document which is not notarial executed. Plaintiff claims to have signed the blank document along with two witnesses who were also witnesses to deed P1/V2 its signatures are not denied.

The gist of VI refer to the fact that by deed P1 (deed No. 11421) which is an outright transfer of property of Rs. 200,000/- and although stated so, the transaction was in fact concluded for a sum of Rs. 1 million, and that the Plaintiff received a sum of Rs. 1 million on 08.09.1994. There is no doubt that VI was prepared, according to Defendant, to support the transaction or to suggest the correct figure or amount agreed upon between parties to be a sum of Rs. 1 million, and that the Plaintiff received the said sum of Rs. 1 million.

Whatever it may be, the trial Judge has based his conclusions on VI. Is it (VI) legally acceptable or admissible in law? Section 2 of the Prevention of Frauds Ordinance contemplates a bar to property transactions. The said Section reads thus:

> No sale, purchase, transfer, assignment or mortgage of land or other immovable property and no promise, bargain, contract or agreement for effecting any such object or for establishing any security, interest or incumbrance affecting land or other immovable property (other than a lease at Will or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time and unless the execution of such writing, deed or instrument be duly attested by such notary and witnesses.

The above section brings within it land or other immovable property, and contemplates a wider area of activity connected to land/immovable property whether it be a sale, purchase, transfer etc. or to establish any security, interest etc. affecting any such land or immovable property. Validity to such activity as described above requires notarial execution

A careful examination of document V1 indicates without a doubt that although deed bearing No. 11421 (P1) refer to a sum of Rs. 200000/- as the sale price regarding the land in dispute, in fact a sum of Rs. 1 million was accepted on the said transaction by Plaintiff. It is clear that V1 contemplates a transaction connected to land/immovable property which gives details of deed P1, which is the question. Therefore validity of V1 depends on compliance with Section 2 of the said Ordinance. At this stage the following dicta in *Dissanayakage Malini Vs.Mohamed Babur 1999 (2) SLR 4*, would be an important guide to the case in hand. It was held:

Per G.P.S. de Silva C.J.

Held:

> P2 being a non-notarial document was of no force or avail in law in view of section 2 of the Prevention of Frauds Ordinance. However, in a case where fraud is pleaded, put in issue and is established by the evidence on record, it is open to the court to take into consideration such document.

> The rigour of the provisions of section 2 of the Prevention of Frauds Ordinance may, on proof of fraud as in the present case, be relaxed on the principle that "the Statute of Frauds may not be made an instrument of fraud."

I am unable to accept the argument that document V1 does not contradict the above stated Section 2 of the Prevention of Frauds Ordinance. If V1 confirms that the Plaintiff sold and transferred a property to the Defendant and Plaintiff accepted a sum of Rs. 1 Million, I wonder, why V1, which is described as a receipt was prepared at the same time and moment of executing deed P1/D2? Deed P1 indicates the consideration to be Rs. 200,000/-. What would be the transaction that should attach legal sanctity? To consider both V1 and P1 executed at the same time and moment suggest an element of fraud, but the issues raised in the case does not indicate that fraud was properly pleaded and put in issue. There is un-contradicted evidence of Plaintiff that he would settle the amount of rupees two hundred thousand as stated in P1 within a year, but no evidence led by Plaintiff to establish that he in fact repaid the amount due or part thereof. A mixture of facts elicited on both sides tends to confuse the main issue. Deed P1 indicates an outright transfer in favour of the Defendant and it does not suggest that P1 was executed as security for a loan, or contain a clause to re-transfer the property in dispute on settlement of the loan. At the least what sort of attendant circumstances could be established to prove that the transaction was in the nature of a resulting trust. Further nothing much

could be deduced from the admissions recorded. Plaintiff was the applicant to the Debt Conciliation Board, but the outcome of such proceedings before the Board are unknown to any court?

The valuation report was produced marked P3. Value given in P3 is Rs. 12,51,190/-. Land in dispute consists of land and building. Plaintiff has testified in evidence that the land is valuable property worth more than fifteen hundred thousand rupees (Rs. 15,00000/-). It is in evidence that Plaintiff became entitled to the property in dispute by a deed of gift which was gifted to him by all his brothers after the demise of his father. There is evidence led before the trial court that even in the deed of gift the correct value had not been inserted correctly. Plaintiff admits that the correct value was not inserted in the deed of gift (831-V3) and in cross examination of Plaintiff admits that the amount inserted in the V3, deed of gift was only Rs. 50,000/- but it is worth fifteen hundred thousand rupees. He no doubt defends his position of undervaluation of the deed, (V3) and attempt to testify that it is no fraud to do so. Plaintiff's evidence no doubt suggest that he was aware of the true value of the property in dispute and that the transaction value had been under-valued for different purposes and prevailing circumstances to establish his case.

I have emphasised the fact that the Apex Court is reluctant to interfere with factual matters. Unless the order itself is perverse it would not be

in the best interest of justice to interfere on factual matters ruled by the lower court. As such certain items of evidence of Plaintiff are disbelieved by the trial Judge. On the other hand the evidence transpired was that the Plaintiff was well aware of the true value of the property in dispute and such property in dispute conveyed and sold to a price grossly disproportionate to the true value. I have also observed that validity of V1, is in question. The only remaining issue to be decided is the applicability of the principle laesio enormis. Over the years the principle of laesio enormis was subject to difference of opinion. What matters may be the views of Roman- Dutch Jurist.

I find an explanation of the principle as follows by Professor C.G. Weeramantry in his Text on Law of Contracts Vol. 1 (Part III & iv)

> **Explanation of the Principle**. Though the civil law permits the parties to make as good a bargain as they can, yet it states that a gross inequality between the price which has been paid and the true value of an article implies something in the nature of fraud or undue influence and on that account allows the one party or his heirs to call upon the other either to rescind the contract and return the purchase money or the property sold as the case may be, or to correct the price by paying a just value for the article. This inequality between the value of the thing and the price paid is termed laesio enormis.
>
> A contract may be avoided by Court on the ground of laesio enormis either when the purchaser pays more than double the true value of the thing or the vendor sells the thing for less than half its value. The person sued has the option of restoring the thing or paying what is wanting to make up the just price. Where the consideration is less than half (or more than twice) the true value of the property, the sale is voidable on the ground of laesio enormis unless there is some special consideration present in the

case which bars the application of the principle. The difference in price must exist at the time of the transaction and not thereafter.

At para 333

The doctrine still obtains in full force and vigour in Ceylon. Bodiga V Nagoor 45 NLR 1 at 4.

At para 335

Action does not lie, where the aggrieved party was aware, or ought to have been aware of the true value at the time of making the contract. Jayawardene Vs. Amerasekera 15 NLR 280; Sobana Vs. Meera Lebbe (1940) 5 C.L.J 46. The burden is on the person claiming the benefit of the true value.

In the case of Jayawardene Vs. Amerasekera (15 N.L.R. 280), I would advert to a further position very much relied upon by the Plaintiff.

As it was held in Jayawardene Vs. Amerasekera (15 N.L.R. 280) a person who knows the value of the property is not entitled to a rescission of the sale merely by reason of the fact that the price at which he has sold it, is less than half its true value. The case is otherwise where the property is sold at a price grossly disproportionate to its true value. In that case the law is on the side of the party who stands to lose by the transaction, and not on the side of the party who stands to make an unconscionable profit.

The annulling of the contract on this head is not permitted when the other party is prepared to increase or reduce the price of the thing to its true value (V.d.L 1. 15. 10).

But one has to gather its application only in the circumstances and facts of the case in hand. Though the above positions had been projected by learned counsel for the Plaintiff, as in Jayawardene Vs. Amerasekera it does not appear to be conclusive. In answer to above I find that Justice Fernando observes in Gunasekera Vs. Amerasekere 1993 (1) SLR at 176/177 the matter has not been decided conclusively in the manner as argued by learned counsel for Plaintiff, for the reasons stated therein as being obiter dictum. This aspect and matter has not been decided by Justice Fernando. I will refer to the relevant portion gathered from pg.176/177.

> Learned Counsel for the defendant submitted that laesio enormis applied even if the vendor was aware of the true value, citing Wessells, Law of Contract, 2nd ed., vol 2, page 1344, section 5100.
>
> "There is a considerable dispute amongst the jurists whether the remedy applies in the case of a person who knows the true value of the thing, but nevertheless sells it for less than half, or purchase property knowing that it is only worth half. Voet seems to consider that in both cases the remedy cannot be invoked (Voet, 18.5. 17)……
>
> Counsel then sought to rely on the further observation of Lascelles, C.J., in that case, suggesting that knowledge is immaterial where the price is grossly disproportionate to the value, pointing out that this dictum was cited in Walter Pereira's Laws of Ceylon, 2nd ed., (1913), p. 657. However, that appears to be an obiter dictum not supported by the opinion of any Roman Dutch jurist; and indeed does not appear in the first edition of Walter Perera's work; it is also not cited by Weeramantry, in his discussion of laesio enormis. In Sobana v. Meera Saibo, it was held that the plea of leasio enormis could not be entertained where, assuming the land to have been

> worth Rs. 500, the plaintiff knew that fact at the time he sold the land for Rs. 100. Although Jayawardene v. Amerasekera was cited with approval, that obiter dictum was not applied. While there appears to be some substance in the contention that this obiter dictum does not correctly set out the Roman-Dutch Law (and is possibly based on a misunderstanding of the concluding portion of Voet 18.5.17), the matter need not be decided now in view of my decision on the other questions arising in this case.

In all the facts and circumstances of the case, I find following important factors from which court has to draw conclusions. The factors in point form are as follows:

(a) Certain items of evidence had been disbelieved by the trial Judge, and the Apex Court would not interfere as regards the trial Judge's findings on same.

(b) Validity of document V1 is in question.

(c) Plaintiff was well aware of the true value of the property in dispute. Plaintiff derived title from a deed of gift and his evidence suggest that even the deed of gift was under valued.

(d) 'Fraud' has not been properly and correctly pleaded and put in issue.

On a perusal of both judgments of the District Court and High Court, I have no hesitation in affirming its conclusions, notwithstanding the views expressed by both courts on the application of the law as regards document V1.

There may be some aspects of the Judgments of the lower courts being liable for comment, but conclusions arrived by both courts need not be disturbed.

I answer the questions of law as follows:

(a) Though document V1 was legally inadmissible, the trial court based on a balance of probability, arrived at the correct conclusion.

(b) No. In the context of the case the doctrine of laesio enormis was correctly considered and not applied.

(c) No.

(d) No. Fraud must be properly and correctly pleaded and put in issue

There is no doubt, for cogent reasons supported by evidence, that the Plaintiff was aware that the property in dispute had been under valued and the sale price inserted in deed P1 was not the true and correct price. Having been aware of the proper value of the property and on that basis knowingly and willingly Plaintiff negotiating and admitting a lower price cannot take him anywhere close to the principle of laesio enormis, as it stands today. When it suits the Plaintiff to quote a low price and get a benefit for a loan transaction and sometime latter to retract from the earlier position is not an acceptable position in law. To affirm and disaffirm or to approbate and reprobate the same transaction even if the original transaction subsequently takes a different

flavour cannot in any circumstances favour the Plaintiff. In these circumstances and in the context of the case in hand I affirm as stated above both Judgements of the District Court and the High Court. This appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S. E. 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

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.

PinchaDewageHeebatHemachandra

No.354V, AbeysekaraMawatha, PolpithiMukalana, Kadana.

12A Defendant- Petitioner-Petitioner-Appellant

SC Appeal 6/2011

WP/HCCA/GPH/30/09(LA)

DC Gampaha 26636/P

Vs

HewadewageAlpin Nona

No. 380A, PolpithiMukalana, Kadana.

Plaintiff-Respondent-Respondent-Respondent

1. SuduwaHewagePiyasena

No 10, AbeysekaraMawatha, PolpithiMukalana, Kadana

2. PriyanthaNilminiGalabadage

AbeysekaraMawatha, PolpithiMukalana, Kadana

3. Galabadadewage Mable

AbeysekaraMawatha, PolpithiMukalana, Kadana

4A. HewadewageAlpin Nona alias Alginnona

380A,PolpithiMukalana, Kadana

5A. HewadewageAlpin Nona alias Alginnona

380A, PolpithiMukalana, Kadana

6. SuduwadewageJelin Nona

No.642, Paranankara, Wattala.

7. SuduwadewageAjonona

C/O, Mr. Bawar, Uggalboda,Polpithi Mukalana, Kadana

8. H.D. Isonona

Uggalboda,Polpithi Mukalana, Kadana

9. SD Siriyawathi

C/O B.D. Abeysekara, Gonahena, Kadawatha.

10. SD Gunaratne

WalpolaBatuwatta.

11A. Pincha Dewage Ratnawathi

Polpithi Mukalana, Kadana

12A. P.D. Ariyaratne

Polpithi Mukalana, Kadana

Defendant-Respondent-Respondent-Respondents

Before : Eva WanasunderaPC, J

Sisira J De Abrew J

UpalyAbeyratne J

Counsel : RanjanSuwadaratne for the 12A Defendant-Petitioner-Petitioner-Appellant.

PalithaRanatungafor thePlaintiff- Respondent-Respondent-Respondent

No appearance for the Defendant-Respondent-Respondent-Respondents

Argued on : 7.12.2015

Written Submissions

tendered on : By the 12A Defendant-Petitioner-Petitioner-Appellant on 4.4.2011

By the Plaintiff-Respondent-Respondent-Respondents on 18.4.2014

Decided on : 31.3 .2016

Sisira J De Abrew

Plaintiff-Respondent-Respondent-Respondents (hereinafter referred to as the Plaintiff-Respondent) filed action bearing No.26636/P against the defendants to partition a land called 'Gonnagahawatta'.

12th defendant also filed his statement of claim. After the death of the 12th defendant, 12A Defendant-Petitioner- Petitioner-Appellant (hereinafter referred to as the 12A Defendant-Appellant) was substituted in the place of 12th defendant.

12A Defendant-Appellant appeared in court on 19.3.1992 and 16.7.1992 and he noted down the next date of trial which was 24.11.1992. On 24.11.1992, 12A Defendant-Appellant did not appear in court and the case was taken up for trial and thereafter interlocutory decree was entered. Thereafter on **1.6.2007** (after 14 years)12A Defendant-Appellant filed petition and affidavit in terms of Section 48(4) of the Partition Law No 21 of 1997 moving to set aside the interlocutory decree on the ground that he could not appear in court on 24.11.1992 as he got infected with chicken-pox on 22.11.1992. After an inquiry the learned District Judge, by his order dated 29.5.2009 dismissed the application of the 12A Defendant-Appellant. Being aggrieved by the said, the 12A Defendant-Appellant appealed to the Civil Appellate High Court and Civil Appellate High Court, by its

order dated 7.9.2010 affirming the order of the learned District Judge dismissed the appeal.

Being aggrieved by the said order of the Civil Appellate High Court the 12A Defendant-Appellant has appealed to this court. This court by its order dated 24.1.2011, granted leave to appeal on the question of law set out in paragraph 18(b) and (c) of the petition of appeal dated 18.10.2010 which are set out below.

1. Have the Hon. High Court Judges erred in law by dismissing the leave to appeal application without considering the fact that the trial judge had no reasons to disbelieve the petitioner's evidence specifically with regard to his sickness which prevented him from appearing in court on the trial date after taking all other steps to get ready for the trial?
2. Have the Hon. High Court Judges of the Western Province holden at Gampaha erred in law by failing to consider the fact that the trial judge has failed to evaluate and/or duly asses the evidence led at the inquiry in arriving at his decision against which the said leave to appeal application is preferred in entering their judgment on 7th September 2009?

The main contention of the 12A Defendant-Appellant was that he got infected with chicken pox on 22.11.1992 and as such on 24.11.1992 he could not come to court. The learned District Judge having considered his evidence, however, dismissed his application. The learned District Judge, it appears from his order, has disbelieved his evidence. I now advert to the contention of the12A Defendant-Appellant. Has he produced to the satisfaction of the learned District Judge that he in fact suffered from chicken pox on 24.11.1992? According to his evidence he lives with his brother and wife in his house. If he was suffering from chicken pox on 24.11.1992, he could have easily sent a message to his Attorney-at-Law through his wife and/or

his brother. But he had not taken this step. Further did he call his wife and brother as witnesses to prove that he was suffering from chicken pox on 24.11.1992? The answer is in the negative. If his wife and brother were called as witnesses they could have said whether or not they too were infected with chicken pox. When I consider all these matters, I am of the opinion that the learned District judge was correct when he said that the 12A Defendant-Appellant has not given evidence to satisfy court. The learned District Judge rejected the application of the 12A Defendant-Appellant to enter the case. I have to state here that the learned District Judge came to the above conclusion after observing the demeanour of deportment of the witnesses. This court did not have the opportunity of observing the demeanour of deportment of the witnesses which the trail court had. When the trail judge has made an order after observing the demeanour of deportment of the witnesses, the appellate court would not disturb such a decision unless it is perverse. This view is supported by the judicial decisions in Fraad Vs Brown 20 NLR 282 wherein Privy Council stated thus: "It is rare that a decision of a Judge so express, so explicit upon a point of fact purely, is overruled by a Court of Appeal, because the Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance".

In Alwis Vs Piyasena Fernando [1993] 1SLR 119 GPS de Silva CJ held this: "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

Leraned counsel appearing for the 12A Defendant-Appellant submitted that the learned District judge should have accepted the evidence of the 12A Defendant-Appellant since it has not been challenged by the other side. There is no rule in law that court should accept evidence of witnesses whose evidence is not challenged. Court is entitled to reject evidence of witnesses even if their evidence is not challenged if their evidence is not true and unacceptable. I therefore reject the above contention of learned counsel for the 12A Defendant-Appellant. For the above reasons, I hold that the orders of the learned District Judge and the Civil Appellate High Court are correct. I therefore refuse to interfere with the aforementioned orders. For the above reasons, I answer the questions of law raised by the 12A Defendant-Appellant in the negative. For the above reasons, I dismiss the appeal of the 12A Defendant-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

Eva Wanasundera PC, J

I agree.

Judge of the Supreme Court.

Upaly Abeyratne J

I agree.

Judge of the Supreme Court.

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

Perakum Dissanayakage Jayasuriya
No.147, Kurunegala Road
Rambukkana
1st Defendant-Respondent-Petitioner

S.C.Appeal No.07/2016
S.C/HCCA/ LA No.483/2014
SP/HCCA/KAG Appeal No.43/2013[F]
D.C.Kegalle Case No.72/RE

Vs.

K. M. Tharanganee Mallika Kumari
Kadawattiya, Walpola Watta,
Kotawella
Plaintiff-Appellant-Respondent

Dissanayake Mudiyanselage Gunathilaka
No.147, Kurunegala Road,
Rambukkana

Presently at "Tilaka Stores",
Wahawa Junction,
Rambukkana
2ndDefendant-Respondent-Respondent

BEFORE : **S.E.WANASUNDERA, PC, J.**
UPALY ABEYRATHNE, J.
K.T.CHITRASIRI, J.

COUNSEL : S.C.B.Walgampaya, P.C. with Upendra Walgampaya for the 1st Defendant-Respondent-Petitioner

D.Jayasinghe for the Plaintiff-Appellant-Respondent

ARGUED ON : 10.11.2016

WRITTEN SUBMISSIONS ON : 22.11.2012 by the Plaintiff-Appellant-Respondent
12.02.2016 by the 1st Defendant-Respondent-Petitioner

DECIDED ON : 16.12.2016

CHITRASIRI, J.

Plaintiff-appellant-respondent (hereinafter referred to as the plaintiff) filed this action seeking to eject the 1st defendant-respondent-petitioner (hereinafter referred to as the 1st defendant) and the 2nd defendant-respondent-respondent (hereinafter referred to as the 2nd defendant) from the premises, morefully described in the schedule to the plaint. It was filed on the basis that the premises put in suit had been sublet to the 2nd defendant by the 1st defendant. 1st defendant coming into occupation of the premises as a tenant under the father of the plaintiff, had not been disputed. In fact, he had paid rent to the father of the plaintiff until 28.02.1983. Plaintiff alleged that she did not receive rent since then from the 1st defendant.

2nd defendant in his evidence has stated that he came into occupation of the premises as a tenant in the year 1979 under the 1st defendant Jayasuriya. Document dated 27th August 1979 marked P6 too, shows that the 1st defendant had handed over part of the premises to the 2nd defendant Gunathilaka, having accepted Rs.1,200/= from him, as the rent due for the next two years. Therefore, it is clear that the 1st defendant having come into

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occupation of the premises in question, as the tenant of the plaintiff's father had sublet, a section of the premises to the 2nd defendant. These facts have not been disputed.

Under the Rent Act, such subletting, if it is without the prior written consent of the landlord, give rise to obtain a decree for ejectment of the tenant. It is in Section 10(2) of the Rent Act that this prohibition to sublet without the prior consent in writing of the landlord is stipulated. It reads thus:

> 10(2) Notwithstanding anything in any other law, the tenant of any Premises-
>
> a) Shall not, without the prior consent in writing of the landlord, sublet the premises to any other person; or
>
> b) Shall not sublet any part of the premises to any other person-
>
> i) Without the prior consent in writing of the landlord; and
>
> ii) Unless prior to so subletting, he had applied to the board to fix the proportionate rent of such part of the premises and had informed the board and the landlord the name of the person to whom he proposes to sublet such part.

Section 10 (5) of the Rent Act reads thus:

> 10(5) Where the tenant of any premises sublets such premises or any part thereof without the prior consent in writing of the landlord, the landlord of such premises shall, notwithstanding the provisions of section 22, be entitled in a Court of competent jurisdiction to a decree for the ejectment of such tenant from such premises, and also for the ejectment of the person or each of the persons to whom the premises or any part thereof had been sublet.

`

In view of the above statutory provisions, landlord is empowered to obtain a decree for ejectment of his/her tenant provided no prior written consent of the landlord had been obtained to sublet the premises. Admittedly, the 1st defendant had not obtained prior written consent of the landlord to sublet the premises to the 2nd defendant.

However, the position of the 1st defendant was that the landlord namely, the plaintiff's father has waived his right, referred to in Section 10(5) of the Rent Act, to eject the tenant since the landlord (plaintiff's father) by his conduct has condoned the act of subletting the premises to the 2nd defendant. It is the matter that was in issue before the District Court as well as in the High Court. It is the same issue that was raised as the question of law in this appeal. The said question of law upon which the leave was granted reads as follows:

> *"When tenanted premises have been sublet without the written consent of the landlord but where there is clear evidence before Court, and a finding by the Trial Judge, that the landlord was fully aware that the tenanted premises had been sublet, and the landlord has continued to accept rent from the tenant for a considerably long period of time thereafter and has had dealings with the sub-tenant, has the landlord implicitly condoned the tenant's conduct of subletting and waived his right to eject the tenant under Section 10(1) of the Rent Act?"*

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Matters referred to in the aforesaid issue had been discussed in the cases of:

- **Abdul Cader vs. Menike [1983] BALR Vol. I, Part 1,page 38**
- **D.T.Robert vs. Mrs.P.Rashad [1954] 55 N.L.R page 517**
- **Chandrasena v. Alfred Silva [1997] 3 S.L.R. page 136**

Head note in the aforesaid reported case, **D.T.Robert vs. Mrs. P.Rashad** (supra) reads as follows:

> *"A tenant wrongfully sublet a portion of the premises without the landlord's prior written consent, but the landlord, although he was aware of that fact, made no protest of any kind and continue to demand, and to accept from the tenant, rent for each subsequent month.*
>
> *In an action brought subsequently by the landlord claiming cancellation of the tenancy on the ground that the tenant had sublet the premises in contravention of the provisions of Section 9 of the Rent Restriction Act-*
>
> *Held that the landlord's conduct after he became aware of the sub-tenancy disentitled him to have recourse to his statutory remedy under Section 9. When a landlord becomes aware of the contravention of Section 9, he must forthwith elect whether or not to treat the contract of tenancy as terminated; if he does not so elect, the contravention is condoned, and the contractual tenancy continues."*

In the case of Abdul Cader Vs. Menike (supra) Soza J held as follows:

> *"Waiver is the voluntary abandonment with full knowledge of the relevant facts, of a right or benefit. The waiver can be express or implied. The expression condonation is a variant of the term waiver.*

`

It means complete forgiveness of a wrong of which all the material facts are known to the innocent party on condition that the wrong will not be continued. The wrong is remitted and the offender reinstated letting bygones be bygones. It is inappropriate to talk of condonation when the wrong is being continued though one can still talk of waiver. Condonation is not always the same as consent. To condone is to forgive a wrong and not to consent to it."

In the case of **Chandrasena vs. Alfred Silva**, (supra) it was held that:

(1) A breach by the tenant of the prohibitions against sub-letting could be waived by the landlord expressly or impliedly. Waiver and Condonation are not always the same as consent.

(2) When the tenant has sublet without the landlord's written consent, the landlord must elect whether or not to treat the contract as terminated. He must make his election forthwith and not so long afterwards as to suggest condonation or waiver.

(3) There is sufficient evidence to show that the previous landlord had not objected to sub-letting and therefore implicitly condoned the 1st defendant's conduct and waived his right to eject him by filing action forthwith.

As Soza J held in Abdul Cader vs. Menike, (supra) condoning subletting can be determined, basically upon considering the facts and circumstances of each case. Then only the issue as to the implied consent by the landlord for subletting can be decided. Hence, it is necessary to look at the evidence

adduced in this case to ascertain whether or not the plaintiff or her father had condoned subletting of the premises by the 1st defendant to the 2nd defendant. Admittedly, 1st defendant became the tenant of the plaintiff's father, long before he sublet it to the 2nd defendant in the year 1979. Even thereafter, 1st defendant was occupying part of the premises while the 2nd defendant was occupying the remaining section of the premises. Thus, he becomes the best person to explain the manner in which the landlord acted in order to establish implied consent of the landlord for subletting the premises to the 2nd defendant. Despite having such a privilege to speak as to the circumstances, the 1st defendant had opted not to give evidence.

He ought to have even known the fact that subletting will adversely affect him. Under those circumstances, I do not see any reason why the 1st defendant did not give evidence to establish condonation on the part of the landlord. Such a failure would stand against the 1st defendant proving condonation of the landlord of subletting. 1st defendant is the person who had taken up the defence of condonation of the landlord. Then it is his burden to establish condonation by the landlord.

Furthermore, only witness who gave evidence to establish implied consent of the landlord for subletting is one Nandasiri. He, in his evidence, has stated that he knew the plaintiff's father as well as the plaintiff. He has stated that he knew plaintiff's father coming to this premises to buy

provisions. That is the only evidence available to establish that the plaintiff and her father were condoning the act of subletting.

Learned Counsel for the plaintiff submitted that the plaintiff's father when he visited the premises may have thought that the 2nd defendant was acting as an agent of the 1st defendant and not as a tenant under the 1st defendant. Such a contention also cannot be totally disregarded when there is no other evidence is forthcoming to establish implied consent of the landlord.

Significantly, the **2nd defendant** who came into occupation under the 1st defendant **has given evidence on behalf of the plaintiff**. He was called as a witness by the plaintiff. His evidence does not suggest that the plaintiff's father consented for him to occupy the premises as a tenant of the 1st defendant.

Furthermore, clear evidence is found to show that the plaintiff and/or her father had not accepted the rent from the 1st defendant from the time the father became aware of subletting of the premises to the 2nd defendant. Even though the rent had been deposited in the Local Authority, the plaintiff has not taken that rent deposited in the Local Authority. Such a conduct shows that the plaintiff or her father had not consented for subletting.

Having considered the aforesaid facts and circumstances, I am of the opinion that the 1st defendant has failed to establish that the plaintiff or her

father has given consent even impliedly, for the 1st defendant to sublet the premises to the 2nd defendant. Accordingly, the first defendant has failed to establish that the plaintiff or her father has condoned subletting the premises to the 2nd defendant. Hence, it is clear that the 1st defendant has not been successful in having the cover of the authorities referred to hereinbefore.

For the aforesaid reasons, the plaintiff is entitled to obtain reliefs as prayed for in her plaint in accordance with the law referred to in Section 10(5) of the Rent Act. Accordingly, the decision of the learned Judges of Civil Appellate High Court is affirmed. This appeal is dismissed. Having considered the circumstances, I do not wish to make any order as to the costs of this appeal.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

WANASUNDERA, 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 in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 12/2012

SC/ HCCA/LA/ 76/2011

WP/HCCA/GPH/29/2003(F)

DC Gampaha/43145/L

Bridget Premalatha Perera,

No. 520, Ranmuthugala,,

Kadawatha.

Plaintiff

Vs.

1. Balasooriyage Anton Nimal Perera,
2. Denipitiya Manikkuge Ramani Kumari,

Both of No. 115/A,
Ihalakaragahamuna,
Kdawatha.

Defendants

AND BETWEEN

1. Balasooriyage Anton Nimal Perera,
2. Denipitiya Manikkuge Ramani Kumari,

Both of No. 115/A,
Ihalakaragahamuna,
Kdawatha.

Defendant Appellants

Vs.

Bridget Premalatha Perera,

No. 520, Ranmuthugala,,

Kadawatha.

Plaintiff Respondent

AND NOW BETWEEN

Bridget Premalatha Perera,

No. 520, Ranmuthugala,,

Kadawatha.

Plaintiff Respondent Appellant

Vs.

1. Balasooriyage Anton Nimal Perera,
2. Denipitiya Manikkuge Ramani Kumari,

Both of No. 115/A,
Ihalakaragahamuna,
Kdawatha.

Defendant Appellant Respondents

BEFORE : S. EVA WANASUNDERA, PC, J.

B. ALUWIHARE, PC, J.

UPALY ABEYRATHNE, J.

COUNSEL	:	Manohara De Silva PC with Vidura Gunaratne and Pubudini Wickramaratne for the Plaintiff Respondent Appellant M.U.M. Ali Sabri PC with Nuwan Bopage for the Defendant Appellant Respondents
WRITTEN SUBMISSION ON:		20.06.2012 (Plaintiff Respondent Appellant) 10.09.2015 (Defendant Appellant Respondents)
ARGUED ON	:	23.09.2015
DECIDED ON	:	02.12.2016

UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) instituted an action in the District Court of Gampaha against the Defendant Appellant Respondents (hereinafter referred to as the Respondents) seeking a declaration of title to the land described in the schedule to the plaint and to eject the Respondents from the said land and to hand over the vacant possession of the same to the Appellant.

Parties have admitted that the 1st and 2nd Respondents who became the owners of the land in suit by virtue of the deed of transfer bearing No 4238 dated 10th August 1988 had transferred the said land to the Appellant by the deed of transfer bearing No 15613 dated 23rd July 1998.

The Respondents filed their answer on the basis that the said property was mortgaged to the Peoples Bank and the Appellant had agreed to lend them a sum of Rs. 475,000/-to redeem the said mortgage on the understanding that the property to be kept as a security with the Appellant. Furthermore, the Respondents have averred that they did not intend to transfer the beneficial interest of the property to the Appellant and therefore the said property is held by the Appellant in trust to the benefit of the Respondents. They further averred that at the time of the sale, value of the said property was over 2.5 million and thus pleaded the benefit of the doctrine of *laesio enormis*.

The case proceeded to trial on 11 issues. The Respondents have raised issues No 06 to 11 on the basis that the Appellant must hold the property in question in trust to the benefit of the Respondents. After trial the learned District Judge delivered the judgment dated 13.05.2013 in favour of the Appellant and upon the appeal, the High Court of Civil Appeal of the Western Province holden at Gampaha, by its judgment dated 28.01.2011, set aside the said judgment of the District Court and enter a judgment in favour of the Respondents.

The Appellant sought leave to appeal from the said judgment of the High Court and this court granted leave on the following questions of law set out in paragraph 12 (b) to (h) of the petition dated 09th of March 2011.

12(b) The learned Judges of the Provincial High Court erred in holding that the said transaction was a loan transaction and not an outright transfer when no interest was paid by the Respondents.

(c) The learned High Court Judges have reached a wrong conclusion that the Respondent borrowed money from the

witness Cabral to settle the existing loan and that they never intended to transfer the beneficial interest in the property to the Petitioner.

(d) The learned high court Judges have failed to consider the evidence given by the bank officer Ananda to the effect that Cabral on behalf of the Plaintiff had deposited Rs. 575,000/- to the 1st and 2nd Defendants' account and in the light of his evidence the learned High Court Judges erred in disbelieving Cabral's evidence that he had paid Rs; 575,000/- to the 1st and 2nd Defendants.

(e) The learned High Court Judges erred in holding that Plaintiff's witness Cabral had contradicted himself when Cabral's evidence is corroborated by Ananda's evidence.

(f) The learned High Court Judges failed to consider the Defendant's evidence at page 111 where he admits that Cabraaal gave Rs. 575,000/.

(g) The learned High Court Judges erred in holding that since the Petitioner was unaware of the boundaries of the property amounts to his intention not to purchase the same.

(h) The learned High Court Judges erred in holding that attendant circumstances demonstrate that the Respondent did not intend to dispose the beneficial interest in the property.

The Appellant has not sought reliefs from this court under the doctrine of *laesio enormis*. He has set out the said questions of law on the basis that the

money transaction between the parties was not a loan transaction but the Respondents intended to dispose of the beneficial interest in the property to the Appellant.

Section 83 of the Trusts Ordinance stipulates that "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".

I now deal with the fact in issue whether the Respondent "intended to dispose of the beneficial interests in the property in suit or not". In this regard both parties relied upon the evidence of witness Lokuliyanage Jorge Nelson Cabraal who was called to give evidence by the Appellant.

Evidence of the 1st Respondent at pages 93 to 99 of the brief demonstrate that the Respondents had borrowed a sum of Rs. 475,000/- from the said witness Nelson Cabral to prevent their land from being auctioned at a public auction due to non-payment of a loan granted by the Peoples Bank and said Nelson Cabral had requested them to transfer the property in suit in his name as a security until the said sum of Rs 475,000/- was settled by the Respondents and therefore they had executed the deed in question bearing No 15613 dated 23rd July 1998 with the sole intention of repaying the money owed by them to said Nelson Cabral and to get the property transferred back to them.

It is important to note that the transferee of the said deed No 15613 was not said Nelson Cabral. Nelson Cabral had testified that the Respondents informed him that the land in suit was mortgaged to the Bank and the bank had

sent a notice indicating the auction of the property in question (V 1). Since the Respondents were not in position to repay the loan they requested him to redeem the mortgage and thereafter he went with them to the bank and paid a sum of Rs 575,000/- and stopped the sale in public auction. In proof of the payment the witness produced half a copy of bank deposit slip dated 04.07.97 marked P 1 and also the full copy of the said deposit slip marked P 4. It is seen from P 1 that the parties had entered in to an agreement to transfer the mortgaged property to Nelson Cabral. P 1 and P 2 have been admitted as evidence without any objection. The witness Nelson Cabraal further testified that since he did not have any money, he obtained the said amount of money from his mother in law (the Appellant) which was kept in her custody by his brother in law for the purpose of purchasing a land and accordingly the transfer of the said land was made in the name of his mother-in law, the Appellant. The witness further stated that the deed of transfer was executed about one year after the money was paid to the Bank and the Appellant or his brother in law was not aware that the land was purchased in the Appellant's name for the occupation of his brother in law.

It is apparent from evidence led at the trial that there had been no money transaction taken place directly or indirectly between the Appellant and the Respondents. There was no iota of evidence to conclude any involvement of the Appellant in the alleged money transaction.

It is apparent from the evidence at page 67 and 68 of the brief that Nelson Cabral has paid the Notary's fees and stamp fees. The Respondents have not contradicted the said evidence. Also, the Respondents have not testified to the effect that they had paid the Notary's fee and stamp fees. On the other hand, if it was not an outright transfer would the purchaser have to pay the charges? Why

Nelson Cabral did willingly come forward to pay the same if the transaction was beneficial to the Respondents in that they were receiving a loan or had received a loan for which a security was given in the form of an outright transfer? On the other hand, if the Respondents being the transferor paid the whole costs of the conveyance it would be a test to find out the nature of the transaction. Therefore it appears that having allowed Nelson Cabral settling the bank loan and also by allowing the cost of the conveyance and stamp fees to be paid by Nelson Cabral, the Respondents have exposed the nature of the transaction.

It is also important to note that the said deed of transfer (P 2) does not contain any clause or condition indicating the existence of a loan agreement or an agreement to re-convey the land in question upon the repayment of the money obtained from Nelson Cabrral by the Respondents. There was no time frame set out in the deed in question or in any other document to that effect.

The 1st Respondent in his evidence at page 97 of the brief had stated that on 04.07.1997 the said sum of money was obtained from Nelson Cabraal on the basis that it would be settled in six months or in one year. The deed of transfer bearing No 15613 (P 2) had been executed on 23rd of July 1998, after lapse of one year of the said date of the money transaction. Even assuming that there was a verbal agreement to settle the money obtained from Nelson Cabraal and to re-convey the property in question, it was evident from the said evidence of the 1st Respondent that they had failed to settle the loan obtained from Nelson Cabraal within the agreed period of time and the deed P 2 had been executed after the lapse of the said time period agreed upon to re-convey the property by the parties. The 1st Respondent in his evidence had stated that he could not make the repayment of money within the agreed period of time and therefore the deed in question was

executed. That would have been the reason for the parties to refrain from setting out any term or condition in the deed in question with regard to the right to re-convey the property in question after the repayment of the money obtained from Nelson Cabraal.

Thus, it is clear that no right of re-transfer was preserved on the face of the Deed P 2. Also, no such a preservation is found in any other documentation. Also, there was no evidence to show that the Respondents requested to accept the said amount of money but the Appellant refused to accept the same.

Thus, it is in the light of the sequence of events and the nature of attendant circumstances that a Court should come to its conclusion as to whether Section 83 of the Trust Ordinance should apply to a particular case as such or not. The fact that the executing of P 2 without subject to any condition was admitted by the Respondents, the fact that the Respondents did not pay the stamp fees and Notary's charges and Nelson Cabral had paid the Notary's fees and stamp fees, the fact that the deed P 2 was a document which came into existence after one year of the money transactions between the Respondents and Nelson Cabraal, the fact that the transferee of the land in dispute was not the said Nelson Cabraal, the fact that there had been no oral or documentary evidence to establish a repayment scheme of the alleged loan with the interest to be accrued there upon and the fact that the failure of the Respondents to prove that the Appellant had agreed to lend them a sum of Rs. 475,000/-to redeem the said mortgage on the understanding that the property to be kept as a security with the Appellant; all go to show that the transaction was an outright transfer and not a loan transaction. The attendant circumstances show that the Respondents intend to dispose of the beneficial interest in the property transferred. In a such situation, the mere possession of the Respondents in the land in dispute would not construct attendant circumstances

favourable to them. Law therefore does not declare under such circumstances (Section 83 of the Trusts Ordinance) that the Appellant would hold such property for the benefit of the Respondents.

Thus, the learned High Court Judges have erred in law in evaluating the evidence in the light of the Respondents' plea of constructive trust within the meaning of Section 83 of the Trusts Ordinance. The said judgment of the learned High Court Judges is thus misconceived in law. Hence I answer the said questions of law in favour of the Appellant. Accordingly, the said judgment of the High Court of Civil Appeal dated 28.01.2011 is set aside and the appeal of the Appellant is allowed with costs. I uphold the said judgment of the learned District Judge dated 13.05.2003.

Appeal allowed.

Judge of the Supreme Court

S. 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 DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Leave to Appeal from the judgment dated 01.11.2013 in the High Court of Trincomalee in Appeal No. HCT/APPL/LT/10/2011 in terms of the High Court of Provincial (Special Provisions) Act No. 54 of 2006.

SC Appeal 12/2015
High Court Trincomalee Case No. HCT/APPL/LT/10/2011
LT Case No. LT/TC/29/10

Wasala Mudiyanselage Susitna Kumara Dayarathne
No. 2, Thalgaswewa,
Agbopura, Kanthale.

Applicant

Vs

Onesh Trading (Pvt.) Ltd.,
No. 61/5, Kent Road,
Colombo 09.

Respondent

AND BETWEEN

Onesh Trading (Pvt.) Ltd.,
No. 61/5, Kent Road,
Colombo 09.

Respondent-Appellant

Wasala Mudiyanselage Susitna
Kumara Dayarathne
No. 2, Thalgaswewa,
Agbopura, Kanthale.

Applicant-Respondent

AND NOW BETWEEN

Wasala Mudiyanselage Susitna
Kumara Dayarathne
No. 2, Thalgaswewa,
Agbopura, Kanthale.

Applicant-Respondent-Petitioner

Onesh Trading (Pvt.) Ltd.,
No. 61/5, Kent Road,
Colombo 09.

Respondent-Appellant-Respondent

BEFORE : Sisira J. De Abrew, J.

Upaly Abeyrathne, J.

K.T. Chitrasiri, J.

COUNSEL : Swasthika Arulingam for the Applicant-Respondent-Petitioner.

Rasika Balasuriya with Samanthi Dissanayake for
the Respondent-Appellant-Respondent.

ARGUED ON : 22.06.2016.

DECIDED ON : 23.11.2016

Sisira J. De Abrew, J.

The applicant-respondent-petitioner (hereinafter referred to as the applicant-petitioner) filed a case in the Labour Tribunal asking for compensation for unlawful termination of his services by the respondent-appellant-respondent (hereinafter referred to as the respondent company).

The learned President of the Labour Tribunal by his order dated 16.03.2011 granted compensation for unlawful termination of services of the applicant-petitioner. Being aggrieved by the said order of the President of the Labour Tribunal, the respondent company appealed to the High Court and the High Court by its order dated 01.11.2013 set aside the order of the learned President of the Labour Tribunal. Being aggrieved by the said order, the applicant-petitioner has filed this appeal. This Court by its order dated 21.01.2015 granted leave to appeal on the following questions of law set out in paragraphs 10 (1) to 10 (v) of the petition dated 11.12.2013 which are set out below.

I. Did the learned High Court Judge err in Law by holding, in the absence of evidence before the Tribunal, that Known You Seeds (Pvt) Ltd has not appointed Onesh Trading (Pvt) Ltd as its agent in writing or verbally;

II. Did the learned High Court Judge, in the absence of testimony, err in Law by holding that there is no clear evidence to establish the fact that Onesh Trading (Pvt) Ltd acts on the whole under the control of Known You Seeds (Pvt) Ltd;

III. Did the learned High Court Judge in the absence of acceptable evidence err in law by holding that Known You Seeds (Pvt) Ltd and Onesh Trading (Pvt) Ltd have been incorporated as two different legal entities?

IV. Did the learned High Court Judge, in the absence of reliable testimony, err in law by holding that Known You Seeds (Pvt) Ltd and Onesh Trading (Pvt) Ltd engage in the business of vegetable seed crop production and sales respectively and carry on two distinct business?

V. Did the learned High Court Judge, err in law by setting aside the order of the learned President of the Labour Tribunal dated 16th

March 2011 which order was based on unchallenged facts adduced in evidence before the tribunal.

Although the leave was granted on the above questions of law, both Counsel made submissions on the question whether the applicant-petitioner was an employee of the respondent company. Therefore the main point that must be considered in this case is whether the applicant-petitioner was an employee of the respondent company. The applicant-petitioner, in his evidence, stated that the respondent company was established on 01.05.2009 and he worked in the respondent company from 01.05.2009 and his services were terminated on 21.10.2010. If this evidence is true, he was an employee of the respondent company for the period commencing from 01.05.2009 to 21.10.2010. Although he, in his evidence, stated the above facts, the respondent company has produced a document marked 'R1' to establish that his contributions to the Employees' Provident Fund (EPF) for May 2009 has been paid by a company called 'Known You Seeds (Pvt) Ltd'. This document establishes the fact that the applicant-petitioner was an employee of a company called Known You Seeds (Pvt) Ltd during the month of May 2009. Thus contention of the applicant-petitioner that he was an employee of the respondent company in May 2009 is therefore disproved by the above document. Further the respondent company has produced two Certificates of Incorporation marked 'R10' and 'R11' which establish the fact that Onesh Trading (Pvt) Ltd (respondent company) and Known You Seeds (Pvt) Ltd are two

different companies. The respondent company, in its answer filed in the Labour Tribunal, has stated that the applicant-petitioner was employed from May 2009 to 21.10.2010 by Known You Seeds (Pvt) Ltd. When I consider the above matters, I hold that the applicant-petitioner was not an employee of the respondent company and that he had no basis to file an application in the Labour Tribunal against the respondent company. When I consider the above facts, I hold the view that the application filed by the applicant-petitioner in the Labour Tribunal should have been dismissed.

For the above reasons, I hold the view that the 1st to 4th questions of law do not arise for consideration. I answer the 5th question of law in the negative. For the aforementioned reasons, I hold that the learned High Court Judge was correct when he set aside the order of the learned President of the Labour Tribunal. For the above reasons, I dismiss the appeal. However, when I consider the facts of this case, I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court

Upaly Abeyrathne, J.

I agree.

Judge of the Supreme Court

K.T. Chitrasiri, 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 from the Order of the Court of Appeal dated 6th March, 2013.

SC Appeal No. 16/2014

SC (Spl) LA Application No. 104/2013

CA Writ Application No. 813/2010

1. Dr. K.M.L. Rathnakumara
   No. 50A-9, 6th Lane,
   Hansagiri Road,
   Gampaha.
2. Dr. A.D.S.R.T. Siriwardhana
3. Dr. R. Indralingam
4. Dr. S. I. V. Dahanayake
5. Dr. S.H. Gunathilaka
6. Dr. K.A.P. Thushantha
7. Dr. A.J. Dharmawansa
8. Dr. V. Athukorala
9. Dr. M.G. Jeevathasan
10. Dr. Nirthasaran Sathiyavanj
11. Dr. N. Gallage
12. Dr. S. Kalaialagan
13. Dr. A.S.Hennanayake
14. Dr. G. T. Gunawardena

Petitioners

Vs.

1. The Postgraduate Institute of Medicine,
   No.160, Norris Canal Road,
   Colombo 07.
   And 48 others.

Respondents

AND NOW BETWEEN

1. Dr. K.M.L. Rathnakumara
   No. 50A-9, 6th Lane,
   Hansagiri Road,
   Gampaha.

2. Dr. A.D.S.R.T. Siriwardhana
3. Dr. S.H. Gunathilaka
4. Dr. K.A.P. Thushantha
5. Dr. A.J. Dharmawansa
6. Dr. V. Athukorala
7. Dr. M.G. Jeevathasan
8. Dr. N. Gallage
9. Dr. S. Kalaialagan
10. Dr. A.S.Hennanayake

Petitioners – Appellants

Vs.

1. The Postgraduate Institute of Medicine,
   No.160, Norris Canal Road,
   Colombo 07.
   And 52 others.

Respondents – Respondents

Before : Chandra Ekanayake, J
Priyantha Jayawardena, PC, J
K.T. Chitrasiri, J

Counsel : Faiz Musthapha, PC with Faiza Markar, Ashiq Hassim, Janaka Kroon and M. Imthiyaz for Appellants.
Farzana Jameel, Senior DSG with Yuresha de Silva, SSC for 3rd, 7th, 12th, 13th, 15th, 21st, 23rd, 25th, 28th, 29th, 33rd, 36th, 39th, 41st, 46th and 48th Respondents.

Argued on : 11th January, 2016

Decided on : 30th March, 2016

Priyantha Jayawardena, PC. J,

The Appellants filing their Petition stated that they are medical officers currently practicing in various posts and that they were following a training programme in 'MD (Medicine)' at the Postgraduate Institute of Medicine (hereinafter sometimes referred to as the "PGIM").

The Appellants have filed the writ application bearing No. CA / Writ - 813/2010 in the Court of Appeal challenging the decision to limit the number of attempts that they can sit for the final examination of 'MD (Medicine) / MD Part II'.

The Appellants stated that the University of Colombo, the 49th Respondent was established in terms of the Universities Act No. 16 of 1978 (as amended) (hereinafter referred to as the Universities Act) and the PGIM, the 1st Respondent was established by Ordinance No. 1 of 1980 made by the University Grants Commission under the Universities Act and is governed by a Board of Management. The PGIM being the only authorized institute in Sri Lanka for the specialist training of medical doctors its academic programmes are planned and executed by the Boards of Study with the approval of the University of Colombo.

The Board of Management of the PGIM is the principal administrative, financial and academic authority and is in charge of the power and duty to approve recommendations and reports that have been submitted to it by Boards of Study of the PGIM on all matters connected with the courses of study and examinations, and also to approve and issue draft regulations relating to the courses of study and examinations in the various specialties in medicine.

The Board of Study of the PGIM exercises, inter-alia, the power to draft regulations relating to courses of study in respect of the relevant specialty (i.e. 'MD Medicine') and to submit such drafts to the Board of Management.

The Appellants stated that they being desirous to further their training and study for a programme in 'MD (Medicine)' conducted by the PGIM enrolled for the said programme in 'MD Medicine' which comprises of 5 stages. i.e.;

Stage I – is qualifying exam referred to as "MD Part I (Medicine) Examination / Qualifying Examination" (hereinafter referred to as MD Part I) which qualifies individuals to follow the said "MD (Medicine)" programme.

Stage II – is a training programme titled "Registrar Training" which is an in-service training period of approximately 30 months.

Stage III – is the final examination for the said programme titled "MD (Medicine) Examination" and / or referred to as MD Part II (Medicine) Examination which consists of inter-alia, an essay paper, and a viva voce.

Stage IV – commences upon successful completion of Stage III and consists of training as a "Senior Registrar".

Stage V – consists of training at a foreign teaching centre.

All the Appellants have enrolled for the said programme in 'MD Medicine' after passing the aforesaid Stage I "MD Part I" examination and were served with letters to that effect.

The Appellants stated that;

(a) The 1st Appellant sat for the aforesaid examination in or around October 2002 and commenced the said programme in or around January 2003;

(b) The 2nd to 6th Appellants (2nd to 8th Petitioners in the Writ Application) sat for the aforesaid examination in or around October 2003 and commenced the said programme in or around January 2004; and

(c) The 7th to 10th Appellants (9th to 14th Petitioners in the Writ Application) sat for the same in or around October 2004 and commenced the said programme in or around January 2005.

Consequent to successful completion of the MD Part I examination, the Appellants were summoned to the PGIM for "Allocation of Trainees in Medicine for Training Units" and assigned to the units that they would be trained at and were also given the Prospectus – 2003 (Regulations and Guidelines) for the said programme.

According to the Appellants, all the Appellants were issued with the same Prospectus at the time of commencement of the said programme. The Appellants stated that the said Prospectus made no reference to the number of attempts an individual can sit for the MD Part II examination.

The Appellants commenced following the aforesaid programme in "MD (Medicine)" and participated in the Stage II 'Registrar Training' conducted by the PGIM which consisted of inter-alia training in General Internal Medicine, Cardiology, Neurology, Psychiatry and Dermatology lasting approximately 30 months.

Upon the successful completion of the training period required for Stage II and having all requisite eligibility criteria for entry into Stage III the Appellants applied and sat for the same which consists of inter-alia, an essay paper, case histories, data and slide interpretations and viva voce. The Appellants were able to successfully complete the essay paper and only some other components of the examination, thus failing the entire exam and requiring that they re-sit the same.

Accordingly, the 1st Appellant's first attempt of the aforesaid examination was in or around July 2005. The 2nd to 6th Appellants' (2nd to 8th Petitioners' in the Writ Application) first attempt of the aforesaid examination was in or around July 2006. The 7th to 10th Appellants' (

9th to 14th Petitioners' in the Writ Application) first attempt of the aforesaid examination was in or around July 2007.

The 1st Appellant's sixth attempt was in or around February 2008. The 2nd to 6th Appellants' (2nd to 8th Petitioners' in the Writ Application) sixth attempt was in or around February 2009. The 7th – 10th Appellants' (9th to 14th Petitioners' in the Writ Application) sixth attempt was in or around February 2010.

However, the Appellants after six attempts at the aforesaid MD Part II were still unsuccessful in passing all the components of the examination. After the sixth attempt at the aforesaid examination they were informed that they had exhausted six attempts at the said examination and therefore could not make another attempt for the same.

The Appellants produced the copies of some of the said letters informing the Appellants that they had exhausted their six attempts marked as P4(a), P4(b), P4(c) and P4(d).

Consequent to several inquiries the Appellants became aware that a new Prospectus (Regulations and Guidelines) for MD (Medicine) – 2005 had been issued by the PGIM stipulating that only six attempts are permitted for the successful completion of the final MD (Medicine) Examination (MD Part II). Further, it applied retrospectively i.e. with effect from 01.01.2004.

The Appellants stated that the said new Prospectus also provided that " a continuous assessment of the trainee will take place at regular intervals " during Stage II and that marks awarded will be carried forward to the MD Part II.

Moreover, the PGIM has issued Circular No. 49/2008 which indicated that candidates for the MD Part II are allowed only 6 attempts has expressly excluded those candidates who have sat for the MD Part I examination before 1998 and according to Appellants they are unaware as to any justification for such categorization.

The Appellants contended that at the time of the introduction of the said new Prospectus, they had already been enrolled at the PGIM and had passed MD Part I examination and were subjected to the former Prospectus – 2003 and therefore, the said decision to limit the number of attempts cannot be applied to them.

The Appellants stated that on or around 03.12.2009 the aforementioned Appellants met the 35th Respondent then Chairman, Dr. M.K. Rangunathan and informed him about the restrictions placed on the number of attempts for sitting the final examination (i.e., MD Part II). The said 35th Respondent Chairman in fact assured the Appellants that the matter would be raised at the next Board Meeting. The Appellants requested that the said repositioning be cancelled, but to no avail.

In the circumstances, the Appellants filed a Writ Application in the Court of Appeal and prayed inter-alia for;

(a) a Writ of Certiorari quashing the decision(s) contained in the Prospectus and Circulars marked P5 read with P6 insofar as they are applicable;

(b) a Writ of Certiorari, quashing the decision(s) contained in the letters marked P4(a) to P4(d) and all similar letters received by the Appellants; and

(c) a Writ of Prohibition, preventing the application of the new Prospectus and Circulars marked P5 read with P6 above, to the Appellants.

The 1st – 27th and 35th – 48th Respondents filed their Statement of Objections in the Court of Appeal and stated inter alia that;

(a) the 1st Appellant enrolled for the MD (Medicine) Programme on 1.1.2003, the 2nd to 6th Appellants (2nd - 8th Petitioners in the Writ Application) on 1.1.2004 and the 7th to 10th Appellants on 1.1.2005 (9th – 14th Petitioners in the Writ Application),

(b) the Board of Management is the academic and executive body of the PGIM and the Boards of Study is in charge of general direction of instruction, education, research and examinations in respect of each specialty in medicine,

(c) the 'MD (Medicine)' programme in 'MD Medicine' consists of 5 stages, which have been designed to provide a trainee with a comprehensive training in various aspects of Internal Medicine,

(d) in addition to the Prospectus – 2003 containing Regulations and Guidelines for MD (Medicine) marked as P3, circulars are also issued pertaining to policy decisions of the Institute which are published in the website maintained by the Institute,

(e) the Prospectus containing Regulations and Guidelines for MD (Medicine) marked as " P5 " was issued in the year 2005, with retrospective effect from 1.1.2004,

(f) Prospectus marked as P5 contained the restriction that only six attempts would be allowed at the MD (Medicine) Part II examination,

(g) the 1st Appellant's sixth attempt was in January 2008, 2nd and 4th to 6th Appellants' (2nd - 4th and 6th – 8th Petitioners' in the Writ Application) sixth attempt was in February 2009, 3rd Appellant's (5th Petitioner's in the Writ Application) sixth attempt was in July/August 2009 and 7th to 10th Appellants' (9th to 14th Petitioners' in the Writ Application) sixth attempt was in February/March 2010,

(h) the Appellants sat for the said examination under the new Prospectus, marked as " P5 ", which contained the aforementioned restriction,

(i) upon the Appellants exhausting all six attempts, they were informed of same,

(j) each Board of Study formulates regulations and guidelines that are required / necessary for each discipline of medicine and such regulations and guidelines in that regard vary from discipline to discipline,

(k) as per the procedure stipulated in the Ordinance, the Board of Management is empowered to draft regulations pertaining to courses of study and examinations upon considering the Reports submitted by the relevant Board of Study, which have to be submitted to the Senate of the University for its approval, and

(l) the Circular No. 49/2008 was issued by the Institute on the 13th August 2008 (P6), stating that the said restriction does not apply to those who sat for the MD Part I examination before 1998.

After the hearing of the Writ Application the Court of Appeal delivered the judgment dismissing the Appellants' application.

In the said judgment the Court of Appeal inter-alia held that " the decision to restrict the number of attempts a candidate can sit for the final examination of MD (Medicine) (MD Part 2) is based on a policy decision, of the Senate of the University. The Board of Management is empowered to draft regulations on training pertaining to the course of study and examination upon considering the reports submitted by the relevant Board of Study and these regulations are approved by the Senate of the University. In relation to policy matters, the court cannot interfere as these matters cannot be considered as exercising judicial or quasi judicial power. For the above reasons the application for a writ of certiorari is refused. "

Being aggrieved by the said judgment of the Court of Appeal the Appellants filed a special leave to appeal application in this Court. The Appellants prayed inter-alia for;

(a) the setting aside of the said judgment of the Court of Appeal dated 06.03.2013;

(b) an interim Order staying the operation of the said judgment of the Court of Appeal dated 06.03.2013 and the decisions contained in P4(a) to P4(d) read with documents marked P5 and P6, in so far as it relates to the Appellants; pending the final determination of this application;

(c) a Writ of Certiorari quashing the decisions contained in the Prospectus (P5) and the Circular (P6), in so far as it relates to the Appellants;

(d) a Writ of Certiorari quashing the decisions contained in letters marked as P4(a) – P4(d) and all similar letters, in so far as it relates to the Appellants;

(e) a Writ of Prohibition, preventing the application of the new Prospectus and Circular, marked P5 read with P6 to the Appellants.

This Court has granted special leave to appeal on the following questions of law;

(a) Did the Court of Appeal err in law in applying the Prospectus (P5) to the Appellants retrospectively?

(b) Did the Court of Appeal err in failing to appreciate that the Appellants had a legitimate expectation that the Prospectus applicable to them was the Prospectus produced marked as P3, which was in operation at the time they commenced the course?

(c) Did the Court of Appeal fall into error by coming to a finding that the said decision as reflected in the Prospectus (P5), to restrict the number of attempts permitted to sit for the Final Examination of MD Medicine (MD Part II) is based on a "policy decision" and therefore not amenable to writ jurisdiction?

(d) Did the Court of Appeal err in failing to take cognizance of the fact that, in terms of Ordinance No. 01 of 1980, the Board of Management of the Postgraduate Institute of Medicine is empowered to make Regulations relating to the courses of study in respect of the relevant specialties, and as such, the said Board was amenable to the writ jurisdiction of the Court of Appeal?

The learned Deputy Solicitor General invited the Court to decide the following substantive question of law on behalf of the Respondents;

(e) Can a substantive legitimate expectation arise in the absence of an express undertaking by the relevant authority on a matter of policy?

Thereafter, this appeal was taken up for hearing and both parties filed their respective written submissions.

During the course of the hearing of this appeal parties admitted the following;

(a) the Appellants enrolled for the training and study for the programme in 'MD (Medicine)' conducted by the PGIM which consists of 5 stages with two examinations,

(b) the 1st Appellant enrolled for the MD (Medicine) Programme on 1.1.2003, the 2nd, 3rd, 4th, 5th and 6th Appellants (2nd - 8th Petitioners in the Writ Application) on 1.1.2004 and the 7th to 10th Appellants (9th – 14th Petitioners in the Writ Application) on 1.1.2005,

(c) all the Appellants were furnished with the Regulations and Training Program – MD (Medicine) issued by the PGIM of the University of Colombo (hereinafter referred to as the Prospectus) issued in 2003 marked as " P3 " at the time of commencement of the said programme. The said Prospectus made no reference to the number of attempts that an individual can sit for the MD Part II examination,

(d) a new Prospectus (Regulations and Guidelines) for MD (Medicine) marked as " P5 " had been issued in the year 2005 by the PGIM stipulating that only six attempts are permitted for the successful completion of the final MD (Medicine) Examination / MD Part II. The inner cover of said Prospectus contained the following;

" ***This prospectus is applicable from 1.1.2004*** ", [emphasis added]

(e) both the said Prospectus contained the following Clause;

" ***The prospectus is subject to revision from time to time. Adequate notice will be given of such changes***. ",

(f) the 1st Appellant's sixth attempt was in January 2008, 2nd and 4th to 6th Appellants' (2nd to 4th and 6th to 8th Petitioners' in the Writ Application) sixth attempt was in February 2009, 3rd Appellant's (5th Petitioner's in the Writ Application) sixth attempt was in July/August 2009 and 7th to 10th Appellants' (9th to 14th Petitioners' in the Writ Application) sixth attempt was in February/March 2010,

(g) On the 13th of August, 2008 PGIM issued the Circular No. 49/2008 in respect of MD (Medicine) examination – February / March, 2009. Clause No. 6 stated;

" ***Please note that candidates are allowed only 6 attempts at the Part II which must be made within a period of 8 years from the date of passing the Part I or equivalent examination to the said qualification. This requirement does not apply to those candidates who have sat the MD (Medicine) Part I examination before 1998.*** ", and

(h) after the sixth attempt at the aforesaid exam the Appellants were informed that they had exhausted six attempts at the said examination.

Is the restriction imposed on number of attempts at MD (Medicine) II stated in Prospectus – 2005 (P5) applicable to the Appellants ?

At the time the Appellants enrolled at the PGIM for the 'MD Medicine' programme the Prospectus – 2003 (P3) was applicable to the Appellants which contained the regulations and training programmes relating to MD Medicine Board Certification in General Medicine and Allied Specialties etc. All the Appellants registered for the MD Medicine Programme under the said Prospectus. Accordingly, the Appellants have all commenced and completed Stage I and II of MD Medicine under the old Prospectus.

The said Prospectus – 2003 made no reference to the number of attempts that an individual can sit for the MD Part II examination.

It is important to note that both the said Prospectus contained the following Clause;

*" **The prospectus is subject to revision from time to time. Adequate notice will be given of such changes.** "* [emphasis added]

The Prospectus issued in the year 2005 contains the following Clause;

" **4.3 STAGE III (MD Exam)**

4.3.1 ……

4.3.2 The eligibility for entry to this examination will be -

(g) Only six attempts will be allowed within a period 8 years from the date of passing Part 1. *"* [emphasis added]

Some of the Appellants were informed the detailed results of the MD (Medicine) Examination held in February / March, 2010 by letters of 20th April, 2010. The said letters marked as "P4(a)" to "P4(d)" stated that the Appellants had been unsuccessful in the above examination. The letter further stated " ***Please note that you have already exhausted six attempts*** ".

Though prospectus issued in the year 2003 stated " ***The prospectus is subject to revision from time to time. Adequate notice will be given of such changes.*** " no notice had been given that the regulations and guidelines stipulated in the Prospectus – 2003 would be revised prior to publishing the Prospectus in the year 2005.

Further, the Prospectus – 2005 neither contained any transitional provisions with regard to the candidates who registered and commenced the program in MD (Medicine) under the Prospectus – 2003 nor had any reference to such candidates what so ever. Moreover, the Prospectus did not refer to the Prospectus – 2003 at all.

Thornton's Legislative Drafting (Fifth Edition) by Professor Helen Xanthaki at page 532 states " Where subordinate legislation is to contain repeal provisions, the necessity for savings and transitional provisions must be considered in the same way as if that legislation were principal legislation.

The same style and technique should be adopted for the amendment and repeal of subordinate legislation as for principal legislation. It is usual to 'revoke' rules and regulations and to 'cancel' notices and orders but the function is that of repeal and there seems no good reason why that word should not be used for subordinate as well as principal legislation. "

Amending provisions are not construed as altering completely the character of the principal law unless clear language is found indicating such an intention. In the absence of any reference to the previous Prospectus, the Prospectus – 2005 cannot be construed as an amendment or a replacement of the Prospectus – 2003.

Therefore, I am of the opinion that the Prospectus issued in the year 2005 did not replace or amend the Prospectus – 2003 and, thus the Prospectus issued in the year 2005 has no application to the candidates who registered for the MD (Medicine) program under the Prospectus – 2003.

Can the Subordinate Legislation be enacted with Retrospective effect ?

Article 76 (3) of the Constitution of Sri Lanka permits the Parliament to make any law containing any provision empowering any person or body to make subordinate legislation for prescribed purposes.

Article 75 of the said Constitution states that the Parliament shall have power to make laws, including laws having retrospective effect. Sri Lankan Legislature enacted the Offences against Aircraft Act No. 24 of 1982 with retrospective effect under this Article.

Section 17 of the Interpretation Ordinance stipulates the general provisions with respect to power given to any authority to make rules, regulations, and by-laws.

Thornton's Legislative Drafting at page 424 says " Delegated legislation may have retrospective effect only if the primary legislation containing the delegation either has that effect or authorities the delegated legislation to have that effect, ' … no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act.' " This principle was adapted by Sharvananda J. in the case of ***the Attorney – General of Ceylon and W.M. Fernando, Honorary Secretary, Galle Gymkhana Club*** **79 (1) NLR 39.**

Constitutional and Administrative Law of Sri Lanka by Joseph A. L. Cooray at page 329 says " The doctrine that subordinate legislation is invalid if it is *ultra vires* is based on the principle that subordinate agency has no power to legislate other than such as may have expressly been conferred by the supreme Legislature. Subordinate legislation is fundamentally of a derivative nature and must be exercised within the periphery of the power conferred by the enabling Act. For example, subordinate legislation having retrospective effect is *ultra vires* unless the enabling Act expressly or by necessary implication authorizes the making of retrospective subordinate legislation. "

At page 323 of the said book states " Unless Parliament has in the enabling or parent Act expressly or impliedly authorized the sub-delegation, the maxim *delegatus non potest delegare* applies to make the sub-delegation unlawful. "

The Postgraduate Institute of Medicine was established by the Ordinance No. 1 of 1980 made by the University Grants Commission (hereinafter referred to as the UGC) under the Universities Act No. 16 of 1978 as amended. However, the said Universities Act did not delegate power to the UGC to make Regulations or Ordinances with retrospective effect.

Hence, UGC has no authority or power to delegate the power to the PGIM to make Regulations with retrospective effect. In fact the said Ordinance did not confer power on the PGIM to make Regulations with retrospective effect. Thus, PGIM has no power to make Regulations with retrospective effect.

Moreover, the inner cover of the Prospectus – 2005 states " This Prospectus is applicable from 01.01.2004 ". However, in order to give retrospective effect to principal legislation or to subordinate legislation it is necessary to have a specific clause to that effect in the operative part of such legislation. A statement in an inner cover, outer cover or a foot note would not satisfy such criteria.

Therefore, though the Prospectus (Regulations and Guidelines) for MD (Medicine) marked as " P5 " is issued in the year 2005 it cannot be applied with effect from 1.1.2004. i.e. with retrospective effect.

Thus, the limitation of attempts at the MD Part II examination stipulated in the said Prospectus – 2005 has no application to the candidates who registered for the MD (Medicine) programme under regulations and guidelines stated in the Prospectus – 2003.

Can the Subsidiary Legislation give rise to a Legitimate Expectation ?

The Appellants enrolled for the training and study for a programme in 'MD (Medicine)' conducted by the PGIM which consists of 5 stages with two examinations. All the Appellants were issued with the same Prospectus (Regulations and Training Program) – MD (Medicine) issued by the PGIM (hereinafter referred to as the Prospectus) issued in 2003 marked as " P3 " at the time of commencement of the said programme. The said Prospectus made no reference to the number of attempts an individual can sit for the MD Part II examination. A new Prospectus (Regulations and Guidelines) for MD (Medicine) – 2005 marked as " P5 " had been issued by the PGIM stipulating that only six attempts are permitted for the successful completion of the final MD (Medicine) Examination/ MD Part II in the year 2005. By the time the Prospectus marked as " P5 " was issued the Appellants had completed part of their MD (Medicine) program under the Prospectus marked as " P3 " issued in 2003.

Though prospectus issued in the year 2003 stated " ***The prospectus is subject to revision from time to time. Adequate notice will be given of such changes.*** " no notice had been given of any change of the said Prospectus – 2003.

Section 6 (1) of the Interpretation Ordinance states " Whenever any written law repealing either in whole or part a former written law is itself repealed, such repeal shall not, in the absence of any express provision to that effect, revive or be deemed to have revived the repealed written law, or any right, office, privilege, matter, or thing not in force or existing when the repealing written law comes into operation.

(2) …….

(3) 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.

(4) Subsection (3) shall apply in the case of the expiration of any written law in like manner as though that written law had been repealed and had not expired.

(5) …… ”

Though the aforementioned section has no direct bearing to the instant appeal as the instant appeal is in respect of subordinate legislation, any person who commences an act under a particular “Regulation” has an expectation to finish the same under the same terms and conditions stated in the said Regulations. Thus, it gives rise to a legitimate expectation for such persons to complete their actions under the same terms and conditions.

However, the regulations can be amended or rescinded by giving reasonable prior notice unless the circumstances warrant an immediate change of the regulations. In fact, keeping in line with this principle both the Prospectus contained a Clause which stated that an adequate notice will be given of any changes.

It is important to note that the 1st Appellant’s sixth attempt was in January 2008, 2nd and 4th to 6th Appellants’ (2nd - 4th and 6th – 8th Petitioners’ in the Writ Application) sixth attempt was in February 2009, 3rd Appellant’s (5th Petitioner’s in the Writ Application) sixth attempt was in July/August 2009 and 7th to 10th Appellants’ (9th - 14th Petitioners’ in the Writ Application) sixth attempt was in February/March 2010. After the sixth attempt at the aforesaid exam the Appellants were informed that they had exhausted six attempts at the said examination.

Therefore, imposing a restriction on the number of attempts at the MD (Medicine) without giving adequate prior notice, is a violation of the legitimate expectation of the Appellants.

Further, though the Appellants sat for the MD (Medicine) examination after the new Prospectus marked as P5 which contained the aforementioned restriction was published in the

year 2005, there is no material before Court that the Appellants sat for the said examination under the said Regulations stipulated in the said Prospectus.

Moreover, Clause 6 of the Circular No. 49/2008 issued in respect of MD (Medicine examination – February / March, 2009 by the PGIM on the 13th of August, 2008 exempted the candidates who sat for the MD (Medicine) Part I examination before 1998 from the six attempts rule.

Both the Prospectus contained Regulations relating to the MD (Medicine) Program which are subordinate legislation. Therefore, it is not possible to amend the subordinate legislation by circulars or by notices published on web-sites. Hence, the said Clause 6 of the Circular No. 49/2008 has no force and effect in law and is a nullity.

Are the Subordinate Legislation subject to Judicial Review ?

The PGIM was established by Ordinance No. 1 of 1980 made by the University Grants Commission under section 140 read with section 18 of the Universities Act No. 16 of 1978.

Section 12 of PGIM Ordinance No. 1 of 1980 provides inter-alia as follows;

‘‘

(1) Subject to the provision of the Act and of any appropriate Instrument, the Board shall exercise the powers and perform and discharge the duties and functions conferred or imposed on, or assigned to, the Institute by this Ordinance.

(2) Subject to the provisions of the Act and of any appropriate Instrument, the Board shall have control and general direction of instruction, education, research and examinations in the Institute.

(3) Without prejudice to the generality of the powers conferred upon it by sub-paragraphs (1) and (2), the Board shall exercise, perform and discharge the following powers, duties and functions –

(g) to recommend to the University, in consultation with the Board or Boards of Study concerned, the postgraduate degrees, diplomas, certificates and other academic distinctions which shall be awarded in the several specialties in medicine, and the courses of study and training to be followed, the examinations to be passed and other conditions to be satisfied by students who wish to qualify for such degrees, diplomas, certificates and other academic distinctions;

(i) to draft, after consideration of reports from the Board or Boards of Study concerned, Regulations relating to courses of study and examinations, and to submit such drafts to the Senate of the University for enactment;

(j) to draft Rules for any matter in respect of which Rules are authorized to be made or may be made and to submit such drafts to the Council or the Senate as the case may be, of the University for enactment; ”

The legislation made under a delegated power is known as subordinate legislation / delegated legislation. Though a principal enactment can contain the policy matters, subordinate legislation cannot contain policies. Further, subordinate legislation can be made only to facilitate the implementation of the principal enactment and to achieve its objects. Moreover, subordinate legislation cannot be made to implement a decision of a policy other than the policy stated in a principal enactment.

Thus, it cannot be said the said clause as reflected in the Prospectus (P5), to restrict the number of attempts permitted to sit for the Final Examination of MD Medicine (MD Part II) is based on a “policy decision” and thus, it is not amenable to judicial review. In any event, such restriction on the number of attempts is a condition in the regulations that is applicable to the candidates and affects their rights.

Article 80(3) of the Constitution “ Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever. ”

Unlike for the principal legislation there is no statutory prohibition on the jurisdiction of courts to consider the validity of subordinate legislation. Thus, the validity of subordinate legislation is subject to challenge in the courts.

Administrative Law (9th edition) by H.W.R. Wade and C. F. Forsyth at page 746 says “ It is axiomatic that delegated legislation no way partakes of the immunity which Acts of Parliament enjoy from challenge in the courts, for there is a fundamental difference between a sovereign and subordinate law-making power. Even where, as is often the case, a regulation is required to be approved by resolution of both Houses of Parliament, it still falls on the ‘subordinate’ side of the line, so that the court may determine its validity.”

In the case of ***The Ceylon Workers' Congress and Superintendent, Beragala Estate*** **76 NLR 1 at page 8** it was held “ Can a Regulation outside the ambit of Section 39 (1) become valid by reason of the fact that Parliament subsequently approved it ? In our opinion the subsequent approval by the Senate and House of Representatives cannot make valid that which previously was invalid, and it is therefore only an *intra vires* rule approved by Parliament that will be “as valid and effectual as though it were enacted” in the Act. ”

Thornton's Legislative Drafting (Fifth Edition) by Professor Helen Xanthaki states " An attack on the validity of subordinate legislation may be directed against the manner in which the delegated power has been exercised, that is to say it may be argued that the statutory conditions attached to the exercise of the power by the enabling provision or some other law of general application were not fulfilled. Alternatively, it is more likely that an attack may be directed against the content of the subordinate legislation, that is to say it may be argued that the exercise of the power was not in its substance within the scope of the delegated power."

H.W.R. Wade and C. F. Forsyth at page 28 says " The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct ? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted ? On an appeal the question is 'right or wrong ?' On review the question is 'lawful or unlawful ?' "

At page 732 it further says " For the most part, however, administrative legislation governed by the same legal principles that govern administrative action generally. For the purpose of judicial review, statutory interpretation and the doctrine of ultra vires there is common ground throughout both subjects. "

In the case of ***The Attorney – General of Ceylon and W.M. Fernando, Honorary Secretary, Galle Gymkhana Club*** **79 (1) NLR 39** Sharvananda J. held " A clear distinction has to be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in a resolution passed by the House of Representatives, a limb of the Legislature. A Court has no jurisdiction to declare invalid an Act of Parliament, but has jurisdiction to declare subordinate legislation to be invalid if it is satisfied that in making the subordinate legislation, the rule-making authority has acted outside the legislative powers conferred on it by the Act of Parliament under which such legislation is purported to be made. "

At page 329 of the book titled Constitutional and Administrative Law of Sri Lanka states " The legal principles governing judicial control of subordinate legislation in relation to the doctrine of *ultra vires* are generally similar to those governing other administrative action. "

It further states " Subordinate legislation may be declared ultra vires and void by the courts on two main grounds: (1) procedural, (2) substantive. "

Moreover, in the case of ***Mixnam's Properties, Ltd. V. Chertsey U.D.C.*** **(1963) 2 All E.R. 787 at 799** Lord Diplock held that " the various special grounds on which subordinate legislation has been said to be *ultra vires* and void – e.g. because it is unreasonable; because it is uncertain, because it is repugnant to the general law or to some other statute. "

Where the executive has been allowed by the legislative to make law, it must abide strictly by the terms of its delegated authority. The subordinate legislation can be challenged on the

basis that it is ultra vires and therefore void because it does not fall within the scope of what is authorized by the enabling power.

There are many instances where Sri Lankan courts have declared the regulations ultra vires when the regulations were made exceeding the power or authority given by the principal enactment.

In the case of ***The Ceylon Workers' Congress v. Superintendent, Beragala Estate*** **76 NLR 1** the court agreeing with the judgment of Weeramantry J. delivered in the case of ***Ram Banda and River Valleys Development Board*** **71 NLR 25** held that Regulation No. 16 is invalid for the reason that it is ultra vires the rule making powers vested in the Minister. The Industrial Dispute Act itself does not contain any provision which limits the time within which an application may be made under section 31 B (1). An unlimited right granted by a statute cannot be validly limited by a regulation without an express power conferred for that purpose by the Act.

Further, in ***King-Emperor v. Benoari Lal Sarma*** **(1945) AC 14 at 24** it was held that there is a presumption that a delegate of legislative power cannot sub-delegate it to another person or body unless sub-delegation of the delegated legislative power is expressly provided for.

However, there is an exception to the aforementioned general rule. Those are the instances where the Legislature itself enacts the relevant regulations as part of an Act. In the case of ***Inspector Joseph v. Sandanam Meenatchy*** **28 NLR 205**, the by-laws in Schedule D of the Ordinance have been enacted by the Legislature as a part of the Ordinance, and the question arose whether these by-laws can be treated and tested in the same way as by-laws made by a Board or Council vested with power to make by-laws for certain specific purpose.

It was held that the by-laws in Schedule D must be treated as an integral part of the Ordinance and as having the same force and effect as the main provision of the Ordinance.

It was further held that the absolute right of the Legislature to enact whatever laws it likes whether in the form of by-laws or otherwise cannot be questioned by courts.

In the instant appeal, in terms of Ordinance No. 01 of 1980, the Board of Management of the Postgraduate Institute of Medicine is empowered to make Regulations relating to the courses of study in respect of the relevant specialties, and as such, the regulations made by said Board are amenable to the judicial review.

In the foregoing circumstances the following questions of law are answered as follows;

(a) Did the Court of Appeal err in law in applying the Prospectus - 2005 (P5) to the Appellants retrospectively?

Yes.

(b) Did the Court of Appeal err in failing to appreciate that the Appellants had a legitimate expectation that the Prospectus applicable to them was the Prospectus produced marked as P3, which was in operation at the time they commenced the course?

Yes. As the Appellants commenced and completed part of their program in MD (Medicine) under the Prospectus – 2003 marked as " P3 ", they entertained a legitimate expectation to complete the said program under the same Prospectus. However, the said Prospectus can be amended or rescinded with reasonable notice.

(c) Did the Court of Appeal fall into error by coming to a finding that the said decision as reflected in the Prospectus (P5), to restrict the number of attempts permitted to sit for the Final Examination of MD Medicine (MD Part II) is based on a "policy decision" and therefore not amenable to writ jurisdiction?

Yes. Subordinate Legislation cannot contain policy decisions. In any event, the restriction on the number of attempts is a condition of the regulations.

(d) Did the Court of Appeal err in failing to take cognizance of the fact that, in terms of Ordinance No. 01 of 1980, the Board of Management of the Postgraduate Institute of Medicine is empowered to make Regulations relating to the courses of study in respect of the relevant specialties, and as such, the said Board was amenable to the writ jurisdiction of the Court of Appeal?

Yes. Subordinate Legislation is not immune from judicial review.

(e) Can a substantive legitimate expectation arise in the absence of an express undertaking by the relevant authority on a matter of policy?

Subordinate Legislation is enacted to effectively exercise, perform and discharge powers, duties and functions under a principal enactment. As such the Subordinate Legislation cannot contain a " policy " and a legitimate expectation may arise based on the contents of the Subordinate Legislation.

For the reasons stated above I set aside the said judgment of the Court of Appeal dated 06.03.2013.

It is not necessary to issue a Writ of Certiorari quashing the number of attempts contained in the Prospectus – 2005 marked as " P5 " and the Circular marked as " P6 " or to issue a Writ of Prohibition, preventing the application of the said Prospectus – 2005 and the said Circular, to the Appellants as they are not applicable to the Appellants.

I issue a Writ of Certiorari quashing the following decision contained in letters marked as P4(a) – P4(d). i.e. " **Please note that you have already exhausted six attempts** ".

Subject to the above I allow the appeal without costs.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree

Judge of the Supreme Court

K.T. Chitrasiri, J.

I agree

Judge of the Supreme Court

THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Special Leave to Appeal under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Roylin Fernando,
Borelessa, Lunuwila

Plaintiff

SC/APPEAL No.18A/09

SC/HC/CALA No. 138/08.

NWP/HCCA/KUR No.15/2008(LA)

D.C.Marawila Case No.1133/L.

vs.

1. W.A.Christian Gamini Fernando,
of Shantha Sevana,
Nainamadama -West
Nainamadama

Waduge Henry Livera

Warnakulasuriya Mary Sarijini
both of Dummaladeniya West,
Wennappuwa

Waduge Anuradha Livera

Waduge Nimala Rosary Livera
both of 36, Main Street,
Nuwara Eliya

1st to 5th Defendants

AND

Roylin Fernando,
Borelessa, Lunuwila

Plaintiff-Petitioner

vs.

1. W.A.Christian Gamini Fernando,
   of Shantha Sevana,
   Nainamadama -West
   Nainamadama

2. Waduge Henry Livera

3. Warnakulasuriya Mary Sarijini

both of Dummaladeniya West,
Wennappuwa.

4. Waduge Anuradha Livera

5. Rosary Livera

both of 36, Main Street,
Nuwara Eliya

1st to 5th Defendants-Respondents

AND NOW BETWEEN

Roylin Fernando,

Borelessa, Lunuwila

Plaintiff-Petitioner-Petitioner

vs.

1. W.A.Christian Gamini Fernando,
   of Shantha Sevana,
   Nainamadama -West
   Nainamadama

2 Waduge Henry Livera

3. Warnakulasuriya Mary Sarijini

both of Dummaladeniya West.
Wennappuwa.

4. Waduge Anuradha Livera

5. Waduge Nimala Rosary Livera

both of 36, Main Street,
Nuwara Eliya

1st to 5th Defendants-Respondents-Respondents

Before: Chandra Ekanayake Acting C.J,
Aluwihare PC J &
Anil Gooneratne, J

Counsel: Ranjan Gooneratne, Attorney-at-Law for
Plaintiff -Petitioner – Appellant
Kalinga Dias Abeysinghe, Attorney-at-Law
for 2 Defendant-Respondent-Respondent

Written Submissions tendered on: 16th July 2009 (by 2nd Defendant-Respondent-Respondent)
4th May 2009 (by Plaintiff-Petitioner-Appellant)

Decided on: 04.03.2016.

Chandra Ekanayake, Acting C.J,

The plaintiff -petitioner-appellant (hereinafter referred to as the plaintiff) by petition to this Court dated 06.11.2008 supported by her affidavit of the same date had moved for Leave

to Appeal against the judgement of High Court of Civil Appeal of the North Western Province (holden in Kurunegala) dated 25.09.2008 (X14), to set aside the same and to direct the District Judge of Marawila to accept the amended plaint dated 18.10.2007. When the above application was supported this Court by its order dated 27.03.2009 had granted leave to appeal on the questions of law set out in paragraph 16(a) to (c) of the above mentioned petition to this Court dated 06.11.2008. The above questions of law are reproduced below:

16 (a) the said order is contrary to law and against the weight of the evidence,

(b) the insertion of the wrong date by the Justice of Peace after attesting the affidavit, cannot vitiate the affidavit,

(c) that the insertion of the wrong date is clearly a clerical error.

The 2nd defendant -respondent-respondent shall be hereinafter referred to as the 2nd defendant.

The impugned judgement of the High Court of Civil Appeal dated 25.09.2008 was delivered after considering an application for leave to appeal against the order of the Learned Additional District Judge of Marawila dated 05.06.2008. When this order was assailed by the plaintiff in the High Court of Civil Appeal, on the date of support for leave to appeal an objection had been raised on behalf of 2nd and 3rd defendant-respondent-respondents on the basis that there was no valid affidavit before that Court for the reason that the affidavit tendered to that Court in support of the petition as required by provisions of section 757(1) of the Civil Procedure Code was an affidavit dated 20.06.2006 (X11) sworn prior to the date in the petition to that Court. By the above petition the plaintiff had sought leave to appeal against the order of Additional District Judge dated 05.06.2008, to set aside the same and to direct the District Court of Marawila to accept the amended plaint dated 18.10.2007.

The date in the petition (X10) is given as -- June 2008 (only with month and the year). The affidavit of the plaintiff is one dated 20.06.2006. The above affidavit appears to have been sworn on 20.06.2006 at Chilaw (as per the jurat of the said affidavit). Learned High Court Judges having examined the aforesaid affidavit at page 3 of the judgement have proceeded to state as follows:

> "It is the duty of Justice of the Peace who administers the oath or affirmation to include the date on which the affidavit was signed, in the jurat. If the impugned affidavit was read over and explained to the plaintiff

as stated in the jurat she could have noticed the mistakes referred to above and corrected them before signing it. Therefore the only conclusion one could arrive at is that the impugned affidavit had not been read over and explained to the plaintiff before signing it. The Justice of the Peace who administered the oath had not been careful enough to read and understand the jurat if it was already there when the affidavit was brought to him for administration of the oath.

In the circumstances it cannot be held that mistakes found in the impugned affidavit are mere clerical errors."

In my view necessity has now arisen to consider section 757 (1) of the Civil Procedure Code which deals with the procedure in respect of applications for leave to appeal. The above sub section is reproduced below:

" 757(1). Every application for leave to appeal against an order of Court made in the course of any civil action, preceding 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 require for service on the respondents."

As per the above sub section every application for leave to appeal against an order of Court made in the course of any civil action, ... shall be made by way of a petition by the party aggrieved or his registered attorney and such petition shall be supported by affidavit, and shall contain the particulars required by section 758. In the case at hand the supporting affidavit of the plaintiff appears to have been sworn on 20.06.2006 at Chilaw. However no material is available to ascertain the date of filing of the said petition of – June 2008(X10).

At the stage of making submissions before the High Court of Civil Appeal the learned counsel for the plaintiff had heavily laid stress on the submission that the place and the date on which the affidavit was signed need not necessarily be in the jurat and it is not an essential requirement. Learned High Court Judges having carefully examined the pronouncement made in Thiyarasa vs Arunodayam 1987 (2SLR) 184 - which too being an authority on which the Counsel for the plaintiff placed heavy reliance, had quite correctly concluded that unlike a notarially executed deed, an affidavit is sworn evidence and the wrong date may not vitiate a deed but it affects the validity of an affidavit. On the other hand if the affidavit in question was in fact read over and explained to the plaintiff before signing the same she could have easily noticed the mistake with regard to the date appearing in the affidavit. According to section 757(1) also an affidavit should be filed to support the averments in the petition. It is noted that the words used in the above sub-section are also to the effect that such petition shall be supported by affidavit. In this instance it has become amply clear that when the date of swearing the affidavit is 20.06.2006, the petition of - June 2008 could not have been in existence when the affidavit was signed.

In this regard it would be pertinent to consider the observation by His. Lordship G P S de Silva J, in the case of De Silva vs L B Finance 1993 (1SLR) 371 to the effect that the place and the date on which an affidavit was signed is an essential requirement of an affidavit.

According to The New Shorter Oxford English Dictionary on Historical Principles. Edited by : Lesley Brown. Vol.2 N - Z – 1993 at page 3153 'support' means -

"Provide authority for or corroboration of (a statement etc.); bear out, substantiate."

In this case the affidavit in question has been sworn almost 2 years prior to the date of the petition. The petition to High Court (X10) only gives the year and the month. Since the affidavit appears to have been sworn on 20.06.2006 in no circumstance could it be considered to be an affidavit supporting the facts averred in the petition X10. Further there is no material available to conclude that this was occasioned due to a clerical error. For the above reasons the affidavit cannot be considered as an affidavit supporting the petition as contemplated in section 757(1) of Civil Procedure Code.

In view of the foregoing, I see no basis to interfere with the findings in the impugned judgement of the High Court of Civil Appeal. I proceed to answer all questions of law on which leave to appeal

was granted against the Plaintiff. The impugned judgement of the High Court of Civil Appeal dated 25.09.2008 is therefore affirmed. This appeal is hereby dismissed. In all circumstances of this case no order is made with regard to costs .

Acting Chief Justice.

Aluwihare 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 Appeal with Special Leave to Appeal granted by Supreme Court under Article 128 read with Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 22/2012

SC.(Spl) LA. No. 12/2011
C.A. (Writ) Application No.99/2006

Mercantile Investments Ltd.,
236, Galle Road, Colombo 03.

Petitioner

Vs.

1. J.A. Sumith Adhihetty,
   No. 1, Cambridge Terrace.
   Colombo 7.

2. Mahinda Madihahewa,
   Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat, Colombo 05.

3. Minister of Labour
   Department of Labour,
   Labour Secretariat, Colombo 05.

4. T. Piyasoma Esq.,
   The Arbitrator,
   9th Floor, Industrial Court,
   Department of Labour,
   Labour Secretariat, Colombo 05.

Respondents

And Now Between

J.A. Sumith Adhihetty,
No. 1, Cambridge Terrace.
Colombo 7.

Respondent-Appellant

Vs.

Mercantile Investments Ltd.,
236, Galle Road, Colombo 03.

Petitioner-Respondent

1. Mahinda Madihahewa,
   Commissioner General of Labour,
   Department of Labour,
   Labour Secretariat, Colombo 05.

2. Minister of Labour
   Department of Labour,
   Labour Secretariat, Colombo 05.

3. T. Piyasoma Esq.,
   The Arbitrator,
   9th Floor, Industrial Court,
   Department of Labour,
   Labour Secretariat, Colombo 05.

Respondent-Respondents

****

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

Upaly Abeyratne,J. &

Anil Gooneratne, J.

COUNSEL : I.S.de Silva with Deeptha Perera for the Respondent-Appellant.

Nigel Hatch PC. with Ms. S. Illangage for the Petitioner-Respondent.

Mrs. Murdu Fernando,PC. ASG. With Rajitha Perera for Respondent-Respondents.

ARGUED ON : **03.12.2015**

DECIDED ON : **15 .02.2016**

*** * * * ***

EVA WANASUNDERA, PC.J.

In this matter, this Court granted Special Leave to Appeal on 30.01.2012 on the questions of law set out in paragraph 39(a) to (c) of the amended Petition dated 06.07.2011. They are as follows:-

39(a) Have the Learned Judges of the Court of Appeal misdirected themselves in law when they proceeded to hold that as the Petitioner had claimed to be in the employment of the Respondent at the time of referred to arbitration the said reference was bad in law?

(b) Have the Learned Judges of the Court of Appeal misdirected themselves in law when they held that despite the long participation at the arbitral proceedings, the Respondent was entitled to canvass the fact that the reference to arbitration was bad in law?

(c) Have the Learned Judges of the Court of Appeal erred in law when they proceeded to consider matters irrelevant to the proper issue before their Lordships'?

The facts can be summarized as follows:-

J.A. Sumith Adhihetty, the Respondent-Appellant (hereinafter referred to as the 'Appellant'), was an employee of Mercantile Investments Ltd., the Petitioner-Respondent Company (hereinafter referred to as the "Respondent"), from the year 1977. The Appellant had joined the Respondent Company as an Accountant and had risen to the post of "General Manager and Executive Deputy Managing Director". On 04.04.2003, he was transferred to the Company's Kohuwala Branch where its garage was situated. The Appellant was dissatisfied with this transfer.

He made representations in this regard to the Commissioner General of Labour, the 1st Respondent-Respondent (hereinafter referred to as the "1st Respondent") by letters dated 05.04.2003 and 09.04.2003. The 1st Respondent called the Appellant for an inquiry to be held on 30.04.2003. Thereafter the Minister of Labour, the 2nd

Respondent-Respondent by notice dated 16.12.2003 referred the matter for arbitration. The matter in dispute, referred to arbitration was, "Whether the deprival of privileges of Mr. J.A. Sumith Adhihetty who joined the Mercantile Investment as an Accountant on 01.10.1977 that he had enjoyed while serving in the post of General Manager and the post of Executive Deputy Managing Director of the Company and the transfer of him to its Kohuwala Branch where the Company's garage is situated with effect from 04.04.2003 is justified and if not, to what relief he is entitled".

Arbitration commenced. Petitioner was giving evidence before the arbitration when the Counsel appearing for the Respondent Company passed away. Thereafter a new Counsel who appeared for the Respondent Company raised two legal objections as follows:-

1. Whether there had been a valid reference of an Industrial Dispute within the meaning of the Industrial Disputes Act? and
2. Whether the arbitrator lacked jurisdiction to entertain, hear and determine the purported industrial dispute referred to him?

The Arbitrator dismissed these objections and directed the arbitration to proceed. The said order is marked P6. It is dated 21.12.2005 and signed by T. Piyasoma, the Arbitrator who is the 3rd Respondent-Respondent to this case before this Court.

The Respondent Company who is the Petitioner-Respondent before this Court sought Writs of Certiorari and Prohibition against this order P6, from the Court of Appeal. The Court of Appeal, by P7, the judgment of the Court of Appeal dated 06.12.2010 set aside the order of the arbitrator and dismissed the arbitration The Appellant sought Special Leave to Appeal against P7 from this Court and Special Leave was granted on 30.01.2012 on the aforementioned questions of law.

It was an admitted fact by both parties that the Appellant joined another Finance Company, namely LB Finance Ltd. with effect **from 10.12.2003,** accepting the post of Director in that Company.

The Minister referred the 'Industrial Dispute' between the Appellant and the Respondent to the Arbitrator **on 16.12.2003.** Therefore ti is apparent that the reference of the Industrial Dispute was done after the Appellant accepted the new occupation. I observe that it is correct to state that the Appellant having accepted the Director Post at LB Finance Ltd., had by himself terminated his services with the Respondent and/or repudiated his contract of employment with the Respondent, **on 10.12.2003.** Therefore, at the time of the Industrial Dispute reference to the Arbitrator, the employment that the Appellant was complaining of, had ended. It is alleged that there was no ' dispute' pending between the employer and the employee on 16.12.2003 to be looked into and given orders to be corrected and/or settled by the arbitrator at the inquiry.

It was also submitted that there is an application before the Labour Tribunal which is still pending which was filed by the Appellant against the Respondent on 25.03.2004 under application No. 1/A/111/04 alleging constructive termination by the Respondent with effect **from 31.12.2003 which date does not seem to be realistic**, as the Appellant was transferred on 04.04.2003; he complained to the Commissioner General of Labour and the Minister referred the matter to the arbitration on 16.12.2003 and he accepted the Director Post in LB Finance Ltd., on 10.12.2003, according to the documents in this brief.

As the arbitrator dismissed the two legal objections taken up by the new counsel of the Respondent company, Mercantile Investments Ltd. , the said Respondent sought to get the order of the arbitrator quashed by way of a writ of certiorari by the Court of Appeal. The Court of Appeal quashed the said order and set it aside and dismissed the arbitration. The Appellant, Mr. Adihetty has come before this Court against the said decision of the Court of Appeal.

The main issue to be resolved seems to be whether the dispute that was referred to arbitration is a 'live dispute' or not in terms of the Industrial Disputes Act. The counsel for the Appellant argued that the dispute can be categorized as a 'live dispute' and the counsel for the Respondent argued that it is not.

The Appellant submitted that **the existence of an employer – employee relationship at the time of the reference to arbitration**, is immaterial for the arbitrator to adjudicate the dispute which arose between the Appellant and the Respondent and that the fact that the dispute arose at the time it occurred was good enough for the arbitrator to decide on the dispute. The Appellant contended that **there should have been a dispute between the employer and the employee at the time the matter was referred to arbitration**. Since the employee was employed with another rival company of the employer at the time of reference of the dispute to the arbitrator the Appellant submitted that it was not possible for the arbitrator to arbitrate as the contract of employment had been brought to an end by the employee himself by that time.

The Industrial Disputes Act which came into existence on the 1st of September, 1951 was amended many times. The title to the Act reads that "it is an Act to provide for the prevention, investigation and **settlement** of Industrial Disputes and for matters connected therewith or incidental thereto".

Section 2 reads:-
Functions of Commissioner in regard to Industrial Disputes.
Where, upon notice given to him or otherwise, the Commissioner is satisfied **that any industrial dispute exists** or is apprehended, it shall be the function of the Commissioner to make such inquiries into the matters in dispute, and to take such other steps, as he may think necessary with a view to promoting a settlement of the dispute, whether by means referred to in this Act or otherwise.

Section 3 reads:-
Powers of Commissioner in regard to Industrial Disputes.

(1) Where the Commissioner is satisfied that **an industrial dispute exists** in any industry, he may

(a) if arrangements for **the settlement of disputes** in that industry have been made in pursuance of any agreement between organizations ……..

(b) **endeavour to settle** the industrial dispute by conciliation or

(c) refer the industrial dispute to an authorized officer **for settlement** by conciliation or

(d) if the parties to the industrial dispute or their representatives consent, refer that dispute by an order in writing **for settlement by arbitration…**……

As can be seen from the aforementioned quoted sections as well as many other sections of the Act, it is my view that the Industrial Disputes Act in totality has been brought about to serve the community involved in industries when they are troubled by some dispute or other. The whole purpose of the act seems to be to resolve the matters by way of attempting to settle disputes which exist between the employer and the employee. The provisions of the Act shows concern about the well being of the workers employed in industries. Most of all, the purpose is **to bring about settlements** between the parties in dispute.

Section 4 reads:

Powers of the Minister in regard to Industrial Disputes.

(1) The Minister may, **if he is of the opinion** that an industrial dispute **is a minor dispute,** refer it, by an order in writing , **for settlement by arbitration** to an arbitrator appointed by the Minister or to a Labour Tribunal, notwithstanding…….

I observe that the Minister had categorized the dispute between the Appellant and the Respondent as **a minor dispute** and referred the matter for arbitration on 16.12.2003. I also endorse the Minister's decision that it is a minor dispute. The question is whether even the minor dispute reference is legally valid.

It is seen from the proceedings before the arbitrator that the Appellant had not divulged that he is re-employed in the rival company of the employer at the time he participated in the arbitration. He had suppressed that fact and had gone on with the arbitration until the new counsel for the Respondent who appeared after the death of the Respondent's former counsel raised the issue that there is no valid reference to the arbitrator done by the Minister as there was no existing dispute to be resolved between the employer and the employee who had repudiated the contract of employment before the reference was done by the Minister.

The argument by the Appellant was that the Respondent has no right to claim that the reference was not valid because he had already participated in the proceedings before the arbitrator. By acquiescence, would an invalid reference be taken as legally valid? Supposing an award was made what is the effect of it? Section 19 is relevant in this regard.

Section 19 reads:-

Effect of an award of an arbitrator.

Every award of an arbitrator made in an industrial dispute and for the time being in force shall for the purposes of this Act, be binding on the parties, trade unions, employers and workmen referred to in the award in accordance with the provisions of Sec. 17(2); and **the terms of the award shall be implied terms in the contract of employment between the employers and workmen** bound by the award.

It is obvious that when an award is made, the terms of the award becomes implied terms attached to the contract of employment. **So, there should be an existing contract of employment for the award to take effect at the time of making the award** at the end of the arbitration. This section presupposes the existence of a valid contract between the employee and the employer.

I find that there was a live dispute to be gone into from the date of the transfer to the time and date on which the Appellant joined another company because the Appellant could be regarded as an employee who wanted to resolve that dispute having resorted to the provisions of the Industrial Disputes Act. The moment that the Appellant joined another company, the dispute that was arisen between the employer Respondent and the employee Appellant and existed till that time, takes a different turn because it cannot be settled between the parties as provided for in the Act. The dispute is not 'live' any more because then the employee is not an employee any more and the relationship between them comes to an end. There is no possibility of 'an award to be taken as implied terms of the contract of employment', according to Sec. 19 of the Act.

The employee will not be without a remedy. He can make an application to the Labour Tribunal for wrongful termination or constructive termination by the employer if it is the

dispute which made him go for employment into another place. In the instant case, the Appellant has filed an application before the Labour Tribunal and it is only laid by until the arbitration comes to an end. This matter cannot be gone into by the arbitrator under dispute resolution since it cannot be settled and an award cannot be implemented as provided for in the Act.

I have considered the case law referred to by the Appellant, namely,

1. Ceylon Printers Vs. Eksath Kamkaru Samithiya (SC. 31/88-SC. Minutes of 11.11.1988),
2. S.B. Perera Vs. Standard Chartered Bank and Others (1992) 1 SLR 73 at Pgs. 83 and 94,
3. Ranin Kumar, Proprietor, Messers Chemie Vs. State Pharmaceuticals Corporation (2004) 1 SLR 277,
4. De Costa Vs. ANZ. Grindlays Bank (1996) 1 SLR 307.

I have also considered the case law referred to by the Respondent, namely,

1. Sunderalingam Vs. State Bank of India (1971) 73 NLR 514,
2. Ceylon Bank Employees Union Vs. Yatawara (1962) 64NLR 49,
3. Upali Newspapers Limited Vs. Eksath Kamkaru Samithiya (1999) 3 SLR 205,
4. Colombo Apothecaries Ltd. Vs. Commissioner of Labour (1998) 3 SLR 320.

I do not want to analyze each and every case since each decision had considered facts totally different to the case in hand.

Being possessed of the facts of this case and the case being a transfer of a person holding a very high post in a Finance Company and that person having gone into another Finance Company, again to a very high post prior to the date of reference to the arbitrator, to decide “whether such transfer is justified and if not what relief he is entitled to”, I hold that there was no existing dispute to be looked into since the reference to the arbitrator was dated later than the date the Appellant joined the new Finance Company. Having gone through the judgment of the Court of Appeal, I find that the Court of Appeal has considered all relevant matters and applicable legal principles in

the judgment. It is a lengthy judgment giving good reasons for every argument before that Court. I answer the questions of law in the negative .

On the aforesaid reasoning, I affirm the judgment of the Court of Appeal dated 06.12.2010 in CA. (Writ) Application No. 99/2006. Appeal is dismissed. However I order no costs..

Judge of the Supreme Court

Upaly Abeyratne, 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

Ceylinco Insurance Company Ltd
Presently known as
Ceylinco Insurance PLC
4th Floor, Ceylinco House
69, Janadipathi Mawatha
Colombo 01.

Defendant-Respondent-Appellant

Vs.

S.C.Appeal No.23/2010

SC/HC/CALA No.240/2009

NCP/HCCA/ARP Case No.154/2007

D.C.Anuradhapura Case No.18572/M

G.G.N.L.M.Razik
Ranatunga Rice Mill
Pothanegama
Anuradhapura

Plaintiff-Appellant-Respondent

BEFORE : **PRIYASATH DEP P.C, J**
UPALY ABERATHNE, J.
K.T.CHITRASIRI,J.

COUNSEL : I.S.de Silva with Suren de Silva
for the Defendant-Respondent-Appellant
Faiz Musthapa P.C, with Kamran Aziz
for the Plaintiff-Appellant-Respondent

ARGUED ON : **18.01.2016**

WRITTEN : 18.02.2016 by the Plaintiff-Appellant-Respondent
SUBMISSIONS ON : 25.02.2016 by the Defendant-Respondent-Appellant

DECIDED ON : **16.05.2016**

CHITRASIRI, J.

Plaintiff-appellant-respondent (hereinafter referred to as the plaintiff) instituted this action against the defendant-respondent-appellant (hereinafter referred to as the defendant) by the plaint dated 02.11.2001 seeking inter alia the following substantive reliefs:

(a) A declaration, declaring that the defendant is liable to pay damages in a sum of Rs.19,900,000.00 to the plaintiff, in terms of the Agreements marked P1 and P2 filed with the plaint, consequent to the destruction caused to the plaintiff's paddy stores in Anuradhapura;

(b) A judgment directing the defendant to pay the said amount of money to the plaintiff, in terms of the said Agreements marked P1 and P2;

(c) A declaration that the defendant has acted in breach of the said Agreements, by failing and/or refusing to pay compensation in the aforesaid sum of money to the plaintiff;

(d) A judgment and a Decree in a sum of Rs.5,000,000.00 in favour of the plaintiff, as damages on the basis that the defendant had violated the terms and conditions of the said Agreements.

Defendant filed its answer dated 18.10.2002 having taken up several preliminary objections which are mentioned in paragraph 2 of the said answer. When the case was taken up for trial on 03.02.2013, learned District Judge without proceeding to record evidence, has decided to ascertain the possibility of answering the issues raised on those

preliminary objections, in terms of Section 147 of the Civil Procedure Code. The said issues bear the Nos.13 and 14 and it reads thus:

13. උත්තරයේ 'ආ' ඡේදයේ සඳහන් පරිදි පැ1, පැ2, පැ3 ලේඛණ අනුව පැමිණිලිකරු නියමිත කාලය තුල නඩු පවරා නොමැත්තේද?

14. එසේනම් මෙම නඩුව කාලාවරෝධී වී ඇත්ද?

Those issues had been raised to ascertain whether or not the plaintiff's action is prescribed. Learned District Judge having interpreted the clause 21 in the agreement marked P1 filed with plaint; in a two page judgment, decided that the cause of action of the plaintiff is prescribed. Accordingly, he dismissed the plaint.

Learned District Judge came to the conclusion that the plaintiff has failed to file action within a period of one year as required by clause 21 of the agreement marked P1. The said Clause 21 in the agreement reads thus:

> *"In no case whatever shall the Company be liable for any loss of damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration".*

In that judgment, learned District Judge has stated that the action had been instituted in the month of November 2001 whilst the damage

caused to the paddy stores upon which the cause of action alleged to have arisen, had been on the 29.07.2000. Accordingly, he has decided that the plaintiff cannot have and maintained this action in terms of the Clause 21 of the Agreement marked P1 (vide at page 17 in the appeal brief).

Being aggrieved by the aforesaid decision, plaintiff lodged an appeal in the Civil Appellate High Court of the North Central Province, Holden at Anuradhapura. Learned High Court Judge has written an exhaustive judgment having looked at various issues concerning law and finally, he allowed the appeal having set aside the judgment of the learned District Judge. His decision was that it is incorrect to rely only on clause 21 of the agreement P1 when determining the question of prescription since there is another clause, namely clause 14 is found in the same agreement which has connection to that issue of prescription. It is evident by the following paragraph found in his judgment.

> *"In this context, the pertinent question is: Is clause 21 a reasonable time limitation clause in view of clause 14 of the policy? In this regard we have to consider the question of whether clause 21 will apply to all circumstances or should it be read in reference to clause 14. We are of the view that the time limitation period in clause 21should be given effect to, so long as it does not affect any other policy term affecting the time period within which an action could be filed."*

Accordingly, having considered the matters contained in the aforesaid clause 14, learned High Court Judge answered the issues 13 and 14 in the negative and determined the issue of prescription in favour of the plaintiff. In doing so, he has extensively considered the law pertaining to various questions of law in his 37 page judgment. Finally, he came to the conclusion that the action is not prescribed in view of the matters contained in clause 14 of the agreement marked P1. Consequently, learned High Court Judge made order directing the Original Court Judge to proceed with the trial and then to answer the remaining issues leaving out the issues bearing Nos.13 and 14 which he has answered reversing the decision of the learned trial judge.

Admittedly, learned District Judge has failed to look at the said clause 14 in the agreement. He had only relied upon clause 21 therein and decided that the action had been prescribed. Learned High Court Judge has reversed the said decision of the trial judge. Accordingly, I will now turn to look at the judgment of the learned High Court Judge against which this appeal is lodged. In that judgment, he has stated that the clause 21 in the agreement upon which the learned District Judge has relied upon to dismiss the action should be read with clause 14 in the agreement and then only the issue of prescription should be determined. The said clause 14 reads thus:

" If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this Policy or if the loss or damage be occasioned by the willful act, or with the connivance of the insured, or if the claim be made and rejected an action or ***suit be not commenced within three months after such rejection*** *or (in case of an arbitration taking place in pursuance of the 19th condition of this Policy) within three months after the arbitrator or arbitrators or umpires shall have made their award,* ***all benefit under this Policy shall be forfeited."***
[emphasis added]

Learned High Court Judge, has stated that the prescription period referred to in clause 21 shall not apply to this case since another clause namely, the aforesaid clause 14 in the same agreement also is relevant in determining the period within which an action or suit be commenced. However, having looked at the matters contained in clause 14, he has concluded that it is impossible for the insured to institute legal action within a period of 3 months as required by that clause 14, in the absence of a letter of rejection of the claim made by the insured.

I too agree with the position that the question of prescription that is to be decided in this instance could be determined only after carefully examining and analyzing all the terms and conditions found in the agreement put in suit without restricting it to one single clause in that agreement. No specific condition too, is found therein to give priority to one clause over the other. This position is supported by the matters referred to in paragraph 621 in **"The Law of Contracts" (Vol.2) by C.G.Weeramantry [at page 620]** It reads as follows:

> *"Clauses in a document must be interpreted in accordance with other clauses contained in the same document whether they precede or follow it.* ***[Pothier's sixth rule]*** *This rule has been adopted in South Africa* ***[Hayne & Co Vs. Kaffrarian Steam Mill Co. Ltd. 1914 A D 363]*** *and in England.* ***[Halsbury 3rd EditionVol 11 at 389]*** *A person construing a document must have regard to the entirety of it and not merely to a part, for "to pronounce on the meaning of a detached part or extract from an instrument if relating to the same subject, is contrary to safe principles of correct interpretation."*

Therefore, it is incorrect to disregard totally, the matters referred to in clause 14 and to decide the case only on the matters referred to in clause 21 in the agreement P1. It is how; the learned District Judge has decided the issue. In the circumstances, I do not see any wrong in the manner in which the learned High Court Judge has looked at the terms and conditions found in the agreement P1.

Then the question arises as to the correctness of the decision that the learned High Court Judge has arrived at on the question of prescription having relied upon the clause 14 of the agreement. His decision to answer the issue of prescription in favour of the plaintiff is purely on his reliance to the matters contained in clause 14 of the agreement. Hence, I will now refer to the matters contained in clause 14 of the agreement which is being reproduced hereinbefore in this judgment, in order to ascertain the correctness of the impugned decision.

Upon a plain reading of the aforesaid clause 14, it is seen that the benefits under the agreement are to be forfeited if and when the matters referred to in the aforesaid clause 14 such as fraud etc. are in existence. In this instance, learned High Court Judge has examined whether there had been a rejection of the claim by the insurer in order to forfeit the benefits under the agreement. Thereafter he has proceeded to ascertain whether the facts and circumstances of this case fall within the ambit of clause 14 of the agreement.

In the process learned High Court Judge, without affording the parties an opportunity to establish the facts concerning the said rejection of the claim has concluded that there was no intimation of the rejection of the claim to the insured. Accordingly, he was of the opinion that the forfeiture referred to in clause 14 of the agreement will not apply in this instance without such a notification being sent by the insurer.

Needless to say, matters such as rejection of the claim and notifying the same by the insurer are to be determined only after allowing the parties to establish those facts having allowed them to call witnesses to give evidence. Particularly, the issue of applicability of clause 14 over clause 21 is a matter that is to be determined after considering not only the evidence but also the submissions of the parties to the action. If an opportunity was given for the parties to adduce evidence, then the veracity of the matters referred to in clause 14 could have been ascertained in the correct manner.

Learned High Court Judge has failed to think on those lines and also has failed to allow the parties even to make submissions on the matters contained in clause 14. Indeed, he on his own has considered the issue at the time of writing the judgment. Basically it amounts to violation of the rules of natural justice. Therefore, it is clear that the manner in which the decision as to the question of prescription arrived at, by the learned High Court Judge relying on clause 14 in the agreement, is erroneous. Such a decision cannot be allowed to stand. Accordingly, it is my opinion that both the learned Judges have misdirected themselves when they decided on the question of prescription raised in this instance.

In the circumstances, I set aside the findings of the learned High Court Judge as well as of the learned District Judge. In view of the above findings learned District Judge is directed to proceed with trial and to

deliver judgment according to law, answering all the issues raised at the trial court after allowing the parties to adduce evidence. No costs.

Appeal allowed.

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

Director General
Commission to Investigate Allegations of Bribery or Corruption
Complainant

SC Appeal 23/2015

HC Colombo HC MCA 59/2009
M C Colombo 95046/2001

Vs

1. Ukwatta Liyanage Colvin Chandrasiri Dias
2. Sangaralingam Navaratnam

Accused

AND

Ukwatta Liyanage Colvin Chandrasiri Dias
1st Accused-Appellant

Vs

Director General
Commission to Investigate Allegations of Bribery or Corruption

Complainant-Respondent

Hon. Attorney General
Respondent

AND NOW BETWEEN

Ukwatta Liyanage Colvin Chandrasiri Dias
Accused-Appellant-Appellant

Vs

1. Director General
Commission to Investigate Allegations of Bribery or Corruption

Complainant-Respondent-Respondent

2. Hon. Attorney General

Respondent-Respondent

Before : Eva Wanasundera PC,J
Sisira J De Abrew J
Anil Gooneratne J

Counsel : Udaya Bandara for the Accused-Appellant-Appellant.
Sunethra Jayasinghe Deputy Director General Bribery Commission for the complainant-Respondent-Respondent
No appearance for the Attorney General

Argued on : 24.11.2015
Written Submissions
tendered on : By the Accused-Appellant-Appellant on 28.5.2015

Decided on : 10.3.2016

Sisira J De Abrew J.

The Accused-Appellant-Appellant (herein after referred to as the accused-appellant) was charged in the Magistrate's Court of Colombo for soliciting and accepting Rs.500/- from Nawala Hettiarchchige Priyantha. The 1st and 2nd counts were based on Section 19(b) and 19(c) of the Bribery Act for soliciting Rs.500/- and the 3rd and 4th charges were based on Section 19(b) and 19(c) for accepting Rs.500/-. The 2nd accused was charged with aiding and abetting the 1st accused (the accused-appellant). The Learned Magistrate, after trial, convicted both accused on all the

counts and the accused appellant, on the 1st count, was sentenced to one year rigorous imprisonment (RI) suspended for ten years and to pay a fine of Rs.1500/- . On the 2nd count he was ordered to pay a fine of Rs.1500/-; on the 3rd count he was sentenced to a term of one year RI suspended for ten years and on the 4th count he was ordered to pay a fine of Rs.1500/-. The 2nd accused on each count was sentenced to pay a fine of Rs.1500/-. Being aggrieved by the said convictions and the sentences, both accused appealed to the High Court. The learned High Court Judge by his judgment dated 16.12.2011, dismissed both appeals. Being aggrieved by the said judgment of the learned High Court Judge, The 1st accused (the accused appellant) has appealed to this court. The 2nd accused did not appeal to this court. This Court by its order dated 13.1.2015 granted leave to appeal on the following questions of law.

1. Did the learned High Court Judge err in law when he failed to consider the error committed by the learned Magistrate when he stated that the accused must be found guilty because the defence had failed to show any contradictions in the evidence of the prosecution witnesses and thereby shifting the burden of proof on the accused?

2. Did the learned High Court Judge err in law when he failed to consider the adverse inference drawn by the learned Magistrate from the conduct of the complainant when he fled the scene after the detection which is irrational and unwarranted in law?

3. Did the learned High Court Judge err in law in affirming the conviction when the learned Magistrate had failed to properly consider and evaluate the entire evidence placed before him?

Facts of this case may be briefly summarized as follows: Nawala Hettiarchchige Priyantha (hereinafter referred to as Priyantha) who was a labourer attached to the Urban Veterinary Surgeon Department, on 20.10.2015 went and requested the accused appellant, Grama Sevaka of the area, to issue a certificate to be submitted to his Department for the purpose of obtaining a loan. The accused appellant after examining the application form informed him that the application had been wrongly filled. Priyantha took the application form back to his office and informed the clerk who filled it that it had been wrongly filled. The clerk however did not accept the said accusation. When Priyantha around 11.20 a.m. on the same day went back to the accused-appellant's office and informed him that it had been correctly filled, he again examined the application form. Thereafter the accused-appellant and the 2nd accused discussed the matter and the 2nd accused told Priyantha that he had to pay Rs.1000/- to the accused appellant to get the job done. When Priyantha told him that he did not have Rs.1000/- , the accused-appellant told him to bring Rs.500/- between 2.30 p.m. and 3.00 p.m. and that he would be present in his office. Priyantha thereafter informed the Bribery Commission and officers of the Bribery Commission organized a raid. Priyantha around 2.30p.m. on the same day went to the office of the accused-appellant with Police Constable Silva who acted as a decoy. The accused-appellant examined the application form and at this stage the 2nd accused who was the aide of the accused-appellant

requested the amount of money in order to issue the certificate. At this stage Priyantha got Rs.500/- from the decoy and gave it to the 2nd accused who put it in the drawer of the accused-appellant. At this time the accused-appellant was seated near his table. After Rs.500/- note was put inside drawer of the accused-appellant, the 2nd accused closed the drawer. Thereafter on a signal given by the decoy, IP Seneviratne Banda recovered the Rs.500/- note from the drawer of the accused-appellant and arrested both of them. PC Silva, in his evidence, corroborated Priyantha. Deelipa Sampath who went with Priyantha, in his evidence corroborates Priyantha with regard to the acts of solicitation by the accused-appellant.

The accused-appellant called one Somawathi to give evidence on his behalf. She in her evidence says that on 20.10.2005 she came to the office of the accused-appellant in order to attend to her National Identity Card. While she was in the office of the accused-appellant, she observed two people who were behaving in a suspicious manner in this office as if they had come to do some unlawful act. She then informed an Air Force Officer who too had come to meet the accused-appellant about the suspicious behavior of the said men. She saw one of them putting something to the drawer of the table of the accused-appellant. The accused-appellant could not see it as he was, at this time, turning his back to the table. Thereafter the accused-appellant sat on his chair and called her. Then some people came and arrested the accused-appellant. This was the summary of evidence of Somawathi. This witness knew the accused-appellant personally. But when the two people were behaving in a suspicious manner inside the office of the accused-appellant she who knew the accused-

appellant personally did not inform him. When the above matters are considered, I am unable to place any reliance on her evidence. Thus the learned Magistrate was correct when he rejected her evidence. Both the accused did not give evidence or make any dock statement.

When I consider the evidence led at the trial, I hold the view that the learned Magistrate has come to the correct conclusion. At this stage it is pertinent to consider the 1st question of law which is reproduced below.

> "Did the learned High Court Judge err in law when he failed to consider the error committed by the learned Magistrate when he stated that the accused must be found guilty because the defence had failed to show any contradictions in the evidence of the prosecution witnesses and thereby shifting the burden of proof on the accused?"

I have gone through the judgment of the learned Magistrate but he has not made such an observation. He has, in his judgment, observed that the contradiction and omissions marked by the defence were not capable of damaging the prosecution case. He has therefore decided to accept the complainant's evidence. He has, after considering the evidence, accepted the prosecution case. I am unable to find fault with the judgment of the learned Magistrate. When I consider the above matters the necessity to answer the 1st question of law does not arise.

I have gone through the evidence of the case and I hold the view that the learned Magistrate had come to the correct conclusion. In my view there are no reasons to interfere with judgments of the learned Magistrate

and the learned High Court Judge. In view of the above conclusion reached by me, I answer the 2nd and 3rd questions of law in the negative.

For the aforementioned reasons, I affirm the judgments of the learned Magistrate and the learned High Court Judge and dismiss the appeal.

Appeal dismissed.

Judge of the Supreme Court.

Eva Wanasundera 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

S.C. Appeal 27A/2009
S.C (Spl) L.A. Application No. 67/2008
C.A Application No. 52/2006

In the matter of an Application for Special Leaved to Appeal from the Judgment of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128(2) of the Constitution

Sri Lanka Insurance Corporation Limited
No. 21, Vauxhall Street,
Colombo 2.

PETITIONER

Vs.

1. Commissioner of Labour
   Labour Department,
   Colombo 05.

2. S.K.S. Rathnayake
   Asst. Commissioner of Labour
   Colombo South Office,
   Labour Department,
   Colombo 5.

3. C.H. Senevirathne
   No. 73, Pepiliyana,
   Boralesgamuwa.

RESPONDENTS

AND NOW BETWEEN

Sri Lanka Insurance Corporation Limited
No. 21, Vauxhall Street,
Colombo 2.

PETITIONER-PETITIONER

Vs.

1. Commissioner of Labour
Labour Department,
Colombo 05.

2. S.K.S. Rathnayake
Asst. Commissioner of Labour
Colombo South Office,
Labour Department,
Colombo 5.

3. C.H. Senevirathne
No. 73, Pepiliyana,
Boralesgamuwa.

RESPONDENTS-RESPONDENTS

BEFORE: Sisira J. de Abrerw J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Sanjeewa Jayawardena P.C. with Sandamali Chandrasekera
Instructed by Dilan Perera for the Petitioner-Appellant

S. Rajarathnam P.C., A.S.G. for the 1st & 2nd Respondent-Respondents

Chris Caderamanpulle for the 3rd Respondent-Respondent

ARGUED ON: 14.03.2016

DECIDED ON: 14.12.2016

GOONERATNE J.

The Petitioner, Sri Lanka Insurance Corporation Limited sought Special Leave to Appeal from the Judgment of the Court of Appeal marked X15 dated 13.02.2008. This court on 28.08.2009 granted Special Leave on the following questions of law set out in paragraphs 16(a), (b), (c) and (i) of the Petition.

(a) Did the Court of Appeal fall into substantial error by misconstruing the contract entered into between the petitioner and the 3rd respondent as a "contract of service" instead of as a "contract for services?

(b) Did the Court of Appeal err by failing to take into consideration the salient features of the contract entered into between the petitioner and the 3rd respondent which clearly established that the 3rd respondent was only appointed to the Panel of Motor Claims Assessors and was in fact, an "independent contractor" providing professional service?

(c) Did the Court of Appeal misinterpret and misapply the established tests formulated to distinguish between an "employee" and an "independent contractor" as well as the particular facts of the instant case?

(i) Did the Court of Appeal misinterpret and misapply the provisions of the EPF Act and the relevant regulations defining the terms "covered employment" and "earnings"?

To state the facts very briefly, the 3rd Respondent (now alleged to be deceased) filed an application with the 1st Respondent the Commissioner of Labour claiming Employees Provident Fund, dues, for which he is entitled during his tenure of office as a 'Motor Claims Assessor' with the Petitioner for the period 1964 to August 2002. The 3rd Respondent did so on the basis that he was an employee of the Petitioner-Appellant. The 2nd Respondent an Assistant Commissioner of Labour by certificate P2 of 2nd December 2004, made order that in terms of Section 38(2) of the Employees Provident Fund Act, as amended, Petitioner has defaulted in a sum of Rs. 1,470,305/12 and such sum, is payable to the 3rd Respondent. The 3rd Respondent's services to the Petitioner Company was about 40 years. The Petitioner however denied liability to pay the said sum, and took up the position that the Petitioner is not liable to pay any sum under the Employees Provident fund Act.

The 1st Respondent however inquired into the matter and came to the conclusion that the work done by the 3rd Respondent comes within "earnings" as per the said Act and consequently directed the Petitioner Company, to comply with the order of the 2nd Respondent and directed the Petitioner to pay a sum of Rs. 1,470,305/12. Petitioner failed to satisfy the said claim made by the Commissioner of Labour. As such the 1st Respondent filed a certificate to recover the dues in terms of Section 38(2) of the Employees

Provident Fund Act. The Petitioner Company filed a Writ Application in the Court of Appeal challenging the Order dated 16.5.2001 (3R1) of the Commissioner of Labour and also sought to prevent the proceedings of the case filed in the Magistrate's Courts, Colombo for failure to comply with the aforesaid decision to wit, to pay amounts due as contributions under the EPF Act.

In the written submissions filed on behalf of the 1st & 2nd Respondents it is stated that the Petitioner's position is that the 3rd Respondent was paid "fees per report" for assessment done on motor claims (vide paragraphs 11(b) to (d) and 13 of the petition). In the counter affidavit the Petitioner had changed it to be as "job by job basis". Learned President's Counsel for Petitioner argues that Motor Claims Assessors are independent contractors and were not employed on a "contract of service" basis but instead on a "contract for service". As such "Motor Claims Assessors" are not employees under the EPF Act. Petitioner also emphasis that no 'control' can be exercised over the work done by 3rd Respondent and as such 3rd Respondent would be an independent contractor. Another position suggested by learned President's Counsel was that 3rd Respondent was not engaged in a covered employment as he was performing work on a "job by job" basis. My attention was also drawn to letter of 15.11.1963 (X1) an application of the 3rd Respondent to be included in the panel of Motor Claims Assessors of the then Sri Lanka Insurance

Corporation. By letter X2 of 20.02.1964 Petitioner informed that 3rd Respondent was appointed to the panel of Motor Claims Assessors. X2 is described as contract for services between the Petitioner Company and the 3rd Respondent. Petitioner also relies on letter X4, supporting the position that Assessors are engaged in the capacity of independent contractors. In a very prolex petition filed before the Supreme Court learned President's Counsel as well as in the lengthy written submissions attempts to demonstrate the historical background, the scope of the responsibilities assigned to Assessors and draws a distinction between the contract for services entered into with the independent and professional Assessors as opposed to contract of employment entered into with Road Assistant Technicians.

I have considered both oral and written submissions of all parties to this appeal. No doubt the written submissions filed on behalf of the Petitioner are very lengthy, but court is guided on very firm acceptable legal principles inclusive of statutory provisions and applicable regulations. In any event the record maintained in this regard from the Court of Appeal and submitted to this court as an annexture contains all relevant details. Petitioner's grounds of appeal are also noted.

I observe that within the four corners of the relevant statute the employment of the 3rd Respondent needs to be a 'covered employment' to make

the Petitioner liable under the EPF Act. Petitioner contends that 3rd Respondent was not engaged in a covered employment as he was on a job by job basis. There are some basic facts that need to be understood. In fact the Judgment of the Court of Appeal refer to same. The 3rd Respondent was issued letter dated 30.04.1964 by the Petitioner (P5 annexed to the Court of Appeal application).

The said letter indicates the following:

(a) 3rd Respondent to safeguard the interest of the Petitioner Company
(b) When requested by the Petitioner Company the 3rd Respondent to undertake inspections, assessments, investigations and other works of similar nature connected to insurance claims, and submit reports without delay, with his opinion.
(c) Report to refer to nature of damage, scrutinize reports and estimate damages.
(d) 3rd Respondent permitted to vary any claim (delete, add or alter)
(e) If the claim exceeds Rs. 3000/- the 3rd Respondent is required to attach a photograph to his report and report to be submitted within three days to the Motor Claims Department.
(f) Report to be submitted as above but 3rd Respondent cannot authorise repairs.
(g) 3rd Respondent paid Rs. 25/- per claim within the city, outside the city limits Rs. 30/-. 3rd Respondent also paid subsistence.

The above indicates as in (a) to (g) the control exercised over the 3rd Respondent, and the manner of performing duties and functions as required by the Petitioner, for which he is paid as in (g) above.

I have taken note of the affidavit of the 3rd Respondent and its document 3R4 dated 02.07.1996 (internal memo). The following conditions are laid down.

(a) It is needless to emphasize the value of the customer service and only if we are able to co-operate and work as a team, we will be able to achieve our goal.
(b) All assessors should report for work by 9.30 a.m at the Motor Claims Department.
(c) After signing the Attendance Register you should proceed to No. 288 Union Place.
(d) The jobs will be assigned to those who have signed the Register.
(e) Disciplinary Action will be taken against the Assessor pertaining to reports delayed without a valid reason.

The 3rd Respondent no doubt is subject to directions of the Petitioner and follow the strict conditions and procedure laid down by the Petitioner Company. He has no free hand where his employment is concerned, with the Petitioner.

The following cases explain to a great extent as to how the facts of the case in hand could be applied. In a contract of service a person is employed as part of the business, i.e whether the person was fully integrated in the employer's business or remained apart from and independent of it. Stevenson Jordon and Harrison Ltd. Vs. McDonald and Evans 1952 (1) TLR 101 CA per

Denning L.J. In the Petitioner Company which is involved in an insurance business the 3rd Respondent plays an important role and thus becomes a part of the, that business, and the Petitioner Company is dependent on reports of Motor Claims Assessors. Further the 3rd Respondent had a very long period of employment with the Petitioner Company, which is no doubt a longstanding regular relationship. In Nethermere (St. Neots) Ltd. Vs. Gardiner (1984) 1 CR 612, it was held that piece work basis employment which showed longstanding reciprocity of obligations though not covered by a formal contractual obligation to undertake a particular quantity of work are employees of the particular business. The 3rd Respondent could be properly described as an employee or a servant of the Petitioners organisation having regard to the nature of work entrusted to him by the Petitioner. The test seems to be whether a particular employment was a casual nature and not whether the employee was a casual worker. Vide S.R. de Silva – legal Framework of Industrial Relations in Ceylon 1973.

Learned Additional Solicitor General in his submissions cited a very relevant case on the subject. Vide Feredral Commissioner for Taxation Vs. J. Walter Thompson (Australia) Pte. Ltd. 69 CLR 227 at pg. 231-233.

> "The fact that artistes are skilled does not make it impossible for them to be in relation of servants to an employer. It is a mistake to think that only

unskilled people can properly be described as servants. If they are subject to detailed contract in the manner in which they do their work, they must be servants. The fact that remuneration is described as a fee rather than as wages is not decisive. The real character of relation between the parties must be determined, whether the payment made is described as wages, fee, salary, commission or by other term. The fact that the artistes are not whole time employees does not show that they are not employees of the company".

I also had the benefit of perusing the following case laws which convince my approach to the case in hand that the Petitioner Company is liable to make contribution in the manner decided by the 1st & 2nd Respondents, although some cases below deal with the Industrial Disputes Act.

Jamis Appuhamy Vs. Shanmugam (1978) Vol. 80 NLR 298. A case dealing with master and servant and contract of service and contract for service – Independent contractor.

At pg. 301...

Contract of service were identified by Lord Thankerton in Short v. J.E.W. Henderson Ltd. to be as follows:-

"(a) The master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension"

Lord Thankerton then went on to say:

"Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted in to an independent contractor that, if and when appropriate cases arose,

it will be incumbent on this House to reconsider and restate the indicia ... The statement ..... that selection, payment and control are inevitable in every contract of service is clearly open to reconsideration".

Thus, it would appear, notwithstanding the absence of the indicia referred to above, circumstances may arise in which no one could reasonably suggest that the relationship is other than that of the contract of service.

Perera vs. Marikar Bawa Ltd 1989 (1) SLR at 347...

The appellant was the Head Cutter of the respondent Company. He was provided with a cubicle but employed his own workmen and used his own tools. The Company passed on tailoring orders to him and on execution he was paid a commission from the collections for each month. The Company collected the payment from the customer and kept the accounts. The appellant did not sign attendance register and was not entitled to a bonus like other employees. The question was whether appellant was a workman within the meaning of the Industrial Disputes Act. Was his a contract of service or contract for services as an independent contractor.

Held

(1) The applicant's work was an integral part of the respondent's business and he was part and parcel of the organisation. The appellant did not carry on his business of Head Cutter as a business belonging to him. It was a business done by the appellant for the respondent. Therefore he was a workman and an employee within the meaning of the Industrial Disputes Act.

C M U Vs. Ceylon Fertilizer Corporation 1985 (1) SLR at 418 & 419 - By a majority judgment (CJ Samarakoon dissenting) Wimalaratne J. Held:

"I have had the benefit of reading the judgments prepared by the Chief Justice and by Wanasundera, J. where the facts are set out.

Wanasundera, J. after discussing the manner in which the workmen have been dealt with by the Fertilizer Corporation concludes that the function of the Hunupitiya Labour

Society was to act as mere agents to supply labour to the Corporation, whilst the Corporation became the employer of the labour so supplied.

The Chief Justice is unable to agree that the Society was merely an agent, for the reason that the Society was actively engaged in working and putting into practice the terms of its contract R6 with the Corporation. Implicit in the judgment of the Chief Justice is the conclusion that the Society and not the Corporation is the employer of these workmen.

The instant case is similar to a situation where a contractor regularly brings labour to the employer's workplace to perform work in the regular course of the business of the employer, and the employer directs how the work is to be performed, and even calls upon the contractor not to employ particular persons from among the workforce. In that situation, my view is that there is no contract of employment between the contractor and workmen. This situation is different to one where a person enters into a contract with another to construct a building, and that other (the contractor) employs labour for the purpose. In that case it may not be difficult to establish the employer-employee relationship between the contractor and the workmen, since the employment of the workmen is on behalf of the contractor, and not on behalf of the person with whom the contractor has contracted to build.

Wanasundera, J. takes the view that on the facts of this case the relationship of employer and employee between the Corporation and the workmen has been established not only by an application of the test of "control", but also by the test of "integration". that is that the workmen were intrinsic to the working of the Corporation.

I am in agreement with the views of Wanasundera, J. The payment of wages by the Society was only a physical act of handing over the wages in the capacity of agent of the Corporation. One has to remember that it was the Corporation, and not the Society that determined the wages of each category of workers – check roll as well as piece-rate workers. As regards control of work, even the Chief Justice has no doubt that it was the Corporation that assigned the work, stipulated the proportions of mixing and indicated the mode of distribution. What appears to have influenced the Chief Justice is that

disciplinary control was in the hands of the Society. There is, however a strong finding of fact by the President that "it is absolutely clear that the supervision and control of the workmen were exercised not by the 2nd respondent (the Society) but by the 1st respondent (the Corporation). "I cannot see sufficient reason to disturb that finding of fact".

The Employees Provident Fund Act in its Part II refers to covered employments, employees to whom the Act applies and contributions. Section 8 of the said Act in its entirety reads thus:

8. Covered employments and employees to whom this Act applies

(1) Any employment, including any employment in the service of a corporation whose capital or a part of whose capital is provided by the Government, may be regulation be declared to be a covered employment.

(2) Regulations may be made –

(a) To treat as a covered employment any employment outside Sri Lanka which is for the purposes of a trade or business carried on in Sri Lanka and which would be a covered employment if it were in Sri Lanka; and

(b) Be treat as not being a covered employment or to disregard.

(i) Employment under a person who employs less than a prescribed minimum number of employees.

(ii) Employment of a person in the service or for the purpose of the trade or business, or as a partner, of that person's spouse.

S 8(2)(b)(iii) re-numbered as s 8 (2)(b)(ii) by as s 5 of Act 8

(3) Subject to the other provisions of this Act, every person over a prescribed age who is employed by any other person in any covered employment shall be an employee to whom this Act applies, For the purposes of this subsection different ages may be prescribed for different covered employment –

(4) Any regulation declaring any employment to be a covered employment may provide that such persons only as earn less than a prescribed amount in that employment or as are of a prescribed class or description, and not other persons in that employment, shall be employees to whom this Act applies.

The above sections brings within its ambit employment in a Corporation whose capital or part is provided by the Government. Section 8(2) (b) (ii) refer to instances as not being covered employment. The said Section 8, further expands to bring persons over a prescribed age and employed to be employees under the Act.

The relevant statute and its regulations very clearly and correctly identify a 'covered employment' and an 'employees' who are subject to the above statute. I cannot see a basis in the way argued by learned President's Counsel for the Petitioner, that the 3rd Respondents employment is not a covered employment, within the relevant statute. Material provided to this court is more than sufficient to conclude that 'Motor Claims Insurance Assessors' fall within the ambit of the Employees Provident Fund Act and their employment is a 'covered employment'. As such the Petitioner is liable to contribute to the Employees Provident Fund, and decision taken in this regard by the 1st and 2nd Respondents can never be faulted.

My attention has been drawn to the regulations made in terms of the Employees Provident Fund Act. Vide 1R1 to 1R3.

1R1 inter alia states (Regulation 3) an employment performed by the day or by the job or by the journey shall not be a covered employment. Learned President's Counsel in his submissions attempted to bring the Petitioner within this definition. I do not think it is so as the 3rd Respondent's employment is not performed by the day or by the job. 3rd Respondent employment is entrusted to him by the Petitioner by contract and with instructions and certain specified acts to be performed by him, and thereby the Petitioner exercise control over the 3rd Respondent. By 1R2 the subject of insurance is declared a covered employment and so are the functions of Assessor by Regulation 23 of 1R3. Regulation 7 of Gazette 1R2 brings within the term 'employee' of the Employers Provident Fund Act persons employed on a remuneration of piece rate or a commission. As such both 1R1 and 1R2 Gazettes in no uncertain terms indicate that provident fund contribution should be paid even for work done on a piece rate basis or a commission for service.

In view of matters discussed in this Judgment and the points considered in the Judgment of the Court of Appeal which I agree, it is incorrect on the part of the Petitioner to state that the terms of the contract had been misinterpreted by the Respondent. I reject the submissions made on behalf of

the Petitioner that the 3rd Respondent performs the work of an independent contract. Documents 3R4, P5 contains valuable material and information which counter the position of the Petitioner. The historical background relied upon by the Petitioner, are no doubt matters to be considered, but I am unable to agree that in this case, it paves the way for an independent contract. In any employment or profession, will have a historical background. It is certainly not the test to determine the issue suggested by the Petitioner. In a world where persons are employed in the private sector or government or semi government organisations, variety of functions are entrusted and imposed upon such persons in their employment. Perhaps it is arguable whether a particular employment has some features of independentness, but certainly not conclusive to support the contention of the Petitioner. What matters is the test of 'control' and 'integration'. In the case in hand supervision and control inclusive of discipline of the 3rd Respondent was in the hands of the Petitioner, which takes the case out of an independent contract. Directives given in P5 and 3R4 also demonstrate trust and reliance placed on technical expertise and professionalism of the 3rd Respondent but it cannot conclude that it is the role of an independent contractor. The role of the 3rd Respondent is that of an employee or a workman and thus support a 'contract of service'. It was a service done by the 3rd Respondent not for himself or for a business belonging to him.

It was service done for the Petitioner Company. 3rd Respondent was part and parcel of the Petitioners business, and was a workman or an employee'.

Petitioner Company also state that Motor Assessors were free to serve any other organisation if they wished. Another comparison done was with Road Assistant Technician, who are employees of the Petitioner Company. I have considered the matters highlighted by the Petitioner in his Petition of Appeal in this regard. All that is stated therein are suggested explanations of something or assumptions as a basis of reasoning and nothing more, that flow from such suggestions. I am unable to accept such reasoning of the Petitioner Company, in this connection.

In all the facts and circumstances of the case in hand I have no hesitation in affirming the Judgment of the Court of Appeal. In the process the role played by the 1st and 2nd Respondents could not be faulted, and they did so within the available statutory frame work.

The 3rd Respondent's unbroken 40 years of service was carried out as an integral part of the business of the Petitioner Company, notwithstanding the modern industrial complexities projected on behalf of the Petitioner Company. In the case in hand whatever professional skills or its technical nature

would not and cannot override the ‘control test’ and the ‘integration test’ which is the ultimate deciding factor. As such this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew 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. 28/2013

In the matter of an application for Leave to Appeal under Section 5C (i) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as Amended by Act No. 54 of 2006

Ambudeniyage Dona Leelawathie
No. 132/22, Ramya Place,
Matarahenwatta, Weliweriya.

PLAINTIFF

Vs.

Karuna Aratchige Ranjith Ariyaratne
No. 09, Lamp Light Way
Atwood – 3049, Victoria,
Australia.

DEFENDANT

AND

Karuna Aratchige Ariyaratne
17, Quarry Road,
Mirihana, Nugegoda.

SUBSTITUTED-PLAINTIFF-PETITIONER

Vs.

Karuna Aratchige Ranjith Ariyaratne
No. 09, Lamp Light Way
Atwood – 3049, Victoria,
Australia.

DEFENDANT

AND

Karuna Aratchige Ariyaratne
No. 17, Quarry Road,
Mirihana, Nugegoda.

SUBSTITUTED-PLAINTIFF-PETITIONER-PETITIONER

Vs.

Karuna Aratchige Ranjith Ariyaratne
No. 09, Lamp Light Way
Atwood – 3049, Victoria,
Australia.

DEFENDAN-RESPONDENT

AND NOW BETWEEN

Karuna Aratchige Ariyaratne
17, Quarry Road,
Mirihana, Nugegoda.

SUBSTITUTED-PLAINTIFF-PETITIONER-PETITIONER-PETITIONER-APPELLANT

Vs.

Karuna Aratchige Ranjith Ariyaratne
No. 09, Lamp Light Way
Atwood – 3049, Victoria,
Australia.

DEFENDANT-RESPONDENT-RESPONDENT RESPONDENT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.
Upaly Abeyrathne J. and
Anil Gooneratne J

COUNSEL: Ranjan Gooneratne for the Substituted-Plaintiff-Petitioner-Petitioner-Petitioner-Appellant

P. L. Gunawardena with K.W.E. Karaliadda for the Defendant-Respondent-Respondent-Respondent-Respondent

WRITTEN SUBMISSIONS OF THE APPELLANT FILED ON:

15.03.2013

WRITTEN SUBMISSIONS OF THE DEFENDANT-RESPONDENT-RESPONDENT FILED ON:

12.08.2013

ARGUED ON: 07.08.2015

DECIDED ON: 14.01.2016

GOONERATNE J.

This was an action to revoke a deed of gift on grounds of gross ingratitude. The deceased plaintiff, the mother (Donor) of the Defendant died after she gave evidence and even after the deceased's husband who was a witness gave evidence and concluded his examination in chief, before the original court. Thereafter the learned District Judge of Nugegoda dismissed the action on the basis that an action to revoke a deed of gift is an action in personam and it abates with the death of the original Plaintiff. On appeal, the Civil Appellate High Court affirmed the judgment of the learned District Judge and dismissed the leave to appeal application made to the Civil Appellate High Court by its order dated 22.08.2012.

The only short point that is involved in this appeal is whether the Petitioner has the right to be Substituted in place of the Deceased-Plaintiff to continue and prosecute the action. Petitioner is the husband of the deceased Plaintiff and heir of the deceased. The stage of litis contestatio being reached, does the cause of action survive? This court on 07.02.2013 granted leave on the question of law set out in paragraphs 12(a), (b), (c), (d) & (e) of the petition dated 18.06.2012. The questions of law as contained in para 12 reads thus:

(a) Is an action for revocation of a deed on the grounds of gross ingratitude, a personal action,

(b) if so

(i) does the action abate with the death of the original plaintiff,

(ii) has the Petitioner, the husband of the deceased Plaintiff, a legal right to be substituted in place of the deceased plaintiff, to prosecute the action.

(c) In terms of the deed marked X1, on the death Leelawathie, the donor does the heirs of the donor step into the shoes of the original donor.

(d) Is the petitioner, the husband of the deceased plaintiff a heir of the deceased.

(e) If so has the petitioner the right to be substituted in place of the deceased plaintiff, to prosecute this action.

The question posed no doubt appears to be not so complex. The provisions contained in the Civil Procedure Code, viz. Section 392, 395 & 398 and provisions on incidental proceedings Part III – Chapter XXV may provide a suitable answer, but the background to the law has a historical approach which surface from the point as to whether the cause of action survived. As such I would prefer to initially approach its origin having resorted to various views and principles which emerge from Roman Dutch Law and English Law. One should also not lose sight of the fact that both the above legal systems have some aspects borrowed from

Roman Law. English and Dutch Law on succession to actions would have some bearing to the case in hand.

The CAPE LAW JOURNAL pgs. 246 – 253 "English & Dutch Law on succession to actions – A contrast", provides some useful material to open the subject at pgs. 245 – 246.

ACTIONS OF CONTRACTS

……..

With regard to actions founded on contract, the English and Roman Dutch Law do not materially differ. The rule in both systems is that the action survives the death of either party. The representatives of a deceased person may proceed with the exercise of a right of action that has accrued to the deceased during his life-time, while they are subject to any liability to action that the deceased has incurred. The only exceptions to this rule in English Law are in the case of actions for breach of promise of marriage, and probably of actions for damages to the person caused by negligent performance of a contract; such, for example, as injury through careless performance of a medical operation. (Pollock on Torts, pp. 54 and 503) the latter species of action partaking of the nature of actions in tort. In Roman Dutch – Law I cannot find any exceptions specified. Van Leeuwen and Van der Linden, amongst other writers, lay down the rule as absolute; Grotius (Introduction III. ch. 1 S. 44) except cases "where the laws have expressly provided otherwise". Perhaps he

refers to such a case as that of partnership, where the death of a partner puts an end to the partnership. …….. Pgs. 245, 246

ACTION OF TORT. ENGLISH LAW

It has been suggested that *personalis* is a misreading of *poenalis*, and that the maxim is thus descended from the rule of Roman Law that the death of a party extinguished an action to recover a penalty (vide Cherry's Growth of Criminal Law in Ancient Communities, p. 64). To me it seems not improbable that the origin of the maxim was a false analogy between the physical world and that of legal ideas. But, whatever its origin, the maxim has been incorporated into English Law jurisprudence; and its consequences are far-reaching. In accordance therewith, it is held that the death of either party to an action founded on tort extinguishes the action. It makes no difference whether the deceased is plaintiff or defendant, whether the action has actually commended or is still potential. ……. Pg. 246

On the other hand the maxim, so far as property was concerned, was limited by the rule that where specific property had been wrongfully appropriated by the person who subsequently died, such property, or its proceeds or value, could be recovered against the estate of the deceased; the action in this case being

regarded as one to recover property, and not personal to the wrong-doer. But this principle was not extended so far as to allow the recovery of damages for wrongful

acts by which the deceased's estate was benefited otherwise than by the addition to it of specific property (Pollock on Torts, 2nd ed., p. 65). Pg. 247

To sum up the English Law as to to the effect on a right of action for tort of the death of either of the parties – the Common Law rule is that such right is thereby extinguished; by judicial decisions an action to recover specific property had been excepted from this rule; by legislation further exceptions have been made in case of injuries to the real or personal estate, and, subject to certain peculiar conditions, in the case of actions brought on account of bodily injuries resulting in death. The death of either of the parties still extinguishes an action for defamation of character, and for willful injury to the person; and it would seem the death of the defendant has the same effect in all cases of bodily injury. Pg. 248

Actions of Tort. Roman Dutch Law

…….

The general rule of Roman Law, was that rights of and liabilities to actions were inherited; the death of a party did not extinguish an action. To this rule one exception is mentioned, in the case of actions *ex contractu, viz*: those founded on the fraud of a deceased person, where the heir (the defendant) has derived no benefit from such fraud, an exception not recognized in Roman-Dutch Law (Groenewegen de Leg. Abr., C. 4, 17). In the case of actions of tort, there was a large class of exceptions to the general rule; but such exceptions were subject to the very practical limitation that the action in every case continued, if the death of the party occurred after the *litis contestatio*. Pg. 248

…….

In the case of *injuria*, the international and illegal infliction of pain, bodily or mental, the death of either party extinguished the right of action. The Roman Law, as regards this class of action, thus corresponded with the English as regards torts generally except that in Roman Law the action continued if the death had occurred *post litis contestationem*. It is easy to understand why the death of the defendant extinguished the right of action for *injuria*, such action being really the archaic substitute for a criminal prosecution. It is not, however, so intelligible on what ground the death of the plaintiff released the defendant from the consequence of his evil doing. …… Pg. 249

Coming now to the Roma-Dutch Law, we find that actions for torts were not extinguished by the death of either party, but like contractual obligations formed part of the inheritance. This rule is very distinctly laid down by Voet (Pandects 47, 1, 3), Vinnius (In Instit. 4, 12) and Groenewegen (De Leg, Abr, C. 1. 4, t. 18), and as we shall afterwards see is not subject to the large class of exceptions that existed in Roman Law. …… Pg. 250

The word 'injury' was used in a narrower sense in Dutch than in English law and corresponds to the Latin term "Injuria". It refers to wrongs against the person, property or honour of another, in which there is an element of insult *(contumelia)*; and includes such torts as malicious arrest, seduction, slander, libel. The rule as regards actions for such wrongs was that the death of either party extinguished the action, except when the death took place *post litem contestatam* (Voet's Pandects

47, 10,22) As pointed out by Vinnius (In Instit. 4, 12), the action for injury was the only one of the private penal actions of the Roman Law that had survived to his time; and the old rule has survived with it. It is however an open question whether under Dutch Law as administered in South Africa the death of a party would extinguish an action for injury in every case. Where the injury has caused special damage, as in the case of the loss of a

situation through libel or slander, it would be quite in accordance with the principles laid down by the Dutch jurists to allow the action to survive the death of one or other of the parties. …….. Pg. 251

I shall conclude by summing up the points of contrast between English and Dutch Law, on the subject of succession to actions of tort:

The rule of English law was that the death of either party extinguished such actions; but exceptions were made by statute in the case of injuries to real and personal property; and in the case of death through negligence, an action was granted for the benefit of the family of the deceased. In Dutch Law, the rule was that the action survived the death of either party. The exceptions were, (1) as regards actions for injury involving insult, in which case the death of either party extinguished the action unless it occurred *post item contestatam*, (2) as regards actions for willful or negligent killing, in which case the estate of the deceased had only a limited right of action, but the relatives of the deceased were entitled to an

action for compensation for their material loss. In other words we may say that the Dutch Law began at the stage at which the English Law has finally arrived.

Pg. 253

I observe that rules suggested and discussed above may not apply uniformly to every case but would depend on facts and circumstances of each case but there is some certainty or certainty could be fathomed in cases of slander/libel and defamation which fall into the category of personal actions and cause of actions cannot survive on the demise of either party. A variety of actions and subjects need to be considered and even in the law of contracts certain limitations are placed depending on the subject matter. I refer to the following extract from the law of contracts – Prof. C. G. Weeramantry.

Vol. II Pgs. 916 & Section 916

> In certain limited classes of contracts death brings about a termination of contractual rights and obligations by operation of law. These are contracts involving rights or duties of a purely personal character, and in these cases death operates as a mode of involuntary assignment of rights and obligations. In all other cases, all contractual rights and duties pass upon death to the representatives of a deceased person, and the obligation is therefore not extinguished, but survives in favour of or against the representative of the estate of the deceased. Examples of contracts of a purely personal nature are those dependent upon personal knowledge, skill or capacity or involving personal services. Even in these latter cases although the contract dies with the deceased, recovery would be permitted by or on behalf of the estate of all such amounts as were due to or from the deceased at the date of his death. …….

Other types of contract that are determined by death are contracts of agency and contracts of partnership. In the former case death of either principal or agent automatically brings about this result unless the contract specially provides that the personal representative of either may continue the relationship. In the latter case the partnership comes to an end both under Roman-Dutch and under English Law. This result followed whether the partnership be for a fixed term or not.

Two other categories of contract must also be observed in this connection, namely, promises of marriage and death or personal suffering resulting from breach of contract. In the case of breach of promise, if the defaulter dies while in default, damages for breach of promise can be claimed from his estate to the extent of the plaintiff's actual pecuniary loss and not more ……..

In regard to liabilities, the representative of the deceased becomes liable as such in respect of all contractual claims which may have been made against the deceased up to the moment of his death irrespective of whether the breach occurred before or after death. Liability is of course confined only to the extent of assets of the estate. In Ceylon the property of a deceased person whether testate or intestate vests immediately on death in his heirs, subject to the payment of just debts, to the extent of which the personal representative as such has a claim upon the property.

I will now consider the facts. The donor died after she gave evidence and even after the next witness for the Plaintiff gave evidence. (this position already stated). Donor Plaintiff, filed action in the District Court of Nugegoda on a deed of gift to have it revoked on grounds of ingratitude of her son, to whom she gifted the property in question by a deed of gift (XI). The deed of gift expressly

state, donor "shall where the context so requires means and include the said E. Don. Leelawathie her heirs executions and administrators". However action for revocation of a gift is of personal nature and issue remains whether the cause of action survives on death of Plaintiff. Ordinarily on the death of a person his estate in the absence of a will passes at once by operation of law to the heirs. Per Grenier A.J. Silva Vs Silva 10 NLR 242. If there was no action filed for revocation of the deed, the donee (Defendant) would have title to the property and even on his death, property will vest in his heirs and would pass to the estate of the donee depending whether the property was alienated during the life time of the deceased donee or not.

The issue to be resolved also involves a procedural aspect. Chapter XXIII Part III of the Civil Procedure Code refer to continuation of actions after alteration of a party's status.

Section 392 reads thus:

> The death of a plaintiff or defendant shall not cause the action to abate if the right to sue on the cause of action survives.

Section 395 of the Code reads thus:

> In case of the death of a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action.

The continuation of an action where other party dies depends on the question whether the right to sue on the cause of action survives. In the case of death of sole Plaintiff the legal representative of the deceased may apply to court to have his name entered in place of deceased to continue the action, provided the right to sue survives. In any event the right to sue need to survive as stated above, and as discussed by eminent jurists. As per Section 392, right to sue on the cause of action should survive for the legal representative to proceed and take part in an interpartes trial.

The case in hand being a case of revocation of a gift (the case proceeded well pass the close of pleadings and leading of evidence of Plaintiff the donor to a close) for ingratitude is of a personal nature alleged between donor and donee. Subject matter of the donation is immovable property. Case in the original court had proceeded a long way with donor's (Plaintiff) evidence being led and that of a witness (husband – Petitioner). No doubt the stage of litis contestatio had reached, at the point and time of death of the Plaintiff. Litis Contestatio in a partition case is marked by the filing of the contesting Defendants answer 16 NLR at 82. Samarawickrema J. in Vangadasalam Vs. Karuppiah 79 (2) NLR 150 SC, held that a personal action dies with the Plaintiff unless the stage of litis contestatio had been reached. This takes place with joinder of issues or close of pleadings.

In *Stella Perera and others Vs. Margret Silva 2002(1) SLR 169 at 175...*

> Admittedly, the 1st defendant died pending the appeal in the Court of Appeal. However, by that time he had a judgment in his favour in respect of his claim to have the donation to his wife revoked and for possession. The stage of litis contestatio having been reached, the first defendant's action did not die with him. The maxim "action personalis moritur cum persona" had no application. Cf. Fernando v. Livera; Dheerananda Thero v. Ratnasara Thero; Krishnaswamy Vengadasalam v. Adika pundagan Karuppam.

Jayasuriya Vs. Samaranayake 1982(2) SLR 460 is another case (Court of Appeal) that considered the position of a death of Plaintiff before litis contestatio in an action in personam. Facts of that case are as follows:

Pgs. 460, 461 & 462 …

> One A.P. Jayasuriya gifted on 16.3.75 a half share of premises No. 25 and 25B Wijerama Mawatha, Colombo 7 to his daughter the respondent.
>
> In this action the said A.P. Jayasuriya sought to revoke this deed alleging several acts of gross ingratitude on the part of his daughter the done.
>
> The Plaint was accepted by Court on 1.8.80 and summons was ordered to be issued, requiring the donee to appear on 24.9.80. Summons was in fact issued on 2.9.80 returnable on 17.9.80
>
> On 17.9.80 it was brought to the notice of Court that the plaintiff the said A.P. Jayasuriya had died on 29.8.80. the widow, his heir, the appellant sought to be substituted as plaintiff.

Held –

That the action for revocation of a deed of gift on the grounds of gross ingratitude was an action in personam and did not survive the plaintiff.

At pg. 462…

…….. After inquiry the learned District Judge upheld both objections and refused the appellant's application for substitution. On the first objection he held that the action was an action in personam , that summons had not been served on the respondent at the time of the plaintiff's death, that as such the action had not, at the time of the plaintiff's death, reached the stage of litis contestatio and that therefore the right to sue on the cause of action did not survive to the appellant. It is this finding of the learned Judge that has been sought to be challenged in this appeal – Appeal was dismissed.

The learned District Judge of Nugegoda in the case in hand held that the cause of action would cease with the death of the Plaintiff. On appeal to the High Court of Civil Appeal the learned High Court Judges affirmed the order of the learned District Judge and dismissed the appeal. It was the position of the High Court Judges that on the death of the Plaintiff the cause of action also becomes devoid of potentiality of prosecution. The learned High Court Judge relies on the Judgment of Dheerananda Thero Vs. Ratnasara Thero 60 NLR 7 and another case No. CA 578/82F unreported.

We also had the benefit of considering a recent case namely Mahawewa and another Vs. Mahawewa. Judgment of Thilakawardena J. with

Marsoof J. & Sripavan J. (as he then was) agreeing. It has referred to almost every case referred to in this judgment including of the judgment cited by the learned High Court Judge.

In the above Mahawewa case it was held:

(a) in terms of Section 398(1)(a) of the Civil Procedure Code, in the event of the death of a sole Defendant, an application can be made for substitution of the legal representatives of the Deceased Defendant, on the condition that the right to sue survives.

(b) the practical effect of Section 392 of the Civil Procedure Code is that the death of either the Plaintiff or the Defendant would cause the action to abate if the cause of action does not survive.

(c) donation and the revocation of gifts in Sri Lanka is governed by Roman Dutch Law, under which a gift once donated, can be revoked on grounds of gross ingratitude by the donee to the donor.

(d) the maxim 'personalis moritur cum persona' cannot be uniformly applied to each and every action which qualifies as personal in nature and whether or not the maxim applies must be determined on the fact and circumstances of the instant case.

(e) an action becomes litigious if it were 'in rem' as soon as the summons containing the cause of action is served on the defendants; if it was 'personam' on reaching of the stage of 'litis contestation'.

(f) if at the time of the original defendant's death the trial had commenced the stage of 'litis contestatio' had been reached at the time of that death.

The case in hand no doubt had reached the stage of litis contestatio. Accordingly this being an action in the nature of action in personam would survive

as the stage of litis contestatio being reached. What is underline to a case of this nature though the case is on revocation of gift, is a property gifted to the donee. The donee with the execution of a deed of gift of property in his favour, certainly acquires certain rights to the property, although a gift could be revoked on grounds of ingratitude, which is a concept that flow from Roman Dutch law. Very many actions in personam like defamation, medical negligence (subject to certain limitations) slander. Libel, and such other actions like partnership, contracts given to artists or even a contract of agency (unless provided otherwise by contract) would be determined by death. My views are fortified as I gather more support from the case of Mahawewa and others Vs. Mahawewa. The dicta from that case, which I wish to follow could be summarised as follows;

> The maxim 'personalis moritur cum persona' cannot be uniformly applied to each and every action which qualifies as personal in nature and whether or not the maxim applies must be determined on the fact and circumstances of the instant case.

Therefore I set aside both orders of the District Court, Nugegoda and the order of the learned High Court Judge. The questions of law as stated above in para 12 of the petition are answered as follows;

(a) Yes, a personal action

(b) (i) If the cause of action does not survive, action would abate,

but not in the case in hand

(ii) petitioner has a right to be substituted

(c) yes

(d) Yes

(e) Yes

We set aside both order of the District Court and the High Court, and direct the learned District Judge to substitute the Petitioner in the room of the deceased Plaintiff and proceed with the trial by adopting the evidence. Appeal allowed as above with costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare PC., J.

I agree

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree

JUDGE OF THE SUPREME COURT

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

SC Appeal No.32/11
SC SPL LA No.304/2009
HCMCA no. 595/04
Magistrate's Court of Maligakanda
No. 7923/C

In the matter of an application under and in terms of Section 9(a) of the High Court of Provinces (Special Provisions) Act No.19 of 1990

Officer-in-Charge.
Police Station, Maradana.

Complainant.

Vs.

01. Galabada Payagalage Sanath Wimalasiri,
No.D/1/2, Police Quarters,
Gonahena, Kadawatha.
02. R. Jeganathan,
No.139, Ericwatte,
Galaha

Accused.

AND BETWEEN

Galabada Payagalage Sanath Wimalasiri,
No.D/1/2, Police Quarters,
Gonahena, Kadawatha.

Accused-Appellant.

Vs.
Officer-in-Charge.
Police Station, Maradana.

Complainant-Respondent

AND NOW BETWEEN

Galabada Payagalage Sanath
Wimalasiri,
No.D/1/2, Police Quarters,
Gonahena, Kadawatha.

Accused-Appellant-Petitioner

Vs.

Officer-in-Charge.
Police Station, Maradana.

Complainant-Respondent-Respondent

Honourable Attorney General,
Attorney-General's Department,
Colombo 12.

Respondent.

BEFORE: WANASUNDERA, PC, J
ALUWIHARE, PC, J
GOONERATNE, J

COUNSEL: Saliya Peiris for the Accused-Appellant-Appellant
Thusith Mudalige, SSC for the Attorney General

ARGUED ON: 15.07.2015

DECIDED ON: 30.11.2016

ALUWIHARE, PC. J

The Accused-Appellant (hereinafter referred to as Appellant) was charged along with another accused before the Magistrate's Court for committing an act of gross indecency between two persons in terms of Section 365A of the Penal Code as amended.

At the conclusion of the trial the Magistrate had found the Appellant and the other accused guilty and having convicted them for the said offence had imposed a term of imprisonment of one year and in addition a fine of Rs.1,500 with a default sentence of six months, was also imposed on the Appellant and the other accused.

Being aggrieved by the judgment the Appellant appealed against the conviction and the sentence so imposed by the Magistrate to the High Court and the High Court having considered the appeal, affirmed the conviction and the sentence.

The Appellant then moved this court by way of Special Leave to Appeal and Special Leave was granted by this court on the questions of law set out in sub paragraphs (a), (b), (c) and (d) of paragraph 8 of the Petition of the Appellant which are reproduced below:

a. Is the conviction of the Appellant vitiated by the failure of the learned Magistrate and the learned High Court Judge to adequately consider the evidence of the 3rd witness for the prosecution Nihal Premaratne?

b. Did the learned Magistrate and the learned High Court Judge fail to consider that the evidence of the 3rd witness for the prosecution Nihal Premaratne casts a reasonable doubt on the prosecution and

lends credence to the defence position that the Petitioner was falsely implicated the police officers who had an altercation with him?

c. Did the learned High Court Judge fail to consider the serious errors of law made by the learned Magistrate in evaluating the Dock Statement of the Petitioner?

d. In the alternative to (a) to (c) above, in all circumstances of this case was the sentence imposed on the Petitioner excessive and done without consideration of the provisions of Section 303(1) of the Criminal Procedure Code?

The facts of this case are as follows:-

Sergeant Wijetunga of Maradana Police had been on "beat" duty with P.C.24473 Dissanayake on the day in question. Around 9.15 p.m. while they were walking from the direction of the Technical junction towards the Maradana Police Station, they had received information to the effect that two persons were engaged in oral sex, inside a vehicle that was parked at a vehicle park nearby. Accompanied by the informant the two police officers had walked up to the vehicle which was found to be a van and had seen two males engaged in the act referred to. Having requested them to come out, both the Appellant and the other accused were placed under custody and had produced them at the Police Station. Under cross examination sergeant Wijetunga stated that the person who gave the information is one Premarathne who runs a tea kiosk close to the Technical junction and he recorded a statement from Premarathne. Sergeant Wijetunga also testified to the effect that the appellant was under the influence of liquor at the time and did not cooperate with him in the discharge of his duties, refusing to disclose his identity or to producing his identity card. When he was

produced before the Officer-in-Charge of the Maradana Police Station, however he had got to know that the Appellant is a sub-inspector of Police.

It had been suggested to this witness on behalf of the Appellant that both the Appellant and the other accused were seated on the rear seat of the van and were engaged in a discussion, which was refuted by Sergeant Wijetunga. Prosecution had led the evidence of P.C. Dissanayake who had corroborated Sergeant Wijetunga on all material particulars.

Prosecution also called witness Premarathne who was alleged to have given the information to the Police officers. This witness however had gone back on his statement and the prosecution had moved court to grant permission to treat this witness as a 'hostile' witness in terms of Section 154 of the Evidence Ordinance, and court had granted permission. Premarathne, in his evidence simply said that he did not know anything about this incident and that the Assistant Superintended of Police came to his house and had wanted him to make a statement as a favour and that was the reason why he signed the statement. At the close of the prosecution case the appellant made a dock statement and the other accused remained silent. In his dock statement, the appellant had stated that he is a sub inspector of police serving at the Police Record Division and on the day in question he left office around 7.00 p.m. and on the way he consumed a small quantify of alcohol at the police officers mess.

On his way, in front of the Eye hospital a person had beckoned him to stop the vehicle and when he did so, he saw the other accused, who had told him, that he beckoned the vehicle to stop by a mistake, thinking it was some other vehicle. The appellant however had offered him a ride and he had got into the vehicle. When he reached the Maradana roundabout, though he wanted to turn in the direction of "Panchikawatta" due to heavy traffic he could not make the turn and had proceeded towards Pettah. Then he had driven the vehicle to the vehicle

park, the one referred to by the police officers, and had stopped the vehicle. At this point the other accused had got off the vehicle and had proceeded towards Pettah on foot.

The Appellant says that he was carrying Rs.100, 000 cash in his brief case which was on the rear seat and wanted to check whether the money was intact. It had taken the appellant about 10 minutes to open the combination lock and having satisfied himself that the money is intact; he had kept the brief case on the seat and had got down from the van. At that point, according to the appellant the two Police officers had approached him and had questioned him.

The Appellant alleges in his dock statement that this led to an altercation between him and the two Police officers. At this point he had seen the other accused who had got off his vehicle some time before, coming towards him. The appellant also had alleged that the two Police officers demanded a bribe through the other accused and the appellant says that he refused to accede to the demand. This, the appellant says in his dock statement, led to a heated situation and ended up with Sergeant Wijetunge and him exchanging blows. He also admits that both the other accused and he were produced before the Magistrate the following morning. He had concluded his dock statement by stating that this allegation was false.

When one considers the version of the prosecution and the version placed before court by the appellant it is significant to note that apart from the denial on the part of the Appellant with regard to the act of engaging in oral sex with the other accused, the inconsistencies are very few. It is common ground that this incident took place in the car park in front of Cinecity Cinema and in the presence of the Appellant and the other accused as well. It is also common ground that the accused was not in the driving seat but in the rear section of the van. The appellant's version is, as he got down from the van after checking his brief case,

the two police officers approached him and questioned him as to what he was doing. The appellant confirms the version of the Police officers by admitting that he consumed liquor before he started his journey.

Of the four questions of law on which leave was granted, the first two in sub paragraphs (a) of (b) of paragraph 8 of the Petition deals with the issue of the failure on the part of both the learned Magistrate and learned High Court Judge to consider the evidence of witness Premarathne in the correct perspective and that both courts had failed to consider whether the evidence of Premarathne, had cast a reasonable doubt in the prosecution case.

It was the position of both police witnesses that they acted on the information given by Premarathne who was cited as a prosecution witness. Premaratne was cited as a prosecution witness. When he went back on his evidence, the Magistrate having considered the application made in terms of Section 154 of the Evidence Ordinance, permitted the prosecution to put questions to witness Premarathne that might have beeen put in cross examination. In the course of the hearing of this appeal the correctness of the decision of the Magistrate with regard to the application made in terms of Section 154 of the Evidence Ordinance was not challenged. The question then is, what is the evidentiary value of such a witness. According to E.R.S.R.Coomaraswamy (The Law of Evidence Vol II Book 2 818) there are two views on the question of the evidentiary value of the evidence of a witness who has been treated as hostile. According to one view, the evidence is of some value and is not to be disregarded altogether and the other view, the evidence is of no value and cannot be relied on for the party calling the witness and or <u>for the other party.</u> It is doubtful whether the maxim, *falsus in uno falsus in omnibus* could be applied to this class of cases. The underlying principle for allowing the party to subject their own witness to virtual cross examination, stems not so much because the witness is necessarily

untruthful, more so because the witness shows hostility towards the party who called the witness.

If the evidence given by a discredited witness in terms of Section 154 is to be used it must be done with great caution and care and should not be acted upon unless parts of his testimony is corroborated by some independent evidence.

In the instant case, this issue does not arise. Witness Premarathne's testimony was to the effect that he had no knowledge whatsoever of the incident and on a certain date, the Assistant Superintendent of Police requested him to sign a statement as a favour.

If the argument of the Counsel for the Appellant is to succeed, then the Court must be in a position to place credence at least on part of Premarathna's testimony.

Premarathne's evidence to my mind is highly improbable. Firstly would the police bring in a total outsider who had nothing to do with the incident, to corroborate the evidence of the two police officers with regard to, a chain of events that is alleged to have taken place knowing very well that there is every risk of the witness contradicting the police version. What was the difficulty for the two police officers to record the incident as their own detection? According to the dock statement of the appellant he speaks of the involvement of an Assistant Superintendent of Police only with regard to the conducting of a disciplinary inquiry.
Premarathne says the Assistant Superintendent of Police made the request on the 21st of August, three days after the incident and after facts were reported to Court. If the inclusion of Premarathne was an afterthought, the two police officers would not have been in a position to refer to the information they

received from Premarathne, in their investigation notes nor the report filed before the Magistrate.

When the police officers were under cross-examination, this fact could have been easily elicited if that was the case. Not a single question had been put to the witness on this aspect.

Thus it appears that evidence of Premarathne, admittedly a reconvicted criminal, is so improbable that one cannot find fault either with the learned Magistrate or the learned High Court Judge for not placing any reliance on his evidence.

I also wish to refer to the view expressed by Justice T.S.Fernando in the case of *Dahanayake Vs. Kannangara, 72 C.L.W 62* at page 65,that where a witness summoned by a party is disbelieved by the trial judge, it would be wholly unreal to utilise ***against*** such party the evidence so given, merely because such evidence has been produced or led on his behalf. (emphasis added)

Considering the above I answer the questions of law raised in sub paragraph (a) and (b) at paragraph 8 of the Petition in the negative, in that I hold, both the learned Magistrate as well as the learned High Court Judge were correct in not placing any reliance on the evidence of Premarathne, and disregarding his testimony.

The 3rd issue on which leave was granted is, whether the learned High Court Judge failed to consider the serious error made by the learned Magistrate in evaluating the Dock Statement of the Petitioner.

As I referred to earlier, apart from the "Actus reus" that constitute the offence, to a great extent the contents of the dock statement are consistent with the version of the prosecution, as presented by the two police officers in their testimony.

Although the learned Counsel for the appellant submitted that the learned Magistrate had rejected the dock statement for two specific reasons, namely that the dock statement was not subjected to cross examination which in turn diminished its evidentiary value, it was contended on behalf of the Appellant that the learned Magistrate ought to have considered the dock statement as evidence subject to the infirmities, in that it was not subject to cross examination and not one made under oath. In fairness to the learned Magistrate, at several places in the judgment he had referred to the dock statement and had finally come to the conclusion that the dock statement does not even cast a shadow of doubt on the prosecution case.

Even if one assumes that the learned Magistrate had not considered the dock statement as he ought to have, still the Appellant in my view is not entitled to any relief, unless it can be shown that the non-direction has occasioned a failure of justice.

According to the dock statement of the appellant, the two police officers solicited a bribe through the other accused, who suddenly surfaced having got off the vehicle at least ten minutes before the police officers arrived. Here is a situation of two low ranking police officers demanding a bribe from a senior police officer. If a bribe was solicited on that occasion the natural and the probable conduct on the part of the Appellant would have been to introduce himself as a sub inspector of police. It is highly improbable to conclude that a police officer of a very junior rank would for no reason implicate a senior officer on a trumped up charge.

When Sergeant Wijetunga was under cross examination it was suggested to him on behalf of the Appellant that both the Appellant and the other accused were seated in the rear seat engaged in a discussion, whereas the Appellant in his dock statement had said that the other accused arrived at the scene after the Police officers confronted him. These are some of the factors that make the defense version so improbable, and I am of the view that both the learned Magistrate as well as the learned Judge of the High Court were correct in rejecting the dock statement. Thus I hold the question of law raised in sub paragraph (c) of paragraph 8 of the Petition also in the negative.

In view of the conclusions referred to above I see no reason to interfere with the finding of guilt of the Appellant.

The final question on which leave was granted is, as to whether the sentence imposed on the Appellant is excessive in the circumstances of this case and as to whether this is a fit case to invoke Section 303(1) of the Code of Criminal Procedure.

There is no question that the individuals involved in the case are adults and the impugned act, no doubt was consensual. Section 365A was part of our criminal jurisprudence almost from the inception of the Penal Code in the 19th century. A minor amendment was effected in 1995, however, that did not change its character and the offence remains intact.

This offence deals with the offences of sodomy and buggery which were a part of the law in England and is based on public morality. The Sexual Offence Act repealed the sexual offences of gross indecency and buggary in 2004 and not an offence in England now.

The contemporary thinking, that consensual sex between adults should not be policed by the state nor should it be grounds for criminalisation appears to have developed over the years and may be the *rationale* that led to repealing of the offence of gross indecency and buggery in England.

The offence however remains very much a part of our law. There is nothing to say that the appellant has had previous convictions or a criminal history. Hence to visit the offence with a custodial term of imprisonment does not appear to be commensurate with the offence, considering the fact that the act was consensual, and absence of a criminal history on the part of the other accused as well. In my view this is a fit instance where the offenders should be afforded an opportunity to reform themselves.

In view of the above I am of the view that imposing a custodial sentence is not warranted in the instant case. Furthermore the incident had taken place more than thirteen years ago.

Considering the above I set aside the sentence of the one year term of imprisonment and substitute the same with a sentence of 2 years rigorous imprisonment and acting under Section 303(1) of the Code of Criminal Procedure Act, suspend the operation of the term of imprisonment for a period of 5 years effective from the date the sentence is pronounced by the learned Magistrate.

Subject to the variation of the sentence referred to above, the conviction is affirmed.

Registrar of this court is directed to have this judgment conveyed to the learned Magistrate for the purpose of pronouncement of the sentence. Subject to the variation of the sentence, the Appeal is dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE EVA WANASUNDERA, PC
I agree

JUDGE OF THE SUPREME COURT

JUSTICE ANIL GOONERATNE
I agree

JUDGE OF THE SUPREME COURT

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

Industrial and Commercial Development [Private] Ltd
No.30, Sea View Avenue
Colombo 03

1st Defendant-Appellant

S.C.CHC Appeal No.33/2009
HC (Civil) 232/05(1)

Vs.

International Cement Traders [Pvt] Ltd., No.44/1, New Nugegoda Road
Peliyagoda

Plaintiff-Respondent

Devco Showa [Private] Ltd
New Nugegoda Road
Peliyagoda

2nd Defendant-Respondent

BEFORE : **S.E.WANASUNDERA, PC J.**
ANIL GOONARATNE, J.
K.T.CHITRASIRI, J.

COUNSEL : K.Kanag-Iswaran P.C with Lakshman Jayakumar for the 1st defendant-appellant
Sanjeewa Jayawardane P.C with Kamran Aziz and Lakmini Warusawithana for the plaintiff-respondent

ARGUED ON : **20.01.2016**

WRITTEN SUBMISSIONS ON : 14.06.2013 by the Plaintiff-Respondent
09.05.2014 by the Defendant-Appellant

DECIDED ON : **17.02.2016**

CHITRASIRI, J.

The 1st defendant-appellant (hereinafter sometimes referred to as the 1st defendant) is a company engaged in construction work whilst the plaintiff-respondent (hereinafter sometimes referred to as the plaintiff) is a company selling cement imported from other countries. The 2nd defendant-respondent did not participate at the trial and the case against it had been laid by. It has no interest in the matter.

Plaintiff instituted this action by the plaint dated 26.10.2006 pleading 27 causes of action relying upon the invoices issued in connection with selling cement to the 1st defendant during the period 01.08.2001 to 18.10.2001. Basically, the plaintiff's claim is for a sum of Rs.3,088,074.51 in respect of supply of bulk cement to the 1st defendant through the 2nd defendant during the aforesaid period. In the plaint, 27 causes of action had been disclosed and of which the first 21 causes of action were on the delivery of cement that had been made on separate occasions and the rest of the causes of action other than the last were on transport charges for the respective deliveries of cement and the last cause of action is on unjust enrichment.

The 1st defendant in its answer having denied any liability as to the claim of the plaintiff has taken up the defence of prescription among other defences. Plaintiff at the outset has raised distinct issues in the original court on each and every causes of action depending on the averments in the plaint.

Having held a protracted trial, learned High Court Judge decided that the plaintiff is entitled to the reliefs that it had prayed for in the prayer to the plaint.

Being aggrieved by the aforesaid decision of the learned High Court Judge, 1st defendant filed this appeal acting under Section 5 of the High Court of the Provinces (Special Provisions) Act No.10 of 1996.

At the commencement of the argument before this Court, Learned President's Counsel for the plaintiff submitted that the petition of appeal of the appellant is not in conformity with the Supreme Court Rules. However, it must be noted that Section 6 of the aforesaid Act No.10 of 1996 clearly stipulates that the procedure adopted in appeals filed to the Supreme Court under Section 5 of the Act shall be the procedure prescribed in Chapter LVIII of the Civil Procedure Code.

Learned President's Counsel for the plaintiff has not raised any objection regarding any specific violation of the provisions contained in the aforesaid Chapter LVIII of the Civil Procedure Code which is the applicable procedure as far as this appeal is concerned. Therefore, the preliminary objection raised on behalf of the plaintiff referring to the Supreme Court Rules is rejected since it has no relevance to this appeal filed against the judgment of the High Court of the Western Province exercising its civil jurisdiction.

Basically, the argument of the learned President's Counsel for the 1st defendant is that the failure on the part of the learned High Court Judge for not addressing her mind to the issue of prescription that was raised on behalf of the 1st defendant. In support of his contention, learned President's Counsel submitted that the plaint of the plaintiff is on the basis of a claim that was made for the goods sold and delivered by the plaintiff to the 1st defendant. Accordingly, he submitted that the claim of the plaintiff is barred by Section 8 of the Prescription Ordinance. Even though the learned President's Counsel for the 1st defendant submitted that the learned trial judge has not addressed her mind to the issue of prescription, it must be noted that the said Section 8 of the Prescription Ordinance was not specifically brought to the notice of the original Court judge in the manner that it was argued in this Court enabling her to consider the issue of prescription in that perspective.

However, this Court is required to consider the applicability of the issue of prescription since it is a question of law which is to be determined even at this appeal stage in terms of Section 758(2) of the Civil Procedure Code. It stipulates thus:

> 758(2) *The Court in deciding any appeal shall not be confined to the grounds set forth by the appellant, but it shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of being heard on that ground.*

Accordingly, I will now advert to the argument advanced relying upon Section 8 of the Prescription Ordinance. The said Section 8 reads thus:

> "*No action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due".*

Having referred to the aforesaid Section 8, Mr.Kanag-Iswaran, P.C. contended that the issue involved in this case amounts to a transaction where the plaintiff had sold and delivered its goods to the 1st defendant. Accordingly, he submitted that the action to recover dues from such a transaction should be brought before Court within a period of one year after the debt became due to the creditor for him to succeed. In **The Law of Contracts [Volume II] by C.G.Weeramantry at paragraph 883**, the manner in which a case falls within Section 8 of the Prescription Ordinance has been discussed. In sub-paragraph (IV) therein he states as follows:

> *"Whether a case falls within the section is determined inter alia by the nature of the agreement in each case, and the mere fact that there is a reference to "goods sold and delivered" in section 8 does not mean that the term of prescription therein stated applies to all actions for goods sold and delivered".*

Also, in sub-paragraph 1 in the aforesaid paragraph 883, Prof. Weeramantry states that Section 8 of the Prescription Ordinance applies only to the goods which are capable of being physically delivered. He also is

mindful of the distinction between the categories of contracts governed by the Sale of Goods Ordinance with that of those referred to in Section 8 of the Prescription Ordinance.

Accordingly, the Court will have to carefully examine the merits of the case in order to determine whether the transaction involved in this matter falls within the category of "goods sold and delivered." In the evidence in chief of the 1st witness for the plaintiff, he has stated that the delivery of cement to the 1st defendant was between the period 14.10.2000 and 31.10.2002. During which period the plaintiff had completed approximately 350 deliveries to the 1st defendant and the defendant had not disputed the same. Therefore, there is no dispute as to the receipt of such consignments of cement by the 1st defendant.

At the time the parties agreed for the above transaction in respect of the selling of cement to the 1st defendant, they also had agreed that the 1st defendant was responsible to make due and prompt payments to the plaintiff for the delivery of cement. [vide at paragraph 7 of the affidavit containing evidence in chief of A.A.0. Ranjith Amarasinghe at page 120 in the appeal brief] In paragraph 22 in that affidavit, he has also stated that the 1st defendant was to pay for the cement supplied and therefore the value of the invoices was always commensurate with the value of the payment. Flowing from this, the total value of the invoices was commensurate to the values of the aggregate payment. Each and every invoice upon which goods were sold

and delivered had been marked in evidence. The last such invoice is dated 18.10.2001. The evidence referred to above had not been contraverted.

In the circumstances, it is clear that the sale of cement to the 1st defendant by the plaintiff was a transaction that fell well within the term "goods sold and delivered". Admittedly, this action was filed on 26.10.2005. The last date of delivery of goods supplied to the 1st defendant by the plaintiff was on 08.11.2001. Therefore, it is clear that this action had been filed after a lapse of a period of one year. Therefore, on the face of the evidence, the action had been prescribed in terms of Section 8 of the Prescription Ordinance.

However, learned President's Counsel for the plaintiff contended that the monies that were due to the plaintiff became due only after the demand was made by the Letter of Demand dated 21.02.2005 that was marked P2 in evidence. (vide at page 84 in the appeal brief) It is common sense to state that when the goods sold and delivered are movables then the value of the goods according to the price that they have agreed would become due to the seller upon completion of the delivery of such goods. In this instance, there was no dispute as to the nature and the delivery of the goods involved. Neither there had been any dispute as to the selling of cement to the 1st defendant by the plaintiff. There was no dispute as to the price of the goods as well.

In the circumstances, soon after the delivery of goods to the buyer, the money due to the seller for those goods becomes payable to the seller and

therefore the said sum of money would be considered as money due to the seller. As mentioned hereinbefore, the last date of the invoice is dated 18.10.2000. Accordingly, it is my opinion that the money due to the plaintiff for the last invoice became due on 18.10.2001 and certainly not upon the demand been made. Hence, I am not inclined to agree with the above contention of the learned President's Counsel for the plaintiff.

Learned President's Counsel for the plaintiff has also submitted that there had been an oral agreement between the parties to this transaction of cement. Accordingly, he contended that the prescriptive period referred to in Section 8 of the Prescription Ordinance shall not apply to this instance. However, in evidence-in-chief of the witnesses who gave evidence on behalf of the plaintiff has not taken up such a position in his evidence. The totality of the evidence led on behalf of the plaintiff had been on the invoices upon which the cement was sold and delivered to the 1st defendant. It is on that footing that the plaint of the plaintiff was also been drafted and filed. Nothing is referred to therein as to any oral or written agreement between the parties.

When the averments in the plaint are read and understood with that of the evidence led in this case, it is clear that it was on the invoices that the cement was sold to the 1st defendant and there was no oral agreement as such between the parties. Indeed, the plaint is clearly on the basis of separate invoices as referred to in paragraph 4 in the plaint. The answer filed by the 1st defendant too had been drafted replying on those averments in the plaint. The

first witness namely Felix Thomas has specifically admitted that there was no written agreement between the parties. (vide at page 160 in the appeal brief) Neither has he said that there had been an oral agreement. In that evidence he had specifically referred to separate transactions based on the respective invoices. Distinct delivery notes also had been marked in evidence by the said witness Thomas to establish that the goods were delivered to the agent of the 1st defendant.

However, it is seen that the second issue of the plaintiff had been raised to establish existence of an agreement entered into between the parties. Upon a perusal of the evidence particularly the evidence in re-examination, it is clear that the position of the plaintiff had always been to recover monies due for the goods that had been sold and delivered to the 1st defendant on the invoices that were marked in evidence and certainly it was not on a written or oral agreement. No questions had been asked either, as to the existence of any agreement between the parties.

The plaintiff had relied upon the document marked P29 (Running Debtors Statement) P42 & P43 in support of the aforesaid contention namely the existence of an agreement between the parties. In those documents a summary of the monies due to the plaintiff had been described. Referring to those documents learned President's Counsel for the plaintiff submitted that those are the documents that indicate an agreement between the two parties. Admittedly, those documents (P29, P42 and P43) had been prepared after

filing of this action. It was admitted so, by the witness for the plaintiff himself and he has clearly stated that in his evidence. (vide at page 213 in the appeal brief) Therefore, the evidence found in those three documents cannot be considered to decide the issue since those had come into place after filing of this action.

In the case of Adamjee Luckmanjee and sons Ltd. Vs. Abdul Careem Hallaje, [63 NLR 407 at 408] the manner in which debt due for the goods sold and delivered had been distinguished with that of an existence of a written letter accepting the amount due. This issue was again extensively discussed in **Ceylon Insurance Company Ltd vs. Diesel and Motor Engineering Company Ltd. [79 NLR Part II at page 5)** as well. No specific acceptance of the debt by the defendant had been produced in this instance. As mentioned in the preceding paragraph, the contents in the documents marked P29, P42 and P43 cannot be considered as evidence in this instance.

In the circumstances, as referred to above, it is clear that this action of the plaintiff had been to recover monies due to it for the goods sold and delivered to the 1st defendant on the invoices marked in evidence. Also, no evidence is forthcoming as to an existence of any written or oral agreement between the parties. The claim of the plaintiff was to sell and deliver its goods to the 1st defendant on the respective invoices.

Furthermore, this action had been filed after a lapse of one year after the date of the last invoice namely, 18.10.2001. Admittedly, the plaint had been filed on 26.10.2005. In the circumstances, it is clear that the positive rule of law referred to in Section 8 of the Prescription Ordinance shall apply in this instance. Accordingly, it is my opinion that this action is to be dismissed in view of the time frame referred to in the aforesaid Section 8 of the Prescription Ordinance.

For the aforesaid reasons, this appeal is allowed. Action of the plaintiff filed in the High Court is dismissed. I make no order as to the costs of this action.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, 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 33/2005
S.C. Spl. LA. No. 03/2005
CA No. 597/2002
DC Mt. Lavinia No.1518/P

In the matter of an application for Substitution under Section 398(1) (a) of the Civil Procedure Code

Gilbert Samaraweera

PLAINTIFF (Deceased)

Weerasooriya Arachchige Agnes
No. 273/A, North Mulleriyawa,
Angoda.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANT-PETITIONER

Vs.

Mahadurage Hemapala
No. 170, Galle Road,
Dehiwela.

RESPONDENT-APPELLANT-RESPONDENT (Deceased)

AND NOW BETWEEN

Weerasooriya Arachchige Agnes
No. 273/A, North Mulleriyawa,
Angoda.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANT-PETITIONER

Vs.

Mahadurage Hemapala
No. 170, Galle Road,
Dehiwela.

RESPONDENT-APPELLANT-RESPONDENT (Deceased)

Mahadurage Asantha Senarathna
No. 170, Galle Road,
Dehiwela.

RESPONDENT SOUGHT TO BE SUBSTITUTED

1. Mahadurage Palani Senarathna
   No. 255/5B/1, Saman Mawatha,
   Nadimala, Dehiwala

2. Mahadurage Manoja Senarathna
   No. 237/110, Mahagedara Watta,
   Arukgoda Road, Alubomulla.

3. Mahadurage Samantha Senarathna
   No. 437/1/B, Sama Pedesa,
   Hokandara North, Hokandara

4. Mahadurage Mahinda Senarathna
   No. 255/5B/1, Saman Mawatha,
   Nadimala, Dehiwala.

5. Mahadurage Helaruwan Senarathna
   No. 277/11A, Quarry Road,
   Nadimala, Dehiwala.

RESPONDENTS-RESPONDENTS

BEFORE: B. P. Aluwihare P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: D.P. Mendis P.C. with J.G. Sarathkumara for
Plaintiff-Petitioner-Respondent-Petitioner

Ms. C. Weerakoon Unamboowa with
Ms. Lumbini Kohilawatta for Substituted-Respondent-
Appellant-Respondent

ARGUED ON: 11.05.2016 &13.06.2016

DECIDED ON: 18.07.2016

GOONERATNE J.

The Plaintiff-Petitioner-Respondent-Petitioner (hereinafter referred to as Plaintiff-Petitioner) having purchased undivided shares of the land in dispute (more fully described in the schedule to the plaint in partition case 1518/P) on or about 1981, filed a partition suit in the District Court of Mt. Lavinia in Case No. 1518/P, on or about 1985. Final decree (P3) was entered in the partition case on or about August 1998. Plaintiff-Petitioner was allotted lot No. 3759 in the partition plan in extent of 3.410 perches which includes the building/premises bearing Assessment No.170. Subsequent to the final partition decree, Plaintiff-Petitioner moved the District Court in terms of Section 52(2) of the Partition Law for a Writ of Possession to evict the occupants in lot No. 3759,

assessment No. 170. The Respondent-Petitioner-Respondent (hereinafter called the Respondent) who claimed tenancy of the above described premises (Assessment No. 170) filed objection and a protracted inquiry commenced in the District Court of Mt. Lavinia. At the conclusion of the inquiry the learned District Judge made order dated 14.03.2002 issuing a Writ of Possession against the Respondent who claimed tenancy rights.

The Respondent tenant being aggrieved of the order of the learned District Judge, filed a revision application in the Court of Appeal. The Court of Appeal, however acting in revision set aside and quashed the order dated 14.03.2002 and dismissed the application of the Plaintiff-Petitioner under Section 52 of the Partition Law. This court, had on or about 25.04.2005 granted leave to appeal for the substantial question of law specified in paragraph 18(a) & (b) of the petition dated 07.01.2005. The said questions reads thus:

(a) The said judgment is against the law in that the Respondent-Petitioner-Respondent has been held to be a deemed tenant which the facts and law that surfaced at the inquiry in the District is contrary to any claim of tenancy.

(b) The receipt of a deemed Tenancy is applicable only in the circumstances emerged in terms of Section 36 of the Rent Act No. 7 of 1972 cannot in law be applied to the circumstances of this case.

It is essential to consider in a way the history of the land in dispute since on one hand the Plaintiff-Petitioner was a purchaser of certain shares in the property in question, and purchased in 1981. Plaintiff-Petitioner no doubt initiated a partition action in 1985, since the property itself was undivided and co-owned by others. On the other hand the question of tenancy arose in the Original Court and it has to be decided according to law and the protection afforded to a tenant in the circumstances need to be considered where the property in dispute is co-owned property. The original owner gifted or sold certain shares to some of his family members and those family members who acquired property rights sold certain shares in the property in dispute to Plaintiff-Petitioner. As such establishing tenancy alone in a co-owned property may not suffice?

The material placed before this court indicates that the original owner was one Lakshapathi Vidanalage Alexander Leopold de Mel, who had five children, namely Artilio, Daisy Agnes, Aloysius, Irene and Albert. The original owner gifted undivided 1/5th share of the property to his son Artilio and sold undivided 1/5th share to Sylvester Perera (son-in-law) who was married to Daisy Agnes. The above original owner Alexander Leopold died intestate and the balance 3/5th undivided share devolved on his children. The son Artilio and daughter Daisy Agnes gave up their shares to the other three children, viz.

Aloysius, Irene and Albert. Thus the three of them became entitled to 1/5th share each. Plaintiff Petitioner purchased undivided shares form Artilio (1/5th share) and original owner's son-in-law who died intestate and his wife Daisy the daughter of original owner inherited undivided share and she sold her share to Plaintiff-Petitioner.

In the petition dated 07.01.2005 filed in the Supreme Court it is pleaded that Plaintiff-Petitioner was declared entitled to 12/40th undivided share and interlocutory decree entered accordingly. Thereafter by the final partition plan No. 3066, Plaintiff-Petitioner was allotted lot 3759 consisting of 03.410 perches (P2). In the said lot allotted to Plaintiff-Petitioner premises No. 170, 170 A (part) and 168 (part) of Galle Road, Dehiwala was included. The Respondent abovenamed claim tenancy of the building bearing No. 170 (part of land allotted to Plaintiff) beginning from the time of the original owner L.V. Alexander Leopold de Mel. To prove tenancy Respondent marked and produced rent receipts, subject to proof.

Notwithstanding the protection given to a tenant under the Rent Laws of our country and particularly provision contained in Section 14(1) of the Rent Act, the position must be seriously considered as to whether the Respondent who claim to be a tenant under one co-owner is in law entitled to continue his tenancy after the purchase of the property in dispute on the basis

that the other co-owners had given their consent for the Respondent to continue his tenancy? In the absence of genuine consent by all the co-owners to permit tenancy, what would be the position in law of the tenant? Or whether the Respondent was a tenant of the premises in dispute for over 30 years, would suffice in all the facts and circumstances of this case?

On a perusal of the evidence as projected by the Respondent, I note that the Plaintiff-Petitioner had accepted the position that the Respondent (Somapala) was the tenant of the original vendor of the land in dispute. Rent was paid to Aloysius the 5th Defendant and when the partition action was filed rent was paid to Aloysius. Somapala entered the land during the period of the original owner and some rent receipts also had been issued by the original owner (X1 – X7). It is in evidence that the Plaintiff-Petitioner having purchased the land in dispute was never paid any rent.

In cross-examination of Plaintiff-Petitioner the following evidence had been elicited. I note proceedings dated 29.06.2000 pg.5 (A9) the following:

අධිකරණයෙන්

ප්‍ර : "තමන් මෙම ඉඩම මිලට ගන්නකොට කුලි කාරයෙක් හිටිය. එහෙත් තමන් ඒ ගැන හිතන්නේ නැතිවද මිලදී ගත්තේ?
උ : "ඔව් මට ඔවුන්ගෙන් සත පහක්වත් ලැබුනේ නැ"

c. In the proceedings (A9) dated 29.06.2000 Pg. 06 it is stated as

උ : මෙම තීන්දුව දුන්නාට පසුව මෙම සෝමපාල යන අය බලහත්කාරයෙන් මෙම ස්ථානයේ ඉන්නේ මට කුලිය වශයෙන් කිසිවක් දුන්නේ නෑ. මෙම තීන්දු ප්‍රකාශය දෙන්න පෙර සෝමපාල මගේ ගෙදරට ඇවිල්ලා කිව්වා තීන්දුව දුන්නාට පසුව ඔහුට එය කුලියට දෙන්න කියලා. මම කිව්වා අවසාන තීන්දුවෙන් පසුව තමයි මොකක් හරි කරන්න ඔනේ කියලා නඩු තීන්දුව දෙන්න කලින් කාට කොටස් යයිද කියලා මට කියන්න බැහැ කිව්වා".

ප්‍ර : එසේ කථා කරනකොට තමන් දැනගෙන හිටියේ නැහැ මෙම සෝමපාල පදිංචි කොටස තමන්ට අයිති වෙන බව?

උ : මම දැනගෙන හිටියේ නැහැ

<u>d. In the proceedings (A9) dated 29.06.2000 Pg. 07 it is stated as.</u>

ප්‍ර : ඔහු කුලි ගෙව්වේ ඇලෝසියස් යන අයට. තමන්ගේ නඩුවේ 5 වන විත්තිකරු තමයි ඔහු? ඇලෝසියස්ට මෙම නඩුවේ වෙනත් කොටසක් දුන්නා?

උ : ඔව්

ප්‍ර : සෝමපාල මෙම නඩුව දමනකොට කාටද කුලි ගෙවමින් සිටියේ ?

උ : ඇලෝසියස් ද මෙල් යන අයට

ප්‍ර : නඩු පවරන අතරතුර සෝමපාය කුලී ගෙව්වේ මෙහි 5 වෙනි විත්තිකරු

උ : ඔව්

<u>e In the proceedings (A9) dated 29.06.2000 Pg. 08 it is states as</u>

ප්‍ර : සෝමපාලගේ ඉල්ලීම තමන් අධ්‍යයනය කර බැලුවාද?

ඒ ඉල්ලීමේ දෙවන ඡේදයේ සෝමපාල කියා තිබෙනවා 170 දරන පරිශ්‍රයේ අවුරුදු 30 කට අධික කාලයක් අඛණ්ඩව නිත්‍යානුකූල කුලී නිවැසියාව සිටි බව ඒ අනුව ඔබ දැනගත්තා සෝමපාල අවුරුදු 30 ක කාලයක් පදිංචිව සිටින බව ?

උ : ඔව්

ප්‍ර : එකී සෝමපාල සඳහන් කර තිබෙනවා ඔහු මෙම ස්ථානයට ආවේ ඇලෝසියස් ලියෝ පෝල් ද මෙල් යටතේ පැමිණි බව?

උ : ඔව්

ප්‍ර : ඒ අනුව තමන් දන්නවා 170 දරණ පරිශ්‍රයේ කුලී නිවැසියා ලෙස අවුරුදු 30 ට අධික කාලයක් පදිංචිව සිටි බව ?

උ : ඔව්

ප්‍ර : සෝමපාල යන අය මුලින්ම ඇලෝසියස් ලියෝ පෝල් ද මෙල් නිකුත් කල කුලී රිසිට් ඉදිරිපත් කලා ?

උ : ඔව්

The position of the Plaintiff-Petitioner was that all the documents that were produced were marked subject to proof and the documents were never proved by the Respondent party. Further it was stressed on behalf of the Plaintiff-Petitioner that document V27 produced on behalf of the Respondent was not proved by Respondent nor could the Respondent explain it and Respondent even denied V27 in the cross-examination of Respondent. Document V27 was an attempt by the Respondent to show that all the co-owners in 1978 accepted the tenancy of Respondent Somapala. This court observes that if V27 was proved, Respondent no doubt would be entitled in law to the protection afforded to a tenant under the Rent laws of our country. This position need to be examined seriously. The Court of Appeal acting in revision may have thought it fit not to examine the evidence on this aspect. However this court need to examine in this appeal the evidence relevant to above to arrive at a conclusion of consent of all co-owners at the relevant time. This aspect is so germane to the central issue before us. Let us examine whether V27 is a legally acceptable document?

The tenant Respondent Somapala in his evidence in chief state, he came into occupation in 1959, but he has no documentary proof to establish that fact. It was under the original owner he occupied the premises in question but the original owner never issued receipts for some time. The first rent receipt according to the proceedings was marked V7. (December 1974) issued by the original owner and singed in his presence. This document was marked subject to proof. Thereafter V8 – V20 were produced and marked (rent receipt) without any objection. Proceedings reveal that V21 was marked subject to proof. It is a letter issued one week before the death of the original owner, wherein the original owner states to pay the rent to one of his sons Artie de Mel. Thereafter the receipts V22 to V26 were marked subject to proof. The important document V27 was also marked subject to proof.

It is important to note the evidence on V27 as it is alleged that all co-owners consented to permitted Aloysius De Mel to collect the rent and signed V27.

Tenant Somapala states all five children of deceased original owner signed letter V27 and thereafter he paid rent to Aloysius De Mel. All other receipts up to V55 were produced subject to proof. Witness also state that he was not aware of the partition case. In cross-examination the witness was questioned on V7 – V20 and the opposing counsel suggested that these

documents were spurious documents but witness Somapala never replied that question. V22 – V26 was shown to witness and was asked as to who signed same on the stamp. Witness states he cannot state who signed these receipts. කියන්න බැහැ කවුද අත්සන් කලේ කියා.

The letter in question (V27) was shown and cross-examined by counsel. Specific question was asked from tenant Respondent (the witness) as to who signed on the stamp on V27. He replied and stated he cannot identify same 'ඒක මට පේන්නේ නැහැ'. Witness was asked who wrote the letter and reply was that this is not the letter මේක නොවේ කොලේ. It is relevant and important to note the evidence on this point in verbatim.

ප්‍ර : කවුද අත්සන් කලේ ව 27?

උ : (සාක්සිකරු බලයි)

ප්‍ර : මුද්දරය උඩ අත්සන් කලේ කවුද?

උ : ඒක මට පේන්නේ නැහැ

ප්‍ර : මේ ලිපිය ලිව්වේ කවුද?

උ : සාක්ෂිකරු බලයි මේක නොවේ කොලේ

ප්‍ර : මේක නොවේ කොලේ කියන්නේ එහෙනම් මොකක්ද?

උ : ඒකේ නම් ලයිස්තුව දිගට තිබුනා

ප්‍ර : මේක ඒක නොවේ තමාගේ නීතිඥ මහතා ඉදිරිපත් කල ලේඛණයක් මේක?

උ : (සාක්ෂිකරු බලයි)

ප්‍ර : තමා කියන්නේ මේක නොවේ ද කොලේ ?

උ : මේක නොවේ නම් 5ක් තිබුනා මෙහි තියෙන්නේ නම් 4ක්

ප්‍ර : මේක මුද්දරයක් උඩ කවුද අත්සන් කලේ? කවුද අත්සන් කලේ කියා දන්නවාද ව 27

උ : හරියට දන්නේ නැහැ

ප්‍ර : කවුද අත්සන් කලේ කියා කියන්න බැරිද?

උ : හරියට පේන්නේ නැහැ

Perusal of the Proceedings I find that there was no re-examination on behalf of Respondent on the above matters especially on V27. The above matters and answers should have been clarified in re-examination. As such court has to conclude that in view of the vague answers given by Respondent on V27 it's contents are not proved and remains a questionable document. If the witness doubt V27, all that should have been explained in re-examination. What remains on V27 is a vague doubtful items of evidence, not proved to the satisfaction of a court of law. Further to prove V27 the 5th, 6th, & 7th Defendants should have been called as witnesses to identify signature and its contents along with all who had undivided shares, to prove V27.

I will also examine the evidence of the other witness called on behalf of the Respondent. The Respondent's son testified. Respondent's son admits that his father Somapala was questioned on documents. This witness was questioned on the genuineness of V27. It was his reply that he is not keen to reply that question. He only wish to state his father was a tenant. The witness' position on the documents proved at the trial are as follows:

ප්‍ර : ව 27 හි අත්සන් ගැනැ සමහර ලියමන් ගැන බොරු කියල මම හරස් ප්‍රශ්ණ අහපු බව දන්නවානේ?

උ : ඔව්

ප්‍ර : තමා ඒවා අද ව 27 ලියවිල්ල සත්‍ය ලියවිල්ලක් බව කියනවාද?

උ : මේක ගැන කියන්න මට වුවමනාවක් නැහැ. තාත්තා කුලී නිවැසිය කියලා කියන්න මම ආවේ

ප්‍ර : මෙම කුවිතාන්සිය තමා හදුනා ගත්ත ව 1 සිට ව 39 දක්වාත් ව 41 සට ව 46 දක්වාත් එහෙම නේ?

උ : ඔව්

The above evidence relate to V27 also, witness states he is unable to state or identify the signature in the documents, including of V27. Evidence of this witness is not supportive of V27 at all. As such there is no corroboration of tenants (Respondent) version.

I observe that the document relied upon by the Respondent tenant (V27) was produced and marked at the trial subject to proof. When the opposing party had the opportunity the witness had been cross-examined on document V27. The material surfaced indicate that reliance cannot be placed on the contents of document V27 and not proved. Respondent at a certain point rejects V27. Nor did the party concerned call, those persons whose names appear in some form in V27 as witnesses to prove its signature and contents. However at the closure of the defence case when the marked documents were read in evidence, the Plaintiff party did not object to the documents produced on behalf of the Respondent. As such the Respondent party rely in the case of Sri Lanka ports Authority Vs. Jugolinija-Boal East 1981(1) SLR 18.

The dicta in the above case refers to the fact that if no objection is taken, when at the close of the case documents are read in evidence, they are evidence for all purposes of the law. This is no doubt the 'cursus curiae' of the Original Court. However the above dicta would not be offended as regards the case in hand is concerned, for the following reason.

The learned counsel for the Plaintiff-Petitioner at the trial took up the objection as and when the document was marked in evidence and court allowed the document to be produced subject to proof. Learned counsel for the Plaintiff-Petitioner cross-examined the witness on document V27 and other documents and went to the extent to establish in court that no reliance could be placed on V27. It was not a mere mechanical objection to the document concerned, but a challenge to the document itself and its contents and proof, under cross-examination. At the end of it even the Respondent on his own rejects V27. Document concerned was subject to scrutinising in open court, and disproved. None of this happened in the case of 'Sri Lanka Ports Authority and another Vs. Jugolinija'. In the said decided case a document was objected to by the opposing party and was only a mere objection without an scrutiny/examination of the document to disprove same. The relevant portion of that judgment reads as follows:

> At the Preliminary hearing Counsel appearing for the appellants stated that he was admitting all documents listed by the respondent except documents listed in item 7 in column II. P1 was one of item 7. When P1 was marked during the trial objection was taken 'as the author of P1 has not been called". I take it, what was meant was, that P1 be rejected unless the author was called to prove the document. Counsel for the respondent closed his case leading in evidence P1 and P2. There was no objection to this by counsel for the appellants who then proceeded to lead his evidence. If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the *cursus curiae* of the original Civil Courts. The contents of P1 were therefore in evidence as to facts therein (vide section 457 Administration of Justice Law, No. 25 of 1975) and it is too late now in appeal to object to its contents being accepted as evidence of facts. Furthermore the trial Judge has, in the course of his order, accepted the document in evidence in terms of the provisions of section 32(2) of the Evidence Ordinance. I cannot therefore agree with the contention that the order of the trial Judge on this point is wrong.

In the above decided case the document which was objected was not challenged and scrutinised in cross-examination like the case in hand. As such the dicta in the above decided case cannot be extended to the case in hand.

In all above circumstances I hold that the protection afforded under the Rent Act does not extend to the tenant Respondent. In the case in hand there is no acceptable/admissible evidence to establish that all other co-owners consented and acquiesced to the tenancy claimed by the Respondent. As such the protection under the Rent Act is not available to the Respondent as against the purchaser i.e Plaintiff-Petitioner. There are some decisions by the Supreme Court and the Appellate Court on this aspect.

The case in point is *Ranasinghe and another Vs. C.A.C. Marikar 73 NLR 361 and at 371*

When there is a valid letting of the entirety of premises to which the Rent Restriction Act applies, a sale of the premises under the Partition Act does not extinguish the rights of the tenant as against the purchaser, even if the tenant's interest is not expressly specified in the interlocutory decree entered in the partition action. Section 13 of the Rent Restriction Act protects any tenant of rent-controlled premises "notwithstanding anything in any other law", except upon grounds permitted by the Section.

Britto v. Heenatigala (57 N.L.R 327) approved
Heenatigala v. Bird (55 N.L.R 277) overrueld.

But if rent-controlled premises are owned by co-owners and one of them lets the entirety of the premises without the consent or acquiescence of the other co-owners, the protection of the Rent Restriction Act is not available to the tenant as against a purchaser who buys the premises subsequently in terms of an interlocutory decree for sale entered under the Partition Act. In such a case, the tenant cannot resist an application by the purchaser to be placed in possession of the premises.

Per Sirimane J.

A person who takes on rent a house which is co-owned, from one co-owner only does so at his peril. If there are circumstances which show that the lessor had a mandate express or implied, from the other co-owners to deal with the entirety of the co-owned property, then the tenant's occupation is secure. If not, it may still be argued on his behalf that because a co-owner cannot be ejected from the corpus in which he has undivided rights, so too, a tenant who claims under him. But, the decree for a partition or sale under the Act puts an end to co-ownership, and the tenant is now a lessee of interests which have no physical existence as "premises" within the meaning of the Rent Restriction Act (as amended by section 11 of Act 10 of 1961) and

> that Act can therefore give him no protection when a purchaser seeks to eject him. His position, in my view, is at best the same as that of a lessee of an undivided share for a period over one month, whose rights have been specified in the decree, and by an analogy, he may claim these interest – perhaps the equivalent of a month's rent – out of the share of the proceeds of sale allotted to his lessor, under Section 50(2) of the Partition Act. But he cannot, in my view, resist an application by a purchaser to be placed in possession.

Ramasinghe Vs. P.D. Hettihewa and others B.A Law Journal Reports 1998 Vol. VII Part II 34 held that:

> A tenant of a co-owner in respect of a house can be ejected on the basis that the tenant was not the tenant of all the co-owners if the house is allotted to another co-owner in terms of a partition decree

66 N.L.R. 302..

> Where there are a number of co-owners in respect of rent-controlled premises, a lease of the entire premises executed by one of them does not bar the other co-owner, in the absence of an issue on acquiescence, from having the tenant ejected as a trespasser.

I also wish to comment on the Judgment of the Court of Appeal wherein it was held that the Respondent to be a "deemed tenant". This is a misdirection of the law by the Court of Appeal as the concept of 'deemed tenancy arises in situations where continuance of the contract of tenancy on death of a tenant. Section 36 of the Rent Act deals with continuance of tenancy

upon death of tenant. Under that Section land-lord has no choice and he is bound to accept persons specified in the section. It has no application to Section 52(2) of the Partition Law merely because the phrase 'deemed to be a tenant is included in Section 14(1) of the Rent Act. No extended meaning to 'deemed tenancy' could be made as regards the Partition Law. The phrase used by the learned District Judge සන්තකයේ තබා ගැනීම උදෙසා කුලී නිවැසියන් වශයෙන් නාම මාත්‍රිකාව හිමිකම් පානු ලබන්නේ ද යන්න". That phrase cannot be interpreted to be "deemed tenancy" as stated by the Court of Appeal but should be understood in the context of the case in hand. Court of Appeal was completely mislead, to give such an extended meaning. There is no comparison or relevance to Section 52(2) of the Partition Law with Section 36(2) of the Rent Act under Section 36, land-lord has no choice, and Section 14(1) requires proof of ownership and consent of all.

In Mrs. D. Karunaratne Vs. Mrs. N.S. Fernando 73 NLR 458 deals with a case where the widower and children could continue tenancy.

It is possible to argue that a tenant is protected in both sections of the Rent Act (Section 14(1) & (36) but reasons contemplated under each section is different and should be understood in the context of a case.

In all the above circumstances I set aside the Judgment of the Court of Appeal, and affirm the learned District Judge's order directing the issuance of a Writ of Possession as per the relevant statutory provisions of the Partition Law. In the context of the case in hand the protection under the Rent Act is not available to the tenant Respondent as against a purchaser who buys an undivided share in a property co-owned and by a partition suit interlocutory decree and final decree is entered for the reasons enumerated in this Judgment.

I observe that proof of tenancy alone would not be a ground to reject an application under Section 52(1) & (2) of the Partition Act in a case where the property in dispute is co-owned. The absence of items of evidence to prove consent and permission of all co-owners to tenancy will terminate tenancy of a co-owned property. As stated above V27 has no evidentiary value. In these circumstances a purchaser of an undivided share in a co-owned property should not be deprived of his genuine property rights. I answer the question of law as follows:

(a) Yes

(b) Yes. Section 36 of the Rent Act deals with continuance of a tenancy upon the death of a tenant. This section enables the survivors of a deceased tenant to continue in occupation. Thus it is a statutory protection afforded to a tenant. It is alien to Section 52(1) & (2) of the Partition Law which

should be understood in the circumstances and context of the case in hand. One co-owner cannot encumber the property as against all other co-owners, unless others have consented.

Judgment of the Court of Appeal dated December 2004 is set aside

Appeal allowed without costs.

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

In the matter of an Appeal to the Supreme Court from the Order of the Civil Appellate High Court of Mount Lavinia dated15.12.2010.

Mary Helen Martin Christoffelez
(Nee Perera),
No. 15A, Pokuna Road,
Kawdana, Dehiwela.

And Now at

No. 54, Broadway Road,
Kawdana, Dehiwela.

SC APPEAL 37 / 2012
SC Leave to Appeal No
HC/HC/CALA/ 35 /2011
DC Mount Lavinia Case
No. 957/T

Respondent Respondent Appellant

Vs

Elrea Joseph Romould Pereira,
"Brighton", 87, Sri Saranankara Road, Kalubowila, Dehiwela.

1st Petitioner Respondent Respondent

Archbishop of Colombo,
Archbishop's House,
Colombo 08.

2nd Intervenient Petitioner
Petitioner Respondent
Mary Theresa Bright
Kariyawasam (nee Pereira),
No. 123, St. Anthony's Road,
Moratumulla, Moratuwa.

3rd Respondent Respondent
Respondent

BEFORE : **PRIYASATH DEP PCJ.,**
S.EVA WANASUNDERA PCJ. &
SISIRA J DE ABREW J.

COUNSEL : Geoffrey Alagaratnam PC for the Respondent Respondent Appellant
Ikram Mohamme PC for the Intervenient PetitionerPetitioner Respondent
Kaushalya Navaratne for the 1st Petitioner Respondent Respondent

ARGUED ON : 24.02.2016.

DECIDED ON : 31. 03. 2016.

S. EVA WANASUNDERA PCJ.

Leave to appeal was granted by this court on 16.02.2012 on the questions of law contained in paragraphs 10(a) and 10(b) of the amended Petition of Appeal dated 30.04.2011. The subject matter of this case is Clause 8 of Document A1,which is the last will No. 70 dated 20.09.1976 of late Mary Helen Oorloff.

Learned District Judge of Mt. Lavinia had made an order dated 31.07.2008, with regard to an application made by the Archbishop of Colombo as the Intervenient Petitioner by way of a Petition dated 17.09.2007 in the Testamentary case No. 957/T regarding the aforesaid Last Will. By this order, the District Judge had made order that the Intervenient Petitioner ,the Archbishop of Colombo does not get any right or title to house No. 31 in Lily Avenue, Wellawatta according to the Last Will No. 70 of late Mary Helen Orloff. The Archbishop of Colombo who is the 2nd Intervenient Petitioner Petitioner Respondent made a revision application to the Civil Appellate High Court to get the said order dated 31.07.2008 revised. The learned High Court Judges over turned the order of the District Judge and made order on 15.12.2010 allowing the revision application of the 2nd Intervenient Petitioner Petitioner Respondent, the Archbishop of Colombo and granting him an entitlement to the said house , in terms of Clauses 2 and 8 of the Last Will.

The questions of law to be decided on, by this court, contained in paragraph 10 of the Petition of the Respondent Respondent Appellant dated 30.04.2011, are as follows:

10(a) Did their Lordships err **in holding** that the rights under Clause 8 only vested in an heir **upon fulfillment of the conditions** stipulated therein?

(b) Did their Lordships err **in failing** to consider well established principles of law that **upon the death of a Testator the property rights in the estate vest in the heirs?**

Clause 8 of the Last Will of Mary Helen Oorloff reads as follows:

" After the death of my brother George Stephen Louis Oorloff, should my house No. 31, Lily Avenue, Wellawatta remain unsold*, the house should be sold together with the property, furniture, fitting etc. , inclusive of all saleable assets with all the money lying in the Bank to my credit after deducting the full cost of the Testamentary case, funeral expenses, debts and other various charges, municipality rates commissions and expenses in connection with the sale of my property etc. and legacies have been paid the total money remaining to be equally divided among my brothers and sisters surviving and being permanent residents of Sri Lanka*, none of the sons and daughters of my

brothers and sisters living or dead are entitled to any benefit of my last will. In case ***there are no beneficiaries alive to receive the benefit of this Last Will,*** the outstanding moneys referred to in this paragraph 8 be paid *to the Roman Catholic Church* to be exclusively used for the propagation of faith in Sri Lanka".

The Respondent Respondent Appellant,(Mary Helen Martin Christoffelez), the 1st Petitioner Respondent Respondent (Elrea Joseph Romould Pereira) and the 3rd Respondent Respondent Respondent (Mary Theresa Bright Kariyawasam) are the three children of the sister of late Mary Helen Orloff, the testatrix of the Last Will, namely Mrs. Doreen Bright Pereira. Doreen Bright Pereira died 16 years after the testatrix.

In the District Court Case No. 957/T, the 3rd Respondent Respondent Respondent and the Respondent Respondent Appellant who are the two girl children of Doreen Bright Perera in the present case before this court, filed a petition and an affidavit on 28.07.2006 and pleaded the following:

1. When the Testatrix died on 1st April,1980 , there were four siblings alive and resident in Sri Lanka. Their names were George Louis Oorloff, Lord Gdlif Dudley Oorloff , Nobel Broyar and Mrs. Doreen Bright Pereira.
2. George Stephen Louis Oorloff died on 21.11.1983. He was unmarried and without any heirs.
3. Lord Gdlif Dudley Oorloff died whose children are abroad and their whereabouts are not known.
4. Nobel Broyar died on 17.06.1988. She was an Australian citizen.
5. Mrs. Doreen Bright Pereira died on 25th May, 1996 leaving a Last Will bearing No. 1779 of 1st August, 1996 and a testamentary case bearing No. 570/97/A was filed with regard to the said Last Will which was concluded with a decision that the Appellant, 1st Respondent and the 3rd Respondent **are the sole beneficiaries of all the property of late Doreen Bright Pereira at the time of her death.**

The other facts pertinent to be taken into account in deciding this matter is as follows: The 1st Petitioner Respondent Respondent preferred the Testamentary

Case No. 957/T, on 20.09.1976. While the case was pending in the District Court of Mount Lavinia, due to a fire in the record room, this file got destroyed. It was reconstructed by the Appellant. The 3rd Respondent intervened in 2006. The Appellant's case was as follows: Her mother, the late Doreen Bright Pereira was the sister of late Mary Helen Oorloff whose last will was being administered in the case, and who lived and resided in Sri Lanka when Mary Helen Oorloff died on **01.04.1980**. Doreen Bright Periera died on **25.05.1996** after the death of the testatrix of this case, who died on 01.04.1980. as well as after the death of the brother of the testatrix, George Louis Oorloff **on 21.11.1983** who had a life interest to the relevant property. **The Appellant became entitled** to the proceeds of the sale of premises No. 31, Lily Avenue in terms of Clause 8 of the Last Will **through her said mother late Doreen Bright Pereira.**

So, I observe that the Appellant and the 1st and the 3rd Respondents are claiming **through the rights of their mother Doreen** who got rights through the last will from the testatrix and *not on their own right as " sons and daughters of my brothers and sisters " as mentioned in the last will.*

Counsel for the 2nd Intervenient Respondent Respondent , submits that the Appellant , the 1st and the 3rd Respondents are the son and daughters of the Testatrix's sister, according to the wording in the Will , who should not be entitled to the property or rights in the Will because one part of the Will reads that, "none of the sons and daughters of my brothers and sisters living or dead are entitiled to any benefit of this my last will ". The 2nd Respondent also contends that the conditions to the Will , have to be complied with, prior to granting the inheritance.

It is a fact that up to date that the said house has not been sold. When this pending case is over, the executor will be able to sell the same. Before granting the proceeds of the sale to the beneficiaries in the will, the funeral expenses, the

cost of the testamentary case etc. should be paid off. **The contest is to get the rights of inheritance for the proceeds of the sale of the house in Wellawatta.**

I find that the conditions are complied with, namely the inheritance should not go to those who are resident abroad. The only sister who was living in Sri Lanka at the time the testatrix died, is Doreen. She lived for a long time after the death of the testatrix, i.e. for 16 years. If the record room of the District Court of Mt. Lavinia did not catch fire and burnt down the record, it may be that the testamentary case would have got concluded before Doreen died and then, she being the sole sibling living in this country would have got entitled to the proceeds of the sale of the house which is the subject matter of this case before she died in 1996. Could just the fact that she died before the testamentary case was over, affect her rights of inheritance under the Will? I opine that it should not.

I find that in the case of ***Malliya Vs Ariyaratne 65 NLR 145,*** Basnayake C.J. has said:

(a) That the executor has power over both movable and immovable property and may sell the property left by the testator in accordance with the directions in the will.
(b) That the immovable property specially devised **vests not in the executor but in the heir to whom it is devised** subject to the executor's right to have recourse to it in its due order for the payment of the testator's debts.
(c) That the **executor's assent** or a conveyance by him **is not necessary to pass title to heirs appointed in the will or the heirs at law.**

Then I would like to refer to the case of ***Kelaart Vs. Van Twest 1981, 1 SLR 353*,(1985) BALJ P 194 – CA**, Justice Victor Perera stated in writing the judgment that the paramount rule is to look for **the intention of the testator** as found in the will. The judges also held that our courts have consistently laid down the principles to be followed in construing Wills and that the **Will must be construed**

as a whole and apparent contradictions must be reconciled, if possible and if that cannot be done, then only will a later provision prevail. But the main thing is to get at the intention of the testator from the whole Will.

Burrows on Interpretation of Documents at page 71 , as well as Beale's Cardinal Rules of Legal Interpretation at page 607 contain many dicta in this regard. I would like to quote one to wit, " The paramount rule is that before all things we must look for **the intention of the testator** as we find it expressed and clearly implied in the general terms of the Will; and when we have found that on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words whether standing first or last."

It is a fact that the testatrix died in 1980 and brother George Stephen Louis Orloff died in 1983. The House No. 31, Lily Avenue was not sold by then. Then, the testatrix had stated that , " the house should be sold together with the property, furniture , fittings etc. inclusive of all saleable assets " . I observe that the **intention first mentioned is that the house should be sold**, **if at the time of the death of George, the house had not been sold.** It is noted that the Last Will was written on 20.09.1976. The testatrix had even given the right for George to sell the house during his lifetime. That is the reason, for having mentioned, 'if at the time of George , the house had not been sold'. I find in Clause 4 of the Last Will, the testatrix had invited the brother George to come and live in No. 31, Lily Avenue and also given him the life interest. So, it is quite well understood that George could have sold the house during his life time but he had not done so. Therefore, it remains as an asset of the testatrix in the Will.

The Counsel for the 2nd Intervenient Petitioner Petitioner Respondent, the Arch bishop of Colombo, **argued** that the principle of law that upon the death of a testator, the property or rights of the estate vests in the heirs **does not apply** in a situation like the one in hand, as Clause 8 of the Will does not vest the house in question on any heir but contains only a direction to the executor that the house be sold and the proceeds be given to the persons who are entitled to **as at that point of time of sale of the house,** in terms of Clause 8. He draws a difference

between *the vesting of the house* in the heirs and *the proceeds of the sale of the house being directed to be given to the heirs.*

Trying to find out the intention of the testatrix, from the wording of the whole of the Will, I am of the opinion that the testatrix wanted to give preference to her siblings living in Sri Lanka and as she had in mind more than one person to be living in Sri Lanka and more over, her thinking that the monies in the bank might not be enough to pay for the testamentary case costs, taxes etc. has made her to direct the executor to sell the house and do the needful after selling the house. If she vested the house in the heirs straight away, the end result would have been the same if the heirs were more than one because then also, the vesting of the house being given to two or three, for them to share the property, it will have to be sold. In any case, the testatrix would not have projected her thoughts to the time when the property would be sold, such as the year of the sale etc. when she got the notary public to write the last will in 1976 and surely would not have ever thought of who would be alive when the house will be sold in the future. Therefore I fail to understand how an argument could be maintained for the testatrix to have had in mind *to give the monies out of the sale at the time of the sale to those who will be living at that time.*

Going through the Last Will of the testatrix bearing No. 70 attested by J.E. Corea, Notary Public of Chilaw, I find that in other clauses she had granted money to be paid to the Priorese of the Carmelite Convent at Mattakkuliya, and to the Roman Catholic Archbishop of Colombo. She had granted a block of land to the godson, Elrea Joseph Romuald Pereira. She had granted life interest of her resident house, No. 31, Lily Avenue, Wellawatta to her unmarried brother George and the right to reside therein until his death was specifically mentioned in Clause 4 of the Last Will. **In the same clause**, it is again specifically mentioned that " A sum of Rs 20000/- to be reserved from the monies in my bank and all other assets of mine,for the payment of all rates and taxes of whatever nature to the various authorities as and when they fall due and for the maintainance of the said building , premises, furniture, fittings etc. to be in good repair and condition". This inclusion of such a sentence shows clearly that she meant these taxes etc. to

be paid from her money, out of the monies in the bank and all other assets of hers, in case the money in the bank is not sufficient.

I am of the opinion that at the time the testatrix died, according to the conditions in the Will, her sister living in Sri Lanka at that time, Doreen Bright Pereira inherited the right to receive the proceeds of the sale of the house No. 31. When the said Doreen died her property rights which she was entitled to receive from her dead sister according to the sister's Will, get inherited by Doreen's heirs. Doreen's heirs are her two daughters and her son who are the Appellant, the 1st and the 3rd Respondents.

The argument of the Ist Intervenient Respondent Respondent which is to the effect that, " at the time of the sale of the house, if the testatrix's siblings are living in Sri Lanka only at that time, that the proceeds of the sale of the house will be granted to them" does not hold water as then the basis of inheritance would till the executor manages to sell the same, by which time , it may be , most probably, that none of her siblings would be living on earth. The 1st Intervenient Respondent Respondent of course would be entitled to whatever the proceeds at whatever the time and day since the position of Archbishop is an official position and not just a human being. The intention of the testatrix does not seem to be anywhere close to that kind of situation.

Anyway, it is a well established principle of Roman Dutch Law that any property intended to be bequeathed under a Last Will , would under no circumstances, remain in suspense. Even English Law favours this presumption that under a Last Will vests early and that it should not remain in suspense.

In the circumstances, I answer the two questions of law aforementioned in the affirmative in favour of the Respondent Respondent Appellant , the 1st Petitioner Petitioner Respondent and the 3rd Respondent Respondent Respondent who are the children of Doreen Bright Pereira who lived in Sri Lanka when the testatrix died on 01.04.1980. The order of the District Judge granting letters of administration is sound in law.

I do hereby set aside the judgment of the High Court dated 15th December, 2010 and affirm the order of the District Court dated 31st July, 2008. I direct the Registrar of this Court to send back the record of the District Court forthwith, if it is here already, to the District Court of Mount Lavinia for proceeding with the rest of the case in administering the Last Will of the testatrix, Mary Helen Orloff.

The appeal of the Appellant is allowed. However I order no costs.

Judge of the Supreme Court

Justice Priyasath Dep PC

I agree.

Judge of the Supreme Court

Justice Sisira J. De Abrew

I agree.

Judge of the Supreme Court

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

S.C Appeal No. 40/2004
SC/HC/CA/LA No. 33/2003
LT No. 9/TK/1280/95
HCALT No. 60/97

In the matter of an appeal under Section 31 DD of the Industrial Disputes Act No. 43 of 1950 (as amended from time to time)

1. Talawakelle Plantations Limited
Mount Mary Road,
Nuwara Eliya.

RESPONDENT-RESPONDENT-PETITIONER

Vs.

Ceylon Estates Staff Union
6, Aloye Mawatha,
Colombo 3.

On behalf of R. Rajendran
Assistant Field Officers Quarters,
Coombewood Division,
Logie Estate
Talawakelle.

APPLICANT-APPELLANT-RESPONDENT

2. The Superintendent
Logie Estate
Talawakelle.

3. Hayleys Plantation Services Limited
400, Deans Road,
Colombo 10.

4. Sri Lanka State Plantations Corporation
Gregory's Road,
Colombo 7.

5. The Land Reform Commission
C82, Gregory's Road,
Colombo 7.

RESPONDENT-RESPONDENT-RESPONDENTS

BEFORE: S. E. Wanasundara P.C. Acting C.J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: Avindra Rodrigo with Ms. Rozali Fernando
And Anuradha Wijesooriya instructed by
F. J. & G de Saram for Respondent-Respondent-Petitioner

Udayasiri Rajapakse with Ms. Ishara Abeysinghe
For 4th Respondent-Respondent-Respondent

Ms. Yuresha de Silva S.S.C. for 3rd Respondent-
Respondent-Respondent

ARGUED ON: 15.11.2016

DECIDED ON: 02.12.2016

GOONERATNE J.

This is a case of termination of employment of an employee. The employer is Talawakele Plantations Limited (Respondent-Respondent-Petitioner – hereinafter referred to as the employer). The applicant employee who was represented by the Ceylon Estates' Staff Union (Applicant-Appellant-Respondent) was employed as an Assistant Field Officer of 'Logie' Estate and particularly attached to the 'Coombewood' Division which is one of the three divisions of 'logie' estate. It is pleaded that the employee was liable to be transferred and was required to accept and work in any part of the estate. In this appeal the facts submitted to court reveal that the employee's services were terminated on or about 01.04.1995. Employee's services being terminated, an application was made to the Labour Tribunal by the employee for relief as per Section 31B of the Industrial Disputes Act as Amended on the basis that his services were unjustly terminated by the employer.

The Labour Tribunal by its Order dated 28.05.1997 (X4) held that employer's decision to terminate the employee's employment was just and equitable. Employee concerned appealed to the High Court. The learned High Court Judge as submitted to this court by learned counsel for the Respondent-Respondent-Petitioner agreed with the findings of the Labour Tribunal but

vacated the Order of the Labour Tribunal purely on sympathetic grounds. Appeal to the Supreme Court is from the Judgment of the High Court dated 24.06.2003. On or about 03.06.2004 Supreme Court granted Leave to Appeal on questions of law stated in paragraph 8 of the Petition. The said questions reads thus:

(i) The said order is wrong, contrary to law and against the weight of the evidence placed before Court;

(ii) The learned Judge failed to subject the evidence to an objective and judicial evaluation and/or to arrive at a judicial determination of the question of law that arose for determination in this case;

(iii) The learned Judge erred in law by failing to take into consideration any of the items of evidence adduced in this case that were in favour of and/or supportive of the case of the Employer;

(iv) The learned Judge erred in law by failing to address his mind to and/or determine according to the evidence the issues that arose for determination in this case;

I would state the facts very briefly. Employee being attached to one of the divisions of the three divisions of the estate was liable to be transferred to any one division, where he is given quarters, and required to reside in the respective division. When the employee was transferred to a particular division, he is expected to take up residence in the house provided for the Division. The evidence led indicates that on transfer, the employee assumed duties in the

division to which he was transferred but refused to vacate the house in which he resided prior to transfer. In other words the employee refused to accept and reside in the residence provided within the particular division, on transfer. This led to action being taken by the employer and ultimately resulted in the termination of employment of the employee. I have no hesitation to observe that this is a case of clear insubordination.

In the Labour Tribunal the employee inter alia prayed for back wages and re-instatement or compensation for loss of employment. On behalf of the employer the Superintendent of Logie Estate gave evidence, and testified that the employee concerned failed to comply with lawful directives given by the employer. Persistent refusal to give up the quarters occupied by employee and refusal to move on to the house provided within the division the employee who was expected to work on transfer, would amount to insubordination. The case of J.E.D.B. and another Vs. Ceylon Workers Congress 1994 (3) SLR 24, it was held that a workman was guilty of insubordination and his services were rightly terminated for refusal to accept a transfer to quarters on another estate. As observed by the learned counsel for the Employer the evidence led reveal that the employee failed to establish that his termination of services was unjustly and unlawfully terminated. Employee's persistent refusal and stubborn attitude

not to comply with directions given by the employer resulted in the Labour Tribunal holding in favour of the employer.

The learned High Court Judge in his Judgment agrees with the findings of the learned President of the Labour Tribunal and in no uncertain terms state that the Labour Tribunal has considered all relevant facts and arrived at a correct decision. Further it is held that the dismissal of the employee's application is justified. The following excerpt from the Judgment of the learned High Court Judge is noted.

අයදුම්කරුට නව සේවා ස්ථායේ නිවසක පදිංචියට යාමටත් නියම කොට තිබු නුමුදු, එකී නියමය නොතකා අයදුම්කරු තමා කලින් සිටි නිවසේ ම රුදී සිටීමෙන් පෙනී යන්නේ අයදුම්කරු හිතුවක්කාර ලෙස සහ අතතනෝමතික ලෙස ක්‍රියා කොට ඇති බවයි. ස්වමියා විසින් ස්ථාන මාරුවක් දුන් පසු කලින් සිටි නිවස භාර දීමට නියෝගයක් කල විට එයට පටහැනිව තමන්ගේ මනාපය සේ ක්‍රියා කිරීමට සේවකයෙකු හට ඉඩ ලබා දුනහොත් එම සේවා ස්ථානයේ නිසි පාලනයක් හෝ විනයක් තබා ගැනීමට හැකි නොවනු ඇත. එහෙයින් මෙවන් හිතුවක්කාර ක්‍රියාවක් හට කිසිදු ඉඩක් නොතැබිය යුතුයන්න මගේ අදහසයි. එහෙයින් කම්කරු විනිශ්චය සභාව ඉදිරියෙහි ඉදිරිපත් වී ඇති සියලු කරුණු අනුව අභියාචකයාගේ ඉල්ලීම කම්කැරු විනිශ්චය සභාව විසින් නිශ්ප්‍රභා කිරීමට සාධාරණ බව මගේ හැගීමයි.

The learned High Court Judge having stated, so as above, proceeded to vacate the Order of the Labour Tribunal as stated by the Judge only on sympathetic grounds which refer to the following positions.

(a) Applicant was only 46 years of age and had been unemployed for 8 years.
(b) The period of 8 years as above is enough punishment for acts of insubordination committed by employee.
(c) Employee to move out of the official quarters occupied by him at the Coombwood Division and report to the employer.
(d) Having complied with (c) above employer is required to employ the applicant with no back wages and at the discretion of employer in any estate of the employer not below the position held by employee prior to dismissal.

The order made by the learned High Court Judge which could be described in the way it is described by the High Court Judge on sympathetic grounds cannot be permitted to stand. I am unable to accept the position that a court of law should deliver Judgment on sympathetic grounds. Any Judge is required to consider the merits of the case, and based on acceptable evidence, pronounce Orders and Judgments according to law. However if settlements are reached, cases could be concluded <u>if either party agree</u> with each other to do so, even on 'sympathetic' grounds without offending laws of the country.

In the field of Labour Law and practices insubordination is a ground for dismissal in all jurisdiction, unless provoked by the management. Even a refusal to obey reasonable orders justifies dismissal 63 NLR 164; 8 CWR 240. It is not incorrect to observe that both aspects i.e insubordination and disobedience justifies dismissal. If not the employer cannot go ahead with his business or an organisation with indisciplined employees, and the basic structure of employment would crash. Tolerance of either of above will result in poor management and mismanagement of the business.

The employee was absent and unrepresented before this court on the date of hearing and also on previous occasions. However the record indicate that the employee Applicant-Appellant-Respondent has filed written submissions on 25.02.2005.

I have considered the written submissions of the employee filed of record but there is no merit in same to consider his position. Nor has the employee met the position of the employer on the question of insubordination or disobedience.

I answer all the questions of law as referred to in paragraph 8 of the petition in the affirmative and in favour of the employer- Respondent-Respondent-Petitioner. The Judgment of the learned High Court Judge dated 24.06.2003 is set aside. I affirm the Order of the Labour Tribunal dated

28.05.1997 wherein the termination of the employee was held to be just and equitable. This appeal is allowed as above without costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

S.E. Wanasundara P.C.

I agree.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal under the provisions of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006

1. S.M. Heenmenike,
2. S.K.A. Priyanthe Senanayake
3. S.K.A. Chamila Kumari Senanayake

All of 1/27, Main Street,
Rambukkana.

Substituted Defendants-Appellants Appellants

SC Appeal No. 41/2012
SC HC CA LA No. 179/2011
Civil Appellate High Court Appeal No. 639/2009
DC Kegalle Case No. 7692/Special

Vs.

1. Suraweera Aratchchilage Mangalika Malkanthi
2. Kaluaratchchilage Pushpa Kaluaratchchi

Both of "Abaya Niwasa"
Walalgoda
Rambukkana

Plaintiffs-Respondents-Respondents

Before	:	Priyasath Dep, PC. J Sisira J. de Abrew, J & Anil Gooneratne, J.
Counsel	:	D.M. Dissanayake with L.M.C.D. Bandara for Substituted Defendant-Appellant-Petitioners. Dinesh de Alwis instructed by Janaki Sandakalum for 1st Plaintiff-Respondent-Respondent.
Argued on	:	08.06 2015
Decided on	:	01.04.2016

Priyasath Dep, PC, J

The Substituted- Defendant –Appellant- Appellants(hereinafter referred to as "Appellants") filed a Leave to Appeal Application against the judgment dated 25.04 2011 of the Provincial High Court (Civil Appeal) of the Sabaragamuwa Province holden at Kegalle in Case No. SP/HCCA/KAG/639/2009 and obtained leave to appeal from this court.

The Plaintiffs-Respondents-Respondents (hereinafter referred to as "Respondents") instituted action in the District Court of Kegalle in Case No. 7692/Spl against the Defendant-Appellants. When the action was proceeding in the District Court the 2nd Plaintiff passed away and the 1st Plaintiff who is the mother of the 2nd Plaintiff filed a petition and an affidavit dated 15th July 2008 and moved to substitute her in place of the deceased 2nd Plaintiff. The Court allowed the substitution and substitution was effected on 02.07.2008. This is reflected in page 55 of the Appeal Brief. The Court ordered the 1st Plaintiff Respondent to file an amended caption. However, this was not complied with. Thereafter trial proceeded and the judgment was delivered in favour of the Plaintiffs.

The Defendants-Appellants appealed against the judgment of the District Court to the Provincial High Court (Civil Appeals). In the Notice of Appeal and in the Petition of Appeal, the Appellants had cited the 2nd Plaintiff who is dead as a Respondent. The Plaintiff-Respondents at the hearing of the appeal took up a preliminary objection to the effect that the Notice of Appeal and Petition of Appeal filed by the Defendants are defective for the reason that the 2nd Respondent named therein was dead on the date of filing of the appeal.

The Appellant submitted that in the District Court it was the 1st Plaintiff-Respondent-Respondent who filed papers to substitute her in place of the deceased 2nd Plaintiff who is her daughter. The 1st Plaintiff –Respondent-Respondent had failed to amend the caption as ordered by court. The Appellant submited that 1st Plaintiff-Respondent-Respondent after the substitution became the only Respondent and she was properly cited as the Respondent in the appeal and there is no prejudice caused.

The Honourable High Court judges held that the Petition of Appeal is not in conformity with 758(1) of the Civil Procedure Code. 758(1) deals with the language and the form of the appeal and it reads thus;

> 758 (1) The petition of appeal shall be distinctly written upon good and suitable paper, and shall contain the following particulars:-
>
> (a) the name of the court in which the case is pending;
>
> (b) the name of the parties to the action;

(c) the name of the Appellant and of the respondent:

(d) The address to the Court of Appeal;

(e) A plain and concise statement of the grounds of objection to the judgment, decree or order appealed against – such statement to be set forth in duly numbered paragraphs;

(f) A demand of the form of relief claimed.

The Respondents heavily relied on the decision of the Court of Appeal in the case of *Wimalasiri and another vs. Premasiri* (2003) 3 SRI LR page 330 where it was held that:

> "Default of citing a person not living as the Respondent in the Notice of Appeal and the Petition of Appeal which resulted from the negligence of the Defendant-Appellant and the Registered Attorney-at-Law would render notice and the Petition of Appeal void *ab initio*. The defect being incurable the Defendant-Appellant cannot seek relief under section 759(2)".
>
> "There is a distinction between mistakes or inadvertence of an Attorney-at-law or party and negligence, a mere mistake can generally be excused but not negligence."

The learned High Court Judges upheld the preliminary objections and rejected the appeal. The Appellants filed a Leave to Appeal Application and obtained leave on following questions of law.

1. Has the Civil Appellate High Court misinterpreted the judgment in the case of *Wimalasiri Vs. Premasiri* (2003) 3 ,Sri.LR 330, in applying the same to the facts of the case at hand ? and

2. In the aforesaid context has the Civil Appellate High Court misdirected in law in coming to the finding that, the failure to name the 2nd Defendant Respondent a party to the Appeal, is an incurable defect which cannot be allowed to be rectified or relief could be sought under section 759(2) of the Civil Procedure Court ?

The Appellants submit that the facts in this case are different from the facts in the case of *Wimalasiri vs. Premasiri* (Supra) which was relied upon by the Respondents. The Appellants submited that the Hon. Judges of the High Court misinterpreted the judgment when it applied the same principles to the present case. In *Wimalasiri vs. Premasiri* there was only one defendant and he was dead at the time of instituting the action. In the present case there are two Plaintiffs and the 2nd Plaintiff died pending the action. 1st Plaintiff was duly substituted in the place of the deceased 2nd Plaintiff. The Learned Counsel for the Appellants submits that no prejudice would be caused as the 1st Plaintiff-Respondent is cited as a party and she is one and the same person substituted in the place of the deceased 2nd Plaintiff. Therefore, appeal could proceed against her despite the fact that she was not cited as the 2nd Substituted Plaintiff-Respondent.

The Appellant submitted that though substitution had taken place in the District Court, the Plaintiff-Respondent had failed to amend the caption as ordered by Court. The initial mistake was done by the Respondent and the Respondent is precluded from raising the objection. The learned Counsel for the Plaintiff –Respondent submitted that there is no legal requirement to amend the caption though as a matter of practice it is done. In support of his argument he cited section 394 of the Civil Procedure Code. According to this section what is required is for the court to 'cause an entry to that effect to be made on the record and proceed with the action'.

The Learned Counsel for the Respondents submitted that the 1st Plaintiff represents her interest as the 1st Plaintiff. As the 2nd substituted Plaintiff her capacity is different as she represents the estate the deceased 2nd Plaintiff. Therefore, in the caption her name should also be included as a party substituted in the place of the deceased 2nd Plaintiff.

The learned Counsel for the Respondent cited cases where Supreme Court held that citing a deceased person as a party or failure to cite all the parties cited in the court below render the appeal ab initio void.

In SC SPL LA No. 39/2010, (Supreme Court Minutes dated 14.05.2010) then, Chief Justice J.A.N. de Silva (Sripavan J, and Ekanayake J. agreeing) dismissed the application upholding a preliminary objection that the application is defective for the reason that a dead person has been made a party.

In *Illangakoon Mudiyanselage Gnanathileke Illangakoon vs. Anula Kumarihamy* SC HC LA 277/11 (SC Minutes of 21.01.2013) Sripavan J, (Hettige, PC J and Dep PC J agreeing) upheld the preliminary objection and dismissed the Plaintiff's leave to appeal application for noncompliance with Rule 28(2) of the Supreme Court Rules of 1990. In that case it was held that the Plaintiff has failed to set out the full title in the application which includes all the persons cited as parties in the proceedings below.

These two cases refer to leave to appeal applications filed against the judgments of the High Court (Civil Appeal) to the Supreme Court for which Supreme Court Rules of 1990 applies. Therefore these two judgments are not relevant to the present appeal. In the case before us, we are dealing with an appeal from the District Court to the High Court (Civil Appeal). The sections applicable to this case are 758 ,759 (2) and 770 of the Civil Procedure Code.

The Learned Counsel for the Appellants submitted that the mistake in citing a deceased party and the failure to name the substituted 2nd Plaintiff as a Respondent is a curable defect under section 759(2) of the Civil Procedure Code. The section 759(2) reads thus:

> 759(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 decision of the Supreme Court in *Nanayakkara vs. Warnakulasuririya* [1993] 2 Sri. L.R 289 would be relevant to the present case. In this case the notice of appeal was accompanied by security for the Respondent's costs of appeal as required under section 755(2).However there was a failure to hypothecate the sum of money tendered by bond as required under section 755 (C) of the Civil Procedure Code. In the said case Kulatunga, J held that:

> " The power of the Court to grant relief under section 759(2) of the code is wide and discretionary and is subject to such terms as the Court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the Court is of opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed."

In the course of the judgment in the said case Kulatunga, J.at page 293further observed that :-

> " In an application for relief under section 759(2), the rule that the negligence of the Attorney-at-Law is the negligence of the client does not apply as in the case of default curable under sections 86(2), 87(3) and 771 of the Civil Procedure Code. Such negligence may be relevant, but it does not fetter the discretion of the Court to grant relief where it is just and fair to do so."

In *Keerthisiri vs Weerasena* [1997] 1 Sri.LR 70 , the Appellant failed to duly stamped the notice of appeal as required under section 755 (1) of the Code. G.P.S.de Silva CJ held that:

> "What is required to bar relief is not any prejudice but material prejudice, i.e. detriment of the kind which the respondent cannot reasonably called upon to suffer. In this instant case there is nothing to suggest that the respondent has been materially prejudiced. I accordingly hold that the Court of Appeal had jurisdiction to grant relief in terms of section 759(2) of the present Code."

The section 770 of the Civil Procedure Code which is reproduced below is also applicable to this case.

> 770. " If, at the hearing of the appeal, the respondent is not present and the court is not satisfied upon the material in the record or upon other evidence that the notice of appeal was duly served upon him or his registered attorney as herein before provided, or if it appears to the court at such hearing that any person who was a party to the action in the court against whose decree the appeal is made, but who has not been made a party to the appeal, the court may issue the requisite notice of appeal for service."

In *KiriMudiyanse vs. BandaraMenika* 76 NLR Page 371 an objection was taken that some of the parties in the lower court were not joined as Respondents in the Notice of Appeal and in the Petition of Appeal. It was held that:

'The Supreme Court had the discretionary power under section 770 of the Civil Procedure Code to direct the 1st to the 3rd and the 6th to the 8th defendants to be added as respondents. The exercise of the discretion contemplated in section 770 is a matter for the decision of the judge who hears the appeal in the particular case. Furthermore, it should be exercised when some good reason or cause is given for non-joinder. The discretion which is an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously.

In *Jayasekera and Lakmini* and others [2010} 1Sri.L.R at page 41 there was a failure to comply with sections 755(1), 755(2) and 758(1) of the Civil Procedure Code. The Appellant had failed to :-

(a) to name the parties to the action,

(b) to name all the respondents to the action,

(c) to give required notices of this appeal to the 1st 2nd and 3rd defendants, and to submit proof thereof.

(d) to provide security for the 1st 2nd and 3rd defendants costs of appeal?

In *Jayasekera and Lakmini*(supra). Chandra Ekanayake, J., cited with approval the judgments in *Nanayakkara vs. Warnakulasuririya*(supra) *Keerthisiri vs Weerasena*(supra) and KiriMudiyanse vs. BandaraMenika(supra) and held :

> " In the case at hand 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 – I am inclined to the view that the Plaintiff being the only respondent named in the notice of appeal would not be materially prejudiced by the grant of relief under section 759(2).

Having considering the authorities cited above, I hold that failure to comply with section 755(1) by not citing the 2nd Substituted Plaintiff as a Respondent in the Notice of Appeal and in the Petition of Appeal is a curable defect under sections 759 (2) and section 770 of the Civil Procedure Code. I set aside the judgment in the High Court (Civil Appeal), Kegalle in case No. 639/2009.

I direct the learned judges of the High Court (Civil Appeal) Kegalle to delete the name of the deceased 2nd Plaintiff- Respondent and add the 2nd Substituted- Plaintiff as the 2nd Substituted- Plaintiff-Respondent and proceed to hear the appeal on merits and deliver judgment according to law.

I order the 1st Plaintiff- Respondent-Respondent to pay Rs. 50 000/= to the Defendent-Appellant- Appellant as costs of this application.

Judge of the Supreme Court

Anil Goonerathne J,

I agree.

Judge of the Supreme Court

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Kumaradasa Karunanayake
[Deceased]

Horagoda, Telijjawela, Matara

Original-Plaintiff

Vs

Suduweli Kondege Helenis Singho
[Deceased]

No.215, Pallimulla, Matara

Original-Defendant

Between

S. K. Jinadasa Dharmawardene of

Walpola, Matara

Substituted-Defendant-Appellant

S.C.Appeal No.43/2014
S.C.[Spl] LA No.100/12
Civil Appeal Case No.27/93[F]
D.C.Matara Case No.2987/M

Vs.

Srinath Karunanayake

No.32/1, Jason Flats,

Sri Saranankara Road, Dehiwela

Substituted-Plaintiff-Respondent

Now Between

S. K. Jinadasa Dharmawardene of
Walpola, Matara

Substituted-Defendant-Appellant-Appellant

Kaushall Ravinath Kumara Karunayaka
Telijjawilla, Matara

Substituted-Plaintiff-Respondent-Respondent

BEFORE : B.P.ALUWIHARE PC J.
UPALY ABEYRATNE J.
K.T.CHITRASIRI J.

COUNSEL : Rasika Dissanayake with C.Wanigapura for the Substituted Defendant-Appellant-Appellant
Mano Devasagayam with Sujeewa Dahanayake for the Substituted-Plaintiff-Respondent-Respondent

ARGUED ON : 01.06.2016

WRITTEN SUBMISSIONS ON : 19.08.2016 by the Substituted-Plaintiff Respondent-Respondent
No submissions filed by the substituted Defendant Appellant-Appellant

DECIDED ON : 06.10.2016

CHITRASIRI, J.

This matter was argued on 01.06.2016 before this Court and upon conclusion of the argument both Counsel moved that they be given a chance to explore a possibility of a settlement of the dispute. Accordingly, the matter

was listed again on 12.07.2016 to ascertain whether there was a settlement. On that date both Counsel moved for a further date to see whether there is a possibility of a settlement. Then the matter was once again mentioned on 25.07.2016 and on that date it was brought to the notice of Court that the parties have failed in arriving at a settlement. Thereafter, both Counsel moved that they be given an opportunity to file submissions in writing in addition to the oral submissions that they have made. Then, the Court directed the parties to file written submissions within a period of one month from 25.07.2016. Accordingly, Counsel for the substituted-plaintiff-respondent-respondent (hereinafter referred to as the respondent) has filed written submissions on 19.08.2016 but the substituted-defendant-appellant-appellant (hereinafter referred to as the appellant) has failed to file written submissions up to now even though more than two months have lapsed from the date that the appellant was permitted to file submissions. Therefore, it is to be noted that the appellant has not filed written submissions as agreed before, despite the fact that the questions of law upon which the leave had been granted are quite different to the questions of law referred to in the petition of appeal.

The plaint in this case was filed as far back as 30.03.1971 by the original plaintiff seeking for an order to transfer and assign half share of the license that was issued to the original plaintiff permitting him to sell foreign liquor at Kotuwegoda, Matara. The said license had been first issued to the father of the original plaintiff in the year 1887. Since then, the license had been

renewed periodically and such renewals had taken place in the names of the successors to the original plaintiff.

On or about the 1st day of September 1964, the original defendant was appointed as a co-licensee to the business due to the ill-health and for other personal difficulties of the original plaintiff. Thereafter, the original plaintiff and the original defendant continued as joint licensees for the said liquor license. On or about 08.04.1968 the deceased plaintiff had discovered that the deceased defendant had procured an alteration to the liquor license by having the name of the deceased original plaintiff deleted from the aforesaid license. Consequently, the deceased original defendant had become the sole licensee of the liquor business in Kotuwegoda, Matara.

Subsequently, it was revealed that the said alteration in the liquor license had been made, upon submitting a document which is dated 30.01.1968. The said document was marked as P10 in evidence. The original plaintiff alleged that the said document marked P10 does not bear his signature. He also alleged that the placing of the signature on that document marked P10 was not an act or deed of the original plaintiff. It is the most important issue that was put in suit before the trial court, becoming it the only question that was to determine in this case. Decision in this case depended on the correctness of the document and the genuineness of the signature alleged to have been placed by the original plaintiff which is found on the said document marked P10.

Learned District Judge had carefully examined this document and also had analyzed & evaluated the evidence particularly the evidence as to the signature alleged to have been placed by the deceased original plaintiff. (Vide pages 268-273 in the appeal brief). Having done so, the learned District Judge decided the case in favour of the plaintiff having granted the reliefs prayed for in the plaint.

Being aggrieved by the aforesaid decision of the learned District Judge, the appellant lodged an appeal addressed to the Court of Appeal. In the Court of Appeal, the issue that was argued was whether or not; the document P10 was obtained by false pretence and/or when the plaintiff had been reduced to a state of intoxication by the defendant and/or when the plaintiff was unable to comprehend the nature of the document which he had signed. Therefore, it is seen that the appeal filed in the Court of Appeal had been argued basically on the issue as to the manner in which the aforesaid document P10 came into existence.

Learned Judge in the Court of Appeal was of the view that it was purely a question of fact. Therefore, she did not incline to interfere with the findings of the trial Judge and dismissed the appeal. I do not see any error as to the way that it was decided by the Court of Appeal. Indeed, when the matter was taken up for hearing in this Court, the appellant did not challenge the aforesaid reasoning of the learned Judge of the Court of Appeal even though the grounds of appeal mentioned in the petition of appeal filed in this Court are

also directed towards the evaluation of evidence led at the trial in the District Court.

When the matter was supported to consider granting of special leave, the learned President's Counsel for the appellant left out the questions of law mentioned in the petition of appeal and has decided to fram two new questions of law. At this stage, it must be noted that the questions of law framed in an appeal may contain facts as well provided those facts that are embodied in the question of law have been led in evidence, allowing the respective parties to cross examine. However, completely new facts cannot be included in a question of law that is to be argued and determined in an appeal.

Framing of questions of law that are to be determined in an appeal had been discussed in the special determination in **Collets Ltd. Vs. Bank of Ceylon. [1982 (2) SLR 514]** In that case, **Sharvananda J** (as he then was) has held as follows:

"1. The "Law" in this context means the General Law and not merely Statute Law.

(a) The proper legal effect of a proved fact is necessarily a question of law. A question of law is to be distinguished from a question of "fact". Questions of law and questions of facts are sometimes difficult to disentangle.

(b) Inferences from the primary facts found are matters of law.

(c) The question whether the tribunal has misdirected itself on the law or the facts or misunderstood them or has taken into account irrelevant considerations or has failed to take into account relevant considerations or has reached a conclusion which no reasonable tribunal directing itself properly on law could have reached or that it has gone fundamentally wrong in certain other respects is a question of law. Given the primary facts, the question whether the tribunal rightly exercised its discretion is a question of law.

(d) Whether the evidence is in the legal sense sufficient to support a determination of fact is a question of law.

(e) If in order to arrive at a conclusion on facts it is necessary to construe a document of title or correspondence then the construction of the document or correspondence becomes a question of law.

(f) Every question of legal interpretation which arises after the primary facts have been established is a question of law.

(g) Whether there is or is not evidence to support a finding, is a question of law.

(h) Whether the provisions of a statute apply to the facts; what is the proper interpretation of a statutory provision; what is the scope and effect of such provision are all questions of law.

(i) Whether the evidence had been properly admitted or excluded or there is misdirection as to the burden of proof are all questions of law.

2. "The Substantial Question of Law"

It is not enough if a mere question of law is involved, it must be a substantial one. Whether a particular question of law is substantial or not must depend on the circumstances of each case. No absolute or exhaustive definition or test of "substantial" question, of law can be formulated. All that this Court can do is to set down some guidelines for its ascertainment."

As mentioned in the aforesaid determination, questions of law may contain facts as well. However, it must be mentioned that totally new material other than a pure question of law cannot be argued in an appeal. If fresh evidence need to be considered in an appeal, there is provision in the Civil Procedure Code for such an application. The two questions of law upon which the special leave was granted in this case are as follows:

(1) *Whether the Court of Appeal and the District Court erred in law granting reliefs as prayed for in paragraphs A, B and C of the prayer in the Plaint in view of the fact that the annual liquor license lapsed on 31.12.1968?*

(2) *In any event whether the Court has jurisdiction to grant damages beyond a period of one year?*

On the face of the two questions of law referred to above, it is clear that those two questions contain issues mixed with facts as well. Those facts relate to the lapse of the liquor license put in suit. Question as to the lapse of the said license issued to the deceased original plaintiff had never been an issue at the trial court. Neither had an issue been raised at the trial in that regard. The second question of law referred to above relates to the validity of the liquor license issued for the periods subsequent to the year 1968. Admittedly, no issue had been framed at the trial in that connection. Therefore, the facts contained in the two questions of law framed in this Court had never been agitated or raised in the District Court.

In the circumstances, this Court is not in a position consider those fresh material at this appeal stage to determine this appeal. No application had been made in terms of Section 773 of the Civil Procedure Code to admit fresh evidence either. Moreover, no question of law had been framed on the material argued before the trial judge. Indeed, when looking at the two questions of law mentioned above, the opinion one would infer is akin to non-filing of an appeal to canvass the decision of the Court of Appeal. Under such circumstances, the judgment of the Court Appeal shall remain intact.

Accordingly, this appeal is dismissed without costs.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PC J.

I agree

JUDGE OF THE SUPREME COURT

UPALY ABEYRATNE J.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for leave to Appeal under and in terms of section 5 C. Off the High Court of the Provinces (Special Provisions) (Amendment) Act No 54of2006.

SC/Appeal/47/2012

SC/HCCA/LA/ No.403/2011

NCP/HCCA/ARP/ 782 / 2010

Polonnaruwa DC NO. 7670/L/99

W. M. Chandra Kumari Palamakumbura,
06th Post,
Hingurakdamana.

Plaintiff

Vs.

P. A. Hema Damayanthie,

Layfarm,

Hingurakgoda.

Defendant

AND

W. M. Chandra Kumari Palamakumbura,
06th Post,

Hingurakdamana.

Plaintiff- Appellant

Vs.

P. A. Hema Damayanthie,
Layfarm,
Hingurakgoda.

Defendant- Respondent

AND NOW BETWEEN

P. A. Hema Damayanthie,

Layfarm,

Hingurakgoda.

Defendant -Respondent-Petitioner

Vs.

W. M. Chandra Kumari Palamakumbura,
06th Post,
Hingurakdamana.

Plaintiff- Appellant- Respondent

BEFORE: Chandra Ekanayake J
Eva Wanasundera PC.J
Buwaneka Aluwihare PC.J

COUNSEL: Lal Matarage instructed by Mihiri Abeyrathne for the defendant Respondent-Appellant

Ranjan Suwandarathne for the Plaintiff-Appellant- Respondent

Argued on: 20-10 2014

Decided on: 09-03-2016

Aluwihare PC.J

The Plaintiff-Appellant-Respondent (hereinafter referred to as the Respondent) instituted action in the District Court against the Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Appellant) and sought an order, declaring that the Respondent is entitled to a paddy land, 2 acres and 2 roods in extent, which is the subject matter of this case, on the strength of a permit issued under the Land Development Ordinance, marked and produced as P1. In addition, orders for the ejectment of the Appellant from the land in suit and damages were also sought in the same action.

At the conclusion of the trial, the learned District Judge, whilst denying the relief prayed for by the Respondent, dismissed the action. Being aggrieved by the order of the learned District Judge, the Respondent appealed to the High Court of Civil Appeals (hereinafter sometimes referred to as the High Court). The High Court by its order dated 13- 09-2011 set aside the order of the learned District Judge and granted the relief prayed for, by the Respondent.

The Appellant aggrieved by the said order of the High Court, moved by way of Leave to Appeal to this court and leave was granted on 24- 02- 2012.

The facts of this case, briefly, are as follows:
The Respondent asserted before the District Court that her father, T.B Palamakumbura became the beneficiary of the land in suit, on a permit (P1) issued to him in the year 1962. Her father, the Respondent claimed, had nominated the Respondent as the successor to the said land and her father had passed away in the year 1974. The Respondent alleged in the plaint that the Appellant had unlawfully possessed the land in suit since 1994 and it was on this basis that she sought relief from the District Court.

The Appellant on the other hand took up the position that the Respondent had on many occasions borrowed money from her by mortgaging the land in suit, as the Respondent was in dire financial straits. The Appellant further asserted that owing to the inability on the part of the Respondent to maintain and develop the land in question, in 1989, pursuant to an agreement between the parties, the Respondent prepared documentation to have the permit transferred in favour of the Appellant and forwarded the same to the Divisional Secretary of Hingurakgoda. To substantiate this position the Appellant marked and produced a notarialy executed agreement as V1(a) which is an agreement to sell. Appellant had also asserted that since 1984 she had been in possession and cultivating the paddy field in question.

In her evidence the Respondent had admitted that she signed the document V1(a) and accepted money from the Appellant. She has also admitted that she does not have a valid permit to the impugned land but had requested the Divisional Secretary to transfer her fathers' rights over the land in suit, to her. She had added that, although, she had been named as the successor, the rights have not been formally transferred to her.

In his testimony, even the Land Officer Somarathne, a witness called to testify on behalf of the Respondent, had stated that the permit to the property is in the name of T.B Palamakumbura, the father of the Respondent. He had added that

in 1962 the permit holder had nominated the Responednt as his successor. The witness, however, has categorically stated that the Respondent is not the permit holder of the impugned property.

The learned District Judge having evaluated and considered the above evidence, had quite rightly held that the Respondent (Plaintiff) has no right to maintain the action as she has not derived any rights to the impugned property as the successor nominated by her father. Accordingly the Learned District Judge had dismissed the Respondent's (Plaintiff's) case.

When this matter came up by way of an appeal, however, before the High Court of Civil Appeals (herein after the High Court) the learned judges of the High Court reversed the order of the District Court and allowed the appeal. It is against this order that the Appellant had moved this court by way of Leave to Appeal.

This court granted leave on the following questions:

(a) The judgement of the honourable Civil Apellate High Court judges is contrary to the provisions contained in the Land Development Ordinance no. 19 of 1935.
(b) The honourable Civil Appellate High Court judges have failed to consider the evidence led in this case in the correct perspective.
(c) The Honourable Civil Appellate High Court judges have failed to consider the document produced marked V1 (X8) and V2 (X9) which were sent by the Divisional Secretary under Section 106 and 110 of the Land Development Ordinance.
(d) The Honourable Civil Appellate High Court judges have failed to consider the fact that even prior to the institution of the said action in the District Court the alleged permit P1 (X3) had been cancelled under section 110 of the Land Development Ordinance.
(e) The honourable Civil Aappellate High Court judges have failed to consider the fact that the Respondent did not have a permit in respect of the said land.
(f) The Honourable Civil Appellate High Court judges have misdirected themselves in concluding that although it appears that the notice V2 (X9) had been sent, the cancellation of the alleged permit P1 (X3) could not be supported by V2 (X9).
(g) The Honourable Civil Appellate High Court judges have misdirected themselves in regard to the burden of proof in a civil case by proceeding to conclude the case on the basis of "fair and justifiable".

(h) The Respondent has no locus standi since she has failed to exercise the rights under section 113 of the Land Development Ordinance.

The contention on behalf of the Respondent was that she (the Respondent) is lawfully entitled to succeed to the rights of the said original permit holder by virtue of the statutory provisions of the Land Development Ordinance (hereinafter sometimes referred to as the Ordinance).

The learned Counsel for the Respondent drew the attention of court to section 48A (2) (c) of the Land Development Ordinance and contended that no person can dispute the rights of such a nominated and a succeeded permit holder, with regard to the possession of the land referred to in the permit. It was further contended on behalf of the Respondent that, in view of the nomination of the Respondent by the original permit-holder, that is the father of the Respondent, as the successor, she derives a statutory right under the Land Development Ordinance and for that reason the Respondent has every right to enjoy the property in suit by virtue of the statutory provisions of the said Ordinance, resulting from her contingent interest in the property.
When one considers the scheme of things under the Land Development Ordinance, it is abundantly clear that no permit holder has absolute right over state land that is alienated to a person on a permit and the rights of a permit holder are strictly contingent upon the permit holder adhering to the conditions under which such a permit is granted. Chapter VII of the Ordinance even provides for cancellation of a permit. It is equally true that the rights of the successor, to a property granted under a permit, are also contingent upon the nominee adhering to the applicable statutory provisions.

No doubt, as pointed out by the learned Counsel for the Respondent that, where a successor has been nominated, the rights of the nominee are recognised by certain provisions of the Land Development Ordinance. In my view, those rights of a nominated successor are again contingent upon the nominated successor fulfilling the requirements under the provisions of the Land Development Ordinance.

In the context of this case the issue that has to be decided is as to whether the Respondent has succeeded to the land in suit, after the demise of her parents.

Of the applicable provisions, sections 55 and 68 of the Ordinance are crucial to decide the issue of this case.

At the hearing, it was contended on behalf of the Appellant that, in terms of Section 55 of the Land Development Ordinance, the mere nomination of a successor by itself cannot be construed as disposition of the land for which the successor is nominated.

Section 55 of the ordinance clearly states:-

> "The act or transaction whereby a successor is lawfully nominated under the provisions of this Chapter shall not be construed as a **disposition** of the land for which such successor is nominated." (emphasis added).

The ordinance defines the term "Disposition" in Section 2 and reads thus:-

> " Disposition with its grammatical variations and cognate expressions means any transaction of whatever nature affecting land or the title thereto, and includes any conveyance, devise, donation, exchange, lease, mortgage or transfer of land;"

Thus, it appears that the mere nomination of a successor does not tantamount to automatic transfer of the land to the successor nominated; the nominee is then required to have the permit officially transferred upon making an application to that effect to the relevant authority. In view of the statutory provision embodied in section 55 of the Land Development Ordinance, only upon regularising the permit, can the successor gain full benefit of the enjoyment of the land.

Section 84 of the ordinance clarifies this position.

Section 84 (b) states that, "if the permit-holder is not survived by his or her spouse or if the spouse does not succeed to the land, any other person who is a duly nominated successor of the deceased permit-holder shall be entitled to succeed to that land on such person obtaining a permit from the Government Agent under the provisions of this Ordinance to occupy that land."

In the present case the Respondent had admitted in her evidence under oath, that she does not have a permit. The evidence is reproduced below:

ප්: තමා නමින් බලපත්‍රයක් තිබෙනවාද?
උ: පියා නමින් තිබෙනවා.
ප්: තමා නමින් නැහැ නේද?
උ: අම්මා ජීවතුන් අතර සිටි නිසා ලබා ගැනීමට නොහැකි වුනා.
ප්: පසුව වත් ලබා ගත්තේ නැහැ?
උ: මෙම ඉඩමට ප්‍රශ්ණ තිබෙන නිසා ඉක්මනින් හරවා ගන්න බැහැ කීවා.

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ප්: මෙම ඉඩමේ තමාට බලපත්‍ර අයිතියක් නැහැ නේද?
උ: දැනට අයිතියක් නැහැ.

In the course of his evidence, witness Somadasa Somarathne, the Land Officer attached to the relevant Divisional Secretariat, stated, having perused the file relating to the land in suit, that the Respondent as the nominated successor had made no application for a permit (in relation to the land in suit) to the Divisional Secretary.

The second aspect this court has to give its mind to is, whether the Respondent has succeeded to the land held by the original permit-holder despite her failure to fulfil the statutory requirement laid down in section 84(b) of the Land Development Ordinance. What would be applicable to the instant case is section 68 (2) (II) of the Land Development Ordinance. For the sake of completion, however, I wish to consider the entirety of the said provision.

Section 68 of the ordinance reads thus;

> **68. Failure of succession.**
> (1) The spouse of a diseased permit-holder, who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19, or the spouse of an owner, **fails to succeed** to the land held by such permit-holder on the permit or to the holding of such owner, as the case may be –
>
> (a) if such spouse refuses to succeed to that land or holding;
>
> or

(b) if such spouse does not enter into possession of that land or holding within a period of six months reckoned from the date of the death of such permit holder or owner.

(2) A nominated successor **fails to succeed** to the land held on a permit by a permit-holder who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19 or to the holding of an owner if he refuses to succeed to that land or holding, or, **if the nominated successor** does not enter into possession of that land or holding **within a period of six months reckoned-**

(i) where such permit-holder or owner dies without leaving behind his or her spouse, from the date of the death of such permit-holder or owner; or;

(ii) where such permit-holder or owner dies leaving behind his or her spouse, from the date of the failure of such spouse to succeed, such date being reckoned according to the provisions of paragraph (b) of subsection (1), or of the death of such spouse, as the case may.

Statutory provision referred to above governs two distinct situations where spouse on one hand and a nominated successor on the other 'fails to succeed' to a land held by a permit-holder, after the death of such permit-holder.

Though it may not be strictly relevant (to the instant case), section 68 (1) of the ordinance states, the spouse fails to succeed to the land if

(a) such spouse refuses to succeed to the land

or

(b) such spouse does not enter into possession of the land within a period of six months from the date of the death of the permit-holder.

Section 68 (2) (ii) of the Ordinance on the other hand, refers to a situation where the permit-holder nominates a successor but dies leaving behind the spouse. In such situations the nominated successor fails to succeed to the land,

if the nominated successor does not enter into possession of the land within a period of six months;

(a) from the date of the failure of such spouse to succeed to the land

or

(b) of the death of such spouse

Thus, where the permit- holder makes a nomination, but is survived by a spouse, the nominated successor has to succeed to the land by entering into possession within the time stipulated in Section 68 (2) of the Ordinance. That would be either within six months from the date the spouse fails to succeed to the land, that is within 12 months reckoned from the date of the death of the permit- holder, or within six months of the death of such spouse.

In the instant case, the permit- holder had died in the year 1974 and the permit-holder's spouse had passed away in July 1998. The Respondent also admitted that the property in suit was mortgaged to the Appellant in the 1980s and the Appellant has been in possession of the property in suit since then.

The action in the District Court, according to the plaint has been filed in August 1999, which is more than one year after the death of the spouse of the permit-holder and even by that date the Respondent had not entered into possession of the land in suit. Hence, I conclude that the Respondent has not succeeded to the same.

Under the circumstances aforesaid, the Respondent does not have any rights flowing from the permit issued to her father under the Land Development Ordinance.

The facts were somewhat similar in the case of **Leelawathie Vs. Perera SC Appeal 166/2010, SC minutes of 3-10-2011.** This was a case where a spouse sought a declaration that she is entitled to the possession of the property in dispute and to eject the Defendant on the basis that her deceased husband was the permit-holder of the impugned property. She claimed that in terms of section 48 of the Land Development Ordinance she became the permit-holder. It transpired in evidence in the said case that since the death of her husband, the Defendant had been cultivating the land in suit , since the spouse had not been able to cultivate it.

Delivering the decision in the said case, her ladyship, Chief Justice Dr Bandaranaike held that "if a spouse of a permit- holder does not enter into possession of the land or holding in question within a period of six months reckoned from the date of the death of the permit holder, the said spouse will fail to succeed to the land so held by the permit-holder of the permit.

Her ladyship Chief Justice Dr. Bandaranaike making reference to section 68 of the Ordinance concluded that, the Appellant (the spouse) had failed to enter into the possession of the land in question within a period of six months from the date of the death of her husband, the spouse is not entitled to claim succession to the land held by her deceased husband as a permit-holder.

In the instant case the only difference is that the Respondent in the case before us is a nominated successor as opposed to the spouse in the case referred to above. Similarly, applying section 68 (2) (ii) of the Ordinance, the Respondent had failed to enter into possession of the land in suit within a six month period from the date of the death of her mother.

The learned judges of the High Court in reversing the order of the District Court have misdirected themselves by not adverting to Section 68 of the Ordinance and were in error when they held that the plaintiff (Respondent to this application) has established her rights to the property in suit through oral and documentary evidence and that judgement should be entered in favour of the plaintiff.

In fact the plaintiff has failed to establish that she has succeeded to the property in suit that was held by her deceased father who was the original permit-holder. The learned judges of the High Court fell into further error when they relied on the decision of **Seenithambi Vs. Ahamadulebbe 74 N.L.R**

page 222, in holding that the defendant had a burden to establish that the permit of the plaintiff is not a lawful one.

The learned judges of the High Court failed to appreciate the fact that the evidence led at the trial was to the effect that the Respondent did not possess a permit, which was admitted by the Respondent herself.

For the reasons stated above the questions on which leave to appeal was granted are answered in the affirmative save for the questions raised in paragraph(c) (d) and (f) which to my mind have no bearing on the issues before us . The appeal is accordingly allowed.

The judgement of the High Court of Civil Appeals dated13-09-2011 is hereby set aside and the judgement of the learned District Judge, dated 23-01-2002, is affirmed.

The appeal is allowed with costs.

JUDGE OF THE SUPREME COURT

Justice Chandra Ekanayake

JUDGE OF THE SUPREME COURT

Justice Eva Wanasundera PC

JUDGE OF THE SUPREME COURT

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

S.C. Appeal No. 50/2010
S.C. HCCA L.A 78/2009
C.A No. CP/HC/CA 66/2007
D.C. Kandy Case No. L/20399

In the matter of an Application for Leave to Appeal against the Judgment dated 17.03.2009 made by the High Court of Civil Appeals of the Central Province in Appeal No. CP/HCCA/Kandy/66/2007

1. Edirisinghe Mudiyanselage Gunamal Ethana Edirisinghe
2. Samarasinghe Thantrige Chinthaka Samarasinghe

Both previously of:
No. 22.
Hewaheta Road,
Illukmodera, Gurudeniya.

Presently of:
No. 46/1,
Tennekumbura, Kandy.

PLAINTIFFS

Vs.

1. Dharmaratne Perera
   No. 38, Tennekumbura,
   Kandy.
2. W. A. P. Perera
   No. 71,
   Tennekumbura,
   Kandy.

3. Nissanka Bandara Sirimalwatte
   No. 71,
   Tennekumbura,
   Kandy.
4. Kurundeniya Seneviratnage Nissanka Seneviratne
   No. 43/40, Talwatte, Kandy.
5. Nihal Perera
   No. 48/2, Hewaheta Road,
   Talwatte, Kandy.
6. Ajith Nanayakkara
   "Olga Beer Point"
   No. 229, Srimath Bennet Soysa Street,
   Kandy.

DEFENDANTS

AND

2. A. P. Perera
   No. 71,
   Tennekumbura,
   Kandy.
3. Nissanka Bandara Sirimalwatte
   No. 71,
   Tennekumbura,
   Kandy.
4. Kurundeniya Seneviratnage Nissanka Seneviratne
   No. 43/40, Talwatte, Kandy.
5. Nihal Perera
   No. 48/2, Hewaheta Road,
   Talwatte, Kandy.

DEFENDENT-PETITIONERS

Vs.

1. Edirisinghe Mudiyanselage Gunamal Ethana Edirisinghe
2. Samarasinghe Thantrige Chinthaka Samarasinghe

Both previously of:
No. 22.
Hewaheta Road,
Illukmodera, Gurudeniya.

PLAINTIFFS-RESPONDENTS

AND

Presently of:
No. 46/1,
Tennekumbura, Kandy.

PLAINTIFFS

3. Nissanka Bandara Sirimalwatte
   No. 71,
   Tennekumbura,
   Kandy.
4. Kurundeniya Seneviratnage Nissanka Seneviratne
   No. 43/40, Talwatte, Kandy.
5. Nihal Perera
   No. 48/2, Hewaheta Road,
   Talwatte, Kandy.

DEFENDENTS-PETITIONERS-APPELLANTS

Vs.

1. Edirisinghe Mudiyanselage Gunamal Ethana Edirisinghe
2. Samarasinghe Thantrige Chinthaka Samarasinghe

Both previously of:
No. 22.
Hewaheta Road,
Illukmodera, Gurudeniya.

Presently of:
No. 46/1,
Tennekumbura, Kandy.

PLAINTIFFS-RESPONDENTS-RESPONDENTS

1. Dharmaratne Perera
   No. 38, Tennekumbura,
   Kandy.

1ST DEFENDANT-RESPONDENT

6. Ajith Nanayakkara
   "Olga Beer Point"
   No. 229, Srimath Bennet Soysa Street,
   Kandy.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

1. Edirisinghe Mudiyanselage Gunamal Ethana Edirisinghe
3. Samarasinghe Thantrige Chinthaka Samarasinghe

   Both previously of:
   No. 22.
   Hewaheta Road,
   Illukmodera, Gurudeniya.

   Presently of:
   No. 46/1,
   Tennekumbura, Kandy.

PLAINTIFFS-RESPONDENTS-RESPONDENTS-PETITIONERS

Vs

3 Nissanka Bandara Sirimalwatte
No. 71,
Tennekumbura,
Kandy.
4. Kurundeniya Seneviratnage Nissanka Seneviratne
No. 43/40, Talwatte, Kandy.
5. Nihal Perera
No. 48/2, Hewaheta Road,
Talwatte, Kandy.

3rd, 4th & 5th DEFENDENTS-PETITIONERS-APPELLANTS-RESPONDENTS

1. Dharmaratne Perera
No. 38, Tennekumbura,
Kandy.

1ST DEFENDANT-RESPONDENT-RESPONDENT

6. Ajith Nanayakkara
"Olga Beer Point"
No. 229, Srimath Bennet Soysa Street,
Kandy.

6TH DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Thisath Wijayagunawardene with Janaka Basuriya
For Plaintiff-Respondent-Respondent-Petitioners

Presanna Goonetilleke instructed by Gaithrie de Silve
For 3rd, 4th, & 5th Defendant-Petitioner-Appellant-Respondents

ARGUED ON: 19.01.2016

DECIDED ON: 02.06.2016

GOONERATNE J.

This is an appeal to the Supreme Court from the Judgment dated 17.03.2009 of the Civil Appellate High Court of the Central Province Holden in Kandy. By the said Judgment the High Court set aside the Judgment and order of the District Court, Kandy, where the learned District Judge refused to set aside an application in a purge default inquiry and set aside an ex-parte Judgment. This court on 04.06.2010 granted Leave to Appeal on the following questions of law, set out in paragraph 16(a), (b), (c) and (d) of the petition dated 24.08.2009. The said questions reads thus:

(a) Were the 3rd to 5th Defendants entitled to have the said Ex-parte Judgment and Decree set aside under Section 86(2) of the Civil Procedure Code without satisfying the said Court that their Registered Attorney had reasonable grounds for his default to appear on the said date of trial?

(b) Must the 3rd to 5th Defendants suffer for the default of their Registered Attorney of not informing the said Defendants the proper trial date and defaulting to appear on the date of the trial?

(c) Is the mistake alleged to have been made by the said Defendants of taking down a wrong date as the trial date of the said case, a reasonable ground for their default that

would entitle them to have the said Ex-parte Judgment and Decree set aside under section 86(2) of the Civil Procedure Code?

(d) Did the failure to file a list of witnesses and documents in terms of Section 121 of the Civil Procedure Code by the said Defendants establish that there was no bona fide intention to defend the said action on the said trial date?

The material placed before this court indicates that at the close of pleadings in the lower court, the case had been fixed for trial on 16.03.2004. The case itself was a land case, where the two Plaintiff-Respondent-Petitioners (hereinafter referred to as the Plaintiffs) sought a declaration of title and eviction of the 3rd, 4th, & 5th Defendant-Petitioner-Appellant-Respondents (hereinafter referred to as the Defendants). On the trial date the said Defendants were absent and unrepresented. Prior to leading ex-parte evidence by the Plaintiff the said Defendants made an application by way of petition and affidavit to have the order made by the District court to fix the case for ex-parte trial vacated. Case had been called on 18.06.2009 for such purpose and the Petitioners state that the Defendants were again absent and unrepresented on 18.06.2004. I find on a perusal of the submissions that the petitioner emphasis the fact that the Defendants were continuously in default.

On this point the Defendants take up another position. Defendants submit that no sooner they became aware that the District Court had fixed the case for ex-parte trial, in order to establish their bona fides and establish a genuine mistake as submitted on behalf of the Defendant's, petition and

affidavit was filed and they moved court to have the matter mentioned in court. However the Plaintiff's party did not consent to vacate the order fixing the case for ex-parte trial, and as such there was no appearance on behalf of the Defendants on the day the case was called in the District Court. As such it is stated that the Defendant party thereafter moved court to have the ex-parte judgment vacated, on decree being served on them.

The questions of law suggested in this appeal are relevant and important to decide this appeal. I have perused the written submission of both parties and the judgments delivered by both courts. It is prudent to start with the pleading and proceedings of the inquiry to purge default. The petition dated 12.11.2004 filed by the 2nd to 5th Defendants aver in paragraphs 5 to 8 of the petition and merely state that they were unaware of the fact that the trial has been fixed for 16th March 2004 and they genuinely believed that the trial was fixed for 26th March 2004. (paragraph 5) In order to get ready for the trial the said Defendants met the registered Attorney on the 20th of the same month. Only then that they came to know that the case had been fixed for trial on the 16th instant and the court had fixed the case ex-parte trial.(as the Defendants were absent and unrepresented) It is stated so in paragraph 6 of the petition. Thereafter the Defendants took steps immediately to get the order fixing the case for ex-parte trial vacated but as advised withdrew that application.

(paragraph 7) The only other remaining paragraph 8 merely state that if the Defendants are deprived from claiming the land in dispute it would be an irreparable loss to them. Further the Defendants submit that they were at all times ready and willing to contest the case. It is the genuine belief on the part of the Defendants as pleaded that they were not aware that the trial was fixed for 16th March 2004.

This court observes that the above pleadings do not precisely and with clarity plead the required reasonable grounds to purge default, which is a requirement under Section 86(2) of the Civil Procedure Code. The written submissions filed of record on behalf of the Defendants take up the position that by mistake the wrong trial date had been taken down. That would be a good defence, but not pleaded in the way it should have been pleaded in the pleadings filed of record. There is no reference in the petition at all that the registered Attorney made a mistake by taking down the wrong date, is a lapse on the part of the Defendants. A point relied upon for one's defence should be disclosed in the pleadings, as this seems to be the only ground that court has to give its mind.

Let me now consider the evidence led at the inquiry as the burden lies on the Defendants. The 3rd Defendant in his evidence inter alia state that he heard the trial date to be 26th March 2004. He came to know from the registered

Attorney that the case was called on 16th March, and that he was unaware of the correct date. He also states he had no reason not to be present in court. එහෙම නෑවින් ඉන්න හේතුවක් තිබුණේ නැහැ. In cross examination of the 3rd Defendant inter alia it is stated by the 3rd Defendant, to a question posed, having shown the journal entry of 16.03.2004, that not only the Defendants, but the Proctor on record was also absent. Witness answer that question as, we 'did not come' 'අපි අවේ නැහැ' It is recorded in the said journal entry that the Defendants were absent and unrepresented and such a position was not denied by the witness. (P3) It is in evidence that the registered Attorney had said that it was the 26th.'නිතිඥ මහතා තමයි කිව්වේ 26 කියලා' To make matters worse the following answers also transpired in cross-examination.

ප්‍ර: නිතිඥ මහතා 16 දා ඉදලා නැහැ?

උ: 26 වැනි දින අපි හිතුවේ.

ප්‍ර: තමුන් කියන්නේ නිතිඥ මහතාත් 16 දා තිබෙනවා කියලා හිතාගෙන හිටියා?

උ: ඔව්

The above items of evidence no doubt is hearsay. On the other hand it has no evidentiary value. Answer of the witness is on what he and the Attorney contemplated to be. The words 'අපි හිතුවේ' and the question හිතාගෙන හිටියා for which the witness answered as yes , is nothing but what the witness thought, it to be. In the first instance the trial Judge cannot act upon this

evidence. Even if the trial Judge decided to admit the above items of evidence he cannot bring within it the registered Attorney by the answer 'we' (අපි) unless the Proctor or the registered Attorney was called to give evidence. I am unable to accept the views expressed by learned counsel for the Defendants on the above items of evidence. Court cannot surmise evidence. It is no answer to state that specific number of witnesses need not be called. Unless there is clear and strong evidence to the effect that Proctor mistook the date to be 26th of March or he took down the wrong date, court cannot act upon conjecture, or on hearsay evidence.

It is no excuse for the registered Attorney not to be present in court as long as a valid proxy is filed of record. It is the responsibility and duty of the registered Attorney to represent his client in court, on all days the case is called, or on the trial dates. The registered Attorney has to make arrangements to enter an appearance. If the registered Attorney made a mistake as taking down the wrong date, he should give oral evidence or at the least if acceptable to court file an affidavit explaining his position. He cannot be heard to say that the clients mistook the date or to depend on the client's answer to court that they mistook the date. It is no doubt, a highly unsatisfactory and an unacceptable position arose for which the registered Attorney alone should take the blame.

The learned District Judge in his reasoning inter alia comment that if the Defendant was mindful and keen about their case, a list of witnesses and documents should have been filed on time. It was not done and it indicates their indifference. However I observe the failure to file the list of witnesses and documents does not necessarily mean that the Defendants were not getting ready for the trial. The learned trial Judge has considered several decided cases. Especially the case of Karunawathie Ekanayake Vs. Gunasekera & Others 1986(2) SLR 250 which held that Defendants negligence and mistake of Attorney cannot excuse the party concerned and in such event an ex-parte Judgment should not be vacated. In the case in hand there is no acceptable evidence placed before the District Court that the registered Attorney-at-Law made a mistake. Such a defect cannot be cured by Defendant's excuse for their negligence alone, so long as a valid proxy is filed of record it operates, until proxy is revoked.

When an Attorney is appointed by a party, such party must take all steps in the case <u>through</u> such Attorney-at-Law Seelawathie Vs. Jayasinghe 1985(2) SLR 266. Once an Attorney-at-Law was duly appointed by the party concerned he foregoes his rights ….. Fernando Vs. Sybil Fernando 1996(2) SLR 169. I also wish to cite Wijesekera Vs. Wijesekera and Others 2005(1) SLR at 58…." It is to the best interest of the Administration of Justice that Judges should not ignore or deviate from procedural law and decide matters on equity and

justice". As such I observe that there is an absence of proof of reasonable grounds as required by Section 86(2) of the Civil Procedure Code.

The learned High Court Judge does not seem to consider at all whether the registered Attorney-at-Law was negligent or not. He merely gets on to a procedural aspect and two factual matters. High Court reject the argument which has already been dealt in this judgment as regards filing of list of witnesses and documents. That position stated by the learned High Court Judge cannot be faulted but he should have examined the applicability of reasonable grounds as contemplated by Section 86(2) of the Code. No doubt the above matters were dealt by the learned District Judge. As such the High Court may have touched upon the above with some reasoning but the fundamental issue is the question of reasonableness and the role of the registered Attorney, on the day in question.

There may have been a bona fide mistake done by the Defendants, but the absence of the role played by the registered Attorney would be the fundamental issue. One cannot merely project the case of the clients of the registered Attorney who are the Defendants and attempt to draw comparisons with the role of the registered Attorney without evidence on that aspect. I observe once again that the registered Attorney either knowingly or

unknowingly or wittingly or unwittingly chose not to provide any material as stated above to support his client's case.

The situation that has resulted from the two Judgments of the District Court and the High Court could be summed up as follows. Learned District Judge's ultimate conclusion in refusing to vacate the ex-parte order is correct. But in the process of arriving at that conclusion, the voyage of discovery by the trial Judge cannot be so sound. The learned High Court Judge who assumed Appellate jurisdiction no doubt thought it fit to reverse the District Court Judgment and allow the appeal on matters dealt by the learned District Judge may be correct, but failed to examine the fundamental issue as discussed above.

The questions of law as per paragraph 16 of the Petition are answered as follows:

(a) No. Registered Attorney has failed in his duties and has shirk his professional responsibility. No explanation was forthcoming from the registered Attorney who has not taken the steps to revoke proxy. Primary duty is on the registered Attorney to appear in court as long as a valid proxy is in operation.

(b) Yes.

(c) No, in view of registered Attorney's lapse as described above.

(d) No, as stated above.

The case of the Defendants had not been established in satisfaction of Section 86(2) of the Code. Prior to considering the conduct of the party concerned it is incumbent upon court to examine the role of the registered Attorney as a proxy was filed of record and as such was in operation. The procedural law as in Section 24 of the Civil Procedure Code leaves no room for a client to act on his own. Whatever it may be the party concerned should take all steps in the case through his registered Attorney, and not on his own. In all the facts and circumstances of this case and in the context of the case in hand I set aside the Judgment of the High Court dated 17.03.2009, and allow the appeal without costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne

I agree.

JUDGE OF THE SUPREME COURT

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

SC/APL/50/2015
SC/HCCA/LA 473/2014
WP/HCCA/AV No. 686/2008
D.C. Pugoda No. 300/L

Dassanayaka Arachchige Jayasekera

PLAINTIFF

Vs.

1. Alawathura Raalalage Dhanusekera
2. Hapan Thanthrige Pabilis

DEFENDENTS

Alawathura Raalalage Dhanusekera

1ST DEFENDANT-APPELLANT

Vs

Dassanayaka Arachchige Jayasekera

PLAINTIFF-RESPONDENT

Hapan Thanthrige Pabilis

2ND DEFENDANT-RESPONDENT

……..

In the matter of an Application for Leave to Appeal made in terms of Section 5C(1) of Act No. 54 of 2006

Alawathura Raalalage Dhanusekera
Adjoining Kahatadeniya Boutique
Dangalla, Pepiliyawala

1ST DEFENDANT-APPELLANT-PETITIONER

Vs.

Dassanayaka Arachchige Jayasekera
Punchi Horagolla Watta,
Ranwala, Meethirigala

PLAINTIFF-RESPONDENT-RESPONDENT

Hapan Thanthrige Pabilis (**Deceased)**

2ND DEFENDANT-RESPONDENNT

2a. Aluthge Kankanamalage Alpi Nona
2b. Hapan Thanthrige Dayangani
2c. Hapan Thanthrige Deepani

All of No. 97, Vihara Mawatha,
Kothalawala, Kaduwela.

2d. Hapn Thanthirige Dayaratna
Punchi Horagolla Watta.
Ranwala, Devindugama, Meethirigala .

SUBSTITUTED 2ND DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: S. E. Wanasundera P.C., J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: Padmasiri Nanayakkara with Thilakasiri Alahakoon
and Ms. Anudi Nanayakkara for the 1st Defendant-Appellant-Appellant

Damitha Karunarathne instructed by Mrs. Churari of the Legal Aid Commission for the Plaintiff-Respondent-Respondent

ARGUED ON: 25.09.2015

DECIDED ON: 18.02.2016

GOONERATNE J.

This was an action filed in the District Court of Pugoda for a declaration that the Plaintiff-Respondent is entitled to a servitude of a right of way over the 1st & 2nd Defendant's land described in the 2nd schedule to the plaint. Plaintiff-Respondent also sought removal of all obstructions placed by the 1st Defendant-Appellant on the right of way. District Court entered judgment in favour of the Plaintiff-Respondent and same was affirmed by the Provincial Civil Appellate High Court, Avissawella. This court on or about 12.03.2015 granted Leave to Appeal from the above judgment, on the following questions of law as in paragraph 28 (a) to (d) of the petition of the 1st Defendant-Appellant.

(a) Was it correct for the learned District Judge and for the Honourable Judges of the High Court of Civil Appeals to hold that the Plaintiff-Respondent is entitled to a right of way when the servient tenement is not described in the plaint?

(b) Did the learned District Judge and the Honourable Judges of the High Court of Civil Appeals err in law in allowing a right of way along the strip of land depicted in සැ-4 where it appears that several intervenient lands exists, and owners of those lands were not made parties?

(c) Do the impugned Judgment of the District Court marked A-12 and the High Court of Civil Appeals marked 'F' offend the rule of indivisibility of servitudes?

(d) Did the Honourable Judges of the High Court of Civil Appeals err in determining the appeal without hearing the Counsel for the 1st Defendant-Appellant without following the provisions of Section 769(1) of the Civil Procedure Code?

Parties to this suit proceeded to trial on 17 issues. Plaintiff's issues in a gist suggest that he is the owner of land described in schedule 1 of the plaint and that in order to get to Plaintiff's land from Tharala Welgama road (should read as Wedagama) the road described in schedule 2 of the plaint was used and thereby Plaintiffs and his predecessor have prescribed to same. (Issue Nos. 2 & 3) The said road is morefully described in plan No. 1041/LRC ඇඩා/2876 of 05.07.1985 (Issue No.4). Obstruction placed on the said road are shown in Commission plan No. W. 1871 dated 16.01.1998 (Issue No. 5). The only means of access to the Plaintiff's land and shortest access is the road shown in schedule 2 of the plaint (Issue No. 6). Defendants are the servient tenement to the said road. (Issue No.7) and the Defendant-Appellants obstructed the said road way on 15.10.1996 (Issue No. 8). Issues once raised and accepted by court would be the material relevant to the case and the pleadings would recede to the background.

Defendants suggest in their issues, alternate roads that could be made available and to be used to get to Plaintiff's land. On the question of prescription 1st Defendant-Appellant raise a question whether the Plaintiffs have prescribed to the land in schedule 1 of the plaint as described in paragraph 4 of

plaint (Issue No. 11). Issue No.12 raised by the 1st Defendant state by reference to LRC plan 3296 in the manner described in the said issue a road is correctly depicted which goes across 1st Defendant's land. Issue No. 13 suggest that under the supervisions of Assistant Superintendent of Surveys a Survey was done by one Senanayake and by plan ගම/2278 of 1988 it shows that an 18 foot road had been reserved. Further issue No. 14 states plan No. 1871 of Surveyor Wijekoon dated 16.01.1998 shows a private road used by the 1st Defendant. The 1st Defendant-Appellant's position as suggested and raised in his issues is that there are alternate routes available to get to Plaintiff's lands and that Plaintiff-Respondent has no right to a road way as pleaded in his plaint (Issue Nos 15 & 16).

In a land case of this nature plaint should necessarily refer to the metes and bounds of the land in dispute by reference to a map or survey plan in compliance with Section 41 of the Civil Procedure Code. Schedule 1 of the plaint gives details of the land owned by the Plaintiff-Respondent described as lot 1 in plan 1041 (P2) and the title deed relied upon by him was marked as P1, The 2nd schedule to the plaint describes a roadway 12 feet wide which gives an extent of 20 perches. Issue No. 2 suggests that to get to Plaintiff-Respondent's land from Tharala-Wedagama road the road described in schedule 2 of the plaint had been used. In Plaintiff's evidence he states the shortest road to his land is from

the Wedagama Ranwala road. This position had been verified at folio 73 of the brief by the lower court as Tharala to Wedagama. Plaintiff's evidence suggest it is a cart way 12 feet wide. I would state the evidence at folio 73 describes and gives more clarity to the point as follows: මගේ ගේ ලග ඉදලා අඩි 12 ක පාරෙ ගියාම වෙදගම තාර පාරට වැටෙනවා අනිත් පැත්තට තරාල වෙදගම සිට තරාල පාරට වැටෙනවා. The 12 feet cart way goes over the lands of the 1st & 2nd Defendants, as testified by Plaintiff-Respondent. In the plaint it is pleaded that Plaintiff is entitled to a road way by reference to plan P2 and P2a connecting such a position, paragraphs 5, 6 & 7 of the plaint need to be considered? Does the plaint inclusive of above and gathered from the plaint describe the servient tenement with precision and definiteness?

I will at this point of my judgment consider the views expressed by the learned High Court Judge in his Judgment dated 06.08.2014, on the point of identification of the servient tenement, and compliance with Section 41 of the Civil Procedure Code. The learned High Court Judge no doubt has given his mind to the question of identity but what is crucial to a case of this nature is a definite and precise description of the servient tenement being described in the plaint. The High Court Judgment refer to the disputed portion of the road is shown as L-L in plan bearing No. 1041 (P2). Learned High Court Judge further states that Commissioner D.A. Wijesinghe prepared his plan 1871 (Commissioner's Plan) and produced at the trial marked P4 & P4A. What has been considered is stated

by the learned High Court Judge in his judgment as “the disputed road way is clearly shown in P4 and this road is connected to Plan P2”, which was prepared in 1985.

I observe that nowhere in Plan P2 does it show the servient tenement of the 1st Defendant-Appellant. In P2 the disputed area is shown as L to L in P2 which shows it is adjoining to lot (1) of P2 claimed by the Plaintiff-Respondent. Lot (2) is described as a road the boundaries are shown in the schedule to said plan and to the east is the land of K.S Ratnapala. South is Kelani river, west again is lot (1). No reference at all to the servient tenement in plan P2, other than P2ඉ as described as the disputed road, extent of road 18 perches. However in schedule 2 of plaint, road is described in extent of 20 perches and 12 feet in width boundaries given as north and south balance portion of road. East and west the land of Dhanusekera (1st Defendant-Appellant). Paragraph 6 of plaint avers that 1st and 2nd Defendants are servient tenements of adjoining road.

The extent in plan relied upon by Plaintiff and paragraph 6 of the plaint differ. Plan gives no indication of a servient tenement but paragraph 6 of the plaint states Defendants are owners of the servient tenement. Plan does not refer to the disputed portion of the road. Paragraph 8 avers the disputed point and obstruction at the point connecting Tharala – Wedagama Road. On this

aspect. David Vs. Gnanawathie throws more light to the legal requirement (CA 661/96 F reported in 2000 (2) Sri L.L.R 353). Though the judgment is a Court of Appeal Judgment same has a persuasive value, and need to be applied and followed.

Per Jayasooriya J.

Pg. 353.

> When the Plaintiff claimed that he has exercised by prescriptive user a right of way over a defined route, the obligation of the Plaintiff to comply with S. 41. Civil Procedure Code is paramount and imperative. Strict compliance with S. 41 Civil Procedure Code is necessary as the Fiscal would be impeded in the execution of the decree/Judgment if the servient tenement is not described with precision and definiteness.

Is it also possible to take the view that the judgments in both courts has permitted a right of way over the road depicted in plan P4? Plaint was not amended. Does plan P4 depict the right of way claimed in the 2nd schedule to the plaint shown as L-L in plan P2 & P2ඇ? Plaintiff in his evidence testified that the 12 feet wide road goes over the lands of the 1st & 2nd Defendants. In cross examination (folio 87) Plaintiff-Respondents admits lot 2 in the plan was the land adjacent to the village and state that it is not the strip of land. To a specific question as to whether the schedule in plaint is wrong, there was no answer by Plaintiff (Page 91).

A commission was issued to a Surveyor. It is necessary to examine the evidence of the Surveyor Wijesinghe at folios 117 to 120 of the brief. He testified that in order to facilitate the Survey he made use of plan P2 (1041). Commission plan is marked P4, and he measured the road way shown by the Plaintiff's party. There were certain obstructions (යම් යම් අවහිරතා) in certain places on the road. There was a gate at the point of commencement of the road. He also states there were no other obstructions. I find that this witness does not specifically state he superimposed plan P2 on the commission plan. This witness' last answer in his evidence was that it is not necessary to superimpose, as there was a road.

Perusal of plan P4, the road/right of way is shown and to the north of the road are the lands of the 2nd Defendant, 1st Defendant-Appellant, and one Ariyasinghe. At a point shown as falling on to Ranwala Wedagama a gate is shown, which is near and adjacent to Ariyasinghe's land. (that is in an extreme corner of the road). The other opposite extreme corner of the road is the Plaintiff-Respondent's land. To the south of that portion is a path leading to Kelani river. I observe on perusing the point where a gate is placed, it is difficult to conclude whether in fact it is an obstruction to the road, but certainly the gate as depicted in P4 is near and bordering Ariyasinghe's property. On the other extreme corner of the alleged road way some dotted lines are depicted.

According to P4 the dotted lines are on Plaintiff's land and that of the 2nd Defendant's land. All this had been marked in the way same as shown by Plaintiff. The portion of land up to 2nd Defendant's land consists of two portions and one is that of the 2nd Defendant and the other is that of Ariyasinghe (not a party). It would be necessary to focus on that part of the evidence of the Surveyor. It reads thus:

මම නිරීක්ෂණය කලා මෙම පැමිණිල්ලේ ඉදිරිපත් කල පාරේ යම් යම් තැන්වල අවහිරතා ඇති බවට. පාර පටන් ගන්න තැන තියෙනවා ගේට්ටුවක් දාල. වෙනත් අවහිරතා නැහැ. මගේ පිඹුරේ බටහිර මායිමේ කඩ ඉරකින් ලකුණු කර තියෙනවා. කම්බි වැටක්. ඒ පාරේ කම්බි ගහලා අවහිර කළ කොටස මම කඩ ඉරකින් පෙන්වා තියෙනවා. බටහිර මායිමේ අවහිරයට අමතරව පාර ආරම්භ වන ස්ථානයේ ගේට්ටුවෙන් අවහිර කර තියෙනවා. ඒ සම්බන්ධයෙන් මගේ වාර්තාවේ සඳහන් කලා.

What concerns this court is whether plan P4, which is the commission plan correspond to schedule 2 of the plaint? It disturbs me to conclude in the manner suggested by the Plaintiff-Respondent. The question is whether the road described in the schedule to the plaint which is marked L-L in P2, and described in the 2nd schedule to the plaint, is outside the right of way depicted in P4? Accuracy, precision and definiteness is always paramount in a case where party seeks to enforce a servitude of a right of way. Has the Plaintiff-Respondent pleaded correctly the land over which he is claiming a right of way? No doubt the servient tenement is not properly described. Pleadings do not with

certainty support the evidence. Care must be taken to understand that a servitude is a restriction upon the enjoyment of the right of ownership of the owner of a servient tenement. It need to be interpreted restrictively. As stated above (as in P4) obstruction with a gate is bordering on Ariyasinhge's land. Ariyasinghe is not a party. The dotted line to indicate another encroachment in P4 which commence from 2nd Defendant's land and goes over to Plaintiff's land. The two obstructions do not connect 1st Defendant's property which has to be a servient tenement, according to the plaint, and proved to the satisfaction of court, as regards a servient tenement. The gate alleged to be an obstruction borders Ariyasinhge's land, who is not a party to the suit. The dotted lines indicative of a barbed wire fence borders the 2nd Defendant's land, though a party, has wilfully not taken part in court proceedings. In this regard I note the evidence of Plaintiff in his cross examination at folio 108 (typed figure 42) of the proceedings as follows:

ප්‍ර : තවදුරටත් යෝජනා කරනව ගේට්ටුව දාල පාර වහල තිබෙන්නේ ධනුසේකර කියන 1 වෙනි විත්තිකාරයගේ ඉඩම හරහා නොවෙයි මේ ඉඩම විත්තිකාරයෙක් නොවන අයකුට?

උ : මේ විත්තිකාරය නොවෙයි ගේට්ටුව සවි කලේ.

ප්‍ර : පබ්ලිස් කියන මෙම නඩුවේ 2 වෙනි විත්තිකාරයගේ ඉඩම මතින් කියන පාර තමාට ලේසියෙන් හා කෙට්යෙන් යන්න පුලුවන් පාරක්?

උ : මට යන්න තහනමක් නෑ.

It is necessary for completeness of this judgment to examine the issue relating to prescription. Issue No. (2) indicates that road described in schedule 2 of the plaint was used by Plaintiff and issue No. (3) states Plaintiff and his predecessors have possessed and used the road for over 10 years and prescribed to same. The learned High Court Judge emphasised the aspect of identity, and on prescription support the position that Plaintiff has used the road for 20 years and his wife corroborated that position which was not disputed. Can the High Court arrive at a conclusion in this manner? If prescription has to be considered, can it be based on mere bare assertions? Are the requirements in Section 3 of the Prescription Ordinance fulfilled to the satisfaction of court?

The evidence reveal that the lands in question and lands in the vicinity were vested in the Land Reform Commission. There is no clear acceptable proof as to when it was vested in the Land Reform Commission, but vesting of the property is not ruled out. Original court should have examined, vesting of the land in the L.R.C with much care in view of Section 6 and 9 of the said law where lands vested in the commission vest with absolute title free from encumbrances. On the other hand Section 9 enacts that a servitude should not be affected. Was there in fact a servitude right of way where people in the area had used the disputed road way prior to Plaintiff-Respondent filing action? However Plaintiff's rights to the property, whatever it may be, may have to be

declared on execution of deed marked P1. These are all areas that should have been checked and verified in the original court.

Plaintiff's evidence in his examination-in-chief (73) and re-examination was that people used this road and used for 20 years. Plaintiff's wife also states the same without explaining such use in detail. Possession must be explained and exemplified. In *Juliana Hamine Vs. Don Thomas 59 NLR 546.*

Held:

> That when a witness giving evidence of prescriptive possession states "I possessed" or "We possessed", the Court should insist on those words being explained and exemplified.

At page 548..

> On this aspect, it is sufficient to recall the observations of Bertram C.J. in the Full Bench Case of *Alwis v Perera:*
>
> "I wish very much that District Judges – I speak not particularly but generally – when a witness says 'I possessed' or 'we possessed' or 'We took the produce', would not confine themselves merely to recording the words, but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts as the witnesses have in their minds are stated in full and appear in the record."

I have to observe that issue No. (3) has not been established by the Plaintiff. This is an important aspect that should have been explained and exemplified by Plaintiff's witnesses. There is no requirement to call such number

of witnesses to prove a point. However other than Plaintiff's own wife an independent witnesses' evidence from the village would have fortified Plaintiff's case , and may have even satisfied the requirements contained in Section 3 of the Prescription Ordinance.

I am unable to accept the position that the road shown in P4 and P4a is connected to the short road depicted in plan P2. Plaint does not describe same in precise terms. I state that a road way is shown in P4 plan but considering the servient tenement that should be depicted on the plan and established in the case in hand, there is no proper identification of same for the reasons stated above. Nor was the plaint amended to provide material to establish precise identity of the land in dispute. There could not have been a bar to amend the plaint to bring it in line with Plaintiff's case.

Plaintiff-Respondent has failed to describe the servient tenement over which the roadway is depicted in P4. The obstruction as described in plan P4 is on two points of the road way shown in P4, i.e barbed wire fence and the gate. It may be possible to state that the alleged obstruction of the barbed wire fence obstructs or is within the lands of the 2nd Defendant. Plaintiff-Respondent seeks access from that obstruction also to the right of way from Kelani river to Ranwala-Wedagama road. The gate which is alleged to be causing obstruction is at the far end or the eastern end of that right of way and certainly not within

the land of the 1st Defendant-Appellant. It is on or within the land of A.R.D. Ariyasinghe (not a party) This is the other lapse apparent on perusal of plan P4. In this regard I would refer to the case of *De Silva Vs. Nonahamy* which assist court to realise the aspect of continuity of servitude.

Macdonell C.J. in Nonahamy Case 34 NLR 113at page 115 held:

> The servitude, here a right of way, is one and indivisible in the sense that it must be shown legally to exist at each and every point on the strip of land over which it is claimed and if the claimant fails to prove its existence at any one of such points, the servitude disappears not at that point only but at every other point;

Plaintiff claims a road way in P4, he should have made the owners of other lands parties more particularly where the gate stood. In the context of this case it should be done. Ariyasinghe in the context of this case is a necessary party. As such the action itself is bad in law. It is so as it was the complaint of the Plaintiff about a gate obstructing his path that encouraged him to file action. The owner of a dominant tenement should establish his right of servitude of the particular servient tenement and in this case is the point where the gate was installed. It may <u>not be necessary</u> to bring all the adjacent owners to the road way into the case even if the law contemplate of each of the contiguous lands is a servient tenement and the law lays that the owner or owners of each such tenement is under a duty to permit the free exercise by the owner or owners of the dominant tenement of his right of way. In the context of the case in hand I

observe that the owners of a servient tenement where the gate and barbed wire fence could be identified, as shown in Plan P4, no doubt, would be necessary parties. Only the 2nd Defendant had been made a party. In the case of a servitude right of way which need to be proved in court by way of a well defined track and the servient tenement, are two matters that need to be established with precision by the owner of the dominant tenement. The obstruction to the road way necessarily has to be considered with the above in mind.

Plan P2 annexed to the plaint was prepared in 1985 (12 years prior to filing action) and the short road shown therein does not correspond to the road depicted in P4. Nor does the road described in the 2nd schedule to the plaint correspond with road described in Plan 4. The survey plan P4 and the evidence led at the trial does not support the plaint. The requirement of Section 41 of the Civil Procedure Code has not been fulfilled. As stated above dominant tenement and the servient tenement need to be described and identified correctly. The servient tenement has not been properly described in the plaint. Servient tenement over which the alleged road runs, had not been described in the plaint. It is fatal.

I agree with the submissions of learned 1st Defendant-Appellant's counsel that the dominant tenement, the servient tenement or tenements and the right of way claimed should be pleaded with necessary meats and bounds.

Commissioner's report and evidence does not reveal with certainty that the commission plan shows a superimposition of plan P2 on plan P4.

The importance of ascertaining and describing a servient tenement has been considered in *Maasdorp's Institutes of South African Law. Vol II – 8th Ed. Pg. 1256.*

> "A servitude may be defined as a detachment of some of the rights of ownership from The ownership of some particular property and either conferring them upon a person other than the owner, or attaching then to the ownership of another property. In other words, it is a right constituted over the property of another, by which the owner is bound to suffer something to be done with respect to his property, or himself to abstain from doing something on or with respect to his property, so that another person may derive some advantage from it. It is the right to make property servient to someone other than the real owner, and from this the term, servitude is derived".

The Judgment of the District Court and the High Court offends the rule of indivisibility of servitude. The servitude right of way shown in plan P4 (subject to the material discussed above) is one and indivisible. It must exist at each and every points, of the road way. Plaintiff has not proved the servient tenement at the point where the gate is shown in plan P4. As such the servitude will disappear at every point of the roadway shown in plan P4.

The 4th question of law reflected in paragraph 28(d) of the petition indicates that the learned counsel for the 1st Defendant-Appellant was not heard, in appeal before the Civil Appellate High Court. The proceedings of

23.06.2014 records the day's events in the High Court. Learned counsel for the Appellant who was to appear was on his way to in Avissawella High Court. It appears that he had not reached court on time. At 10.35 a.m court had fixed the matter for judgment and permitted parties to file written submissions. Both parties have filed written submissions. I cannot fault the learned High Court Judge for doing so, since it was the only case to be taken up for argument. Court cannot be faulted for counsel's lapse. Proceeding of the day give no indication of an application for a postponement.

The question of law arising from paragraph 28 of the petition are answered as follows:

28(a) It is incorrect for the Judges in both courts to hold that the Petitioner-Respondent is entitled to a right of way. In the absence of material to identify the right of way in the plaint and non-compliance with Section 41 of the Civil Procedure Code, is fatal to a case of this nature.

28(b) As observed in this Judgment, servient tenement which is adjacent/over which the roadway proceeds are relevant and material to the case in hand. Failure to make the relevant owner of that servient tenement a party is an error. Judges in both courts erred in this regard and the action is not properly constituted.

28(c) Both Judgments of the District Court and the High Court offend the rule of Indivisibility of servitude, as stated above in this Judgment.

28(d) An opportunity was made available by the High Court to tender written submissions and both parties have tendered submissions. It was the counsel for the Appellant who failed to appear in court at the correct time. No court could be faulted in the absence of a proper application for an adjournment.

In all the above facts and circumstance the Judgments of the District Court and the Civil Appellate High Courts are set aside. Appeal allowed without costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

S. E. Wanasundera 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

Hettiarachchige Don Nicholas
Heliyan
No.243. Wilpatha
Chilaw

Defendant-Appellant-Appellant

S.C.Appeal No.51/2015
S.C./HC/CA/LA/No.172/2014
NWP/HCCA/KUR/137/2009(F)
D.C.Chilaw Case No.540/L **Vs.**

Peththaperuma Arachchi Somawathie
"Siriniwasa", Addipala
Chilaw

Plaintiff-Respondent- Respondent

BEFORE : **B.P.ALUWIHARE PC J.**
K.T.CHITRASIRI J.
PRASANNA S JAYAWARDENA PC J.

COUNSEL : Amrit Rajapakse with Niranjan de Silva for the Defendant-Appellant-Appellant

Dr.Sunil Cooray with Sudarshani Cooray for the Plaintiff-Respondent-Respondent

ARGUED ON : **10.08.2016**

WRITTEN : 07.05.2015 by the Defendant-Appellant-Appellant
SUBMISSIONS ON: 09.09.2016 by the Plaintiff-Respondent-Respondent

DECIDED ON : **29.11.2016**

CHITRASIRI, J.

This action was instituted by the plaintiff-respondent-respondent (hereinafter referred to as the plaintiff) in the District Court of Chilaw seeking *inter alia* for a declaration that the plaintiff is the owner of the land referred to in the Crown Grant bearing No. පුත්/ප්‍ර/3540 dated 4.3.1993. The plaintiff has also sought for a declaration, declaring that the defendant-appellant-appellant (hereinafter referred to as the defendant) is not entitled to claim any right over the land in question since the Agreement to Sell marked V4, relied upon by the defendant has no force or avail before the law. The plaintiff also has sought to have the defendant evicted from the land in suit and has claimed damages as well from the defendant until she obtains the possession of the same.

The defendant having relied upon the terms and conditions of the aforesaid Agreement to sell dated 23.8.1993 which bears the No.4050, attested by P.M.T.Pathiraja, Notary Public, (marked as V4 in evidence) has sought to have a declaration, declaring that he is the owner of the land in question and has prayed to have the action of the plaintiff dismissed. In the alternative he has claimed Rupees Twenty Five Million (Rs.25,000,00/-) as damages and has further sought to remain in possession (*jus retentionis)* of the land until the said sum of Rs.25,000,00/- is paid to him.

Both the learned District Judge and the learned judges in the Civil Appellate High Court have held with the plaintiff and made order evicting the

defendant subject to Rs. Five hundred thousand (Rs.500,000/-) being paid to the defendant considering the improvements that he has made on the land.

When the matter was taken up before this Court, it made order granting leave on the questions of law referred to in paragraphs 14 (ii), (iii), (iv) and (v) of the petition of appeal dated 7.4.2014. The first two questions of law had been raised to ascertain whether or not, the aforesaid Agreement to sell has become unenforceable due to it been frustrated for the reason that it contains a condition which cannot be performed in terms of the law. The other two questions of law are in relation to the compensation awarded to the defendant.

As mentioned before, learned Judges in the courts below have come to the conclusion that the said sale agreement marked V4 cannot be enforced due to it been frustrated because the law, particularly Section 46 of the Land Development Ordinance does not permit the Divisional Secretary to grant written permission to transfer the land to the defendant. (vide at page 17 in the District Court judgment/page 263 in the appeal brief) In other words, the basis for the rejection of the agreement V4 was that it governed by the Roman Dutch principle namely "impossibility of performing the obligation".

At this stage, it is pertinent to refer to the law in this regard. Prof. C.G.Weeramantry in his book "The Law of Contracts" at paragraph 787, states thus:

"To summarize the position, in the Roman-Dutch law the presumption would seem to be that the contract is subject to an implied condition that impossibility operates as a discharge, unless the parties contract to the contrary, whereas in English law the presumption would seem to be in favour of an absolute contract unless it can be shown that the parties had contracted on the basis of a condition that impossibility was to discharge the contract."

In paragraph 790 of the said book, it is stated as follows:

"(a) ***Supervening Illegality****. It has been well recognized in English law since Atkinson Vs. Ritchie [1809 (10) East 530] that supervening illegality discharges the contract. Supervening illegality may arise in various ways, such as by legislation or by new facts causing a clash with public policy, a common illustration of which is the outbreak of war."*

As mentioned before, learned judges in the District court and the Civil Appellate High court, relying upon the aforesaid principle namely "supervening illegality" have decided the case in favour of the plaintiff stating that the sale agreement V4 had been entered into in violation of Section 46 of the Land Development Ordinance.

Accordingly, I will now look at the relevant statutory provisions relied upon by the learned judges in the Courts below in order to decide whether or not the agreement to sell [V4] had been frustrated. Those relevant Sections are the Sections 42 and 46 of the Land Development Ordinance. Section 42 of the

Land Development Ordinance refers to **disposition** of State lands while Section 46 refers to the lands alienated on a permit under the Land Development Ordinance. Aforesaid Section 42 of the Land Development Ordinance reads thus:

> *"The owner of a **holding** may dispose of such holding to any other person except where the disposition is prohibited under this Ordinance, and accordingly a disposition executed or effected in contravention of the provisions of this Ordinance shall be null and void."*
> *(emphasis added)*

The word **"Holding"** referred to therein is defined in Section 2 of that Ordinance and it reads thus:

> ***"Holding"** means a land alienated by a **Grant** under this Ordinance and includes any part thereof or interest therein."*

Section 46 of the said Act reads thus:

> *(1) Subject to the provisions of subsection (2), no **permit-holder** shall execute or effect any disposition of the land alienated to him on **the permit.***
>
> *(2) With the written consent of the Government Agent, a **permit-holder** may mortgage his interest in the land alienated to him on **the permit** to any registered society of which he is a member.*
>
> *(3) Any disposition, other than a disposition in accordance with the provisions of subsection (2), of any land alienated on **a permit** shall be null and void."*
> *[emphasis added]*

Accordingly, it is clear that Section 46 of the Land Development Ordinance imposes a blanket prohibition to transfer the lands alienated by way of a "**Permit"** issued by the State while Section 42 permits an owner of a land

alienated by way of a grant to dispose the same provided such a transfer is not specifically prohibited by law.

Having adverted to the law, I will now briefly refer to the facts of this case. Admittedly, the land which is the subject of this case had been alienated to the father of the plaintiff namely Peththaperuma Arachchige Thomas Appuhamy by way of a Grant by the then Head of the State. The said Grant was marked as P2 in evidence. Since it is a Grant under the aforesaid Section 42 of the Land Development Ordinance, the Grantee namely Thomas Appuhamy entering into an agreement to transfer the land given to him is not unlawful.

Then the question arises as to the manner in which such a transfer could be effected. The Grant marked P2 contains several conditions to observe if the Grantee wishes to transfer the land subjected to in the Grant. Those conditions are as follows:

කොන්දේසි :-

1. **මෙහි සඳහන් අවම අනු බෙදුම් ඒකකය. එනම්, උස්බිම් භාගය ට වඩා ප්‍රමාණයෙන් අඩු වූ මෙම ඉඩමේ බෙදා වෙන්කළ කොටසක් අයිතිකරු විසින් බැහැර නොකළ යුතුය.**
2. **මෙහි නියමිත අවම භාගයට වඩා අඩු එනම්, 1/10 වඩා මෙම ඉඩමේ නොබෙදා වෙන් කළ කොටසක් අයිතිතරකැ විසින් බැහැර නොකළ යුතුය.**
3. **1 වන කොන්දේසියේ සඳහන් අවම අනු බෙදුම් ඒකකයට වඩා අඩු ප්‍රමාණයක් වූ ඉඩමේ බෙදූ කොටසකට කිසිම තැනැත්තෙක් අයිතිකරු නොවිය යුතුය**

4. 2 වන කොන්දේසියේ සඳහන් අවම භාගයට අඩු වූ ඉඩමේ නොබෙදූ කොටසකට කිසිම තැනැත්තෙක් අයිතිකරු නොවිය යුතුය.

5. දැනට ඉදිකරන ලද හෝ ඉදිකර ගෙන යනු ලබන හෝ මින්මතු ඉදිකරනු ලබන වාරිමාර්ග ක්‍රමයකින් මේ බිම් කොටසට හෝ එහි යම් කොසකට වාරිමාර්ග පහසුකම් සැළසෙන්නේ නම්, එකී වාරිමාර්ග පහසුකම් සැලසෙන බිම් කොටස සම්බන්ධයෙන් අයිතිකරු (453 අධිකාරය වූ) වාරිමාර්ග ආඥා පනතේ විධිවිධාන වලට හා ඒ යටතේ සාදන ලද යම් රීතිවලට අනුකූලව කටයුතු කල යුතුය.

6. දිසාපතිවරයාගෙන් ලිඛිත අවසරයද උචිත බලධාරියාගෙන් බලපත්‍රයක් ද ලබා ඇත්නම් මිස, අයිතිකරු විසින් ඉඩමෙහි හෝ ඒ මතුපිට කිසිම ඛනිජ ද්‍රව්‍යයක් සඳහා කැනීම් සෙවීම, එය ලබා ගැණීම, ප්‍රයෝජනයට ගැණීම, විකිණීම හෝ අන්‍යාකාරයකින් බැහැර කිරීම නොකළ යුතුය.

7. සභාපතිවරයාගේ පූර්ව ලිඛිත අවසරයක් ඇතිව මිස, ඉඩමෙහි හෝ එහි කිසිම කොටසක අයිතිය බැහැර නොකළ යුතුය.

8. “මෙම පැවරීමේ නීත්‍යානුකූල ලේඛනයේ ඇතුලත් ලැබුම්කරුගේ නම සහ ලිපිනය දැක්වෙන විස්තර වාක්‍යයෙහි වරදක් ඇති බව දැන් පෙනීයන බැවින් එහි සඳහන් පැවරුම්ලාභියාගේ නම වෙත්ත පෙරුම ආරච්චිගේ තෝමස් අප්පුහාමි යන වචනය වෙනුවට පෙත්ත පෙරුම ආරච්චිගේ තෝමස් අප්පුහාමි යන වචනය යෙදීමෙන් එම වරද නිවැරදි කරන ලදී. / කිරීමට මෙයින් අනුමැතිය දෙමි.

Those conditions in the Grant Marked P2 alone show that it is not unlawful to transfer the land given on the said Grant provided the aforesaid conditions found therein are not violated. At the same time, it is important to note

that another condition had been imposed by the Rules made under the Land Development Ordinance, in the event a Grantee intends to alienate a land given on a Grant. It is mentioned in Rule 37, made under the said Ordinance and it reads as follows:

> "37.**ප්‍රදාන පත්‍රයක් මත දුන් ඉඩමක් සම්බන්ධයෙන් වූ විට දිසාපතිගේ පූර්ව ලිඛිත අවසරය ඇතිව මිස ඉඩමෙහි හෝ එකී කොටසක අයිතිය බැහැර කළ හැකි නොවේ.**"

In terms of the aforesaid Rule made under the land Development Ordinance, Thomas Appuhamy (the father of the plaintiff) should have obtained permission from the Government Agent of the area, if he needed to alienate the land that was given to him by way of a Grant. Admittedly, in the agreement to sell marked V4 also contains such a clause. Indeed, Thomas Appuhamy (plaintiff's father) has sought permission of court to have the said permission obtained, by filing a writ application which bears the No.HCA 40/95 in the High Court of Chilaw. (at page 328 in the appeal brief)

Therefore, it is clear that the parties to the agreement Marked V4 has not violated any provision of law when they entered into it. Neither have they violated the conditions found in the Grant marked P2. In the circumstances, it is incorrect to have decided that the said Agreement to Sell marked V4 had been frustrated due to supervening illegality.

At this stage it is important to mention, the circumstances under which the aforesaid writ application had been filed by Thomas Appuhamy (father of the plaintiff). It had been filed to have a directive on the relevant authorities in the Government,

directing them to allow Thomas Appuhamy to transfer the property to an outsider. That action had been filed due to the claims made by the legitimate children of Thomas Appuhamy. Plaintiff alleged to have been a child born to parents who were not married though she claims that Thomas Appuhamy was her father. Therefore, it is seen that the legitimate children of P.A.Thomas Appuhamy were disputing claims made by the plaintiff over the land in question. However, before a decision was made by court in that case, Thomas Appuhamy had passed away. Therefore, it is clear that Thomas Appuhamy had taken every effort to comply with the law with the intention of transferring the property to the defendant as agreed in the agreement marked V4. Had he been alive, he could have transferred the property to the defendant after complying with the conditions required by law.

In the circumstances, it is clear that no evidence is forthcoming to show that there had been any supervening illegality in performing the conditions contained in the agreement to sell marked V4. Therefore, I am of the opinion that the learned Judges in the Courts below have misdirected themselves when they decided that the conditions in the said agreement marked V4 cannot be enforced due to supervening illegality.

At this stage, it is necessary to mention that by the document marked P7, the District Secretary of Pallama has issued the certificate dated 16.01.2001, declaring that plaintiff, has become the owner of the land in dispute. The said decision had been made only upon considering the nomination made by the Grantee in the Grant making the plaintiff as his successor to the land but it had been decided so by the

District Secretary without holding a proper inquiry. Facts of this case show that such a nomination had been made enabling the nominee, namely the plaintiff in this case, to comply with the conditions referred to in the agreement V4 and then to transfer the property to the defendant. Such a position is evident by the evidence of the Land Officer and the Assistant Land Commissioner of the Provincial land Office. Moreover, the decision of the District Secretary found in P7 had been made without the participation of the defendant. He has not considered those matters when he issued the document P7. He has not even considered the valuable consideration paid by the defendant to the plaintiff and to her alleged father Thomas Appuhamy at the time the agreement V4 was entered into. Neither has he considered the improvements made by the defendant since he came into possession of the land in the year 1993.

For the aforesaid reasons, the first two questions of law framed by this Court are answered in favour of the defendant. In view of the said answer to the first two questions, the issue as to the payment of compensation raised in the remaining two questions of law will not arise.

Accordingly, I make the following orders.

1. Judgment dated 04.11.2009 of the learned District Judge of Chilaw is set aside.
2. Judgment dated 06.03.2014 of the Civil Appellate High Court of Kurunegala is set aside.
3. Plaint dated 14.09.2001 filed by the plaintiff is dismissed.
4. Claim made by the defendant in the case filed in the District Court, Chilaw also is dismissed.

5. The decision contained in the document dated 16.01.2001 (P7) made by the District Secretary Pallama is declared null and void.
6. The Agreement to Sell contained in the deed baring No.4050 dated 23.08.1993 attested by P.M.T.Pathiraja Notary Public shall continue to be in force. This does not mean that the defendant is entitled to the land in question. It is to be decided by the authorities concerned.
7. Accordingly, the Defendant is to make an application to the officer who is entitled to make an order in terms of Rule 37 made under the Land Development Ordinance, to obtain permission from the authorities. The said officer is to hold an inquiry with the participation of all the parties concerned and to make an order according to law as to the title of the land in dispute.
8. Considering the circumstances of the case, no order is made as to the costs of this appeal.
9. The District Judge of Chilaw is directed to enter decree accordingly.

Appeal allowed.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PC J.

I agree

JUDGE OF THE SUPREME COURT

PRASANNA S JAYAWARDENA, 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.62/2011
S.C.[H.C] CALA No.225/2010
HCCA Western Province
[Avissawella] Case No.52/2008[F]
D.C.Homagama Case No.2741/L

Elvitigalage Don Lalith Chandrasiri
No.193/136, Maththegoda
Polgasowita

Plaintiff

Vs

1. Kodithuwakku Kankanamge Dayani Vinitha
No.116,Mabulgoda
Pannipitiya

Original Defendant

2. Kodithuwakku Kankanamge Sarath (Deceased)
No.116, Mabulgoda
Pannipitiya

Added Second Defendant

2A.Kodithuwakku Kankanamge Lalitha Dayangani
No.103, Maththegoda Road
Polgasovita

2A Defendant

AND BETWEEN

Kodithuwakku Kankanamge Lalitha Dayangani
No.103, Maththegoda Road
Polgasovita

2A Defendant-Appellant

Elvitigalage Don Lalith Chandrasiri
No.193/136, Maththegoda
Polgasowita

Plaintiff-Respondent

AND NOW BETWEEN

Elvitigalage Don Lalith Chandrasiri
No.193/136, Maththegoda
Polgasowita
Plaintiff-Respondent-Appellant

Kodithuwakku Kankanamge Lalitha Dayangani
No.103, Maththegoda Road
Polgasovita

At present –
No.116, Mabulgoda,
Pannipitiya
2A Defendant-Appellant-Respondent

BEFORE : **B.P.ALUWIHARE, PC, J.**
ANIL GOONARATNE, J.
K.T.CHITRASIRI, J.

COUNSEL : Aravinda Athurupana with Ananda Senanayake
for the Plaintiff-Respondent-Appellant
Ranjan Suwandaratne with Anil Rajakaruna
for the 2A Defendant-Appellant-Respondent

ARGUED ON : **15.07.2016**

WRITTEN SUBMISSIONS ON : 02.11.2011 by the Substituted 2A Defendant-Appellant-Respondent
04.07.2011 by the Plaintiff-Respondent-Appellant

DECIDED ON : **08.09.2016**

CHITRASIRI, J.

Being aggrieved by the judgment dated 07.06.2010 of the learned Judges in the Civil Appellate High Court in Avissawella, the plaintiff-respondent-appellant (hereinafter referred to as the plaintiff) filed this appeal seeking *inter alia* to set aside the aforesaid judgment of the Civil Appellate High Court. Simultaneously, the plaintiff has sought to have the judgment dated 09.07.2002 of the District Court of Homagama, affirmed. This Court upon considering the material placed before it granted leave to appeal on the questions of law set out in sub-paragraphs (i) (iii) (iv) (vi) and (vii) in paragraph 16 of the petition of appeal dated 19.07.2010. Those questions of law are as follows:

(i) that the High Court failed to appreciate the effect and impact of the provisions of Section 68 of the Evidence Ordinance, and the fact that documents marked by the defendant had been led in subject to proof but had not been proved, and the fact that 2එ1 was only a photocopy, and that the plaintiff had in fact challenged it.

(iii) that the said High Court erred in law by failing to appreciate the admission made by 2A Defendant only witness, on the purported basis that such admission was not an "unqualified admission".

(iv) that the said High Court erred in law by failing to appreciate that the plaintiff had established his title not only by affirmative evidence of himself but also by what was elicited through the cross-examination of his opponent's only witness.

(vi) that the said High Court erred in law by failing to appreciate the uncontraverted evidence of the Plaintiff as to the subdivision of the Original larger land; and thereby coming to an erroneous finding that land in suit was only a portion of a larger land.

(vii) that the said High Court erred in law by failing to appreciate that, even if the land in suit had been a portion of a larger land and thereby making the Plaintiff a co-owner, a co-owner is entitled to seek the ejectment of a trespasser.

The aforesaid first 4 questions of law basically revolve around the law relating to the burden of proof, particularly when it comes to *rei vindicatio* actions. Learned District Judge, having accepted the evidence of the plaintiff was of the view that the plaintiff has successfully discharged the said burden cast upon him in order to prove his title to the land put in suit and decided the case in favour of the plaintiff. Learned High Court Judges were on a contrary opinion and held that the plaintiff has failed to discharge his burden. Accordingly, they reversed the decision of the learned District Judge and allowed the appeal of the 2A defendant.

In this case, the plaintiff has sought *inter alia* to have a judgment declaring that he is the owner of the land morefully described in the schedule to the amended plaint. He also has sought to have the 2A defendant evicted therefrom. He also has claimed damages from the defendant until he gain possession of the land in suit.

In the original plaint of the plaintiff, only the 1st defendant Kodithuwakku Kankanamge Dayani Vinitha was made a party to the action. Thereafter, her brother was added as the 2nd defendant to the case by the plaintiff. Upon the death of the said added 2nd defendant, 2A defendant was substituted in his place. In the amended plaint dated 28.07.1998, plaintiff averred that Elvitigalage Don Simon Singho was the original owner to the land in question. Having stated so, the plaintiff has described the manner in which he became entitled to the land. Accordingly, the plaintiff gave evidence at the trial supporting the said devolution of title that he has averred in his amended plaint.

2A defendant-appellant-respondent [hereinafter referred to as the 2A defendant] in her answer dated 15.02.2000 has taken up the position that the original owner to the land was not the aforesaid Elvitigalage Don Simon Singho but he was one Omattage Themis Perera. In that answer, she also has stated that the said Omattage Themis Perera by deed bearing No.1474 dated 23.06.1963 has sold 1/2 share of the land to the said Elvitigalage Don Simon Singho. Accordingly, the position taken up by the 2A defendant was that the original owner disclosed by the plaintiff had title, only to 1/2 share of the land and not to the entirety of it. Therefore, the crux of the issue in this case is to determine whether or not the plaintiff was successful in establishing the fact that Elvitigalage Don Simon Singho was the original owner to the entire land referred to in the schedule to the amended plaint.

It is trite law that the burden, in an action for a declaration of title, lies on the plaintiff to prove that he/she has dominium over the land put in suit. At the same time, it is to be noted that it is not the duty of the defendant to show that the plaintiff has no title to the land that he claims. It is also an accepted principle that it is necessary to have strict proof in such an action to establish title. Following are some of the decisions by which the aforesaid position of the law had been accepted and established.

- **Peeris Vs. Savunhamy (1951) 54 NLR 207**
- **Muththusamy Vs. Seneviratne (1946) 31 CLW 91**
- **Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167**
- **Sarachchandra Vs. Dingiri Menika (2004) BLR 77**
- **Jayatissa Vs. Gunadasa (2008) BLR 295**

In this case, learned District Judge having accepted the pedigree of the plaintiff has concluded that it is the burden of the 2A defendant to prove the aforesaid deed 1474 marked 2V1, if she needs to disprove the original ownership of Simon Singho who was the original owner according to the plaintiff. At the time the aforesaid deed 1474 was marked in evidence, the plaintiff has moved that it be produced subject to proof which the 2A defendant has failed to comply with. Accordingly, learned Counsel for the plaintiff contended that the defendant has failed to prove the said deed 1474 as required by Section 68 of the Evidence Ordinance and therefore the original ownership of Jemis Perera as alleged by the 2A defendant should stand as not proved. It was the view of the learned District Judge as well.

Manner in which a document that requires an attestation, be used in evidence is referred to in Section 68 of the Evidence Ordinance. It stipulates thus:

> *"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence."*

The aforesaid section 68 of the Evidence Ordinance show the way in which a document that required by law to be attested could be admitted in evidence. The manner in which such a document is to be used in evidence under Section 68 of the Partition Law is quite different to the way it is referred to in the aforesaid Section 68 of the Evidence Ordinance though both the Sections speak of the way a document attested by a notary is to be used in evidence. I do not wish to examine the said difference between the two Sections in this judgment since it is the Section 68 in the Evidence Ordinance that is applicable in this instance. Admittedly, the 2A defendant has failed to prove the deed 1474 [2V1], as required by Section 68 of the Evidence Ordinance.

However, the issue here is to determine whether the inadmissibility of the aforesaid deed 1474 marked 2V1 in evidence, would entitle the plaintiff to say that he has proved the fact that Simon Singho was the original owner to the entire land referred to in the schedule to the amended plaint. The first deed produced on behalf of the plaintiff is the deed bearing No.74 marked P2 by which Simon Singho has gifted his title to Elvitigalage Don Jemis Singho who was the predecessor-in-title of the plaintiff. Then the question arises as

to why the plaintiff concealed the deed 1474 [2V1] despite the fact that it is the deed by which the original owner Simon Singho became entitled to the land in question. Indeed the said deed 1474 had being referred to in the very first paragraph of the plaintiff's deed P2 by which he has sought to establish the original ownership of Simon Singho. Plaintiff's failure to produce the deed 1474 itself shows that he has not proved that he had dominium over the property that he has claimed.

At this stage, it is necessary to note that in a vindicatory suit, the law requires to have strict proof as to the title claimed by a plaintiff. This requirement of strict proof had been discussed in the cases of **Wanigaratne Vs. Juwanis Appuhamy, [65 NLR 167] Samarapala Vs. Jagoda [1986 (1) SLR] and Jayatissa Vs. Gunadasa. [2008 BLR at page 295]** Therefore, merely because the 2A defendant has failed to prove the deed 1474 in terms of Section 68 of the Evidence Ordinance, it will not become a reason for the plaintiff to escape from his burden to prove title to the land in question. Accordingly, the matters mentioned above show that the plaintiff has failed to prove his case in accordance with the law pronounced in those cases referred to above.

I also have carefully looked at the judgment of the Civil Appellate High Court and found that the learned Judges in that Court has correctly applied the relevant law to the facts in this case. In that judgment learned Civil Appellate High Court Judges have held thus:

"Besides, it appears that the land in suit has been merely described as a defined portion depicted as Lot 3C in the plan prepared in 1993 (P1). But it is not described in the pleadings as to how such distinct portion came into existence though the title deeds marked as P2 and P3 in evidence show that the land in suit is a subdivided land depicted in a plan prepared in the year of 1989. The learned counsel for the 2A Defendant has contended that it is not worthy to act upon the said plan marked P1 as it was prepared just one year previous to the bringing of the instant action. At the same time the learned counsel for the Plaintiff has argued that such matter cannot be raised first time in appeal since it is an issue based on a question of fact. We are of the opinion that albeit such issue had not been raised in a specific form at the trial, such aspect falls within the purview of the Plaintiff's initial burden of proving the title to the land in suit together with its identification. Therefore we are inclined to the opinion that the Plaintiff whilst establishing the title to the land in suit which is apparently a subdivided portion of a larger land it should be pleaded and proved that the predecessor-in-title of the Plaintiff had entitled to the entirety of such larger land without merely describing the subject matter as a divided and separate portion. In other words in deciding whether the predecessor-in-title of the Plaintiff namely the aforesaid Jamis had become entitled to convey such defined portion, it should have been proved that the said Jamis was none other than the sole owner of such larger land. It seems that in such process the Plaintiff has relied on a title deed marked P2 to establish that the said donor Simon has gifted entirety of the land called Lot 3 depicted in the plan No.1137 dated 24.12.1989 (not produced in evidence) to the aforesaid Jamis immediate predecessor-in-title of the Plaintiff. However, the deed by which the said Simon said to have got title to such land has not been submitted by the Plaintiff within the course of the trial. Particularly in the presence of the assertion of the 2A Defendant that the aforesaid Jamis by that deed had conveyed only an undivided half share of the original

land, we are of the view that it is the burden of the Plaintiff to prove at least the said Simon and his donee Jamis had exclusively possessed such distinct land in a manner sufficient enough to presume that they had acquired prescriptive title to the same together with their paper title."

The above reasoning of the learned High Court Judges shows that they have carefully addressed their minds to the issue and have applied the law correctly.

The remaining issue is on the question of law raised in paragraph 16(vii) of the petition of appeal. In law, it is correct to state that a co-owner is entitled to have a trespasser evicted from the land though that co-owner is entitled only to a fraction of it. This position in law had been clearly set down in the case of **Hevawitarane et.al Vs. Dungan Rubber Company Ltd. [17 NLR 49]** The plaintiff in his evidence has stated that his predecessor in title had permitted one Jemis to take charge of the possession of this land and thereafter the said Jemis had handed over possession to the 1st defendant. (Vide proceedings at page 96 in the appeal brief). The 1st defendant who gave evidence on behalf of the 2A defendant also has said that it was through Jamis that the defendants came into possession of the land. No evidence is forthcoming to establish that the aforesaid permission given to Jamis was terminated at any stage.

Accordingly, the defendants have denied that they are trespassers to the land. 1st defendant in her evidence has said that the defendants were in possession of this land since 1984 having built a boutique with the permission obtained from the Pradeshiya Sabha. Documents to support such a

proposition also have been marked in evidence. Under such circumstances, defendants cannot be treated as trespassers. Therefore, it is clear that the plaintiff has failed to establish that the 2A defendant is a trespasser to the land in suit. In the circumstances, it is my opinion that the plaintiff is not in a position to evict the defendant in accordance with the law referred to in **Hevawitarane et.al Vs. Dungan Rubber Company Ltd. [supra]** since it would apply only to the trespassers.

For the reasons set out above, I answer all the questions of law in favour of the 2A defendant. Accordingly, this appeal is dismissed with costs. Judgment of the Civil Appellate High Court in Awissawella to stand as it is.

Appeal dismissed.

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

In the matter of an Appeal from the Provincial High Court of Kandy.

Nawala Rathnayake Mudiyanselage Chandra Ranasinghe, No. 41 and 41/1/1, Anagarika Dharmapala Mawatha, Kandy.

Plaintiff

SC Appeal No. 64/2014
SC/HC/CA/LA Application No. 58/2013
CP/HCCA/KN/53/2010 (F)
D.C. Kandy No. X/12451

Vs

1. Palitha Munasinghe
2. S.M. Munasinghe
   Both of Official Residence, Bank of Ceylon, Peradeniya.

   Presently at No. 43, Anagarika Dharmapala Mawatha, Kandy.

Defendants

AND

1. Palitha Munasinghe
2. S.M.Munasinghe
   Both of Official Residence, Bank of Ceylon, Peradeniya.
   Presently at No. 43, Anagarika Dharmapala Mawatha, Kandy.

Defendants Appellants

Vs

Nawala Rathnayake Mudiyanselage Chandra Ranasinghe, No. 41 and 41/1/1, Anagarika Dharmapala Mawatha, Kandy.

Plaintiff Respondent

AND NOW

Nawala Rathnayake Mudiyanselage Chandra Ranasinghe, No. 41 and 41/1/1, Anagarika Dharmapala Mawatha, Kandy.

Plaintiff Respondent Appellant

Vs

1. Palitha Munasinghe
2.S.M.Munasinghe

Both of the Official Residence, Bank of Ceylon,Peradeniya.
Presently at No. 43, Anagarika Dharmapala Mawatha, Kandy.

Defendants Appellants Respondents

BEFORE : S.EVA WANASUNDERA PCJ.
K. T. CHITRASIRI J. &
NALIN PERERA J.

COUNSEL: Samantha Ratwatte for the Plaintiff Respondent Appellant.
S.C.B. Walgampaya PC. for the Defendants Appellants Respondents

ARGUED ON: 11.07.2016.

DECIDED ON: 14.09.2016.

S. EVA WANASUNDERA PCJ.

This Court granted leave to appeal on 12. 05. 2014 on the questions of law enumerated in paragraph 15 (a) to (f) of the Petition dated 20.02.2013 from the

judgment of the High Court of Civil Appeal of the Central Province holden in Kandy.

They are as follows:-

1.Is the said judgment contrary to law and against the evidence available in the record?
2. Did the High Court of Civil Appeal err in holding that there has been a merger (conficio) of the dominant and the servient tenement in one and the same person by disregarding the specific authority cited namely that of Perera Vs Samarakoon 23 NLR 502, the judgment of Bertram CJ which was agreed upon by Schneider J ? (whereby it was held that it was only the acquision of the same right in the dominant land and the servient land that one could apply the concept of merger)
3.In any event did the High Court of Civil Appeal misdirect itself in fact and in law when deciding that the concept of merger was applicable without such an issue being framed in the original Court and being directly in conflict with the admissions recorded in the original Court?
4. Did the High Court of Civil Appeal err by failing to consider the admissions recorded in the original court and accepting the arguments which were contrary to the admissions of fact recorded in the original court?
5. Did the High Court of Civil Appeal err by misconstruing the meaning of "open passage" and by holding that a further requirement of establishing of a servitude known as servitude of a passage had to be proved when in fact the simple English meaning of passage which was accepted through out in the original court was in fact the ability of Lot 3 to be used as an access?
6.Did the High Court of Civil Appeal err in holding that the deed marked P2 in the original court transferred the entirety of Lot 3 when clearly as can be seen from pages 530 particularly 532 of the document marked X what was transferred was lot numbers 4 and 5 together with a servitude over Lot 3?

By all these questions of law, the Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) is challenging the judgment of the High Court mainly on the basis that the High Court was wrong in holding that there had been a merger of the rights thereby extinguishing the servitude that was created by the deeds.

According to the Plaint, the Plaintiff had prayed for *firstly* a declaration of title to Lot 4 in Plan 1592 which is the accepted plan by all parties, and *secondly* for an order to keep Lot 3 in Plan 1592 as an open passage so that the Plaintiff's right to receive light and air as a servitude would not be disturbed.

The Plaintiff further prayed for an enjoining order and a permanent injunction to stop the Defendants Appellants Respondents (hereinafter referred to as the Defendants) from building on Lot 3. The Plaintiff also contended that she should be granted access to maintain and repair her water pipes which were facing the said Lot 3.

The Plaintiff got **title** to the land by **Deed No. 14321** dated 05.02.1991. By this deed, she had bought Lot 4, which is of an extent of 3 Perches and Lot 5 which is of an extent of 8.75 Perches, together, for a purchase price of Rs. 100,000/- from W.A. Saranaguptha Jayasinghe. This deed is done on a printed deed form and has two Schedules, describing Lot 4 and Lot 5 , with the boundaries. There **is no mention of any other Lot, over which there is any right of 'open passage' in this particular deed.**

The background facts are as follows. Mrs. S.A.P.Seelawathie Jayasinghe who was the owner of a block of land of an extent of 23.25 Perches had got a surveyor to divide the same into five Lots. The Plan No. 1592 was done on 21st June, 1972 by the licensed surveyor and leveler, L.W. Ariyasena. On 31.07.1972, she executed **Deed No. 7440** and gifted Lot 1 of 5.25 Perches, to her daughter Kusum Kanthi Kularatne nee Jayasinghe. In that Deed there is **no mention of Lot 3 as an' open passage.'** On 27.08.1979 she transfered Lot 2 by **Deed No. 29** to H.N.Amara Herath and P.S. Jayasinghe for a consideration of Rs. 6000/-. Even in this deed, there is **no mention of Lot 3 being left as an open passage.**

By **Deed No. 9461** dated 18.02.1978, Seelawathie Jayasinghe transferred Lots 3, 4 and 5 to W.A.Saranaguptha Jayasinghe for a consideration of Rs. 4000/-. This deed **has one schedule** which is referred to in the body of the deed. This schedule contains **three lands** which are specifically identified under specifically described three Lots of land namely **Lots 4, 5 and 3** in the same order and Lots 4 and 5 are further described as portions of land surveyed in 1954. **Lot 3 stands alone** in the schedule to **the Deed No. 9461** as the last block of land which was transferred to the purchaser, W.A.Saranaguptha Jayasinghe.

As pointed out by the Plaintiff's counsel at the hearing of this Appeal, at the end of the description of Lots 4 and 5, there is a mention of " **a right of way over and along the portion marked Lot 3 " in the said plan.**

I observe that this right of way over Lot 3 was recognized as a right of way to reach the Lots 4 and 5 , **only up to this day, i.e. 18.02.1978 , on which date that block of land , i.e. Lot 3, was transferred to the same person who would be owning Lots 4 and 5 of the same land from the said date**. In other words, Lot 3 had been a right of way as a servitude to Lots 4 and 5 from 31.07.1972 to 18.02.1978. On 18.02.1978, Seelawathie Jayasinghe transferred Lots 4 and 5 along with the soil rights of Lot 3 to Saranaguptha Jayasinghe. Then, the right of way became a soil right by a proper deed of title **when Lot 3 was bought over by one and the same person who became the owner by purchase of Lots 4 and 5.**

In other words, Lot 3 was recognized as a right of way or open passage from 31.07.1972 as a means of access to Lots 4 and 5 until 18.02.1978. When Seelawathie Jayasinghe sold Lots 4 and 5 to Saranaguptha Jayasinghe on 18.02.1978, she sold Lot 3 also to Saranaguptha Jayasinghe.

It is at this point that the judgment of ***Perera Vs. Samarakoon 23 NLR 502*** can be applied where it was held that, " it is only upon the acquisition of the same right in the dominant land and the servient land, that one could apply the concept of merger." I hold that on 18.02.1978, Saranaguptha Jayasinghe **got the merged rights and became the owner of soil rights of Lots 4 and 5 and 3.The servitudal rights over Lot 3 had come to an end on 18.02.1978.**

The Court of Appeal had followed the same principle in ***David Vs. Gnanawathie 2000, 2 SLR 352*** and similarly held that merger of the dominant and servient tenement in one ownership **terminates and extinguishes the servitude.**

As an owner thereafter, Saranaguptha Jayasinghe was entitled to sell each block of land separately as separate blocks of land to any person who was willing to buy them at whatever price he wants to, after the date on which the dominant and servient tenement got merged on 18.02.1978.

According to Plan No.1592, Lot 5 is facing the main road, Sanghamitta Mawatha, Lot 4 is facing the other main road, Anagarika Dharmapala Mawatha. Lot 4 is a long strip of land which is ajoining Lot 5. The block of land Lot 5 is in extent more than twice the size of Lot 4. Lots 4 and 5 together have two main roads facing each block on either side. Lots 1 and 2 have only one side facing Anagarika Dharmapala Mawatha and they are 5.25 Perches and 3.25 Perches. They are comparatively small when compared with Lots 4 and 5 taken together. Lot 3 is an ' L ' shaped block of land of 3 Perches situated between Lot 4 and Lot 2.

The position of the owner of Lots 5,4 and 3, being Saranaguptha Jayasinghe, after 18.02.1978 , was that he could legally mortgage, transfer, lease or gift or dispose of any of the lots at his will.

It is at this juncture that Saranaguptha Jayasinghe had **sold Lots 4 and 5** to the **Plaintiff,** Chandra Ranasinghe in 1991 **by Deed No. 14321**. He had kept Lot 3 for himself. **He had not mentioned anything about Lot 3 in that Deed. There is no right of way to be given or any reason for Lot 3 to be kept as an 'open passage'**.

Saranaguptha Jayasinghe had not given any right of way to the Plaintiff in the Deed of Transfer No. 14321. I fail to see how the Plaintiff could pray as a relief in the Plaint for a right of way or a servitude over Lot 3 or to leave it as an open passage **when it is not specifically mentioned in the deed by which she got title to Lots 4 and 5.** The mere wording in the printed form to the effect that 'all rights privileges, easements,servitudes and appurtenances whatsoever' is not sufficient enough to convey a right or servitude over another specific portion of land even though the counsel for the Plaintiff Respondent Appellant contended that it should be so, at the hearing of this case.

I agree with the High Court Judges when they held that**, if it was the intention of the vendor to convey any right or servitude it should be specifically mentioned** in the Deed and such mere wording in the printed form to such effect is not sufficient to convey any right or servitude to be in existence.

Lot 3 is adjoining Lots 1 and 2. Even though the owners of Lots 1 and 2 did not have any mention of Lot 3 as an open passage or a right of way in their title

deeds, they themselves being siblings of one family might have used Lot 3 for convenience in going about doing their daily affairs, even after 18.02.1978.

In 1994, the owner of Lot 1, W.A.Kusum Kanthi Kularatne nee Jayasinghe and the owner of Lot 3, Saranaguptha Jayasinghe decided to sell the said Lots 1 and 3. When selling the same, together, for one million rupees to Seelawathie Minnette Munasinghe, they got their other sibling, P.Somachandra Jayasinghe and his wife to join as Vendors in the sale, thus granting all the rights they have been enjoying up to that date, if any, to be transferred to the Vendee. **The Vendee in that Deed No. 9277 dated 10.06.1994 is the 2nd Defendant in the present case.** The two blocks of land, Lots 1 and 3 when joined together takes the shape of the English letter ' U ' and that is the reason why the Plaintiff in her Plaint complains that the house the Defendants are building is in the shape of U and obstructing the right to light and air to her house which is already built. At the innception of the case, the Plaintiff had got an enjoining order to stop the 1st and 2nd Defendants, building on their land but later on it was desolved after the inquiry held by the District Court in that regard.

It is to be noted that even though the Plaintiff sought a decree to the effect that she is entitled to a **servitude of light and air over Lot 3,** the District Judge concluded that the Plaintiff was **not entitled to such a right as prayed for.** Yet, the Plaintiff **did not file an Appeal** against the judgment challenging the said decision. The Plaintiff was happy with the District Judge's decision granting the relief that Lot 3 be left open as an open passage.

The learned Judges of the High **Court has not dealt with** the pleading whether the Plaintiff has **a right to light and air over Lot 3** because the Plaintiff did not file an Appeal from the District Court Judgment in that regard. I quite agree with the High Court Judges' decision not to look into that aspect.

The Plaintiff's land is a much larger land than the Defendants' land and a house has been built on it some time ago, according to a **plan approved by the Municipal Council**. As such, the owner of the said house, the Plaintiff, cannot, in a broader sense, reasonably have any complaints about light and air. Anyway the Plaintiff had not pursued such a right in the Civil Appellate High Court by way of an Appeal when the District Judge had not granted that right to her.

For the aforementioned reasons, I hold that the learned High Court Judges have held quite correctly that the Plaintiff is not entitled to any other relief other than a declaration of title to Lots 4 and 5. I affirm the judgement of the Civil Appeallate High Courtt.

I answer all the questions of law enumerated above in the negative, in favour of the Defendants Appellants Respondents and against the Plaintiff Respondent Appellant.

Appeal is dismissed. However I order no costs.

Judge of the Supreme Court.

Justice K. T. Chitrasiri
I agree.

Judge of the Supreme Court.

Justice Nalin Perera
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 the Supreme Court against the Judgment dated 27.03.2012 in Appeal No. CP/HCCA/K AN/162/2010(F) and CP/HCCA/K AN/163/2010(F) in terms of Section 5C (1) of Act No. 54/2006.

S.C. Appeal No. 66/2015

SC.HC. (CA) LA. No. 176/2012
CP/HCCA/KAN/162/2010(F)
DC. Kandy No. 13842/P

1. Galange Kade Chandrawathie Nilagaratne
Hawendeniyagama, Pussellewa.

2. Galange Gedera Swarnathilaka Nilagaratne
390, Siyambalagoda, Danthure.

Plaintiffs

VS.

(deceased) 1. Kularatne Wijetileka
Galanga, Siyambalagoda,
Danthure.

1a. Haddage Prema Wijetileka
(correctly read as Haddawage Prema Wijetileka)

1b. Pradeep Lakmal Wijetileka

1c. Wasana Wijetileka
(appearing by her Guardian Haddage Prema Wijetileka)

(deceased) 2. Suraweera Sumanasinghe

2a. Nishantha Kumarage
Galanga, Siyambalagoda,
Danthure.

(deceased) 3. Galange Kade Sumanasingha

3a. Y.G. Thilakawathie
388, Siyabalagoda, Danthure.

4. Padma Kumari Nilagaratne
Shantha Niwasa, Pussellawa.

5. Rupassarage Rohitha Wickramaratne
Siyambalagoda,
Danthure.

6. Bandula Nishantha Kumarage,
Siyambalagoda,
Danthure.

Defendants

AND

Haddage Prema Wijetileka
(correctly read as Haddawage Prema Wijetileka)
Galanga, Siyambalagoda,
Danthure.

1a Defendant-Appellant

VS.

1. Galange Kade Chandrawathie Nilagaratne
Hawendeniyagama, Pussellewa.

2. Galange Gedera Swarnathilaka Nilagaratne
390, Siyambalagoda, Danthure.

Plaintiff-Respondents

1b. Pradeep Lakmal Wijetileka

1c. Wasana Wijetileka
(appearing by her Guardian Y.B.

Haddage Prema Wijetileka)

2a. Bandula Nishantha Kumarage
392, Siyambalagoda,
Danthure.

(deceased) 3. Galange Kade Sumanasingha
388, Siyambalagoda,
Danthure.

3a. Y.G. Thilakawathie

4. Padma Kumari Nilagaratne
Shantha Niwasa, Pussellawa.

5. Rupassarage Rohitha Wickramaratne
Siyambalagoda,
Danthure.

6. Bandula Nishantha Kumarage,
392, Siyambalagoda,
Danthure.

Defendant-Respondents

AND NOW BETWEEN

Galange Gedera Swarnathilaka
Nilagaratne
390, Siyambalagoda, Danthure.

2nd Plaintiff-Respondent-Appellant

VS.

Haddage Prema Wijetileka
(correctly read as Haddawage Prema Wijetileka)
Galanga, Siyambalagoda,
Danthure.

1a Defendant-Appellant-Respondent

1b. Pradeep Lakmal Wijetileka

1c. Wasana Wijetileka
(appearing by her Guardian Y.B. Haddage Prema Wijetileka)

2a. Bandula Nishantha Kumarage
392, Siyambalagoda,
Danthure.

(deceased) 3. Galange Kade Sumanasingha
388, Siyambalagoda,
Danthure.

3a. Y.G. Thilakawathie

4. Padma Kumari Nilagaratne
Shantha Niwasa, Pussellawa.

5. Rupassarage Rohitha Wickramaratne
Siyambalagoda,
Danthure.

6. Bandula Nishantha Kumarage,
392, Siyambalagoda,
Danthure.

Defendant-Respondent-Respondents

Galange Kade Chandrawathie Nilagaratne
Havendeniyagama, Pussellewa.

1st Plaintiff-Respondent-Respondent

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S.C. Appeal No. 64/2015

SC.HC. (CA) LA. No. 179/2012
CP/HCCA/KAN/163/2010(F)
DC. Kandy No. 13842/P

1. Galange Kade Chandrawathie Nilagaratne
   Hawendeniyagama, Pussellewa.

2. Galange Gedera Swarnathilaka Nilagaratne
   390, Siyambalagoda, Danthure.

Plaintiffs

VS.

(deceased) 1. Kularatne Wijetileka
Galanga, Siyambalagoda,
Danthure.

1a. Haddage Prema Wijetileka
(correctly read as Haddawage Prema Wijetileka)

1b. Pradeep Lakmal Wijetileka

1c. Wasana Wijetileka
(appearing by her Guardian Haddage Prema Wijetileka)

(deceased) 2. Suraweera Sumanasinghe

2a. Nishantha Kumarage
Galanga, Siyambalagoda,
Danthure.

(deceased) 3. Galange Kade Sumanasingha

3a. Y.G. Thilakawathie
388, Siyambalagoda,
Danthure.

4. Padma Kumari Nilagaratne
Shantha Niwasa, Pussellawa.

5. Rupassarage Rohitha Wickramaratne
Siyambalagoda,
Danthure.

6. Bandula Nishantha Kumarage,
Siyambalagoda,
Danthure.

Defendants

AND

Bandula Nishantha Kumarage,
392, Siyambalagoda,
Danthure.

2a and 6th Defendant-Appellant

VS.

1. Galange Kade Chandrawathie Nilagaratne
Hawendeniyagama, Pussellewa.

2. Galange Gedera Swarnathilaka Nilagaratne
390, Siyambalagoda, Danthure.

Plaintiff-Respondents

1a. Haddage Prema Wijetileka
(correctly read as Haddawage Prema Wijetileka)
Galanga, Siyambalagoda,
Danthure.

1b. Pradeep Lakmal Wijetileka

1c. Wasana Wijetileka
(appearing by her Guardian Y.B. Haddage Prema Wijetileka)

(deceased) 3. Galange Kade Sumanasingha
388, Siyambalagoda,
Danthure.

3a. Y.G. Thilakawathie

4. Padma Kumari Nilagaratne
Shantha Niwasa, Pussellawa.

5. Rupassarage Rohitha Wickramaratne
Siyambalagoda,
Danthure.

Defendant-Respondents

AND NOW BETWEEN

Galange Gedera Swarnathilaka
Nilagaratne, 390, Siyabalagoda,
Danthure.

2nd Plaintiff-Respondent-Appellant

VS.

Bandula Nishantha Kumarage,
392, Siyambalagoda,
Danthure.

2a and 6th Defendant-Appellant-Respondent

1a. Haddage Prema Wijetileka
(correctly read as Haddawage Prema Wijetileka)
Galanga, Siyambalagoda,
Danthure.

1b. Pradeep Lakmal Wijetileka

1c. Wasana Wijetileka
(appearing by her Guardian Y.B. Haddage Prema Wijetileka)

(deceased) 3. Galange Kade Sumanasingha
388, Siyambalagoda,
Danthure.

3a. Y.G. Thilakawathie
C/O. Dhanapala Kade, Ihalagama,
Atabage, Gampola.

4. Padma Kumari Nilagaratne
Shantha Niwasa, Pussellawa.

5. Rupassarage Rohitha Wickramaratne
Siyambalagoda,
Danthure.

Defendant-Respondent-Respondents

Galange Gedera Chandrawathie Nilagaratne,
Hawendeniyagama, Pussellawa.

. **1st Plaintiff-Respondent-Respondent**

*** * * * * * ***

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

Buwaneka Aluwihare, PC.J. &

Anil Gooneratne, J.

COUNSEL : Asthika Devendra with L. Warusawithana and M. Sarathchandra for the 1st Plaintiff-Respondent-Appellant and 2nd Plaintiff-Respondent-Appellant

Harsha Soza PC. With Anuruddha Dharmaratne for 1A and 2A Defendant-Respondent- Respondents.

ARGUED ON : **22.09.2015 & 29.09.2015**

DECIDED ON : **29.01.2016**

EVA WANASUNDERA, PC.J.

At the hearing of the aforementioned cases on 22.09.2015 and on 29.09.2015, both parties agreed that the two appeals (SC. Appeal 66/2015 & SC. Appeal 64/2015) be consolidated and a single judgment be written on SC. Appeal 66/2015. The parties in both cases agreed to abide by one judgment.

In SC. Appeal 66/2015, Leave to Appeal was granted on 27.03.2015 on the questions of law set out in paragraph 21(i), (iii) and (vi) of the Petition dated 03.05.2012. They are as follows:-

21(i) Did the Learned High Court Judges err in law by holding that the Decree marked P4 could not be considered as evidence of the title of Bilindu when there was no point of contest raised by the contesting Defendants as to the validity of the said Decree marked P4?

(iii) Have the Learned High Court Judges misdirected themselves when they held that Bilindu the vendor had only kept for herself the dwelling house by not evaluating the evidence given by the 2nd Plaintiff, establishing the fact that the surrounding land of the said house was also left to the said Bilindu at the execution of Deed No. 6062?

(vi) Was the High Court in error by holding that the Decree entered in Case No. 3476/L could not be considered as the best evidence placed before the District Court to establish the title of the Petitioner to the land sought to be partitioned?

The subject matter of the case in hand is the District Court of Kandy Partition case No. 13842/P. The Schedule to the Plaint gives the extent as 27.9 perches. The Plaintiffs were 2 in number and the Defendants were 6 in number. The 1st Defendant had died and three persons claimed under him as heirs. The 2nd Defendant also had died and one person claimed under him as an heir. The District Judge heard the case on 3 admissions

and 66 issues. The admissions are set down here since they are pertinent to the question in hand to be decided. They are:

(1) The parties admit that the subject matter of the case, the land to be partitioned was at one time owned by Sinhala Pedi Gedera Bilindu.

(2) The parties admit that the land to be partitioned was depicted as Lot 1 and Lot 2 together in Plan No. 614 dated 14.7.1998 made by licensed Surveyor R.B. Wijekoon (Plan was marked as X)

(3) The parties agree that 2a Defendant and 6th Defendant were one and the same person, namely Bandula Nishantha Kumarage.

The task for the District Judge was to decide the extent of the land which remained with Bilindu after the execution of the Deed No. 6062 dated 15.11.1928.

Delivering judgment on 23.06.2010, the District Judge granted certain portions of the land, mentioning the shares to the parties of the case and referring to the Plan X. At the end the District Judge left 2/30th share not allotted to an heir who failed to prove the ownership to that share and further directed that the parties should be allotted the said shares with the buildings as that they are possessed with and with rights of way to each party. The District Judge has also stated in the judgment, if allotting becomes practically very difficult, parties to the case can sell and/or buy the allotted portions from each other.

The District Judge had mentioned in pg. 24 of the judgment that the Plaintiffs had proved that Bilindu was the owner of the 27.9 perches with the house on it and therefore she is taking the pedigree from that base. The District Judge arrived at that finding on the strength of the Decree entered in case No. 3476/L declaring that Bilindu was entitled to Lots 4 and 5 of Plan No. 4319A; Lot 5 being the extent on which the house was standing on and Lot 4 being the surrounding land of the house. Lot 4 was 20.7 perches and Lot 5 was 7.2 perches.

The Plaintiff-Respondent-Appellant's claim before the District Court also was the same. In the amended plaint dated 16.02.2005, paragraph 2 (a), (b), (c) and (d), it is specifically averred that Bilindu sold the larger land and kept for herself a portion of land of an extent

of 27.9 perches which is her dwelling house and the land surrounding it, as mentioned in the schedule. The schedule referred to plan 4319A dated 23.11.1955 and 14.1.1957. The District Judge accepted this position. He affirmed the decree in the District Court case No. 3476/L to which Bilindu and one Deen were the only parties. In deed 6062 dated 15.11.1926 Bilindu was the seller and Deen was the purchaser of the property.

The substituted 1a Defendant-Appellant by herself and the substituted "2a and 6th" Defendant-Appellant by himself (one person) appealed to the Civil Appellate High Court against the judgment of the District Court, separately, in two applications namely CP/HCCA/KAN/162/2010(F) and CP/HCCA/KAN/163/2010 (F). The Learned Civil Appellate High Court Judge consolidated the two appeals with the consent of parties and delivered the judgment on 27.3.2012 reversing the District Court judgment and dismissed the action of the Plaintiffs in the District Court. The 2nd Plaintiff-Respondent-Appellant is now before this Court challenging the judgment of the Civil Appellate High Court.

The basis of the said Civil Appellate High Court judgment can be summarized as follows:-

(a) P4, which is the **Decree** in case No. 3476/L is not in accordance with **the judgment,** which is a settlement between parties and therefore P4 cannot be considered as evidence of title of Bilindu.

(b) The only available evidence of title of Bilindu is the deed marked P1 which states in the schedule that "all that western portion in extent one amunum paddy sowing (together with all the buildings and plantations thereon save and **except the tiled dwelling house alone**) out of the field called Galange Kumbura" and therefore what the vendor Bilindu had only kept for herself **is only the dwelling house** since no boundaries of a specific portion of appurtenant land is mentioned in the deed, and

(c) The trial Judge should have been careful to compare the decree relied on by the Plaintiffs with the findings of the Court.

Having gone through the brief thoroughly, I observe the following. By deed 6062 dated 15.11.1926 (P1) Bilindu sold one amunum of the land called Galange Kumbura to Deen keeping for herself the "tiled dwelling house alone". In this Deed P1, in the clauses thereof, it is mentioned that she got title to this land by way of a deed number 3677 dated 07.09.1926 attested by R.E. Seneviratne Notary Public. In the same year by deed No. 6062(P1) dated 15.11.1926 she sold the same land to Deen except the house. The case record of L 3476 case which is part of this brief shows that, thereafter, Deen leased the land back to Bilindu for 10 years by deed of lease number 12318 dated 10.07.1941. The ten years was over by 10.07.1951. Bilindu did not give back the possession of the leased land. Then Deen filed case No. L3476 to evict him from Deen's land. Case was settled on 11.05.1953. It was settled thus: "The Defendant admits that she entered the land as a tenant of the Plaintiffs. Of consent judgment to be entered for the Plaintiffs as prayed for with damages at Rs.200/- up to date and further damages at Rs.66/- per month until Plaintiffs are restored to possession and costs. I enter judgment accordingly. Parties sign the record".

I observe that Bilindu, accepted that she was a lease holder and/or tenant on the land that belonged to Deen. Deen was the purchaser of the land from Bilindu in 1926. Bilindu was already in her dwelling house. It was an accepted fact by both parties. When decree was entered on 03.04.1957, i.e. almost 3 years later, even then, Deen agreed not to issue writ until 30.4.1957. It is mentioned so, at the end of the decree.

The decree in any District Court case is always filed in compliance with the provisions of the Civil Procedure Code. In practice the decree is usually drafted and filed by the Plaintiff's instructing Attorney. The Court Officers go through it carefully and the other side can point out if there is something wrong in the decree and get it corrected. It is under all these circumstances that this decree dated 03.04.1957 was filed. It is an accepted document by parties to that action, namely Bilindu and Deen.

It is observed that Plan 4319A referred to in the decree of 3476/L, marked as P5 is dated 24.01.1957. It is mentioned that it was surveyed on 28.11.1955 and the parties present were a representative of Deen named Tikiri Duraya for Plaintif-Petitioner and 2nd, 3rd and 4th Respondents, meaning Sirisoma, Bilindu and Sirisena. This plan, I observe, has been

done between the date of settlement in case L 3476, ie. 11.05.1953 and the date of the decree, ie. 03.04.1957 which is quite credible and wisely done for everything to be crystal clear. The decree has clearly done justice by the parties by declaring the entitlement of parties and clearly mentioning the lots each party is entitled to. It is mentioned in the decree that the Plan P5 is part and parcel of this decree and filed of record in L3476. It gives the 2nd Plaintiff namely, W. Rankiri Danture, Lots 1, 2, 3 and 4A together of an extent of A1 R3 P23.7 and Lot 4B and Lot 5, to the 3rd Respondent who is Bilindu, Lot 4 and Lot 5 together is of an extent of 27.9 perches.

So I observe that there is **no good reason** for the Civil Appellate High Court Judges to go on the basis that the **decree is not in conformity with the settlement entered in Court**. **The decree is in fact inconformity with the settlement arrived at in open Court**. The settlement was pursued with a survey and making a plan and specifically allotting the portions of land to Bilindu and Deen. The Civil Appellate has gone quite wrong on this point.

I observe, incidentally that there was no issue before the District Court and even in the High Court with regard to the validity of this decree in L 3476, namely P4. There was no challenge on P4. Therefore, I am of the opinion that the High Court has gone at a tangent by trying to determine the validity of P4 even though the High Court was never even invited to do so by any party before Court and by doing so Court finally arrived at a wrong finding.

Furthermore the evidence in Court given by the 2nd Plaintiff before the trial Judge amply proves that the house and the land around it was given to Bilindu. The evidence nicely puts it down as, “since the house was owned by a female (i.e. Bilindu) and she should be allowed to go out when necessary, I allowed the land around the house for her use”-
(**ඒ ගෙදර අයිතිවෙලා තිබුනේ ගැහැණු කෙනකුට. එළියට පහලියට යන්න ඕන කියලා ඒ කොටස අත හැරියා**) It is in the colloquial village language and therefore well said. Anyway no person woman or man selling his or her own land keeping the house to live in, would never sell every inch of the land not preserving a road way and a little land around it. The whole land Bilindu sold to Deen was almost 2 acres in extent and out of that Bilindu had kept for herself the land of 27.9 perches with the consent of the purchaser Deen, which seems to

be quite sensible and reasonable. In practice no block of land can exist without a road way.

I have also considered all the arguments brought up by the Counsel for the Respondents by way of written submissions as well as oral submissions. I am of the opinion that the judgment of the Civil Appellate High Court cannot be allowed to stand. I answer all the questions of law aforementioned in the affirmative in favour of the Appellant.

I set aside the judgment of the Civil Appellate High Court of Kandy dated 27.3.2012 and affirm the judgment of the District Court of Kandy dated 23.06.2010. The appeal is allowed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare, 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 APPEAL UNDER AND IN TERMS OF SECTION 5C(i) OF THE HIGH COURT OF THE PROVINCES (SPECIAL PROVISIONS) AMENDMENT ACT NO. 54 OF 2006 READ TOGETHER WITH ARTICLE 127 OF THE CONSTITUTION.

1. HembanapuraSonaliNelunga de Silva,
2. HembanapuraHareshNilanka de Silva, both of, No. 491, High Level Road, Wijerama, Nugegoda.

Plaintiffs

SC / Appeal No. 71/2014
SC/HCCA/LA/194/2013
WP/HCCA/MT/36/11(F)
DC Mt. Lavinia Case No. 891/05/SPL

Vs

1. LalithRohanaEdirisingha, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe. (Deceased)

1A. SunithaNandaniChandrasekera, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe.

2. WaranukuwannaWaduge Don Malrani Iranganie Mala Perera, No. 46, School Lane, Station Road, Dehiwala.

3. SajithThumalPanduwawala, Kumara Oil Mills, Kandy Road, Miriswatta, Imbulgoda.

Defendants

AND

SajithThumalPanduwawala, Kumara Oil Mills, Kandy Road, Miriswatta, Imbulgoda.

3rd Defendant Appellant

Vs

1. HembanapuraSonaliNelunga de Silva.
2. HembanapuraHareshNilanka de Silva.

Both of No. 491, High Level Road, Wijerama, Nugegoda.

Plaintiffs Respondents

1.LalithRohanaEdirisinghe, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe (Dceased)

1A. SunithaNandaniChandrasekera, No. 743/8A, MuwanhelaWatta Road, 4th Lane, Talangama North, Malabe.

2.WaranukuwannaWaduge Don MalraniIranganie Mala Perera, No. 46, School Lane, Station Road, Dehiwala.

1st& 2nd Defendants Respondents

AND NOW BETWEEN

SajithThumalPanduwawala, Kumara Oil Mills, Kandy Road, Miriswatta, Imbulgoda.

3rd Defendant Appellant Appellant

Vs

1. HembapuraSonaliNelunga de Silva,
2. HembapuraHareshNilanka de Silva,

Both of No. 491, High Level Road, Wijerama, Nugegoda.

1st and 2nd Plaintiffs Respondents Respondents

1. LalithRohanaEdirisingha, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe. (Deceased)

1A. SunithaNandaniChandrasekera, No. 743/8A, MuwanhelaWatta Road, Talangama North, Malabe.

2. WaranukuwannaWaduge Don MalraniIranganie Mala Perera, No. 46, School Lane, Station Road, Dehiwala.

1st and 2nd Defendants Respondents Respondents.

BEFORE: **S. EVA WANASUNDERA PC,J.**
PRIYANTHA JAYAWARDENA PC,J.
NALIN PERERA J.

COUNSEL: HarshaSoza, PC with HarindraRajapaksha for the 3rd Defendant Appellant Appellant.
Collin A. Amarasinghe for the 1st and 2nd Plaintiffs Respondents Respondents.

ARGUED ON: 03. 08. 2016.
DECIDED ON: 24. 11. 2016.

S. EVA WANASUNDERA PC.J.

Leave to Appeal was granted on the following questions :-

1. Did the Honourable Judges of the High Court err in holding that sale of the land to the Petitioner (Appellant) is invalid and/or is subject to a constructive trust?
2. Did the Honourable Judges of the High Court fail to consider that there is no evidence of fraud?
3. Did the Honourable Judges of the High Court err in law in approving the learned District Judge invoking the principle of LaesioEnormis to set aside the deed at the stage of the judgment without an issue at the trial and without affording an opportunity to the Petitioner (Appellant)?

The background facts are pertinent to be noted. The 1st and 2nd Plaintiff Respondents RespondentsRespondents (hereinafter referred to as the Plaintiffs) are brother and sister. Their uncle, AluthgamageSomaweera de Silva had died on 19.05.1996. leaving a Last Will dated 16.05.1996. In the Testamentary Case No. 555/97/T in the District Court of Mt. Lavinia , probate was granted to the 1st Defendant Respondent RespondentRespondent (hereinafter referred to as the 1st Defendant, namely LalithRohanaEdirisinghe as executor of the said Last Will. As provided for in the Last Will**, among many other disbursements** such as granting

his own dwelling house to his elder sisterAluthgamageNandawathie de Silva bearing No. 491, High Level Road , Nugegoda; granting another house bearing No. 39, SiriNiwasaMawatha, Kalutara North to his neice,DinaliNilanga de Silva; granting the car park and workshop at No. 485/7, High Level Road, Gangodawila, Nugegoda , again to his elder sister A. Nandawathie de Silva; granting the motor vehicle service station at No. 489, High Level Road, Nugegoda, again to his elder sister A. Nandawathie de Silva;**the deceased uncle Somaweera de Silva**, had provided for Lot 56 of St. Edward Estate, in Glenfall Road , Nuwaraeliya of an extent of 31.5 perches to be bequeathed to both LalithRohanaEdirisinghe, and W.W.D.M.Irangani Mala Perera together **subject to three conditions.**The said LalithRohanaEdirisinghe was the appointed executor of the Will. The condition which is the subject matter of this action is that, the testator had stated that the said Lalith and Mala had" to sell the said block of land and provide for the education of his neice and nephew, (who are the Plaintiffs as aforementioned), "if the need arises" ".

LalithRohanaEdirisinghe and W.W.D.M. Irangani Mala Perera, when they became owners of the said Lot 56 of St. Edward Estate by an executor's deed, sold the said land to SajithThumalPanduwawala, the 3rd Defendant Appellant Appellant (hereinafter referred to as the 3rd Defendant Appellant) by Deed of Transfer No. 20310 dated 29.05.2002 attested by R.M.N.W. Rajakaruna N.P. The consideration for the transfer was Rs. one million. The Plaintiffs contend that the 1st and 2nd Defendants Respondents Respondents (hereinafter referred to as the 1st and 2nd Defendants) had held the said property in trust for the Plaintiffs according to the Last Will of AluthgamageSomaweera de Silva ; that the 1st and 2nd Defendants had executed the transfer of the land to the 3rd Defendant Appellant acting in collusion and acting fraudulently for a lesser sum of money than its true value at that time; and therefore the land should be resold for the market value of the date of the sale and for that purpose the transfer deed of the property should be rescinded and money should be paid to the Plaintiffs for their education.

It is alleged that a constructive trust is created under the Last Will No. 17 marked as P1 at the District Court Trial which contains the following conditions:

" to sell the land and to make use of the proceeds of the sale for the following purposes:-

(a) The medical attention and expenses of myself and my elder sister the said AluthgamageNandawathie de Silva'
(b) The education of my nephew HembapuraHareshNilanka de Silva and my neiceSonaliNelunga de Silva both of No. 39, SiriNivasaMawatha, Kalutara North**, if the need arises**,
(c) The purchase of a plot of land to the value of Rupees One Hundred Thousand(Rs.100,000/-) for HewaralageChandrathilake (NIC No. 67133802V) of GanepallaVidyalaya, Naligama. "

I observe that the beneficiaries of clauses No. (a) and (c) above have not made any complaint or have not joined the 1st and 2nd Plaintiffs in this law suit. The executant of the Last Will had passed away on 19.05.1996. The Testamentary Case No. 555/97/T was concluded in the District Court of Mt. Lavinia. The value of the land as mentioned in the affidavit of the executor in the testamentary case was Rs.1.5million on 17.01.1997. The Plaintiffs Respondents' valuer had valued the same to be , for Rs. 3.95million, in 1997.

The case was taken up for trialexparte against the 1st and 2ndDefendants in the District Court even though they had filed answer and prayed for a dismissal of the action at the initial stages of the case. Their position had been that they sold the property to the 3rd Defendant Appellant at the correct value because the property was on a hilly terrain and difficult to access and was also occupied by a squatter at that time. They had pleaded that it was sold at that price due to these difficulties. The 1st Defendant had passed away before the trial commenced and the 2nd Defendant could not be found in the given address.However now the 1st Defendant has been substituted. The trial was heldexparte against them. The Plaintiffs have the advantage of executing the decree against them at any time.

The 3rd Defendant Appellant is the transferee of the property who is the present owner of the land which is 31.5 perches in extent in Nuwaraeliya.The contesting parties before this Court are the 3rd Defendant Appellant and the Plaintiffs Respondents. The 3rd Defendant Appellant had filed answer and prayed for a dismissal of the action on the grounds that he was a bona fide purchaser for value, and that he had not acted in breach of any trust in favour of the Plaintiffs. He had completely denied the existence of any trust between him and the Plaintiffs.

The Plaintiffs were brother and sister. They gave evidence on behalf of themselves at the trial. They admitted having received Rs. 1,55000/- from the 1st Defendant and Rs. 44,500/- from the testator's sister Nandawathie acting on behalf of the 1st Defendant, in regard to the expenses they needed in connection with their studies at different times when money was needed. There was no evidence of having requested for any more money in writing except two letters sent by each plaintiff to the 1st Defendant on 11.05.2005 , i.e. only 16 days before filing action in the District Court. The date of the Plaint is 27.05.2005. Both of them were working at the time of giving evidence. They were 29 years and 27 years respectively at the time of giving evidence.The evidence did not disclose any fraudulent act of the 3rd Defendant Appellant. The evidence showed that what the Plaintiffs wanted was a part of the consideration of Rs. one million paid to the 1st and 2nd Defendants by the 3rd Defendant Appellant. The evidence of the Plaintiffs show that they wanted a reasonable amount which was in fact not specified either in the Plaint or in evidence. Yet the prayer of the Plaint prayed for rescission of the deed of transfer by the 1st and the 2nd Defendants to the 3rd Defendant Appellant on the ground of fraud.

The District Judge held with the Plaintiffs and gave order to rescind the said Deed. The 3rd Defendant appealed to the Civil Appellate High Court and the High Court dismissed the Appeal and affirmed the judgment of the District Court. Hence the matter is before this Court.

An analysis of the Last Will clearly shows that the deceased person intended to grant the land in question to the 1st and 2nd Defendants. The testator never intended to grant the land to the Plaintiffs.
The testator directed the 1st and 2nd Defendants to sell the land first and then to do three duties, one of which was to spend for the education of the Plaintiffs, if and when the need arises. I am of the opinion that in such a situation, the Plaintiffs cannot be heard to state that the said 1st and 2nd Defendants held the land in trust on behalf of the Plaintiffs. Yet one of the arguments of the Plaintiffs was that the said land was held by the 1st and the 2nd Defendants in trust for the Plaintiffs. The proceeds of the sale after they sell the land was held in trust to comply with the directions in the Last Will.

As such,it is obvious that the limit of the expenditure was the amount of the sale proceeds. Therefore it is understood that even if the need arises as and when the Plaintiffs decide to do studies abroad or do foreign educational degrees, which were some of the reasons given in their evidence at the trial, if the sale proceeds are not enough for the expenditure as the Plaintiffs want for further education as adults, there cannot be a duty to spend any amount of money exceeding the amount gained from the sale.

At the end of the Testamentary case, the 1st and 2nd Defendants received the same by way of an executor's deed. Then the proper owners of the land were the 1st and 2nd Defendants. The Last Will directed them to sell the land and make use of the proceeds to perform certain duties. It is only one of the duties of the 1st and the 2nd Defendants, according to the Will, to give money, only 'if the need arises', for education of the Plaintiffs. There was no limit mentioned about how much money to be paid. There were other things specified in the Last Will to be done after the sale of the land, such as spending for the testator's sister's sickness and also to buy another property for another person specifically named and mentioned in the Will. It may be taken for granted that those duties were done because those parties have not complained and come before court.

The Plaintiffs have not placed before court any request made in writing except two similar letters, a few days before filing action to show that " the need had arisen" and it was requested and that the 1st and 2nd Defendants had failed to comply with the directions given in the Will. Moreover even though fraud was pleaded against the 1st and 2nd Defendants in collusion with the 3rd Defendant, there seems to be no proof placed before court. The Valuer giving evidence had placed the market value of the land at that time. The Defendants had pleaded the reasoning why it was sold at Rs. one million. The balance of probabilities of evidence does not point at the 3rd Defendant having committed a fraudwhen he bought the land. He was aware that the Plaintiffs were named in the Will to be benefitted by the sale because the title deed by which the 1st and 2nd Defendants had got title ,was an executor's deed with conditions mentioned in the Last Will.

Legally, the 3rd Defendant Appellant cannot be held to be liable to be a trustee of the Plaintiffs. He is a total outsider. The direct connection is between the 1st and 2nd Defendants and the Plaintiffs. The testator had intended money to be given for education **only if the need arises.** There was no evidence before court that

the need had arisen and the money **was requested and denied**. In fact I fail to see even a cause of action on that ground because other than the two letters similarly drafted by each of the Plaintiffs which were sent only a few days before filing action, there was no evidence to show that monies requested was not paid. On the contrary, there was money paid at two earlier occasions when it was needed, as accepted by the Plaintiffs in evidence.

The Plaintiffs are at liberty to claim that the 1st and 2nd Defendants had sold the land for a lesser value than the proper market value and disregarded their request to grant any money to the Plaintiffs as there is a trust placed on them by the testator. How can they claim any trust placed on the 3rd DefendantAppellant who is the buyer of the property? The buyer who is a third party cannot be held liable for the decision taken by the 1st and 2nd Defendants to sell the property to him. Fraud has not been proven against the 3rd Defendant Appellant to have acted in collusion with the 1st and 2nd Defendants.

The learned Judges of the District Court and the High Court had invoked the principle of LaesioEnormis to set aside the deed of transfer. The said doctrine applies only between vendors and vendees.LaesioEnormis means the inequality between the value of the thing and the price paid for the same. It implies that the vendor has sold the property at less than half its true value either having been misled by the vendee or in complete ignorance of the true value. LaesioEnormis is pleaded in cases only between the seller and the buyer with regard to the goods/property sold and bought. A third party outside the sale of the property cannot plead the doctrine of laesioenormis. In the present case, **the Plaintiffs are not vendors or vendees. Therefore they cannot plead laesio enormis.** Neither can the Judges apply that doctrine in this situation in relation to the interests of a third party.

The ***Law of Contracts by C.G. Weeramantry Volume 1 at page 332*** states thus:
" Though the civil law **permits the parties** to make as good a bargain as they can, yet it states that a gross inequality between the price which has been paid and the true value of an article implies something in the nature of fraud or undue influence and on that account **allows one party of his heirs to call upon the other** either to rescind the contract and return the purchase money or the property sold as the case may be, or to correct the price by paying a just value for the article. This inequality between the value of the thing and the price paid is termed

laesioenormis."The judges have considered laesioenormis as a ground for their decision to rescind the deed of transfer which they are not legally entitled to do because it is **not pleaded by the Vendor or the Vendee** both of whom are Defendants in this case. A third party cannot allege that the contract of sale is voidable on account of the doctrine of laesioenormis. In the case in hand the Plaintiffs are not a party to the sale of the land. It is a contract of sale between the vendors, the 1st and 2nd Defendants and the vendee, the 3rd Defendant Appellant.

Anyway there had been no issue on laesio enormis at the trial either. The judges of the District Court and the Civil Appellate High Court have erred in the decision to rescind the Deed of Transfer.

The learned High Court Judges had held that there had been fraud in the sale of the property. In the case of ***LakshmananChettiarVsMuttiahChettiar 50 NLR 337*****,** it was held that "the burden of proving fraud was on the Plaintiff who alleged fraud against the Defendant. **Fraud must be established beyond reasonable doubt and a finding of fraud cannot be based on suspicion and conjecture."**Howard C.J. in writing this judgment , allowing the Appeal with costs entered as the last sentence of his reasoning in the judgment thus**: " I think that fraud has not been established beyond all reasonable doubt."**

In the case in hand, I observe that there was no evidence led before the trial court with regard to any fraud having been committed by the 3rd Defendant Appellant. The Valuer who had prepared a valuation on behalf of the Plaintiff at his request placed the valuation before court and gave evidence only on the value of the land at that time. That was all the evidence with regard to the sale price being low. The Plaintiff placed before court the affidavit of the 1st Defendant which mentioned that the value of the land at the time of the Testamentary Case was Rs. 1.5million. Even if it is taken that the sale value is less than what it should have been, any fraud on the part of the 3rd Defendant Appellant was not addressed by the Plaintiffs at all.

The Judges of the High Court has had only a suspicion and conjecture that there was fraud on the part of the 1st and 2nd Defendants and the 3rd Defendant Appellant which was most probably created by the valuer's evidence who valued the land for a bigger price. I am of the opinion that **any fraud has not been**

proven by the Plaintiffs **against the 3rd Defendant Appellant beyond all reasonable doubt** as laid down in the case ***of LakshmananChettiarVsMuttiahChettiar(supra).*** I hold that fraud has not been proven by the Plaintiffs against the 3rd Defendant Appellant.

In the circumstances, I answer the questions of law enumerated above in the affirmative and in favour of the Appellant. I set aside the judgment of the High Court of Civil Appeals of Mt. Lavinia dated 2nd April, 2013 and the judgment of the District Court of Mt. Lavinia dated 11th January, 2011.

Appeal is allowed. However, I order no costs.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.
I agree.

Judge of the Supreme Court

H.N.J.Perera J.
I agree.

Judge of the Supreme Court

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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

Mahawattage Wijayapala of Hathuwa, Piyadigama, Ahangama.

PLAINTIFF

SC Appeal No. 71 A/ 2010 **Vs**

1.Suduwelikondage Percy Mahinda Weliwatta
2. Ahangama Vidanage Magilin Silva (Dead)
2A. Wanigathunga Arachchige Ranjith de Silva of Sri Ginananda Mawatha, Karandugoda, Ahangama.
3. Baranage Allis Appu (Dead) of Karandugoda, Ahangama.
3A. B. Peter Appu of Piyadigama, Ahangama.
3B. R.P.Rosalinnona of Sri Ginananda Mawatha, Karandugoda, Ahangama.
4. Parana Rattambige Arlin Nona (Dead),Sri Ginananda Mawatha, Karandugugoda, Ahangama.
5. Akuressa Acharige Bandusena, Sena Jewellers , Ahangama.
6. Uyana Hewage Babunona (Dead)
7. Wellage Nandasiri.
8. Wellage Nandasena.

9. Wellage Padumasena.

10. Wellage Indrani, all of Sri Ginanada Mawatha, Karandugoda, Ahangama.

11. Lanhewage Agnes Silva (Dead)

11A. Wellalage Sumithra Sudharma Gunathilaka of Sri Ginananda Mawatha, Karandugoda, Ahangama.

12. Dikkumburage Nikulas Silva (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama.

12A. Dikkumburage Wijedasa of Piyadigama, Ahangama.

13. Nanayakkara Liyanage Edwin Alwis (Dead) of Weliwatta, Ahangama.

14. Wellalage Pantis Appu (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama.

14A. Wellalage Sumithra Sudharma of Sri Ginanada Mawatha, Karandugoda, Ahangama.

15. Koggala Wellalage Marthenis Appu (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama.

16. Malidurage Wilson of Meegahagoda, Ahangama.

17. L.B.Meena Nona of Sri Ginananda Mawatha, Karandugoda, Ahangama.

18. Bopage Gomis of Kahawathugoda, Ahangama.

19. Koggala Wellalage Sumathiratna of Sri Ginananda Mawatha, Karandugoda, Ahangama.

20. Saldurage Sawneris (Dead) of Kahatagahawatta, Meegahagoda, Ahangama.

21. Saldurage Garlis of Keraminiyawatta, Ahangama.
22. Saldurage Jamis
23. Saldurage Somasiri
24. Saldurage Subaneris
24A. Newtan Dunusingha all of Keraminiya, Ahangama.
25. Olidurage alias Ahangama Gamage Charli of Madagodawatta,Meegahagoda Ahangama.
26. Olidurage Piyasiri alias Piyasiri Dharmage of Madagodawatta, Meegahagoda, Ahangama
27. Paththiniya Durage Shelton of Kahawathugoda, Ahangama.
28. Olidurage Dochchi alias William Somawansa (Dead) of Keraminiyawatta Ahangama.
28A. D. Wilson of Keraminiyawatta, Ahangama
29. Olidurage Isaneris (Dead)
29A. O.D.Wimalasenaof Keraminiyawatta, Ahangama.
30. Olidurage Simon all of Keraminiyawatta Ahangama
31. Olidurage alias Vidanadurage Wilina of Keraminiyawatta, Ahangama
32.Olidurage Simon of Fonsekawatta, Kotegoda, Nugegoda
33. Hewa Rathgamage Wimalasena of Karandugoda, Ahangama
34.Uyanahewage Kulawathie of Dominguwawatta, Hathuwa, Piyadigama, Ahangama.
35. Dulcy Balamana of Piyadigama, Ahangama
36. Baranage Dayaseeli, and

37. Upali Kalupahana , both of Sri Gnanananda Mawatha, Karandugoda,

DEFENDANTS

AND

Mahawattage Wijayapala of Hathuwa, Piyadigama, Ahangama.

PLAINTIFF – PETITIONER

Vs

1. Suduwelikondage Percy Mahinda Weliwatta
2. Ahangama Vidanage Magilin Silva (Dead)

2A. Wanigathunga Arachchige Ranjith de Silva of Sri Gnanananda Mawatha, Karandugoda, Ahangama.

3. Baranage Allis Appu (Dead) of Karandugoda, Ahangama.

3A. B. Peter Appu of Piyadigama, Ahangama.

3B. R.P.Rosalinnona of Sri Gnanananda Mawatha, Karandugoda, Ahangama.

4. Parana Rattambige Arlin Nona (Dead),Sri Gnanananda Mawatha, Karandugugoda, Ahangama.
5. Akuressa Acharige Bandusena, Sena Jewellers , Ahangama.
6. Uyana Hewage Babunona (Dead)

7. Wellage Nandasiri.

8. Wellage Nandasena.

9. Wellage Padumasena.

10.Wellage Indrani, all of Sri Ginanada Mawatha, Karandugoda, Ahangama.

11. Lanhewage Agnes Silva (Dead)

11A. Wellalage Sumithra Sudharma Gunathilaka of Sri Ginananda Mawatha, Karandugoda, Ahangama.

12. Dikkumburage Nikulas Silva (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama.

12A.Dikkumburage Wijedasa of Piyadigama, Ahangama.

13.Nanayakkara Liyanage Edwin Alwis (Dead) of Weliwatta, Ahangama.

14. Wellalage Pantis Appu (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama.

14A. Wellalage Sumithra Sudharma of Sri Ginanada Mawatha, Karandugoda, Ahangama.

15. Koggala Wellalage Marthenis Appu (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama.

16. Malidurage Wilson of Meegahagoda, Ahangama.

17.L.B.Meena Nona of Sri Ginananda Mawatha, Karandugoda, Ahangama.

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22. Saldurage Jamis
23. Saldurage Somasiri
24. Saldurage Subaneris
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26. Olidurage Piyasiri alias Piyasiri Dharmage of Madagodawatta, Meegahagoda, Ahangama
27. Paththiniya Durage Shelton of Kahawathugoda, Ahangama.
28. Olidurage Dochchi alias William Somawansa (Dead) of Keraminiyawatta Ahangama.
28A. D. Wilson of Keraminiyawatta, Ahangama
29. Olidurage Isaneris (Dead)
29A. O.D.Wimalasenaof Keraminiyawatta, Ahangama.
30. Olidurage Simon all of Keraminiyawatta Ahangama
31. Olidurage alias Vidanadurage Wilina of Keraminiyawatta, Ahangama
32.Olidurage Simon of Fonsekawatta, Kotegoda, Nugegoda
33. Hewa Rathgamage Wimalasena of Karandugoda, Ahangama
34.Uyanahewage Kulawathie of Dominguwawatta, Hathuwa, Piyadigama, Ahangama.

35. Dulcy Balamana of Piyadigama,
Ahangama
36. Baranage Dayaseeli,

37. Upali Kalupahana both of Sri
Ginananda Mawatha, Karandugoda,

DEFENDANTS – RESPONDENTS

AND NOW BETWEEN

Mahawattage Wijayapala of Hathuwa,
Piyadigama, Ahangama.

PLAINTIFF – PETITIONER – APPELLANT

Vs

1. Suduwelikondage Percy Mahinda
Weliwatta
2. Ahangama Vidanage Magilin Silva (Dead)

2A. Wanigathunga Arachchige Ranjith de Silva
of Sri Ginananda Mawatha, Karandugoda,
Ahangama.

3. Baranage Allis Appu (Dead) of Karandugoda,
Ahangama.

3A. B. Peter Appu of Piyadigama, Ahangama.

3B. R.P.Rosalinnona of Sri Ginananda Mawatha,
Karandugoda, Ahangama.

4. Parana Rattambige Arlin Nona (Dead),Sri
Ginananda Mawatha, Karandugugoda,

Ahangama.

5. Akuressa Acharige Bandusena, Sena Jewellers , Ahangama.

6. Uyana Hewage Babunona (Dead)

7. Wellage Nandasiri.

8. Wellage Nandasena.

9. Wellage Padumasena.

10. Wellage Indrani, all of Sri Ginanada Mawatha, Karandugoda, Ahangama.

11. Lanhewage Agnes Silva (Dead)

11A. Wellalage Sumithra Sudharma Gunathilaka of Sri Ginananda Mawatha, Karandugoda, Ahangama.

12. Dikkumburage Nikulas Silva (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama.

12A. Dikkumburage Wijedasa of Piyadigama, Ahangama.

13. Nanayakkara Liyanage Edwin Alwis (Dead) of Weliwatta, Ahangama.

14. Wellalage Pantis Appu (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama.

14A. Wellalage Sumithra Sudharma of Sri Ginanada Mawatha, Karandugoda, Ahangama.

15. Koggala Wellalage Marthenis Appu (Dead) of Sri Ginananda Mawatha, Karandugoda, Ahangama.

16. Malidurage Wilson of Meegahagoda, Ahangama.

17. L.B.Meena Nona of Sri Ginananda Mawatha, Karandugoda, Ahangama.

18. Bopage Gomis of Kahawathugoda, Ahangama.
19. Koggala Wellalage Sumathiratna of Sri Ginananda Mawatha, Karandugoda, Ahangama.
20. Saldurage Sawneris (Dead) of Kahatagahawatta, Meegahagoda, Ahangama.
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23. Saldurage Somasiri
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25. Olidurage alias Ahangama Gamage Charli of Madagodawatta,Meegahagoda Ahangama.
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27. Paththiniya Durage Shelton of Kahawathugoda, Ahangama.
28. Olidurage Dochchi alias William Somawansa (Dead) of Keraminiyawatta Ahangama.
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30. Olidurage Simon all of Keraminiyawatta Ahangama
31. Olidurage alias Vidanadurage Wilina of Keraminiyawatta, Ahangama

32.Olidurage Simon of Fonsekawatta,
Kotegoda, Nugegoda
33. Hewa Rathgamage Wimalasena of
Karandugoda, Ahangama
34.Uyanahewage Kulawathie of
Dominguwawatta, Hathuwa,
Piyadigama, Ahangama.
35. Dulcy Balamana of Piyadigama,
Ahangama
36. Baranage Dayaseeli,
37. Upali Kalupahana both of Sri
Gninanda Mawatha, Karandugoda,

DEFENDANTS – RESPONDENTS – RESPONDENTS

BEFORE : **S.Eva Wanasundera PC.J.**
Sisira J de Abrew J. &
Upaly Abeyrathne J.

COUNSEL : Rohan Sahabandu PC for the Plaintiff – Petitioner - Appellant
Harsha Soza PC with Upendra Walgampaya for 4A Defendant – Respondent – Respondent
Chandana Wijesooriya for the 12B to 12 H Defendants – Respondents - Respondents

ARGUED ON : 07.12.2015.

DECIDED ON : **24.03 .2016**

S.EVA WANASUNDERA PCJ.

In this matter, leave to appeal was granted on 23.07.2010., on one question of law, i.e. " In the circumstances pleaded, is the affidavit filed by the Plaintiff Petitioner Petitioner in compliance with the provisions of Section 12(3) of the Oaths and Affirmation Ordinance? "

The facts pertinent to this case are as follows: The Plaintiff filed a Partition Action to partition the land of an extent of about two acres. The preliminary plan No. 328 of 03.09.1976 showed the land to be partitioned as an extent of 3 Roods and 7.85 Perchs. Initially a commission was issued to Surveyor Gamini Nihal Samarasinghe to prepare the final plan. He submitted Plan No.328A of 20.11.1999. whereby he proposed a scheme for division of the corpus. The Plaintiff had objected to this plan and pursuant thereto Surveyor K.W.Pathirana submitted plan No. 3181 dated 14.09.2002 and thereafter plan No. 3181A. There were objections to these plans and at the instance of the 1st Defendant-Respondent-Respondent a commission was issued to Surveyor W.T.S. Wijayatillake and he submitted plan No. 436 dated 27.02.2004.

However, it is common ground that after inquiry, Court by its order dated 06.03.2009 accepted plan No. 328A of surveyor G.N. Samarasinghe subject to certain modifications for the division of the corpus amongst the parties. The Plaintiff Petitioner being aggrieved by the said order of the order of the District Judge sought leave to appeal therefrom to the High Court of Civil Appeals of the Southern Province holden at Galle.

A preliminary objection was raised that the said Leave to Appeal application is not maintainable in as much as the petition by which leave to appeal was sought was **not supported by a valid Affidavit** as required by law. The parties who objected, moved that the application for leave be dismissed in limine.

The High Court by its order dated 24.11.2009 accepted the said objections and dismissed the leave to appeal application of the Petitioner with costs. The Plaintiff Petitioner has come before this court against the said order of the High Court. Leave was granted by this Court on the aforementioned question of law.

This Court has to analyze the matter in view of the Oaths and Affirmation Ordinance.

Sec.12 (3) of the Oaths and Affirmation Ordinance reads:

" Every commissioner before whom any oath or affirmation is administered, or before whom any affidavit is taken under this Ordinance, **shall state** truly in the jurat or **attestation at what place** and on what date the same was administered or taken, and shall initial all alterations, erasures, and interlineations appearing on the face thereof and **made before the same was so administered and taken."**

In many cases of the Supreme Court, the jurat of an affidavit has been discussed. I observe that an affidavit is a document by which someone affirms or swears to the facts which is within his knowledge. Therefore it is a very important document. In the present case the Appellant tendered an affidavit along with his petition to the High Court of Civil Appeals which court should rely on what is contained in the affidavit as sheer evidence pertaining to the matters before court in the Petition. In this Affidavit, the place it was signed is not mentioned in the jurat. The High Court has rejected it. The Justice of the Peace is supposed to read the contents of the Affidavit to the Affirmant/Deponent and then only should the signature of the Affirmant/ Deponent be placed on the Affidavit. For this procedure to take place, the Justice of the Peaceor the Commissioner of Oaths and the Affirmant/Deponent should be seated in one place , each one facing the other one, for one to understand what he is signing. The place is important. If someone could prove that they were at different places on that date, for example, that the Affirmant/Deponent was in one country and the Justice of the Peace was in another country, then that affidavit will be proven to be untrue and false. There is no way to challenge an Affidavit, if the place is not mentioned. In the same way if the language it is written in is not understood by either the affirmant or the justice of the peace, again, the Affidavit can be challenged. In such a case if the Justice of the Peace knows the language the affidavit is written in, he can explain the contents to the Affirmant in the language he and the Affirmant know. Here again, the place is important. They have to be in

a suitable place where the contents of the affidavit can be read over and explained by the Justice of the Peace to the Affirmant. That is the reason why the place of attestation should be mentioned in the Jurat.

It was argued by the Appellant that the seal of the Commissioner of Oaths bears a place namely 'Galle' and that is enough to show that the place of attestation as Galle and on that alone, the place of attestation can be taken as Galle.The Affirmant residing in Colombo could sign an affidavit in Colombo before a Commissioner of Oaths who has a seal bearing his name and the word 'Galle' which is his main station of practice, at a time he is in Colombo. It is allowed in law for him to read over and explain the contents of the Affidavit to the affirmant sitting in Colombo as he can practice anywhere in the Country. Yet, the place of attestation should be mentioned as Colombo because otherwise on the face of the document there is no way that he could reasonably be taken for granted to be present in Galle for the attestation to be performed in Galle. The place in the seal of the Commissioner of Oaths is no proof of the place of attestation. It is only an indication of where the principal office of practice of the Commissioner of Oaths is. After all, the rule that the place of attestation should be mentioned which is contained in a statute as a statutory provision cannot be ignored as technical.

The Statutory Provision of Sec. 12(3) of the Oaths and Affirmation Ordinance, specifically mention that all the alterations , erasures and interlineations on the face of the Affidavit should be initialed by the Commissioner of Oaths before it is administered and taken by the person swearing or affirming the Affidavit. So, it has to be read over by the Commissioner by himself and then while reading over that way, he has to identify the alterations, erasures and interlineations and then initial the same by himself. It is only then that he can step onto administering the Affidavit, which means 'giving out' the oath/affirmation to the Deponent or Affirmant. It is to be noted that every step of the way is explained in the statutory provision. It has to be done carefully and diligently. At the time of administering the Affidavit, the Commissioner has to read the Affidavit over and explain what is contained in it, to the deponent/affirmant and get the person deposing /affirming

to understand and know what he is deposing / affirming to. It is a serious matter taking place between two persons., the deponent/affirmant and the Commissioner. Both of them vouch for the way it is done. The Affirmant/Deponant is then fully aware of what he is affirming to or he is deposing to, since it is as good as giving evidence before Court. The affidavit is an alternative method of giving evidence. We all are aware how important it is to be in the witness box inside a Court house giving evidence. Providing evidence by way of an affidavit should be given the same seriousness and importance. The place all this work is done is very important. It is like the person in the witness box giving evidence except for the fact that he will not be cross examined. The penal sanctions against a person swearing an affidavit which bears false evidence is the same in law as for a person who swears and gives false evidence.

Moreover, it should be noted that Sec. 12(3) is mandatory as it states that " shall state truly at what place and on what date….". Therefore the place of attestation to be mentioned in the jurat is mandatory and cannot be treated as simple as a technicality. If, in an affidavit, the place of attestation is not mentioned in the jurat, it cannot be in law regarded as a perfected affidavit before a commissioner of oaths and cannot be given due recognition in law as a valid affidavit in whatever forum it is produced. The rule of law has to be followed for recognition to take place for the document to be an affidavit. The date and the place of attestation go together each being very important for the validity of the document.

I have considered the following cases which were submitted in the written submissions as well as in the oral submissions:

1. Fancy Vs Sanoon 2006 BLR 58.
2. Kariyawasam Vs Sourthern Provincial Road Development Authority and 8 others 2007 , 2 SLR 33.
3. Navaratne Vs Wadugodapitiya 2006 1 SLR 273.
4. Kariyawasam Vs. Don Mercy 2006 2 SLR 256.

I conclude that the Affidavit filed by the Plaintiff Petitioner Appellant is not in compliance with Sec. 12(3) of the Oaths and Affirmation Ordinance. I hold that the Judges of the Civil Appellate High Court were correct in dismissing the appeal on the preliminary objection. I affirm the said order. This Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

Sisira J de Abrew 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

An Appeal from the Civil Appellate High Court holden in Gampaha.

Galkadu Dewage Nandasena,
No. 379, Uggalboda West,
Gampaha.

Plaintiff

Vs

SC Appeal No. 74/12
SC/HCCA/LA Application No. 250/2010
Provincial High Court Gampaha (Appellate) Appeal No. WP/HCCA/ GPH/57/ 2006 (F)
D.C. Gampaha Case No. 40315/L

1.Walimuni Senadheerage Malini Rupasinghe
2.Handunge Saranapala
Both of No. 433, Galwetiya Road,
Uggalboda, Gampaha.

Defendants

AND

1. Walimuni Senadheerage Malini Rupasinghe
2. Handunge Saranapala,
Both of No. 433, Galwetiya Road,
Uggalboda, Gampaha.

Defendant – Appellants

Vs

Galkadu Dewage Nandasena,
No. 379, Uggalboda West,
Gampaha

Plaintiff - Respondent

AND NOW

Galkadu Dewage Nandasena,
No. 379, Uggalboda West,
Gampaha.

Plaintiff- Respondent- Appellant

Vs

1. Walimuni Senadheerage Malini Rupasinghe
2. HandungeSaranapala
   Both of No. 433, Galwetiya Road, Uggalboda, Gampaha.

Defendant-Appellant-Respondents

BEFORE: **S. EVA WANASUNDERA, PCJ**
UPALY ABEYRATHNE, J
K.T. CHITRASIRI, J

COUNSEL: P.L. Gunawardena with K.W.E. Karalliyadde and D.G.K. Karunarathne for the Plaintiff-Respondent-Appellant.
Dr. S.F.A. Cooray with Ms. S. Cooray for the Defendant-Appellant-Res -pondents.

ARGUED ON: 27. 04. 2016.

DECIDED ON: 05. 07. 2016.

S. EVA WANASUNDERA, PCJ.

Leave to appeal was granted on the questions of law set out in paragraphs 20(b), (c), (d) and (e) of the amended Petition dated 08.04.2011. The basis of these questions of law are that the judgment of the Civil Appellate High Court is contrary to law and against the weight of the evidence which was led before the trial judge in the District Court.

An action was filed in the District Court of Gampaha by the Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff) on 17.01.1997 praying for a declaration of title to the land in the schedule to the Plaint, for ejectment of the Defendants-Appellants-Respondents (hereinafter referred to as the Defendants) from the northern part of the land and for damages. The land is of an extent of one Rood and 25.2 Perches.The Defendants are husband and wife who had allegedly destroyed the northern boundary of the land and reconstructed a new boundary including part of the Plaintiff's land. Evidence show that after quarrelling about the problem and after complaining to the Police etc. the Plaintiff had filed this rei vindicatio action.

The Plaintiff claims title on Deed No. 2806 dated 01.06.1996. The Vendors were Amuwala Dewage Edward Jayasinghe, Amuwala Dewage Isilin Sumanawathie Wijeratne and Amuwala Dewage Seelin Fernando. They claim title from their mother, Kaluwa Dewage Punchinona who had got title through the Deed of Partition No. 10886 dated 23.06.1962.Punchinona had received a specific lot, namely Lot F from and out of the land called Galwetiye - Kele which was part of a large land of an extent of 7Acres 2 Roods and 27.8 according to the Plan No. 398 surveyed on16.12.1961. According to this Plan and the Partition Deed 10886, I

observe that one Kaluwa Dewage Milee Nandawathie had got Lot A (3A 0R 0 3.5P) , Lot D (0A 1R 25.2P) and Lot E (0A 1R 25.2P) which extents total up to 3 Acres 3 Roods and 13.9 Perches whereas Kaluwa Dewage Punchi Nona had got Lot F which is of a very much lesser extent of only 1 Rood and 25.2 Perches (0A 1R 25.2 P). Milee Nandawathie and Punchi Nona were sisters.

The Defendants in their answer claims Lot F only **on prescription**. They admit that they are husband and wife and also that the wife**, the 1st Defendant**, is the **daughter of K.D.Milee Nandawathie**.

The trial judge in the District Court held with the Plaintiff and observed that the Defendants cannot claim the land now as the 1st Defendant had transferred the land to one Handunge Gamini by Deed marked as V1 for Rs.25000/- after the Plaintiff filed this action in the District Court and before the Defendants filed the answer. In the answer the Defendants had not divulged that fact, namely that they are not the owners of the land since the land was transferred to Handunge Gamini who is not a party to the District Court action. Deed V1 gives the source of title as ' by prescription'. The trial judge had analysed the evidence given by the Plaintiff, the deeds produced by the Plaintiff, the documents such as Plans and the report of the Court Commissioner who also had given evidence in the course of the trial. The evidence of the Defendants also had been analysed and the trial judge had commented that the said evidence does not show credence to their claim on prescription.The Court Commissioner had given evidence to the effect that the newly constructed fence and the destruction of the old boundary was seen at the time he went to survey the land. The Plan done by the Court Commissioner shows that the Defendants had encroached into Lot F by 34.2 Perches.

However, the Defendants' lawyer had cross examined the Plaintiff with regard to the proof of Punchi Nona's title devolving on the three Vendors from whom the Plaintiff got title. The Plaintiff claimed that they were the children of Punchi Nona.Two of the Vendors, namely Edward Jayasinghe and Seelis Fernando had given evidence at the trial. I observe that they were 82 years and 78 years of age at the time of giving evidence. They had produced a letter from the Registrar of Births and Deaths that their registration of birth registers had got decayed and they had by themselves given evidence that their mother was Punchi Nona. They had also testified to the fact that the 1st Defendant was the daughter of their

mother's sister Milee Nandawathie and that the 1st Defendant was entitled to only Lot E under her mother which was adjoining Lot F. The Partition Deed No. 10886 was signed by Milee Nandawathie agreeing that Punchi Nona was entitled to Lot F.

The trial judge had accepted the evidence of the Vendors who transferred the land to the Plaintiff to the effect that they were the children of Punchi Nona. I observe and confirm what the trial judge had concluded to be true, through evidence. Just the fact that the birth certificates could not be produced at the trial for no fault of the Plaintiff as the Registrar of Births had said that they cannot be issued as the books were decayed, should not be held against those who gave evidence to the fact that Punchi Nona was their mother because It would then amount to a miscarriage of justice against the Plaintiff.

The Civil Appellate High Court Judges at page 3 of their judgment , while accepting the principle that the Appellate Court should not disturb the findings of the trial judge, states that:
"Nevertheless, in my view, the findings of the learned District Judge in this case are not mostly based on the credibility of the witnesses. ***The learned District Judge has come to those findings after evaluation of the evidence adduced by the Plaintiff.*** Therefore, I believe this Court has a right to look into the correctness of the learned trial judge's opinions**."**

Having gone through the evidence given at the trial, I observe that the trial judge has not only gone through the evidence of the Plaintiff but considered and ***analysed*** the evidence given by the vendors from whom the Plaintiff had got title to the particular land, who were very old people, as well as others such as the Court Commissioner who made the superimposed plan, and the other witnesses on behalf of the Plaintiff who had deposed to the fact that the Defendants were living in the adjoining land but never possessed or took the fruits of the land in question. The trial judge in fact has commented on the evasive answers given by the 1st Defendant with regard to the partition plan, partition deed and the fact that the land claimed by the Defendants are not their land any more as they had parted with it as soon as this action was filed in the District Court by the Plaintiff .

I am of the view that the Civil Appellate High Court Judges have gone wrong in their view that there was not enough proof of the fact that the Vendors who sold

the land were Punchi Nona's children who had the right title to sell the land to the Plaintiff. I am of the view that the Plaintiff has adduced enough evidence to prove his title as expected in a rei vindicatio action. He bought the land on 1st of June , 1996 by Deed 2806 from three persons , namely two brothers and a sister being the only surviving children of Kaluwa Dewage Punchi Nona who got the land by way of the Partition Deed No. 10886 dated 23rd June, 1962, which is 34 years prior to Deed 2806. The Plaintiff had possessed and enjoyed the fruits of the land until 1996 when the Defendants who had been on the adjoining land to the north of this land in question, had destroyed the northern boundary and erected a new fence. The Plaintiff had then at once complained to the Police and later filed this action for a declaration of title. The District Judge had correctly granted the declaration of title to the Plaintiff.

I therefore hold that the judgment of the Civil Appellate High Court is contrary to law and contrary to the evidence led at the trial before the District Court. I answer the questions of law raised at the leave to appeal stage of this case, in the affirmative, in favour of the Appellant.

I set aside the judgement of the Civil Appellate High Court dated 24. 06. 2010 and affirm the judgment of the District Court dated 15. 05. 2006.

Appeal is allowed with costs.

Judge of the Supreme Court

Justice Upaly Abeyrathne
I agree.

Judge of the Supreme Court

Justice K. T. Chitrasiri
I agree.

Judge of the Supreme Court

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 76/2011

SC/ HCCA/LA/ 182/2010

EP/HCCA/KAL/151/2008

DC Kalmunai No/1168/L

Ahamed Lebbe Hadjiar Athambawa,

(Deceased)

1. Mohamed Ismail Alim Suhaihaumma,
2. Athambawa Sulha Beebe,
   Both of Division 5,
   Sainthamaruthu.

Substituted Plaintiff

Vs.

1. Athamlebbe Mohamed Yusuf,
2. Seenimohamed Jemilunnisa,
   Both of Division 3,
   Nintavur.

Defendants

AND

1. Mohamed Ismail Alim Suhaihaumma,
2. Athambawa Sulha Beebe,
   Both of Division 5,
   Sainthamaruthu.

Substituted Plaintiff Appellant

Vs.

1. Athamlebbe Mohamed Yusuf,
2. Seenimohamed Jemilunnisa,
   Both of Division 3,
   Nintavur.

Defendant Respondents

AND NOW BETWEEN

1. Athamlebbe Mohamed Yusuf,
2. Seenimohamed Jemilunnisa,
   Both of Division 3,
   Nintavur.

Defendant Respondent Appellants

Vs.

1. Mohamed Ismail Alim Suhaihaumma,
2. Athambawa Sulha Beebe,
   Both of Division 5,
   Sainthamaruthu.

Substituted Plaintiff Appellant Respondents

BEFORE : K. SRIPAVAN, CJ.

WANASUNDERA, PC, J.

UPALY ABEYRATHNE, J.

COUNSEL : A. R. Surendran PC with V. Puvitharan, N. Kandeepan and M. Jude Dinesh for the Defendant Respondent Appellants

		Nizan Kariapper with Wasantha Wanigasekera, M.C.M. Nawas, M.I.M. Iynullah, Ms. Sanfara and Ms. Irfiya for the substituted Plaintiff Appellant Respondents
WRITTEN SUBMISSION ON:		29.02.2016 (Defendant Respondent Appellants) 29.02.2016 (Plaintiff Appellant Respondents)
ARGUED ON	:	05.02.2016
DECIDED ON	:	09.06.2016

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of the Eastern Province holden at Kalmunai dated 06.05.2010. By the said judgment the High Court of Civil Appeal has set aside the judgment of the learned District Judge of Kalmunai dated 09.10.2002 and allowed the appeal of the substituted Plaintiff Appellant Respondents (hereinafter referred to as the Respondents) with costs. Being aggrieved by the said judgment of the High Court of Civil Appeal the Defendant Respondent Appellants (hereinafter referred to as the Appellants) sought leave to appeal to this Court and leave was granted on the questions of law set out in paragraph 23 (V), (VII) and (XIV) of the Petition of Appeal dated 16.06.2010. Said questions of law are as follows;

(V) Were the learned High Court Judges erred in failing to appreciate that the substituted Plaintiff had failed to discharge

the burden of establishing the market value of the land at the time of the sale by calling a person competent to give valuation of the land to give the market value of the said land and that therefore he was disentitled in law to rely on the ground of '*leasio enormis*'?

(VII) Have the learned High Court Judges misdirected themselves in coming to the conclusion that the sale is liable to be cancelled on the basis of '*leasio enormis*' without considering the fact that there was absolutely no evidence showing that the original Plaintiff who sold the land to the Defendants did not know the market value of the said land at the time of the sale?

(XIV) Did the learned Judges of the High Court err in law in as much as even on the basis of their conclusion that there was '*leasio enormis*' (which is not conceded) they ought to have given the defendants their lawful right of election and the option of paying the deference between the alleged value of the land and the price paid by the Defendants?

The original Plaintiff in his amended plaint dated 28th of September 1979 averred that by virtue of deed of transfer bearing No. 11945 dated 11.09.1971 he became the owner of the land described in the schedule to the plaint. On or about 02.12.1975, he borrowed from the 1st Defendant a sum of Rs 18,000/- and granted a usufructuary mortgage of the said land to the 1st Defendant by deed bearing No 26257 dated 02.12.1975 and in pursuance of the said usufructuary mortgage the 1st Defendant entered in to the possession of the said land. Thereafter the original Plaintiff burrowed from the 1st Defendant a further sum of Rs. 4,000/-

and executed a deed of transfer bearing No 26903 dated 12.09.1976 transferring the said land to the 2nd Defendant who was the wife of the 1st Defendant. In this regard the Plaintiff took up the position that he did not intend to dispose of the beneficial interest of the said land to the Defendants by the said deed of transfer No 26903 and at the time of execution of the said deed of transfer No 26903 the Defendants agreed to re-convey the said land to the Plaintiff upon the repayment of said sum of money borrowed on said two deeds. He further averred that on or about 15th of March 1978 he offered the said sum of money to the Defendants but the Defendants in breach of the agreement refused to accept the money and to discharge the mortgage bond and to retransfer the said land to the Plaintiff. Accordingly the Plaintiff sought a declaration that the said property is held by the Defendants in trust to the benefit of the Plaintiff and in the alternative sought relief under the doctrine of '*leasio enormis*' on the basis that at the time of execution of the said deed of transfer No 26903 said property was worth Rs. 60,000/- and the price at which he sold the property is less than half its true value.

The Appellants, in their amended answer dated 28th May 1980, took up the position that the actual value of the land prevailing at the time of sale was paid to the Respondents.

The case proceeded to trial on 19 issues. The Respondents have raised issues on the basis that the Appellants must hold the property in question for the benefit of the Respondents and also on the basis that the Appellants secretly intended to defraud the Respondents at the time of the execution of deed bearing No 26903 and acted in collusion and *malafide* obtained a transfer at an undervalue and at a price grossly disproportionate to its true value.

Even though at the hearing of the appeal before this court the learned Counsel for the Appellants submitted that as reflected in paragraph 04 of their written submission the only question to be dealt with by this court is that 'whether the Respondents are entitled to set aside the sale of the land in dispute to the Appellants on the basis of *laesio enormis*?'

Upon the said question of law, the learned counsel for the Appellants submitted that the Respondents have failed to prove that the land in question was sold for less than half of its true value. It is well settled law that the burden is on the person who claims the benefit of the doctrine of *laesio enormis* to prove the true value of the thing in question at the time of sale. This may be done by expert evidence or by proving the market value at the time and place of sale. (Article 336 of The Law of contracts by C.G. Weeramantry at page 330 – First Indian Reprint - 1999 – Published by Kailash Balani for Lawman (India) Private Limited)

In the case of *Goonaratne Vs Don Philip* (1899) 5 NLR 268, It was held that "in order to succeed in an action for rescission of sale on the ground of *Enormis Laesio:* plaintiff must prove that the property was at the date of the sale worth double the price the defendant paid for it."

Therefore the Respondents, in order to claim the benefit of the doctrine of *laesio enormis,* must prove the true value of the land in question at the time of the sale and it was sold less than half of its true value.

I now consider whether the Respondents were able to discharge the said burden on balance of probability.

At the trial before the District Court the Plaintiff Respondents had closed their case leading the evidence of the Assistant Commissioner of Agrarian

Services Ahamadlebbe Ibrralebbe, witness Abubucker Meerasaibu and the 1st substituted Plaintiff Mohamed Ismail Alim Suhaihaumma reading the documents marked P 1 and P 2. P 1 was the mortgage bond bearing No 26257 dated 02.12.1975 and P 2 was the deed of transfer bearing No 26903 dated 03.09.1977.

The Appellants had closed their case leading the evidence of the 1st Defendant Respondent Appellant Atham Lebbe Mohammed Yuoosuf, witness Umarlebbe Wathoor, Divisional Officer, Agrarian Services Department, witness Murukuppan Thawarajah, clerk, Land Registry, witness Velu Umapathi, Registrar of Land Kalmunai, witness Abdul Hameed Abdul Wahab, Grama Niladari. Nintavur and witness Mohamed Thamby Sehu Ismail, reading the documents marked D 1 to D 4. The Appellants had produced several deeds of transfer marked D 1 to D 4 in order to establish the market value of the land in dispute prevailing at the time of the execution of the deed in question.

Both parties admitted that the original Plaintiff had become the owner of the land in dispute by virtue of the deed of transfer bearing No 11945 dated 11.09.1971 and also the original Plaintiff borrowed from the 1st Defendant a sum of Rs 18,000/- on 02.12.1975 upon a usufructuary mortgage bond bearing No 26257 dated 02.12.1975.

According to the evidence of the 1st substituted Plaintiff Appellant Respondent after the execution of the said mortgage bond, her husband, the original owner had borrowed from the 1st Defendant a further sum of Rs 4000/- upon the execution of the deed of transfer bearing No 26903 dated 03.09.1977 (P 2). It is important to note that in her evidence at page 110 of the brief she categorically said “I do not know what the price of this land was in 1975 and 1976”.

Witness Abubucker Meerasaibu too was an ordinary person who had no knowledge or experience in valuing lands. The only witness who had been called to give evidence with regard to the true value of the land in dispute at the time of sale was Ahamadlebbe Ibrralebbe, the Assistant Commissioner of Agrarian Services. In his evidence he said that his previous position was the Divisional Officer for Nintavur and his functions were implementation of the Agrarian Services Law No 58 of 1979, attending to irrigation and cultivation disputes, convening committee meetings and attending to divisional agricultural development activities etc. He said that he was not functioning as a Valuer of Lands. He further said that he did not know the particular field but he knew 'kandam' in which that was situated. His evidence was not based upon a valuation report which had been prepared by him after an inspection of the land in dispute.

The Respondents did not call any other witnesses to prove the true value of the land in dispute at the time of sale or to corroborate the evidence of the Assistant Commissioner of Agrarian Services. Assistant Commissioner himself had admitted that he was not an expert on the valuation of lands. In the said premise the Assistant Commissioner's unsupported evidence of the true value of the land in dispute should not have been accepted, as there was no evidence that he was specially skilled in regard to the valuation of land, and it had not been established that, as an Valuer, he was an "expert" within the meaning of section 45 of the Evidence Ordinance. Furthermore, his evidence at page 88 of the brief clearly reflects that his valuation was a mere assertion, and there was no explanation as to how it was arrived at - whether by reference to comparable sales, or any of the other recognized methods of valuing lands. His valuation of the land in dispute, with its many defects, at a round figure of Rs. 10 to 12 thousand per acre in 1975, without any explanation, was clearly arbitrary and capricious.

With regard to the Assistant Commissioner's evidence, learned Counsel for the Respondent submitted that the learned High Court Judges have sufficiently dealt with the Assistant Commissioner's qualifications as an expert and had reach to the conclusion that it had been sufficiently established.

The learned High Court Judges, in order to justify their conclusion which was solely based upon the evidence of the Assistant Commissioner of Agrarian Services, have cited a selected portion of the dictum in *Gunasekera Vs Amarasekera* [1993] 1 SLR 170 which reads thus "It is for the judge to determine whether the witness had undergone such a course of study or experience as will render him expert in a particular subject, and it is not necessary for the expertise to have been acquired professionally". No doubt that the Judge who hears the case should determine whether a particular witness had undergone such a course of study or experience as will render him expert in a particular subject. But in doing so a Judge should consider the evidence adduced at the trial to establish the proficiency in the relevant field in order to form a decision that the particular witness had undergone such a course of study or experience as will render him expert in a particular subject.

It seems that the learned High Court Judges had not paid their attention to the facts and circumstances of the case of *Gunasekera Vs Amarasekera* (supra) and to the final determination of the Supreme Court. In this case the defendant's surveyor who was the only witness testified for the case of the Defendant, said that he was a licensed surveyor, as well as a Court Commissioner of many Courts; and that he had five years' experience in "surveying land and valuing buildings". In evidence-in-chief he said nothing whatever about any special skill, qualification or experience in valuing land. As for the property in suit, he said it was a 50 to 60 year old house, 2,300 sq. ft. in area, built of brick, with a tiled

roof and cement floors, and jak timber frames; being of solid construction, despite damage caused by vandals and through neglect, he valued the house (as at January 1979) at Rs. 100,000. The land he valued at the rate of Rs. 15,000 per perch, i.e. Rs. 525,000. The property was thus worth Rs. 625,000 in his opinion. He did not give any explanation as to how he arrived at these figures. The Supreme Court held that the defendant has failed to prove that the true value of the property in suit was more than double the consideration shown on the face of the deed. It is manifest that the Supreme Court had not relied upon the sole evidence of the surveyor in deciding the true value of the subject matter.

On the other hand, in *Ponnupillai Vs Kumaravetpillai* (1963) 65 NLR 241, 248 where the Privy Council had acted upon the evidence of a surveyor in determining the value of land in order to apply the doctrine of *laesio enormis*. In that case there were several witnesses in regard to value, the surveyor having been also the Chairman of the local authority; further, there is nothing to suggest that the necessary evidence to qualify him as an expert had not been led.

Cross, Evidence (6th ed., p. 442) observes: "It is for the Judge to determine whether the witness had undergone such a course of special study or experience as will render him expert in a particular subject and it is not necessary for the expertise to have been acquired professionally".

Similarly, Coomaraswamy, Evidence (2nd ed., vol. 1, p. 624) observes "Any person who, from his circumstances and employment, possesses special means of knowledge, has given the subject particular attention, and is more than ordinarily conversant with its details, will be considered ' specially skilled ' for the purposes of this section ".

For the forgoing reasons I hold that the Respondents have failed to prove the true value of the land in dispute at the time of the sale. Hence I set aside the judgment of the High Court of Civil Appeal of the Eastern Province holden at Kalmunai dated 06.05.2010 and affirm the judgment of the learned District Judge dated 09.10.2002. I allow the appeal of the Appellants with costs.

Appeal allowed.

Judge of the Supreme Court

K. Sripavan, CJ.

I agree.

Judge of the Supreme Court

Wanasundera, PC, J.

I agree.

Judge of the Supreme Court

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

S.C. Appeal No. 78/2013
SC/HC(CA) LA No. 75/2012
WP/HCCA/AV No. 698/2000(F)
D.C. Pugoda No. 221/L

In the matter of an Application for Leave to Appeal from the Judgment of the High Court of Civil Appeal of Western Province dated 23.01.2012 in terms of High Court of Provinces (Special Provisions) Act No. 54 of 2006 (as amended)

1. Hettiarachchi Wellaburage
Madurawathie Jayasundara

2. Alagiyawanna Mohotti Appuhamilage
Pradeep Kumara
appearing by his next
Friend Alagiyawanna Mohotti
Appuhamilage Chandradasa,

Both of Walpolawatte,
Narangaspitiya,
Kirindiwela.

PLAINTIFFS

Vs.

1. Hettiarachchi Welliamburage
Chandrawathhie Jayasundera

2. Hapuarachchige Rupasinghe **(Deceased)**

2a. Hettiarachchige Weliamburage
Chandrawathie Jayasundara of

Medawalawita,
Meddagama,
Kirindiwela.

DEFENDANTS

AND

1. Hettiarachchi Wellaburage
Madurawathie Jayasundara

2. Alagiyawanna Mohotti Appuhamilage
Pradeep Kumara

appearing by his next
Friend Alagiyawanna Mohotti
Appuhamilage Chandradasa,

Both of Walpolawatte,
Narangaspitiya,
Kirindiwela.

PLAINTIFFS-APPELLANTS

Vs.

3. Hettiarachchi Welliamburage
Chandrawathhie Jayasundera

4. Hapuarachchige Rupasinghe **(Deceased)**

2a. Hettiarachchige Weliamburage
Chandrawathie Jayasundara of

Medawalawita ,
Meddagama,
Kirindiwela.

DEFENDANTS-RESPONDENTS

AND NOW BETWEEN

1. Hettiarachchi Wellaburage
Madurawathie Jayasundara

2. Alagiyawanna Mohotti Appuhamilage
Pradeep Kumara **(Deceased)**

2a. Alagiyawanna Mohotti
Appuhamilage Chandradasa

2b. Alagiyawanna Mohotti
Appuhamilage Cisna Kumari

Both of Walpolawatte,
Narangaspitiya,
Kirindiwela.

PLAINTIFFS-APPELLANTS-PETITIONERS

Vs.

1. Hettiarachchi Welliamburage
Chandrawathhie Jayasundera

2. Hapuarachchige Rupasinghe **(Deceased)**

2a. Hettiarachchige Weliamburage
Chandrawathie Jayasundara of

Medawalawita ,
Meddagama,
Kirindiwela.

DEFENDANTS-RESPONDENTS-RESPONDENTS

BEFORE: S.E. Wanasundera P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: D. N. Vijithsing for the Plaintiffs-Appellants-Petitioners

Romesh Samarakkody with Priyanthi Ganegoda
instructed by Ms. A.D.M. Samarakkody
for Defendant-Respondent-Respondents

ARGUED ON: 09.09.2016

DECIDED ON: 27.10.2016

GOONERANTE J.

This was an action filed in the District Court of Pugoda for a declaration of title to the land described in schedule 3 of the amended Plaint and eviction/damages against the Defendant-Respondents from the said lands. The learned District Judge dismissed the Plaintiff-Appellant-Petitioner's suit filed in the District Court, Pugoda and Plaintiff-Appellant-Petitioners having appealed to the relevant High Court against the Judgment of the learned District Judge, the High Court affirmed the Judgment of the District Court and dismissed the appeal. The Supreme Court on or about 31.05.2013 granted leave as per paragraphs 12(i) and 12(ii) of the petition dated 29.02.2012. The said questions reads thus:

12. (i) Did learned High Court Judges of Civil Appeal High Court err in law by coming to the conclusion that the 3rd schedule morefully described in the

plaint is an undivided portion of a larger land where as the Petitioners established that the said portion was possessed as defined and definite portion for more than 70 years.

(ii) whether the learned High Court Judges of Civil Appeal erred in law by holding that the Petitioners could not maintain this action as the Petitioners could not described a define portion despite of the fact that the boundaries of the said land were demarcated and shown by a survey plan.

The only matter that concerns this court is to arrive at a decision connecting the above questions i.e as to whether the Plaintiff-Appellant-Petitioners had long possession of the land in dispute and possessed the land as a defined and definite portion of a larger land. It is a question of fact, whether parties have had long exclusive possession in a defined area to enable the party concerned to claim prescriptive rights, to the land in dispute. We have heard submissions of both learned counsel on either side.

Parties proceeded to trial on nine issues. Based on the issues Plaintiff-Appellant-Petitioner urged that they have title to the land described in schedule 3 of the amended plaint and that the Defendant party illegally and forcibly possess the land in dispute. The Defendant-Respondents' position, as could be gathered from the issues take up the position that schedules 1, 2 & 3 described in the amended plaint are undivided portions of lands of a land called

'Muththetuwatte' in extent of about 30 Acres. It is also the position of the Defendant-Respondent that the land described in schedule 3 above and the land transferred to Plaintiff's son Pradeep Prasanna are undivided portions of land included in a large extent 30 Acres of land stated above. Further the case of the Defendant-Respondent is that the Plaintiff party has not been able to possess divided portions of land. As an alternative relief, Defendant-Respondent claim that land described within schedule 3 of the amended Plaint was possessed by the Defendant party and Defendant-Respondent has prescribed to the land in dispute.

This court having perused the evidence led at the trial and the two Judgments delivered by the lower courts is more than satisfied that the land described in schedule 3 of the amended Plaint is only a part of an undivided portion of a larger land. Learned District Judge has correctly considered and analysed the evidence led at the trial and it supports the contention of the Defendant-Respondents as stated above. I note the following important items of evidence of the Surveyor who gave evidence at the trial, and produced plan No. 968 of 23.04.1997.

In cross-examination:

ප්‍ර : තමා මැන්න අවස්ථාවේදි තමා සැලකිල්ලට ගත්ත යම් ලේඛණයක් තිබුනාද? ඔප්පුවක් හෝ පිඹුරක් ?

උ: නැත. මට තිබුනේ කොමිෂම පමණයි

ප්‍ර : කිසිම ඔප්පුවකින් මායිම් පෙන්නුවාද?

උ: ඔප්පු මා බලන්නේ නැහැ. ඉඩිරිපත් කලෙත් නැහැ

ප්‍ර : තමා මොකද කියන්නේ මනින්න කිව්ව ඉඩමත් මැන්න ඉඩමත් ගැන

උ: ප්‍රමාණයේ විශාල වෙනසක් දක්නට තියෙනවා

ප්‍ර : තමා මනින්න ගිය අවස්ථාවේදි තමා දැන ගත්තාද මේ ඉඩම් කොටස අක්කර 39 ක් විශාල ඉඩමක කොටසක් කියා?

උ: ඔව්

ප්‍ර: බෙදපු කොටසකට කිසිම සැලැස්මක් ඉදිරිපත් කර තිබුනේ නැද්ද?

උ: නැත.

Surveyor's evidence reveal that no plan or deed was submitted to him to conduct the Survey. He only had the commission papers. Surveyor states in evidence that there was a clear difference in extent. Difference of 1 Acre and 7 Perches. Surveyor further states that he became aware by the survey that the land to be surveyed was part of a larger land in extent of 30 Acres. I note that the above items of evidence (not contradicted) does not in any way support the Plaintiff-Appellant's case. Learned District Judge also observes, that the Plaintiff parties' position was their possession of the land in dispute was a separate, defined and identifiable plot of land with long possession, but no plan was submitted to prove the defined portion and Plaintiff's case not supported with reliable evidence. A mere statement of a witness of occupying a land for long years would not suffice to satisfy the requirements of Section 3 of the Prescription Ordinance. Definite acceptable boundaries need to be shown and

established. This should be so in a case where the contest by the opposing party is so strong based on undivided property rights. In *Loku Menika Vs. Gunasekera 1997 (2) SLR 281 Ranarajah J.* followed the principle that that the separate possession alone does not constitute adverse possession for purpose of establishing prescriptive title against co-owners. The above position more or less discussed in Seeman Vs. David 2000(3) SLR 23.

I also note that Deed P1 relied upon by Plaintiff-Appellants describe the land as 1/20th share (undivided) from a 30 Acre land. P2 & P3 the schedules refer to as undivided lands. Plaintiff has also admitted that there is a Partition Case for the 30 Acre land and that the Plaintiff is a party to that case.

The evidence led at the trial does not support a separate and a defined portion of land as argued by the Plaintiff-Appellants. Both courts the District Court and the High Court arrived at the same conclusions as above. Both courts have considered and given its judicial mind to basic primary facts as stated above. This court is not in a position to interfere with such basic and primary facts. It could be done only in a case where a perverse finding could be detected. Plaintiff-Appellants have not convinced this court that the Judgments

of both courts are perverse. Further on a balance of probability the Trial Court has chosen to accept and recognise the case and version of Defendant-Respondents. Mere expression of possession and referring to some boundaries would not suffice. What is required in law would be independent long possession of definite and defined portions of lands. This is so in cases where the corpus consists of undivided portions of lands. The two questions of law are answered in the negative and I observe that the High Court has not erred in its Judgment and conclusions. Therefore I dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera 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 in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 80/2004

SC/ Spl/LA/347/2003

C.A No 274/94 (F)

DC Panadura / 18019 / L

Don Lesley Kannangara,

No. 9, Siddhamulla,

Piliyandala.

Plaintiff

Vs.

Thanaweera Arachchige Nihal Wijeratne,

"Samudra",

Kesbewa,

Piliyandala.

Defendant

AND

Don Lesley Kannangara,,

No. 9, Siddhamulla,

Piliyandala.

Plaintiff Appellant

Vs.

Thanaweera Arachchige Nihal Wijeratne,
"Samudra",
Kesbewa,
Piliyandala.

Defendant Respondent

AND NOW BETWEEN

Thanaweera Arachchige Nihal Wijeratne,
"Samudra",
Kesbewa,
Piliyandala.

Defendant Respondent Petitioner

Vs.

Don Lesley Kannangara,,
No. 9, Siddhamulla,
Piliyandala.

Plaintiff Appellant Respondent

BEFORE : B. P. ALUWIHARE, PC, J.
UPALY ABEYRATHNE, J.
ANIL GOONARATNE, J.

COUNSEL	:	Rohan Sahabandu PC for the Defendant Respondent Appellant
		Chathura Galhena instructed by Manoja Gunawardana for the Plaintiff Appellant Respondent
WRITTEN SUBMISSION ON:		10.12.2009 (Defendant Respondent Appellant)
		04.01.2010 (Plaintiff Appellant Respondent)
ARGUED ON	:	11.01.2016
DECIDED ON	:	21.10.2016

UPALY ABEYRATHNE, J.

The Plaintiff Appellant Respondent (hereinafter referred to as the Respondent) had instituted an action against the Defendant Respondent Appellant (hereinafter referred to as the Appellant) in the District Court of Panadura seeking inter alia a declaration of title to the land described in the schedule to the plaint and to eject the Appellant from the said land. The Appellant had filed an answer denying the averments contained in the plaint and praying for a dismissal of the action of the Respondent. The case proceeded to trial on 09 issues. After trial the learned District Judge dismissed the Respondent's action. Being aggrieved by the said judgment dated 09.03.1994 the Respondent preferred an appeal to the Court of Appeal. After the hearing the Court of Appeal set aside the said judgment dated 09.03.1994 and directed the learned District Judge to enter judgment for the Respondent as prayed for in the plaint.

The Appellant sought leave to appeal to this court from the said judgment of the Court of Appeal dated 07.11.2003 and this court granted leave on the following questions of law set out in paragraph 22(a) i. of the petition of appeal dated 17.12.2003 which reads thus;

> "Did the Court of Appeal err in holding that the corpus was properly identified in the circumstances of the case?"

At the trial before the District Court both parties admitted that, W. K. Edwin was allotted Lot A of 'Kongahawatta', as set out in the final decree of the partition action bearing No 4081 of the District Court of Colombo, which was described in the schedule to the plaint in the said action. The final plan of the said partition decree had been produced at the trial marked P 2. According to the said plan P 2, Lot No A is bounded on the North by property of W. K. Don Edwin on the East by property of Liyanage Obias on the South by Lot B and on the West by paddy field of W. K. Don Edwin and containing in extent 01 Rood and 33.22 Perches.

According the schedule to the said plaint the land in suit is bounded on the North by property of W. K. Don Edwin on the East by property of Liyanage Obias on the South by Lot B and on the West by paddy field of W. K. Don Edwin and containing in extent 01 Rood and 33.22 Perches. It was the position of the Respondent that he derived title to the said land by the deed of transfer bearing No 1150 dated 05.10.1982 attested by A. A. Karunarathne, Notary Public. It is clearly seen that the boundaries described in the schedule to the said deed No 1150 and the boundaries described in the schedule to the said plaint are identical and tally with the boundaries described in the said final partition plan P 2.

The other matter to be examined is whether the said boundaries physically exist on the soil as the boundaries of the land in suit. In this regard the Court of Appeal has given more weight to the evidence of W. I. I. Fernando, Licensed Surveyor and Court Commissioner, who was called by the Respondent. Surveyor W. I. I. Fernando had prepared the Plan bearing No 1114 dated 18.08.1987 (P 1) superimposing the said final partition plan No 86 (P 2) prepared by Surveyor Athuraliya, the plan bearing No 443 (P 3) prepared by T. C. R. Fernando, Licensed Surveyor and the plan bearing No 3384 (P 4) prepared by Lucas H. De Mel, Licensed Surveyor. In his evidence Surveyor W. I. I. Fernando had testified that as per the superimposed plan, the land claimed by the Respondent had been depicted as Lots A1, A2 and A3 which were depicted as Lot A in plan No 86 (P 2). Surveyor Fernando has further stated that the Respondent showed him the area depicted as X in his plan No 1114 as the potion of land possessed by him. Accordingly the land in suit had been depicted as Lots A1, A2, A3 and X in the said superimposition plan P 1. It is pertinent to note that the extent of lot A depicted in plan bearing No 86 which is one Rood and thirty three Perches tallies with the extent of Lots A1, A2, A3 and X depicted in the said superimposition plan No 1114. Said evidence had not been challenged by the Appellant.

On the hand the Appellant had claimed title to the land in dispute on the deed of transfer bearing No 29130 dated 13.01.1977 (D 6). According to the said deed of transfer the land described therein is depicted in the plan bearing No 443 dated 21.03.1973 (P 3). Since the Respondent has established the identity of the corpus by the said superimposition plan No 1114, the burden has shifted on the Appellant to contradict the said evidence and to establish the identity of the land depicted in the plan 443 by preparing a superimposition plan which should have been made superimposing the plan No 443 on the said superimposition plan No

1114. But the Appellant has failed so to do. In the absence of such evidence I am unable to agree with the submissions of the learned Counsel for the Appellant that the Court of Appeal has erred on facts and in law in holding that the Respondent had proved the identity of the corpus.

In the circumstances I see no reason to interfere with the said judgment of the Court of Appeal. Hence I answer the said question of law in the negative. The instant appeal of the Appellant is dismissed with costs.

Appeal dismissed.

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

SC. Appeal No. 82/2013
SC/HC/CALA/438/12
High Court Case No.
SP/HCCA/KAG/820/2011
D.C. Kegalle Case No. 5682/L

In the matter of an Application for Leave to Appeal made in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 as amended by Act No. 54 of 2006.

1. Arampath Geeganage Somarathne
Buthgamuwa,
Pahala Buthgamuwa.

2. Jayasooriya Arachchillage Siriyalatha
alias Siriyawathie
Ragal Kanda,
Alawwa.

3. Rathnayake Adikaram Thenennehelaga
Sunil Rathnayake
Ragal Kanda,
Alawwa.

4. Ranamuka Arachchillage Asoka
Ragal Kanda,
Alawwa.
DEFENDANTS-RESPONDENTS-PETITIONERS

Vs.

Hettimudiyanselage Somarathna
Kehel Kotuwa,
Ragal Kanda,
Alawwa.
PLAINTIFF-APPELLANT-RESPONDENT

BEFORE : **SISIRA J. DE ABREW, J.**
K.T. CHITRASIRI, J. &,
PRASANNA S. JAYAWARDENA, PC. J.

COUNSEL : Ranil Samarasooriya with Nalaka Samarakoon for the Defendant-Respondent-Petitioners.

Sunil Abeyrathne with Thashira Gunathilake for Plaintiff-Appellant-Respondent.

ARGUED &
DECIDED ON : 22.07.2016

SISIRA J. DE ABREW, J.

Heard both Counsel in support of their respective cases.

This is an appeal against the judgment of the Civil Appellate High Court dated 09.06.2012 wherein the Civil Appellate High Court set aside the order of the learned District Judge dated 01.12.2010. This Court by its order dated 20.06.2013 granted leave to appeal on the questions of law set out in paragraph 28 (i) and (ii) of the petition dated 17.10.2012 which are reproduced below;

(i) Did the Respondent and his Registered Attorney-at-Law fail to establish sufficient cause and/or valid reason and or reasonable grounds that warrant the setting aside of the dismissal of the said D.C. Kegall Case No. 5682/L?

(ii) Did the Honourable Judges of the said Provincial High Court err in law in holding that the Respondent and his Registered Attorney-at-Law established sufficient cause and/or valid reason and or reasonable grounds that warrant the setting aside of the dismissal of the said D.C. Kegalle Case No. 5682/L?

The facts relevant to the issue in this case may be briefly summerized as follows.

The case in the District Court was taken up for trial on 05.07.2004. Part of the Plaintiff's evidence was concluded on this date (05.07.2004). The learned District Judge thereafter postponed the case for 22.11.2004, on which date the learned District Judge was on leave. The Acting District Judge, on 22.11.2004, put off the case for 02.05.2005. It has to be noted here that on 22.11.2004, the parties were present in Court. On 02.05.2005 when the case was taken up for trial, the Plaintiff was absent and unrepresented and the learned District Judge dismissed the Plaintiff's action.

Being aggrieved by the said order of the learned District Judge, the Plaintiff filed petition and affidavit under Section 87(3) of the Civil Procedure Code to have the order of dismissal set aside. After inquiry, the learned District Judge by his order dated 01.12.2010 dismissed the application of the Petitioner to re-open the case. Being aggrieved by the said order of the learned District Judge, the Plaintiff filed an appeal in the Civil Appellate High Court and the Civil Appellate High Court by its order dated 09.06.2012 set aside the order of the District Judge. Being aggrieved by the said order, the Defendant-Respondent (hereinafter referred to as the Defendant) appealed to this Court.

In order to allow an application under Section 87(3) of the Civil Procedure Code, the most important thing that must be considered is whether there were

reasonable grounds for the non appearance of the Plaintiff. The position taken up by the Plaintiff in this case is that on 22.11.2004 when the case was put off by the learned District Judge, he heard the date as 25.05.2005. The Plaintiff gave evidence to this effect. The Attorney-at-Law on record, Sujatha Udalagama too gave evidence stating that she heard the next trial date as 25.05.2005. Before she gave evidence she also filed an affidavit to this effect. This affidavit is annexed to the petition filed in the District Court seeking to set aside the order of the District Judge dismissing the plaint.

We have perused the evidence given by the Attorney-at-Law, Sujatha Udalagama. We see no reason to disbelieve the evidence of Sujatha Udalagama, AAL. We note that even the District Judge has not stated in his order that he disbelieved the evidence of Sujatha Udalagama, AAL.

Learned Counsel for the Appellant contends that although Attorney-at-Law, Sujatha Udalagama produced her Diary and the file cover of the case, she did not produce the said documents marked P2 and P3 for the inspection of the District Judge.

The question that must be considered is eventhough the said documents were not produced for the inspection of Court, can the Court dismiss or reject the evidence of Sujatha Udalagama, AAL. As pointed out earlier, we have perused the evidence of Sujatha Udalagama, AAL and we see no reason to reject the evidence of the said Attorney-at-Law. To allow an application under Section 87(3) of the Civil Procedure Code, what is necessary to establish that there were reasonable grounds for non appearance of the Plaintiff. When we go through evidence of the Plaintiff and the evidence of Sujatha Udalagama, AAL, we hold that they have established reasonable grounds for non appearance of the Plaintiff

on 02.05.2005. We therefore hold that the District Judge was in error when he rejected the application to have the exparte decree vacated. We further hold that the order of the Civil Appellate High Court is correct. For the above reasons, we affirm the judgment of the Civil Appellate High Court and dismiss this appeal with costs fixed at Rs. 40,000/-.

JUDGE OF THE SUPREME COURT

K.T. CHITRASIRI, J.

I agree

JUDGE OF THE SUPREME COURT

PRASANNA S. JAYAWARDENA, PC. J.

I agree

JUDGE OF THE SUPREME COURT

NT/-

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

S.C. Appeal No.83/2011
SC(HC) CALA Application No. 69/2011
WP/HCCA/Mt./16/2002 (F)
D.C. Moratuwa Case No. 353/L

In the matter of an application for Leave to Appeal 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.

1. Merennege Lisi alias Erine Salgado
2. Mahatellage Saman Suranga Pieris
3. Mahatellage Sujith Asanga Pieris

All of Nonis Mawatha, Molpe , Moratuwa.

4. Mahatellage Sarath Jayantha Pieris
Of No. 19/2, Thapasarama Road, Moratumulla, Moratuwa.

5. Mahatellage Jayantha Pieris
Of No. 34/288, Kirikannamulla, Yakkala.

6. Mahatellage Mallika Harriet Pieris
Of No. 10/2, Nonis Mawatha, Molpe, Moratuwa.

7. Mahatellage Renuka Nimali Pieris
Of Nonis Mawatha, Molpe, Moratuwa.

PLAINTIFFS

Vs.

1. A.M. A. Kalum Karunaratne
Of No. 326/1,
Suwarapola, Piliyandala.

2. Hapuhennedige Janet Elizabeth
Of Mola Road, Katubedda,
Moratuwa.

DEFENDANTS

AND

A.M. A. Kalum Karunaratne
Of No. 326/1,
Suwarapola, Piliyandala.

1ST DEFENDANT-APPELLANT

Vs.

1. Merennege Lisi alias Erine Salgado
2. Mahatellage Saman Suranga Pieris
3. Mahatellage Sujith Asanga Pieris

All of Nonis Mawatha, Molpe ,
Moratuwa.

4. Mahatellage Sarath Jayantha Pieris
Of No. 19/2, Thapasarama Road,
Moratumulla, Moratuwa.

5. Mahatellage Jayantha Pieris
Of No. 34/288, Kirikannamulla, Yakkala.

6. Mahatellage Mallika Harriet Pieris
Of No. 10/2, Nonis Mawatha, Molpe,
Moratuwa.

7. Mahatellage Renuka Nimali Pieris
Of Nonis Mawatha, Molpe, Moratuwa.

PLAINTIFFS-RESPONDENTS

8. Hapuhennedige Janet Elizabeth
Of Mola Road, Katubedda,
Moratuwa.

2ND DEFENDANT-RESPONDENT

AND NOW BETWEEN

A.M. A. Kalum Karunaratne
Of No. 44/10/3,
Suwarapola, Piliyandala.

1ST DEFENDANT-APPELLANT-PETITIONER

Vs.

1. Merennege Lisi alias Erine Salgado
2. Mahatellage Saman Suranga Peiris
3. Mahatellage Sujith Asanga Pieris

All of Nonis Mawatha, Molpe ,
Moratuwa.

4. Mahatellage Sarath Jayantha Pieris
Of No. 19/2, Thapasarama Road,
Moratumulla, Moratuwa.

5. Mahatellage Jayantha Pieris
Of No. 34/288, Kirikannamulla, Yakkala.

6. Mahatellage Mallika Harriet Pieris
Of No. 10/2, Nonis Mawatha, Molpe,
Moratuwa.

7. Mahatellage Renuka Nimali Pieris
Of Nonis Mawatha, Molpe, Moratuwa.

PLAINTIFFS-RESPONDENTS-RESPONDENTS

8. Hapuhennedige Janet Elizabeth
Of Mola Road, Katubedda,
Moratuwa.

2ND DEFENDANT-RESPONDENT-RESPONDENT (Deceased)

BEFORE: S. E. Wanasundara P.C., J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: R.C. Gooneratne for 1st Defendant-Appellant-Petitioner-Appellant
H. Peiris for Plaintiffs-Respondents-Respondents

ARGUED ON: 14.01.2016

DECIDED ON: 27.06.2016

GOONERATNE J.

This is a case the Plaintiff-Respondents-Respondents (hereinafter referred to as Plaintiffs) filed action in the District Court of Moratuwa, (353/L) mainly to attack a Judgment and Decree collaterally in a case (250/L) filed by the 1st Defendant-Appellant-Petitioner-Appellant where the Plaintiffs were not made a party to the action. A party to a suit could show by a separate action (as the Plaintiff) that a Judgment or Decree sought to be proved against them has

been obtained by fraud and collusion. (51 NLR 34, 40 & 41) In brief the facts of this case are as follows, as gathered from the plaint.

One Benedict Peiris was the original owner of the land described in the schedule to the plaint in extent of about 7.45 perches. Plaintiffs are the wife and children of the said Benedict. (now deceased) The 2nd Defendant was the above named Benedict's aunt and Benedict during his life time had obtained a loan of Rs. 1000/- from the 2nd Defendant and transferred the property in dispute by deed P10/V2 No. 1600 as security for the said loan. However it is apparent that even the learned District Judge takes the view that deed marked P10/V2 was an outright transfer of the property in dispute and not executed as security for the loan transaction. (conditional transfer)

It is pleaded and counsel argued that the said Benedict though executed deed marked P10/V2 in favour of his aunt Elisabeth (2nd Defendant) he continued to live and possess the property in dispute along with his family for about 23 years, after execution of deed marked P10/V2 (during 1964 to 1987). The above facts are not so much in dispute between the parties to the suit. It is also stated that the 2nd Defendant on or about 1987 filed action in case bearing No. 216 in the District Court of Panadura for a declaration of title and for eviction of the above named Benedict and others from the property in dispute but the

said action was dismissed. Nor did the 2nd Defendant appeal from the Judgment in Case No. 216.

It is important in a case of this nature to gather all the facts pertaining to the land in dispute. Benedict died in 1993. Whilst the Plaintiffs were in possession or continued to be in possession (Plaintiffs being Benedict's successors) the 2nd Defendant by deed No. 4827 of May 1995 P2/V1 transferred the property in dispute to the 1st Defendant-Appellant-Petitioner. (hereinafter referred to as the 1st Defendant) Thereafter the available material furnished to this court suggests that the 1st Defendant had attempted to evict the Plaintiffs from the land in dispute and even initiated proceedings in the Conciliation Board and even sent a quit notice (P12). However at a subsequent stage the 1st Defendant filed action bearing No. 250/Land only against the 2nd Defendant and obtained an ex-parte judgment. By obtaining a writ of execution, in the said case 1st Defendant, evicted the Plaintiffs who were not made parties to the suit in the above case No. 250/Land.

Supreme Court on 24.06.2011 granted leave to appeal on the questions of law set out in paragraphs 14(a), (b), (c) & (d) of the Petition as follows. Learned counsel for Plaintiffs suggested questions (e) & (f)

(a) Without an issue being formulated on the question of prescription can the High Court of Civil Appeals determine that the plaintiffs have prescription to the premises in suit?

(b) Does prescription begin to run from the time an action is instituted or from the (time) determination is made that the defendant occupies the premises in suit with the leave and licence of the plaintiff?

(c) Have the plaintiffs any rights to the premises in suit. If not should they have been made parties to the action bearing No. 250/L.

(d) Can the judgment in Case No. 250/L be attacked collaterally on the ground of fraud and collusion?

(e) In any event is the judgment in case No. 250/L void in law on the ground of fraud and collusion?

(f) If so is the judgment of the Civil Appeal High Court of Mount Lavinia affirming the judgment of the District Court, correct?

All the above material facts are relevant to the case in hand. It is based on the above facts, as correctly narrated by the learned District Judge that gave rise to the case in hand which ultimately resulted in an appeal to the Supreme Court. It is due to all the above facts and circumstances that the Plaintiffs filed another action bearing No. 350/Land on the premise that Plaintiffs were evicted in case No. 250/Land by a judgment obtained in the said case by fraud and collusion (observed by this court at the very outset of this Judgment). The 1st Defendant-Appellant-Petitioner was the successful Plaintiff in Case No. 250/L where serious allegations of fraud and collusions are made against him, by the Plaintiffs in the case in hand.

The prayer to plaint in the case in hand seeks the following substantive relief.

(a) To declare that deed No. 4827 of 23.05.1995 in favour of the 1st Defendant is invalid/void and as such he is not entitled to property rights.

(b) To declare that Plaintiffs are not entitled to be evicted based on the judgment entered against the 2nd Defendant in case No. 250/L wherein the Plaintiff was not a party to that action.

(c) That the Judgment (250/L) in the above case was obtained by fraud/collusion.

(d) In view of (c) above Judgment be declared null and void.

(e) Plaintiffs be restored to possession, as they were illegally dispossessed consequent to the above Judgment.

The 1st Defendant of course maintains that he is a bona fide purchaser and he, got title from the 2nd Defendant who transferred the property in dispute by deed P10 to the 1st Defendant, and that there was no fraud or collusion in the process of ejecting the Plaintiffs. Parties proceeded to trial on 18 issues. The 2nd Defendant Janet Elizabeth filed action against late Benedict before the above cases in case No. 216 in the District Court of Panadura, on or about 1987. Evidence reveal that Benedict during his life time executed Deed No. 1600 P10 in favour of the 2nd Defendant. Trial Judge having analysed the evidence arrived at a conclusion that deed P10 is an outright transfer, and no indication that it is executed as security for a loan. However Benedict and family continued to

possess the land in dispute after execution of deed X1, as a licencee, with the leave and licence of the 2nd Defendant Janet Elizabeth. However the 2nd Defendant having filed case No. 216 against Benedict which was dismissed would necessarily mean as observed by the learned District Judge, that the licence to possess the property in dispute would be at an end or terminated. Irrespective of the outcome of case No. 216. I observe and concur with the views of the lower court that the licence to possess was terminated, with such action being filed. Such possession could even be terminated by a normal letter issued by the licensor to the licencee. There is no need for any formality, as these are arrangements between parties may be on informal agreements and arrangements.

It is in evidence that the Plaintiff party continued to possess the land in dispute after the dismissal of the action in case No. 216/L (dismissal on 03.09.1992) oral evidence reveal that the 1st Defendant claiming to be the owner of the property in dispute by deed marked P2/V1 executed on May 1995, made attempts to induce the Plaintiffs to hand over the land in dispute to him and even sent letter P12 and also sought the intervention of the Mediation Board by P13. Letter P12 letter written by the 1st Defendant demonstrates in no uncertain terms that the 1st Defendant claims to be the owner, and specific reference is made in P12 to the 1st Plaintiff's occupation and demands that possession be

handed over to the 1st Defendant before 15th January 1996. P12 further states that failure to hand over possession would result in legal action. This letter written by the 1st Defendant to 1st Plaintiff is a quit notice. Having sent letter P12 and initiating Mediation Board proceedings as referred to in P13 no doubt demonstrates that 1st Defendant's grievance was with the Plaintiff party. P12 & P13 cannot be taken lightly and court is entitled to infer or form an opinion as in the ordinary course of events and business as to what should have followed. It should have been and it need to be an action in court to obtain relief against the Plaintiff party who were in occupation. 1st Defendant's own evidence reveal Plaintiffs were in possession. It did not happen in that way. It took a different turn and 1st Defendant filed action only against the 2nd Defendant. 1st Defendant knowingly and willingly or deliberately seems to have kept the Plaintiff party in the dark, and left them out of the level playing field.

Conduct and attitude of the 1st Defendant was in one way to abuse the process of court and on the other hand <u>fraudulently and craftily</u> to evict the Plaintiff party and in the process obtained an ex-parte Judgment against the 2nd Defendant who had parted with title by that time. What followed after Judgment was to use the statutory machinery by obtaining a writ of execution to eject the Plaintiff party who were not parties to the suit. Items of evidence taken in it's entirely and taken in a chronological order suggest wilful fraudulent

conduct on the part of the 1st defendant and he acted collusively with the 2nd Defendant to evict Plaintiff party. I take note of the following items of evidence to connect P12/P13.

ප්‍ර: එසේ ඉන්න විට මොනව හෝ දැනගන්න ලැබුනද?

උ: කැලුම් කරුණාරත්නට මේ ඉඩම විකුණු බව දැනගන්න ලැබුනා. මා කැලුම් කරුණාරත්නගෙන් ඒ බව දැනගත්තා

ප්‍ර: එතකොට තමන් කැලුම්ට කිව්වාද ?

උ: මා කිව්වා මේක අපට අයිති ඉඩමක් නඩු කියා මේ ඉඩම අයිතිවුනේ ඒ නිසා අපි යන්නෙ නැහැ කියා අපි කිව්වා

ප්‍ර: ඊට පසු කැලුම් කරුණාරත්න මොනව හෝ කළාද ?

උ: ඊට පසුව ලිපියක් එව්වා

(i.e. P12) (Proceedings of 2002.1.23 page 6 lines 12 to 19)

Contest between the 1st & 2nd Defendant was only a show or a sham in a case No. 250/L, Court could infer all the circumstances although there is no direct evidence. It is demonstrably fraudulent.

Once fraud and collusion is apparent it entitles the party who suffered as a result to challenge the proceedings in a separate action.

In any event therefore, as the decree in 250/L was obtained by fraud and collusion not only is the decree void on this ground also, it entitles the plaintiffs to challenge the proceedings in a separate action.

As was pointed out in Sirisena and Others Vs. Kobbekaduwa Minister of Agriculture and Lands 80 NLR 1 at page 66 quoting Denning LJ in Lazarus Estates Limited Vs. Bearely 1956 1 AER 341 at page 345 "No judgment of a court or order of a minister can be made to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is specifically pleaded and proved. But once it is proved it vitiates judgments, contracts and all transactions whatsoever."

Woodroffe & Amir Ali in their celebrated treatise. "The Law of Evidence" 14th Edition Volume 2 at page 1263 quoting Petharam CJ in Mahomad Golab Vs. Mahomad Sulliman (1894) 21 C 612 at 619 states the law thus:- "The principle upon which these decisions rest is that where a decree has been obtained by a fraud practiced upon the other side, by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit and not only by an application made in the suit in which the application was passed to the court by which it was passed".

E.R.S.R. Coomaraswamy in his treatise "The Law of Evidence", 2nd Edition, Volume 1 page 597 also states that a separate action could be brought." The most natural course for a party to a judgment who seeks to impeach it for fraud and collusion is by application to the court which pronounced the judgment to set it aside, or to bring a regular action".

The 1st Defendant as stated above demonstrably set in motion the grounds to file a court action, against the Plaintiffs. P12 & P13 are more than sufficient to conclude in that way as he was aware that Plaintiffs were in possession, and not the 2nd Defendant. 1ST Defendant having got title from the 2nd Defendant claims to be the owner of the property in dispute, had an obstacle placed before him. i.e possession of the property in the hands of the Plaintiffs (vide P12). Thus a cause of action accrued to him against the Plaintiff party and the definition of cause of action under Section 5 of the Civil Procedure Code is

not exhaustive to deny him a right to sue. A cause of action means that a particular act on the part of the Defendant which gives the Plaintiff his cause of complaint – Jackson Vs. Spittel (1870 L R S C P.542). But the 1st Defendant craftily without making Plaintiffs parties to the suit deliberately and fraudulently kept them out of the scene, very well knowing or having arranged with the 2nd Defendant to lead ex-parte evidence. It is a collusive action. Quit notice P12 and mediation attempt (P13) to get possession are legally acceptable steps in the process. Having done so and 1st Defendant's failure to file action against the Plaintiff is a deliberate attempt to obtain possession by fraud.

Plaintiff party strongly argue that the Judgment and Decree in Case 250/L is a nullity as it was obtained by fraud and collusion. They are entitled in law to attack the said decree collaterally. As such the Judgment and Decree in Case No. 353/L restoring them to possession is valid in law. Plaintiff party was in possession for 23 years and the 2nd Defendant attempt to evict them by Case No. 216 D.C Panadura was dismissed. There was no appeal from the Judgment in case No. 216. Thereafter even after Benedict's demise, the family as the Plaintiff party continued to reside until they were ejected by the execution of the impugned writ in case No. 250/L. The Judgment in Case No. 250/L was procured by misleading court fraudulently and collusively. That position is supported by 2nd Defendant not filing answer and allowing ex-parte evidence to

be led. Nor was the 2nd Defendant in possession when possession was handed over (P7). When fraud and collusion is apparent Judgment is a nullity and same could be canvassed in a separate action.

I agree with the submissions of learned counsel for the Plaintiffs that Section 328 of the Code is designed for speedy justice but it does not exclude a separate action. Both remedies may be available to the Plaintiffs to either proceed under Section 328 of the Civil Procedure Code or file a separate action. However Plaintiffs are challenging the validity of the Decree and Judgment in Case No. 250/L. As such the remedy under Section 328 may not be available. One of the principal submissions of learned counsel for the Plaintiffs was that Judgment and Decree in 250/L case is a nullity and void, as the Plaintiffs who were in actual possession was not a party. I agree that this was done deliberately.

IN *Jayalath Vs. Abdul Razak 56 NLR 145 ….”* Execution proceedings are collateral to the Judgment and no inquiry into the regularity or validity of the Judgment can be permitted in such proceedings. The case of *Isabella Perera Hamine Vs. Emliy Perera Hamie 1990 (1) SLR 8* provides more clarity. *S.N. Silva J.* (former C.J as he was then) held in proceedings under Section 52(1) of the Partition Law, that when a person was ejected by a writ emanating from a void order he could come by way of a separate action as he was challenging the

"antecedent validity of the writ of execution itself". i.e the order from which writ emanated as distinct from the "manner of execution" of writ. In such a case the proper application was by a separate action. Invoking the inherent powers of court under Section 839 of the Civil Procedure Code and Section 328 was not open to him. The above position is supported in several earlier judgments as *Marjan Vs. Burah 51 NLR 34; at 40/41. Jayasinghe Vs. Mercantile Credit Ltd. 1982 (2) SLR 495.* Court has inherent power to order restoration as "court will not permit a suitor to suffer by its wrongful act, vide *Sirinivasi Thero Vs. Suddasi Thero 63 NLR 31 at 34*.

Were the Plaintiffs not possessing in their own right? Benedict Possessed after he transferred the property to 2nd Defendant on deed P10, may be as a licencee. But subsequent to Judgment or upon filing Case No. 216/L it took a different turn, and not as licencee. Plaintiffs possessed adversely to the 2nd Defendant on their "own account" and not on account of 2nd Defendant.

The very fact of filing case No. 216/L against Benedict ipso facto terminated the licence and after the Judgment in the said case Plaintiffs continued possession went against or contrary to 2nd Defendant character and it changed to adverse possession. Plaintiffs' possession was in their own right.

The nature of possession of Benedict and that of the Plaintiffs was possession on their own right and not possession on account of 2nd Defendant. (Based on the result of case No. 216) As such learned District Judge was correct in observing in his Judgment that the Plaintiffs were on their way to prescribe the land in dispute. 1st Plaintiff's evidence was as follows:

ප්‍ර: ඔය නඩු තීන්දුවට පසුව තමන් ඒ ඉඩමෙන් අයින් උනාද?

උ: ඒ ඉඩම අපි බුක්ති විඳපු විදියට බුක්ති වින්ද? (continued possession without interruption on their own right, as above).

I am unable to accept the argument of 1st Defendant-Appellant that a new meaning would be given to the word 'fraud' if the Judgment in an action can be challenged collaterally. Civil Procedure Code as referred to in Section 17 enacts that non joinder of parties would not defeat the action but court will deal with the matter in controversy as far as rights and interest of the parties before it. It is unfortunate that the 1st Defendant-Appellant-Appellant does not deal with the quit notice (P12) and the Mediation Board notice P13 in their oral or written submissions. The procedural law should not be misunderstood in the way the 1st Defendant argues his case. Procedural Law is in no way inferior to the substantive law. An application of Section 17 of the Civil Procedure Code has

nothing to do with a case where fraud and collusion takes place to oust a party from a case which is done deliberately. I have discussed several decided cases in this judgment where courts have in no uncertain terms held that in such a situation it could be dealt with by a separate action, Misjoinder or non-joinder is another aspect of procedural law but unconnected to fraud: One cannot ignore the reason to despatch quit notice P12 and mediation notice P13. P12 & P13 should be the applicable ground and reason to bring an action by the 1st Defendant (as discussed above) and not to keep the Plaintiff in the dark. It goes beyond procedural irregularity.

There is no need to prove a case by direct evidence alone. Facts and facts in issue should culminate in such a way for a judge to arrive at a conclusion in favour of a party to a suit. Where all the items of evidence are collected and arranged in a chronological order and such events taken together it could be established on a balance of probability, that a party is entitled to relief in a civil case and case itself will be at its conclusion. The learned trial Judge has in his Judgment considered all material/primary important facts and arrived at a conclusion in favour of the Plaintiff. This court is not in a position to disturb those findings of the learned District Judge, on primary facts. An agreement or arrangement could be either express or implied. Based on a balance of all probabilities, I hold that the learned District Judge was correct in arriving at a

conclusion on fraud and collusion, act being the nature of the action based on all relevant and primary facts.

The question of law are answered as follows:

(a) There was no issue raised at the trial based on prescription. The observation of the Civil Appellate High Court on prescription is incorrect but prescription commenced to run on the dismissal of the action in case No. 216/L.

(b) As in (a) above

(c) Plaintiffs possessed the land in dispute on their own right from the institution and dismissal of case No. 216.

(d) Yes it can be attacked collaterally on grounds of fraud and collusion by a separate action.

(e) Yes, void in law.

(f) Yes correct.

In all the facts and circumstances of this case I observe that fraud and collusion of the Petitioner (1st Defendant) had been well established in this case. Nor was any denial by the Petitioner (1st Defendant) of his own quit notice (P12) and the initiative taken by him to evict the Plaintiffs by resorting to mediation procedure (P13). Having done so and even in his oral evidence admitting long

possession of Plaintiffs and the absence of 2nd Defendant on the land in dispute, could not have been in the ordinary normal course of events to keep the Plaintiff party in the dark by not making them parties to the suit. It is no error or procedural irregularity to have done so or state it's a curable defect, but fraud and a collusive act on the part of the 1st Defendant was done deliberately. Irrespective of how the question of title could be approached, long possession of Plaintiffs party cannot be denied. Original owner Benedict continued to reside even after Judgment in case 216 until his death in 1993. 1st to 7th Plaintiffs being Benedict's heirs continued to stay up to the time of ejectment by the execution of the impugned writ in case No. 250/L on 05.09.1999 (Fiscal's report P7).

The right to bring a separate action has been discussed in this Judgment. Further Section 44 of the Evidence Ordinance recognise such a right. Numerous case law support such position. I have also no hesitation in endorsing trial Judge's views. The change of character of Benedict's possession and that of the Plaintiffs are also taken note by this court based on Case No. 216/L, which was a Judgment not subject to an appeal, by any aggrieved party. Further in Case No. 216/L the 1st Defendant was not a party and question of 'res judicata' would never arise.

I agree with the conclusions of the learned High Court Judge in dismissing the appeal. Subject to the views expressed above I affirm the Judgment of the District Court. This appeal stands dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S.E. Wanasundara 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

In the matter or an Appeal against the Judgment of the Court of Appeal

Brown and Company Limited,
No. 481, T. B. Jaya Mawatha,
Colombo 10.

Petitioner

Vs

SC APPEAL No. 84/2011
SC (Spl) LA 194/2010
C. A. Application No. 777/20

1The Commissioner of Labour,
Labour Secretariat,
Narahenpita, Colombo 5.

2. A. Dissanayake,
Assistant Commissioner of Labour, (Colombo Central),
Labour Secretariat,
Colombo 5.

3. R. B. Godamunna,
Deputy Commissioner of Labour,Industrial Relations Unit, 7th Floor,Labour Sectretariat.

Respondents

M. V. Thegarajah,
23/2, Independence Avenue, Colombo 7.

Complainant Respondent

AND NOW BETWEEN

Brown and Company Limited,
No. 481, T. B. Jaya Mawatha,
Colombo 10.

Petitioner Appellant

Vs

1 The Commissioner of Labour,
Labour Secretariat,
Narahenpita, Colombo 5.

2. A. Dissanayake,
Assistant Commissioner of Labour, (Colombo Central), Labour Secretariat,
Colombo 5.

3.R. B. Godamunna,
Deputy Commissioner of Labour,Industrial Relations Unit, 7th Floor, Labour Sectretariat,

Respondents Respondents

M. V. Thegarajah,
23/2, Independence Avenue, Colombo 7.

Complainant Respondent Respondent

BEFORE : S. EVA WANASUNDERA PCJ.
BUWANEKA ALUVIHARE PCJ.
NALIN PERERA J.

COUNSEL: S.A.Parathalingam PC with RiadAmeen for the Petitioner Appellant.
M.A. Sumanthiran with ViranCorea, J. Arulanandstham and S. Samararachchi for the Complainant Respondent Respondent.
Mrs. M.N.B. Fernando PC , ASG with Rajiv Goonetilleke for the 1st to 3rd Respondents

ARGUED ON: 19. 05. 2016.

DECIDED ON: 03. 08. 2016.

S. EVA WANASUNDERA PCJ.

This Court granted special leave to appeal on 22.06.2011 on the questions of law contained in paragraph 42 (a), (c) and (f) of the Petition dated 12.10.2010. The said questions read as follows:-

42(a) Once gratuity has already been taken by the Complainant in the course of his employment, does this not clearly signify a break in his chain of employment and in such event, can such employee be said to be in continuous employment? In this context the Court of Appeal, in its judgment dated 2nd September, 2010 has erred in law in arriving at it's finding that there was no break in his period of service.

42(c) The Court of Appeal erred in law in coming to the finding that there was no break in service of the Complainant Respondent's employment.

42(f) The Court of Appeal misdirected themselves that the physical continuance of employment is the sole basis that determines the continuous and uninterrupted service under the Gratuities Law and thereby erred in law.

I would like to put down the facts which are accepted by both parties with regard to this matter.The Complainant Respondent Respondent(hereinafter referred to as the Respondent), Theagarajah commenced employment with the Petitioner Petitioner (hereinafter referred to as the Petitioner) , Brown and Company PLC with effect from the 1st of January, 1962 and continued to serve the Petitioner until the Respondent reached the age of 55 years. The Respondent was retired by letter P1 dated 18th September, 1986 which is marked by the Petitioner as an annexture to the Petition.

At the retirement, the Respondent received his gratutity of Rs. 750000/- calculated at the last drawn salary of Rs. 30000/- per month and taking into account 24 years of service. His date of retirement was 31st of October, 1986. By P1, a letter dated 18th September, 1986 the Respondent was informed that he was being retired from the services of the Petitioner Company, with effect from 31st October, 1986 and the Company had further thanked him for his services. By 4th April, 1989 the due gratuity was paid in full and accepted by the Respondent who was then the Deputy Chairman of the Petitioner Company.

On the 1st of November, 1986, the Respondent was back in temporary employment on the conditions contained in document P4 which granted employment for 9 months to end on 31st July, 1987. It was an accepted fact that such fixed term contracts were granted to him from time to time and his services ran upto 30th June,2006. He retired as Chairman of the Petitioner Company, from his second phase of employment which was on contracts on that date. His salary at the time he left in 2006 was Rs. 540,000/- per month. He was paid gratuity from 1.11.1986 to 30.06.2006 in a sum of Rs. 20,196,000/- on 3rd July, 2006. This payment had been done **on the erroneous calculation of the period of service as 44 years taking the date of employment as 1st January, 1962.** The Respondent was informed of this miscalculation and **he returned Rs. 13,104,000/- which was the erroneous overpayment.**

Later on, the Respondent had lodged a complaint with the Commissioner of Labour, the 1st Respondent on the 26th April, 2007. The 1st Respondent acting on the complaint held an inquiry. The inquiry officer was the 2nd Respondent, the Assistant Commissioner of Labour. By his order dated 17th September, 2007, the 2nd Respondent had held that **there was an interruption** in the employment of

the Complainant who is the Respondent in the case in hand and directed the Petitioner Company to pay Rs. 13,338,000/- for the second segment of the employment of the Complainant Respondent. Since the Petitioner Company had already paid that amount, it was held that no sum of money was due to the Complainant as gratuity from the Petitioner Company.

I observe that the Complainant Respondent in this case by P 18 dated 17th December, 2007 had sought to ***re-initiate the inquiry by the 2nd Respondent, the Assistant Commissioner of Labour which was concluded 3 months ago on the 17th September,2007.*** *The 3rdRespondent , the then Commissioner of Labour had* ***then inquired into the same matter which was concluded by the 2nd Respondent.*** *At the end of this inquiry, the 3rd Respondent had, after the new inquiry held by him , directed the Petitioner to* ***pay to the Complainant Respondent, a further sum of Rs. 16,575,000/- as gratuity inclusive of a 30% surcharge.***

The Petitioner challenged the said decision in the Court of Appeal. Even though the Court of Appeal granted a stay order until the final determination of the case, finally, the Court of Appeal dismissed the Application of the Petitioner on 2nd September, 2010.

This Court granted leave on the questions of law as aforementioned. To my mind the matter to be decided is whether there was an accepted break in service of the Respondent and whether physical continuance of service can be taken as continuous and uninterrupted service according to law. The written law pertinent to this matter is included in the Payment of Gratuity Act No. 12 of 1983 as amended.

Section 5 of the Act reads:

5(1) **Every employer** who employs or has employed fifteen or more workmen on any day during the period of twelve months immediately preceding the termination of the services of a workman in any industry shall, on termination (whether by the employer or workman, or **on retirement** or by the death of the workman or by operation of law, or otherwise) of the services at any time after the coming into operation of this Act, of a workman who has a period of service of not less than five completed years under that employer, **pay to that workman in respect of such services,** and where the termination is by the death of that

workman, to his heirs**, a gratuity** computed in accordance with the provisions of this Part within a period of thirty days of such termination.

Section 20 of the Act reads:

"Completed service" means uninterrupted service and includes service which is interrupted by approved leave on any ground whatsoever, a strike or lock out or cessation of work not due to any fault of the workman concerned, whether such uninterrupted or interrupted service was rendered before or after the coming into operation of this Act.

I observe that at the inquiry before the 2nd Respondent, it was admitted by the Complainant Respondent that there were two segments in his employment, one segment from 1962 to 1986 , i.e, 24 years at the end of his 55th year which was the due date to retire, according to a condition in the letter of appointment and the other segment from 1986 to 2006 which was on contract basis starting with the first period of contract being only 9 months, according to the evidence led at the inquiry. The gratuity which was paid at the end of his service at 55years was accepted by him at that time. Moreover he accepted to work on contract basis which was renewed periodically upto 2006.

I am of the opinion that having accepted the legally due gratuity at the age of 55 years the Respondent cannot make a claim to be paid gratuity for a period of time for which he was paid once. The moment gratuity is accepted for the first segment of 24 years, he accepts and concludes that he has got gratuity for that period. He is estopped in law from making any claim for that past period for which he accepted gratuity once.

Then he was the Deputy Chairman of the Petitioner Company. I further note that it was not an extension of service which was granted to him at the end of 55 years of age. He was given prior notice of sending him on retirement and he accepted it. **He never objected to that. Neither did he ask for any extensions**. He simply accepted the new fixed term contract. He was made the Chairman. He was paid a very high salary over 5 lakhs of rupees monthly with all other benefits. He enjoyed all those facilities for another 19 years. He relinquished his position as Chairman and left the Company completely at the age of 74 years.

I fail to understand how the 3rd Respondent could have ever initiated a second inquiry on the same matter which was concluded and a decision given by the 2nd Respondent. If at different times, a complainant can get the Commissioner of Labour to re do an inquiry , under the law , it would definitely create disaster. Once an inquiry is concluded, the Act does not provide for re – initiating another inquiry on the same matter. If the Commissioner of Labour could be influenced, then , it looks like he could commence inquiries again and again on the same matter.

I am of the view that the second inquiry which was conducted by the 3rd Respondent is unlawful. There is no provision in the Gratuity Act to that effect at all. He should not have touched a matter which was concluded and finalized. Having done a second inquiry on the same matter, the 3rd Respondent had reversed the findings of the 2nd Respondent without any reason.

The learned Judges of the Court of Appeal has considered ***The Finance Company VsKodippilli C.A. minutes of 23.11,2005 in case No. 1111/03.*** I find that in the Kodippili case the facts are different. In that case, the services of the Complainant was extended. At the time of retirement the Complainant was admittedly on **an extension of service**. In the case in hand, the Complainant **was retired in service** and he **had accepted a fixed term contract**.

Moreover, I observe that the Complainant Respondent has been paid gratuity for the second segment of his service at the rate of one month's salary per year (and not ½ a month's salary per year) at an enhanced rate voluntarily by the Petitioner for the second segment of his service on a fixed term contract basis.

I find that the Court of Appeal has gone wrong in its judgment by having decided that the service was not interrupted just because the Complainant Respondent had physically come to work on the very next day after the date of retirement at 55 years. The Court of Appeal had ignored the fact that he was retired and then he accepted the fixed term contract and commenced services anew according to the contract and come on the next day as a worker on contract basis.

Due to the aforementioned reasons , I make order setting aside the Judgment of the Court of Appeal and the decision of the 3rd Respondent, the Deputy Commissioner of Labour. The Appeal of the Appellant is allowed. However I order no costs.

Judge of the Supreme Court

Justice Buwaneka Aluvihare
I agree.

Judge of the Supreme Court

Justice NalinPerera
I agree.

Judge of the Supreme Court

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

In the matter of an appeal in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 read with Article 118 of the Constitution.

SC / Appeal / 87/2002

SC/ Spl/LA/ 158/2002

C.A. Rev. No 769/2001

D.C. Pugoda 38/P

Singanipurage Kusuma Rajapakse
Muttetuwatta,
Dompe.

Plaintiff

Vs.

1. Rajapakse Hunuge Evsa,
   Giridara,
   Dompe.
2. Rajapakse Hunuge Alice,
   Pahala Dompe,
   Dompe.
3. Rajapakse Hunuge Punyasena Fernando,
4. Singanipurage Dharmasiri,
5. Singanipurage Karunathilake,
6. Rajapakse Hunuge Sarath Rajapakse,
7. Rajapakse Hunuge Wasantha Ramani
8. Rajapakse Hunuge Jayantha Ranjan Rajapakse,
9. Rajapaksage Mahattaya,
10. Hikkaduwage Winsena Rajapakse,
    All of Muttettuwatta,
    Dompe.

Defendants

AND

3. Rajapakse Hunuge Punyasena Fernando,

7. Rajapakse Hunuge Wasantha Ramani Rajapakse,

8. Rajapakse Hunuge Jayantha Ranjan Rajapakse,

3rd 7th & 8th Defendant Petitioners

Vs.

Rajapakse Huniuge Sarath Rajapakse,

Muttettuwatta, Dompe.

6th Defendant Respondent

Singanipurage Kusuma Rajapakse,

Muttettuwatta, Dompe.

Plaintiff Respondent

1. Rajapakse Hunuge Evsa,
   Giridara,
   Dompe.
2. Rajapakse Hunuge Alice,
   Pahala Dompe,
   Dompe.
4. Singanipurage Dharmasiri,
5. Singanipurage Karunathilake,
9. Rajapaksage Mahattaya,
10. Hikkaduwage Winsena Rajapakse,
    All of Muttettuwatta,
    Dompe.

Defendant Respondents

AND NOW BETWEEN

7. Rajapakse Hunuge Wasantha Ramani Rajapakse,
8. Rajapakse Hunuge Jayantha Ranjan Rajapakse,

7th & 8th Defendant Petitioner Petitioners

Vs.

Rajapakse Huniuge Sarath Rajapakse,

Muttettuwatta, Dompe.

6th Defendant Respondent-Respondent

Singanipurage Kusuma Rajapakse,

Muttettuwatta, Dompe.

Plaintiff Respondent-Respondent

3. Rajapakse Hunuge Evsa,
   Giridara,
   Dompe.
4. Rajapakse Hunuge Alice,
   Pahala Dompe,
   Dompe.
6. Singanipurage Dharmasiri,
7. Singanipurage Karunathilake,
11. Rajapaksage Mahattaya,
12. Hikkaduwage Winsena Rajapakse,
   All of Muttettuwatta,
   Dompe.

Defendant Respondent-Respondents

BEFORE	:	SISIRA J DE ABREW, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Ms. Mudithavo Premachandra for the 7th and 8th Defendant Petitioner Appellants Romesh Samarakkody for the 6th Defendant Respondent-Respondent and the Plaintiff Respondent-Respondent
WRITTEN SUBMISSION ON:		29.01.2003 & 30.03.2009 (7th & 8th Defendant Petitioner-Appellants) 31.12.2002 (Plaintiff Respondent--Respondent)
ARGUED ON	:	24.06.2016
DECIDED ON	:	21.10.2016

UPALY ABEYRATHNE, J.

The Defendant Petitioner Appellants (hereinafter referred to as the Appellants) sought special leave to appeal to this Court from the judgment of the Court of Appeal dated 11.06.2002 and this Court granted special leave to appeal on the questions of law set out in the paragraph 16 (h), (i) and (j) of the petition of appeal dated 14th July 2002. Said questions of law are as follows;

16(h) Did the Court of Appeal err in law holding that the Application in Revision is misconceived and ought to have been rejected as the remedy available to the Appellants was not revision but to appeal notwithstanding lapse of time under Chapter LX of the Civil Procedure Code?

16(i) Did the Court of Appeal err in law holding that since the 3rd, 6th, 7th and 8th Defendants have filed a joint statement of claim the 3rd, 7th and 8th Defendant Appellants are not entitled to contest or deprive the 6th Defendant of the share to which he is declared entitled to by the judgment of the District Court when, by issue No 15, the defendants have brought to the notice of court, the question whether an undivided 1½ acres was remaining to be gifted by deed No 8379 in 1989?

16(j) Has the Court of Appeal failed to consider the grounds on which the 3rd, 7th and 8th Defendants have invoked the revisionary jurisdiction of the Court of Appeal?

The following question of law has been raised at the time of granting the leave.

> "If leave is not granted by this court, whether it would result in grave miscarriage of justice in as much as the learned District Judge appears to have fallen in to error in presuming that the extent of the corpus sought be partitioned was 12 acres in extent, whereas, it was in fact 05 Acres 03 Roods 20.7 Perches in extent as depicted in preliminary plan P 2 (699/P)"

The Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent) instituted the said action against 1st to 10th Defendants in the District Court of Gampaha seeking to partition the land described in the schedule to the amended plaint. According to the schedule to the said amended plaint dated 16th February 1993, the land sought to be partitioned was bounded on the North by the land of Dimunpura Hunuge Nonis Fernando and the land of Kodikarage Karanis Appu on the East byBandara Watta on the South and west by Muththes paddy field and containing in extent about 12 acres.

The 3rd 5th 6th 7th 8th and 10th Defendants have filed a joint statement of claim. In paragraph 02 of the said statement of claim dated 5th December, 1994, they have averred that the land sought to be partitioned had not been accurately depicted in preliminary plan bearing No 699/P marked X 1. They have challenged the said preliminary plan on the basis that the land depicted in the preliminary plan was not as large as described in the schedule to the amended plaint but a smaller land in extent Acres 05 Roods 03 Perches 20.07. The said Defendants have not disputed the boundaries of the land in suit which were depicted in the said preliminary plan as well as of the land described in the schedule to the plaint. Furthermore the said Defendants admitted the original owners of the said land as shown in the Appellant's pedigree excluding the person who had been described in the Appellant's pedigree as 'unknown'.

It is noteworthy that although the said Defendants had disputed the extent of the land in suit, no attempt had been made to show a larger land as claimed in the statement of claim, so far as possible by reference to physical meets and bounds, or by reference to a plan.

Also on the other hand, the said Defendants in prayer 'b' of their statement of claim have prayed for that "in the event, the Court decides to partition the land depicted in the said preliminary plan to grant rights as pleaded in their statement of claim". In the light of the said pleadings I have no hesitation in concluding that the said prayer 'b' demonstrates the said Defendants' willingness to admit the corpus as depicted in the said preliminary plan bearing No 699/P marked X 1.

The case proceeded to trial on 18 issues. The Plaintiff Respondent has closed her case leading her evidence and reading the documents marked P 1 to P 6. The 3rd 5th 6th 7th 8th and 10th Defendants have closed their case leading the evidence of the 3rd and 8th Defendants and reading the documents marked 3 D 1 to 3 D 11. The learned Additional District Judge has delivered the judgment in favour of the Plaintiff Respondent. Being aggrieved by the said judgment dated 28.01.2001, the 3rd 7th and 8th Defendants have preferred an application in revision dated 14th July 2002 to the Court of Appeal and the Court of Appeal has rejected the said application in revision.

The Court of Appeal has reached the said conclusion mainly on the grounds;

- the 6th Defendant, who had filed a joint statement of claim with the 3rd 7th and 8th Defendants, is now contesting the application in revision filed by the 3rd , 7th and 8th Defendants, and,
- Since the 3rd, 7th and 8th Defendants had not taken steps within 14 days to appeal against the judgment of the District Court the remedy available to the said Defendants has been specifically provided in Chapter LX Civil Procedure Code.

It is pertinent to note that the 6th Defendant, who had filed a joint statement of claim along with the 3rd 7th and 8th Defendants, has filed a statement objecting to the said Application in Revision filed by the 3rd 7th and 8th Defendants. In paragraph 03 of the said statement of objections the 6th Defendant has averred that the judgment of the learned Additional District Judge dated 28.02.2001 is correct and is based on the facts and evidence of the case.

It is also important to note that, in answering to the paragraph 23 of the plaint, the 3rd 5th 6th 7th 8th and 10th Defendants, in paragraph 22 of their joint statement of claim dated 05th December 1994, had averred that Diamon, who became entitled to undivided 17/1920, 1/8 and 67/480 shares had transferred 1/8th share of his rights to the 6th Defendant by deed of transfer bearing No 8379 dated 10.04.1989. Also, in answering to the paragraph 24 of the plaint, the 3rd 5th 6th 7th 8th and 10th Defendants, in paragraph 23 of their joint statement of claim, had averred that 1½ acres had been transferred to the 6th and 7th Defendants by a deed of transfer bearing No 104.

But, in contrary to the said statement of claim the 3rd 7th and 8th Defendants, in paragraph 16(c) and (d) of their petition to the Court of Appeal dated 28th May 2001, has averred that the learned Additional District Judge had erred in concluding that Diamon had conveyed 1½ acres each to Punyasena by Deed No 3997 and to his son, the 6th Defendant, by said Deed No 8379 dated 10.04.1989.

According to the findings of the learned Additional District Judge which appears at page 11 of the judgment dated 28.02.2001 the said averment of the 3rd 7th and 8th Defendants is erroneous. The learned trial judge has clearly stated at the said page 11 of the judgment that, although both the Plaintiff and the Defendants had stated that Diamon had transferred 1½ acres to his son, the 6th Defendant, by Deed of Transfer bearing No 8379, the said Deed had not been produced for the examination of the Court. Therefore the Court has to decide that said Diamon, having believed that his 727/2560 share amount to 3 acres, had transferred ½ share of his said rights to Punyasena and balance ½ share to his son, the 6th Defendant. Accordingly 6th Defendant became entitled to ½ share of 727/2560; i.e. 727/5120 share, and Punyasena, the 3rd Defendant became entitled to balance ½ share of 727/2560; i.e. 727/5120 share of the corpus.

Needless to say that it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. *(Alwis vs. Piyasena Fernando (1993) 1 SLR 119)*

In the above context I am not inclined to agree with the submission of the Appellants that the conclusion of the learned Additional District Judge was erroneous. Also, I hold that the facts and circumstances of the case clearly reveal that the land to be partitioned was clearly depicted in the preliminary plan bearing No 699/P marked X 1. Since the Appellants have preferred a belated application in revision based on the devolution of title, disputing the rights of the 6th Defendant of which had been admitted by the Appellants in their joint statement of claim, I hold that the Court of Appeal was correct in rejecting the Appellants' application in

revision for the reasons stated in the judgment of the Court of Appeal dated 11.06.2002.

For the forgoing reasons I dismissed the Appeal of the Appellants with costs.

Appeal dismissed

Judge of the Supreme Court

SISIRA J DE ABREW, 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 89/2010

NWP/Civil Appellate High Court
No. NCP/HCCA/ARP 210/2007

D.C. Anuradhapura 15625/L

In the matter of an application for Leave to Appeal

Seyyadu Mohommaduge Razik
Gallenbindunuwewa
Horowpotana.

PLAINTIFF

Vs.

1. Suleiman Adam Kandu
Kivul kade,
Horowpothana.

2. Abdul Hameed Mahamad Mihilar
Fancy Textiles Mahaveediya,
Horowpothana.

DEFENDANTS

Seyyadu Mohommaduge Razi
Gallenbindunuwewa
Horowpotana.

PLAINTIFF-APPELLANT

Vs.

1. Suleiman Adam Kandu
   Kivul kade,
   Horowpothana.

2. Abdul Hameed Mahamad Mihilar
   Fancy Textiles Mahaveediya,
   Horowpothana.

DEFENDANTS-RESPONDENTS-

AND NOW BETWEEN

Seyyadu Mohommaduge Razik
Gallenbindunuwewa
Horowpotana.

PLAINTIFF-APPELLANT-PETITIONER

Vs.

1. Suleiman Adam Kandu
   Kivul kade,
   Horowpothana.

2. Abdul Hameed Mahamad Mihilar
   Fancy Textiles Mahaveediya,
   Horowpothana.

DEFENDANTS-RESPONDENTS-RESPONDENTS

BEFORE: B.P. Aluwihare P.C., J.
Anil Gooneratne J. &
K. T. Chitrasiri J.

COUNSEL: Mahanama de Silva with
K.N.M. Dilrukshi for the Plaintiff-Appellant-Petitioner

N. M. Shaheid for Defendants-Respondents-Respondents

ARGUED ON: 15.07.2016

DECIDED ON: 30.09.2016

GOONERATNE J.

This was an action filed in the District Court of Anuradhapura for a declaration of title and eviction of the 1st and 2nd Defendants named in the plaint filed in the District Court. The learned District Judge of Anuradhapura, after trial delivered judgment dismissing the plaint. An appeal had been preferred to the Civil Appellate High Court from the judgment of the District Court, and that Appeal was dismissed by the High Court on or about 20.10.2009. The application for leave was supported before this court on 30.08.2010, and court having heard the application, granted leave on the said date on the questions of law set out in

paragraphs 17(a) and 17(b) of the petition dated 26.11.2009. The said question of law reads thus:

(a) Has the High Court misdirected itself in holding that the corpus was an undivided and co-owned land on the basis of Deed P1 since the evidence was that after the execution of the said deed the vendees, namely the 1st defendant and the said Seynul Abdeen, had possessed their respective shares separately and as two distinct and divided lots?

(b) Has the High Court misdirected in law in holding that the order made in respect of the said preliminary issue No. 22 is not final and conclusive? Is the said determination obnoxious to section 147 of the Civil Procedure Code?

It is unfortunate that the hearing of this case had been postponed since 30.08.2010, for various reasons. However, a further petition dated 23.10.2014 was filed by the Plaintiff-Appellant-Petitioner moving this court to admit fresh evidence which had emerged subsequent to supporting this application for leave, and this order concerns only the admission of fresh evidence at the stage of appeal. The application of learned counsel for appellant to admit fresh evidence is clearly stated in the petition dated 23.10.2014. To state very briefly it is pleaded that the deceased Sella Marrikar Seyinul Abdeen who was the owner of the land described in the schedule to the plaint transferred the land in dispute to the 1st Defendant-Respondent-Respondent by deed bearing No.

5862 dated 23.2.1998. (correct Deed No and date to be ascertained) Subsequent to the delivery of the judgment by the District Court the learned Magistrate of Anuradhapura convicted the 1st Defendant-Respondent-Respondent and two others for forgery of the deed in question bearing No. 9075. (Order A1). The 1st Defendant-Respondent-Respondent appealed to the High Court from the order of conviction, and the High Court affirmed the Order of the Magistrate (Order A2)

The only matter to be decided at this stage is whether fresh evidence pertaining to the forgery of the deed (A1 & A2) could be admitted, to enable this court to consider same at the hearing of this appeal. The learned Magistrate and the High Court Judge confirm that the deed in question bearing No. 9075 was a forgery. In the subsequent petition (dated 23.10.2014) it is disclosed that the Defendant-Respondent-Respondent has filed a Leave to Appeal Application SC/LA/67/2014 against the order of the learned High Court Judge and it is pending in this court. One argument that could be advanced would be that since the Leave to Appeal Application SC/LA/67/2014 is pending new material or fresh evidence should not be admitted, as the question of forgery would depend on the outcome of the said Leave to Appeal Application. On the other hand it could be contended that even though the Apex Court need to decide on the above question the material relevant to the case could be placed before court as fresh material and it

would be a matter for court to either accept or reject such material (A1 & A2) irrespective of the outcome of the Leave to Appeal Application.

In *Ratwatte Vs. bandara 70 N.L.R 231* - Pgs 475/476…

In *Ratwatte Vs. Bandara et al…,* it was laid down by the Supreme Court, following an English decision, that reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz.,

(i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive;

(iii) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible although it need not be incontrovertible.

The English decision followed in this case was *Ladd vs. Marshall,* where Denning, L. J enumerated those three conditions.

It may be helpful to ascertain the position of the land in dispute at least to a point prior to variance of facts between the parties. (The position of the case need to be dealt at a proper hearing). Petitioner states that the original

owner of the land called "Kattakuduwa" in extent of 34 perches was one S.Kulasekera and his wife and both of them sold 1/4th share of the land to the 1st Defendant and Sella Marrikar Seyinul Abdeen. Petitioner claims his share of the land through Sella Marrikar Seyinul Abdeen. On the demise of the said Sella Marrikar Seyinul Abdeen the said Abdeen's wife and children sold the land to the Petitioner by deed No. 79 (P1). 1st Defendant-Respondent claims that Sella Marrikar Seyinul Abdeen sold his share to the 1st Defendant by Deed No. 9075 which according to the Petitioner was a forged deed. As such the question of forgery seems to be at the forefront of this case and subsequent application to admit fresh evidence.

However if the question of forgery and orders A1 & A2 are contested, until finality is reached A1 and A2 may not show the expected results. In fact learned counsel for Defendant-Respondent-Respondent submitted to this court that the Leave to Appeal Application SC/LA/67/2014 is pending in the Supreme Court challenging the High Court Order (A2).

Forgery as contemplated by the Penal Code is an offence which is illegal and contrary to law. Illegality is a question of law which could be raised at any stage of a suit. I am also mindful of Section 44 and 41A of the Evidence Ordinance. It reads thus:

44. Fraud, collusion, or incompetence of court may be proved.

Any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under sections 40, 41, 41A, 41B, 41C or 42 and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.

41A. Relevancy of judgments recording convictions in civil proceedings.

(1) Where in an action for defamation, the question whether any person committed a criminal offence is a fact in issue, a judgment of any court in Sri Lanka recording a conviction of that person for that criminal offence, being a judgment against which no appeal has been preferred within the appealable period or which has been finally affirmed on appeal, shall be relevant for the purpose of proving that such person committed such offence, and shall be conclusive proof of that fact.

(2) Without prejudice to the provisions of subsection (1) , where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been convicted of any offence by any court or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court or court martial recording a conviction of such person for such offence, being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purposes of proving that such person committed such offence or committed the acts constituting such offence.

The above sections of the Evidence Ordinance are quite clear and does not need further explanations. However finality on A1 & A2 will be reached at the conclusion of the Leave to Appeal application to the Supreme Court, and its outcome. (SC/Spl Leave to Appeal No. 67/2014).

In all the above circumstances the application to admit fresh evidence is justified provided finality is reached accordingly in the pending Leave to Appeal application, which should favour the Plaintiff-Appellant-Petitioner, and not otherwise. The Plaintiff-Appellant-Petitioner was not able to place the evidence of forgery before the District Court as material based on conviction by the Magistrate's Court and the High Court was available only by 19.03.2014. The question of forgery will if admitted in law, would have an important influence on the final outcome of the case and such evidence may be apparently credible. Therefore this court is of the view that application of the Plaintiff-Appellant-Petitioner cannot be allowed at this stage, unless some finality could be gathered from the above Leave to Appeal Application. It would be premature at this stage to admit the evidence or the orders A1 & A2. As such I am not in a position to accede to the application of the Petitioner to admit fresh evidence. However if at the hearing of the final appeal it could be considered by this court if Leave to Appeal is refused.

Subject to above application to admit fresh evidence is refused.

Application refused subject to above views of court.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare P.C., J

I agree

JUDGE OF THE SUPREME COURT

K. T. Chitrasiri J.

I agree

JUDGE OF THE SUPREME COURT

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

S.C. Appeal No. 90/2009
S.C. (Spl) L.A. Application No. 175/2008
C.A. (Writ) Application No.487/2000

In the matter of an application for Special Leave to Appeal from the Judgment of the Court of Appeal under and in terms of Article 128(2) of the Constitution.

1. Mary Leslin Mendis

2. T. Jayendra Mendis

Both of No. 193, Chilaw Road, Negombo.

PETITIONERS

Vs.

1. Land Reform Commission,
C 82, Gregory's Road,
Colombo 7.

2. A. L. M. Fernando
Chairman
Land Reform Commission,
C 82, Gregory's Road,
Colombo 7.

3 Director, Land Ceiling,
Land Reform Commission,
C 82, Gregory's Road,
Colombo 7.

4 Minister of Agriculture and Lands
"Sampathpaya",
82, Rajamalwatta Road,
Battaramulla.

5. T. Nandana Mendis
68, Temple Road, Negombo.

6. T. Tosathirathna Mendis
68, Temple Road,
Negombo.

RESPONDENTS

AND NOW BETWEEN

1. Mary Leslin Mendis

2. T. Jayendra Mendis

Both of No. 193, Chilaw Road,
Negombo.

PETITIONERS-PETITIONERS

Vs.

1. Land Reform Commission,
C82, Gregory's Road,
Colombo 7.

2. A. L. M. Fernando
Chairman
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C 82, Gregory's Road,
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"Sampathpaya",
82, Rajamawatta Road,
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5. T. Nandana Mendis
68, Temple Road,
Negombo.

6. T. Tosathirathna Mendis
68, Temple Road,
Negombo.

RESPONDENTS-RESPONDENTS

BEFORE: K. Sripavan C.J.,
Priyantha Jayawardena P.C., J
Anil Gooneratne J.

COUNSEL: Manohara de Silva P.C for the Petitioner-Appellant
instructed by Mr. K.V. Gunasekera Attorney at Law

Nihal Jayamanne P.C with Anandalal Nanayakkara for the
5th and 6th Respondent-Respondents.

Geeshan Rodrigo for the 1st to 3rd Respondent-Respondents

Rajitha Perera S.S.C. for the 4th Respondent-Respondent

ARGUED ON: 06.11.2015

DECIDED ON: 12.02.2016

GOONERATNE J.

This is an appeal from a judgment of the Court of Appeal dated 07.07.2008, dismissing an application for Writs of Certiorari and Mandamus, arising from certain decisions/and or orders of the Land Reform Commission

Law. A Writ of Certiorari was sought to quash that part of the order requiring approval of the Minister, in respect of a decision made by the 1st Respondent Commission under Section 14(1) of the said law. Mandamus was sought directing the 4th Respondent Minister, to grant the required approval for transfer of lands in dispute and to direct, the 1st Respondent Commission to transfer the land in favour of the Petitioners. However in the proceedings before the Court of Appeal learned President's Counsel for the Petitioner has indicated that his clients would not seek relief as per sub paragraph (b) of the prayer regarding a Writ of Mandamus and only the prayer pertaining to certiorari would be pursued.

On 21.07.2009, this court granted Special Leave to Appeal on the questions of law referred to in paragraphs 22(b), (c), (d) & (e) of the petition dated 12.08.2008.

It reads thus:

(b) Did the Court of Appeal err in holding that "the decision taken by the 1st Respondent to transfer the property that contained in letter dated 11.05.1999 (P3) is under section 22(1) (bb)" when P3 clearly states that it has been issued under Section 22(1) (a)?

(c) Did the Court of Appeal err in holding that the land in question is for a non-agricultural purpose when the same is admittedly an estate and no party has taken up the position that it is not an agricultural land?

(d) In any event, did the Court of Appeal fail to consider the definition of "agricultural land" given in Section 66 of the Land Reform Law which means not only land used as agricultural land, but also includes land capable of being used for agriculture. The lands described above are estates, and in the absence of any assertion that the estates were going to be converted to any other purpose the Court of Appeal erred in holding that the lands are for a non-agricultural purpose?

(e) Did the Court of Appeal err in not granting the reliefs prayed for in paragraph (a) and (c) of the prayer to the petition when the failure to effect the transfer under Section 14(1) was due to the fault of the 1st Respondent Commission and not of the Petitioner?

Learned counsel for 5th & 6th Respondents raised the following question of Law and accepted by court.

Whether the documents which has been produced before the Court of Appeal marked X1 – X12 precluded any relief being granted to the petitioner (Documents 'X1' – 'X12' are annexed to the petition dated 21.07.2010 of the 5th & 6th Respondents, filed in the Court of Appeal)

The following facts are admitted by all parties to this appeal.

(1) Statutory declaration as required by Section 18 of the Land Reform Law was made by Mudaliyar T. David Mendis on or about 15.11.1972, wherein it had been disclosed that in the said declaration names of 15 children as particulars of the family. (Folios 42 – 38 of LRC file)

(2) The said Mudaliyar Mendis was the statutory lessee.

(3) An application made in terms of Section 14(1) of the said law dated 25.11.1972 for an inter family transfer of certain lands in favour of one of the sons T. Jayaratne Mendis.

(4) On receipt of the declaration the Land Reform Commission processed the applications and allotted the lands (as described in paragraph 4 of the petition filed in the Court of Appeal and paragraph 5 of the petition filed in this court).

(5) The Commission failed to effect a transfer in favour of T. Jayaratne Mendis within one year of the above application, as per Section 14(2) of the Land Reform Law.

(6) On 01.11.1975 T. Jayaratne Mendis died.

(7) On or about 13.06.1977 Mudaliyar Mendis requested the Ministry of Agriculture and Lands, to transfer the lands allocated to late T. Jayaratne Mendis in favour of certain other members of the family (P1 annexed to petition 'A')

(8) Hon Attorney General's advice sought by the 1st Respondent Commission (X1) and advice received in this regard (P2).

(9) Two members of the family of Mudalioyar Mendis filed an application for intervention in the Court of Appeal Writ Application.

(10)Intervention was allowed by the Court of Appeal and parties added as 5th and 6th Respondents.

In this appeal, when one has to consider the totality of material placed before court there is no doubt that the 1st Respondent Commission has failed to take the required steps as per the Land Reform Law. At a very early stage the Commission failed to comply with the provisions contained in Section 14(2) of the Land Reform Law. As such the situation gradually became more complex, even to resolve the matter according to the available provisions of the Land Reform Law. Notwithstanding the advice of the Hon. Attorney General, the 5th and 6th Respondents to this appeal too have placed material to support their case, with certain orders made by the Land Reform Commission in favour of the 5th and 6th Respondents.

Petitioners seek to set aside the judgment of the Court of Appeal marked and produced as 'G'. In this connection the question of law at paragraphs 22(b) and (c) of the petition where Special Leave to Appeal was granted arising from order P3, need to be examined. What is objectionable to the petitioners is the last paragraph (3) of P3 wherein the Minister's approval had been sought. However order P3 would have been in favour of the Petitioners, if the Minister <u>in fact approved</u> the order P3.

In this regard Section 22(1) of the said law has to be considered. The said section as amended by Act No. 39 of 1981 and Act No. 14 of 1986 reads thus:

22 (1) Any agricultural land vested in the Commission under this Law may be used for any of the following purposes:

(a) alienation for agricultural development or animal husbandry by way of sale, exchange, rent purchase or lease to persons who do not own agricultural land or who own agricultural land below the ceiling;

(b) alienation by way of sale, exchange, rent purchase or lease to a person for agricultural development or animal husbandry, or for a cooperative or collective farm;

(bb) alienation, by way of sale or lease with the approval of the Minister, for non-agricultural purposes; and

(c) …….

I would refer to the following extract of the Judgment of the Court of Appeal which seems to be objectionable, to the Petitioners.

In the instant case the Petitioners have not made an application to the 1st Respondent for alienation of agricultural land for agricultural development or animal husbandry….

Even though the said decision to alienate the said agricultural land to the 1st Petitioner is stated in the letter dated 11.05.1999 (P3) is under Section 22(1) (a) of the said Law, the sale should have been under Section 22(1) (bb) of the said Law as the sale is for non-agricultural purposes. In view of Section 22(1)

(bb) alienation, by way of sale could be made by the 1st Respondent with the approval of the Minister. Therefore the Commission has sought the approval of the Minster.

It is evident that the above section 22(1) of the Land Reform Law contemplates of two positions, relevant to the case in hand.

(a) alienation for agricultural purposes as per Section 22(1) (a) of the said law.

It is the purpose for which agricultural land vested in the commission may be used. The above section (22(1) (a)) does not contemplate any kind of ministerial authority.

(b) alienation for non-agricultural purposes was introduced by the Amendment Act No. 39 of 1981 and Act No. 14 of 1986. If the alienation was for non-agricultural purposes ministerial approval would be necessary.

If the commission decides to act under Section 22(1) (a) the commission cannot abdicate their powers to the Minister. Nor can the Minister demand that his authority should prevail, as regards use of land for agricultural purposes. But if the lands in dispute are to be used for non-agricultural purposes ministerial authority would be necessary.

Letter P3 indicates that the commission for whatever reason decided to effect a transfer under Section 22(1) (a) as it was satisfied it was to

be alienated for agricultural purposes. There is no provision in law for the commission as contained in Section 22(1) (a) to obtain the approval of the minister to alienate land under the said section.

I regret to observe that the learned Judge of the Court of Appeal erred to the extent of stating in his Judgment by referring to letter P3 that "even though the said decision to alienate the said agricultural land to the 1st Petitioner is stated in the letter dated 11.05.1999 (P3) is under Section 22(1) (a) of the said law, the sale should have been under Section 22(1) (bb) of the said law, as the sale is for non-agricultural purposes. Either party to this appeal was not in a position to provide material that the purported alienation was for non-agricultural purposes. Court of Appeal has misdirected, in the application of law and fact in the instant case on this point. Judges cannot assume and rely on a state of facts which cannot be established and obtained from the record, especially when parties to the suit have not invited court to do so, or failed to provide such material. Nor can a Judge change the law based on assumptions. Law need to be interpreted in keeping in mind the intention of the legislature.

I am reminded of the following rule of interpretation. General Principles of Interpretation – Maxwell 12th Ed.

Pgs. 28 & 29

> If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.

> "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases. .....
>
> Where the language is plain and admits of but the meaning, the task of interpretation can hardly be said to arise. .....
>
> The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands, and to "leave the remedy (if one be resolved upon) to others."

The Land Reform Commission has acted ultra vires the Land Reform Law by inserting in P3 a (last sentence) request to get the approval of Minister. Court of Appeal erred by assuming and taking the view that land in dispute was for a non-agricultural purpose.

Section 22(1) of the said law does not pose any difficulty in its interpretation. It is just plain and simple. Judge should not add or modify its language but to give effect to its ordinary and natural meaning. This could be best understood as observed by Wadugodapitiya J. in Victor Ivan and Others Vs. Hon. Sarath N. Silva & Others 2001(1) SLR at pg. 327

> In the guise of judicial decisions and rulings, Judges cannot and will not seek to usurp the functions of the Legislature, especially where the Constitution itself is concerned.

What has been sought from the Court of Appeal is a Writ of Certiorari/Mandamus. These are discretionary remedies of court. Even if this court as observed above answers the question of law at paragraphs 22 (b), (c) and (d) in the affirmative in favour of the Petitioner, yet the relief sought are discretionary remedies, court is bound to consider whether the Petitioner has satisfied court, as regards the grounds on which a Writ of Certiorari and Mandamus were sought. Even if such grounds to issue a Writ of Certiorari and Mandamus could be established, court has also to consider whether the Petitioners-Petitioners are disentitled to the relief prayed for even if the grounds of issuing a writ are satisfied, due to the discretionary nature of the remedy. It is common ground that courts are reluctant and had on numerous occasions refused to issue prerogative writs if it could be established and Petitioners are guilty of/and or disentitled to the remedy , based on

(a) Laches/undue delay
(b) Wilful suppression/misrepresentation of material facts
(c) Acquiescence
(d) Grave public/administrative inconvenience
(e) Futility
(f) Availability of alternative remedy
(g) Locus standi

Prerogative writs cannot be issued as of right or as a matter of course, due to its discretionary nature. A court has to examine any writ application, having considered the merits of the case and the question of an issuance of a writ.

Court of Appeal Judgment in its entirety makes no mention to the position of the 5th & 6th added Respondents, although intervention was permitted. Nor is there any reference to the objections filed on behalf of the 1st & 3rd Respondents. As such there is no clue in the Judgment as to the several steps taken by the Land Reform Commission in matters concerning the other members of Mudaliyar. Mendis' family consisting of 15 children. As stated above on a perusal of all the material placed before this court inclusive of the LRC, Departmental file made available to this court, notwithstanding the steps taken and dealings had by the Land Reform Commission on behalf of Petitioners, it is apparent that the Commission had made certain orders in favour of the 5th & 6th Respondents either simultaneously or during the relevant period or within a reasonable time after issuance of letter P3. (Vide 'X2', 'X3', 'X3A' & 'X12' (annexed to the petition of 5th & 6th Respondents and folios 442, 441 & 440 of L.R.C file marked 'Y' and folio 444 marked 'Z' from L.R.C file.)

I have perused Documents 440 – 442 from the L.R.C file. Same indicates that the L.R.C had made order in favour of the 5th & 6th Respondents and two other family members of late Mudaliyar Mendis as per Section 14 of the Land Reform Law. (documents at folios 442, 441 & 440 referred to above are dated 23.02.2000). The said letter also indicates that the commission has revoked the order made in favour of the Petitioners as evinced in P3, and the Minister's directive in this regard had been accepted by the commission. Document at folio 444 (Board minutes) confirm the above decision.

Document 'X2' dated 17.06.1977 letter sent to Mudaliyar Mendis by the L.R.C referring to his letter (P1) approves the allocation of lands to 5th & 6th Respondents and two other family members. 'X3' letter dated 30.04.1985 call upon Mr. Mendis to submit a survey plan to effect the necessary allocation of lands to 5th & 6th Respondents and other two family members. By 'X12' dated 27.04.2000 L.R.C confirm order 'X2' and communication 'X3'.

This is the complex situation that had arisen for the parties concerned and for the Land Reform Commission itself. I have to comment that the matters disclosed to court by the added 5th & 6th Respondents, are steps taken/orders made by the Commission, are all matters

for the commission to take full responsibility. The situation no doubt had given rise to certain inconsistencies and disputed facts, which is not well suited to be dealt in review procedures before a court of law.

I note the following matters which had not been disclosed by the Petitioner-Appellants in their Writ Application sought from the Court of Appeal. Such facts on one hand amounts to wilful suppression of material facts and on the other hand gives rise to disputed facts.

(a) The inter family transfer sought by Mudaliyar Mendis and his wife by letter P1, had response by the Land Reform Commission as evinced by letter 'X2' dated 17.06.1977 authorising as land allotted to 5th & 6th Respondents and two other family members namely Palitharatne Mendis & Thosathiratne Mendis

(b) Decision of the commission produced as 'X2' above, confirmed by 'X12' in the year 2000 by the Land Reform Commission. 'X12' issued subsequent to issuance of P3 (partly relied upon by the Petitioner-Appellants).

(c) Decisions made by the commission to sell the same properties referred to in letter P3 are also included in 'X2'. (in favour of the added Respondents and two others)

(d) Decisions taken in P3 had been set aside by the Land Reform Commission by documents produced as 'Y' (folio 442 of LRC file) and '2' (folio 444 of LRC file).

(e) Petitioner-Appellants could not have been unaware of above decisions in favour of 5th & 6th added Respondents, as the Writ Application was filed soon after 'X2' was issued in favour of the above added Respondents. Further letters P4, P5 & P6 sent by the two Petitioner-Appellants indicates the enthusiasm on the part of the said Appellants to get the commission activated on letter P3. In paragraph 11 of the petition filed in the Court of Appeal, it is pleaded that the 2nd Petitioner-Appellant visited the office of the Land Reform Commission on several occasions to obtain relief and sent letter P6 without success.

It is unimaginable that the Petitioner-Appellants were unaware of the matters referred to in (a) to (d) above.

(f) If P1 had been disclosed by the Petitioner-Appellants, there is no reason to <u>have not disclosed</u> the material in (a) to (e) above. Further an attempt could have been made to challenge the orders/decisions made in favour of the 5th & 6th Respondents, and as such those decisions confirm the position of the said Respondents.

(g) Decision P3 and 'X2', 'X3' are decisions/orders made by the Land Reform Commission. These decisions give rise to an inconsistent and disputed positions, based on entirety of the facts presented to court, by the parties concerned.

In all the facts and circumstances of this appeal, I observe that in the area of public law an Administrative Body, Statutory Institutions or any Authority established to deal with the public, must exercise its powers fairly, reasonably, rationally for the proper purpose for which these bodies and Institutions are established. In doing so, every attempt must be made to avoid contrary positions which gives rise to disputed facts. If the exercise of powers are challenged by a party it is incumbent upon the party concerned to disclose to court all material and relevant facts. The state and its Institutions also must rigorously observe its own internal standards and guide lines.

In this case court no doubt had to consider the vires of the decisions conveyed to the Petitioner by P3. As such the first three questions of law raised by the Appellants have to be answered in their favour in the affirmative. Court of Appeal erred to that extent. However the Petitioner-Appellants have sought prerogative writs to obtain relief. It is on that footing that the application filed in the Court of Appeal, ultimately ended in the Supreme Court by way of an

appeal. The path to obtain relief was by way of a Writ Application. This Court observes that the several points referred to in (a) to (f) above cannot favour the Appellants to obtain relief by way of a Writ Application. The final outcome of the Writ Application in the Court of Appeal was a dismissal of the Writ Application, but for the reasons stated therein in the judgment marked and produced as 'G'. Even if the Court of Appeal erred to the extent as stated above, this court observes that the final decision of dismissal should stand and we should not interfere with the said judgment dismissing the application. In arriving at this decision I have considered the decided cases on the point of non-disclosure of material facts. i.e *Pathirana J. Alphonso Appuhamy Vs. Hettiarachchci (1973) 77 NLR 131, 136; Dahanayake Vs. Sri Lanka. Insurance Corporation Ltd. (2005) 1 SLR 67, 78-9. Walker Son & Co. Ltd. Vs. Wijayasena 1997 (1) SLR 293, 301-2 per Ismail J.* "to make the fullest possible disclosure of all material facts". A Court of Appeal Judgment *per Jayasooriya J. Blanca Diamonds (Pvt) Ltd. Vs. Wilfred Van Els (1997) 1 SLR 360, 362-3*

Other aspect that would disentitle the Appellants to a remedy by way of a writ are the disputed facts. The issuance of letter P1 had been disputed by the Appellants. The several acts and steps taken by the commission are inconsistent and amount to disputed facts. It requires that major facts are not

in dispute and the legal result of the facts are not subject to controversy vide Thajudeen Vs. Sri Lanka Tea Board & Another 1981 (2) SLR 471. This Judgment considered and applied in a recent case S.C 59/2008 decided on 16.02.2009 Judgment of Thilakawardene J.

I answer the questions of law posed in this appeal as follows in paragraph 22 of the petition.

22 (b) Yes

22(c) Yes

22 (d) Yes

22 (e) No. Court of Appeal could not have granted the writs sought due to the reasons stated in this judgment and having considered the discretionary nature of such writs. However there was no valid order made by the commission as per Section 14(2) of the Land Reform law.

On the question of law raised by learned counsel for the 5th & 6th Respondents, I answer, the said question as follows.

In view of documents marked 'X1', 'X2', 'X3' & 'X 12', relief sought by way of certiorari/ mandamus cannot be granted.

In this regard the decisions referred to at folios 440 – 442 and 444 of the L.R.C file have also been considered by court. In all the facts and circumstances of this case the appeal to this court is dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

K. Sripavan C.J

I agree

CHIEF JUSTICE

Priyantha Jayawardena P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an Appeal from a judgment of the Civil Appellate High Court of the Sabaragamuwa Province holden in Kegalle.

WeligalleWedarallageDevarAshoka Gunawardena of Weligalla Road, Mawanella.

Plaintiff

SC Appeal No. 95/2010
SC/HCCA/LA No. 164/2010
SP/HCCA/Kag/41/LA
D.C.Kegalle Case No.952/L

Vs

PradeshiyaSabhava of Mawanella

Defendant

AND

WeligalleWedarallageDevarAshoka Gunawardena of Weligalla Road, Mawanella.

Plaintiff Appellant

Vs

PradeshiyaSabhava of Mawanella

Defendant Respondent

AND NOW BETWEEN

PradeshiyaSabhava of Mawanella

Defendant Respondent Appellant

Vs

WeligalleWedarallageDevarAshoka Gunawardena of Weligalla Road, Mawanella

Plaintiff Appellant Respondent

……..

In the matter of an Appeal from a judgment of the Civil Appellate High Court of the Sabaragamuwa Province holden in Kegalle.

WeligalleWedarallageMadhawaSisira Kumara,
Of No. 527, Anwarama, Mawanella.

Plaintiff

Vs

PradeshiyaSabhava, Mawanella

Defendant

AND

SC Appeal No. 98/2010
SCHC(CA)LA No.165/2010
SP/HCCA/Kag/44/2009LA
D.C.Mawanella No.948/L

WeligalleWedarallageMadhawaSisira Kumara, of No. 527, Anwarama, Mawanella.

Plaintiff Appellant

Vs

PradeshiyaSabhava of Mawanella

Defendant Respondent

AND NOW BETWEEN

PradeshiyaSabhava of Mawanella

Defendant Respondent Appellant

Vs

WeligalleWedarallageMadhawaSisira Kumara, of No. 527, Anwarama, Mawanella.

Plaintiff Appellant Respondent

……

BEFORE : S. EVA WANASUNDERA PCJ.
U. ABEYRATHNE J.
H.N.J.PERERA J.

COUNSEL: Priyantha Gamage for the Defendant Respondent Appellant.
Dr. Sunil Cooray for the Plaintiff Appellant Respondent.

ARGUED ON: 17. 10. 2016.

DECIDED ON: 30. 11. 2016.

S. EVA WANASUNDERA PCJ.

When these Appeals were argued, the parties to the Appeals agreed to abide by one judgment written in SC Appeal 95/2010. Therefore only the said Appeal was taken up for hearing and concluded. This Judgement shall bind all the parties in both SC Appeal 95/2010 and SC Appeal 98/2010.

The Plaintiff Petitioner Respondent (hereinafter referred to as the Plaintiff) instituted action against the Defendant Respondent Appellant (hereinafter referred to as the Defendant) , the Pradeshiya Sabha of Mawanella seeking inter alia a declaration of title to the land described in the Schedule to the Plaint, a declaration that the Defendant does not have a right to construct a roadway within the said land **and for a permanent injunction to prevent the same.**

At the end of the inquiry regarding the interim injunction to stay the construction of the road by the Defendant Pradeshiya Sabha, the **District Judge delivered order refusing the interim injunction** as prayed for by the Plaintiff. The Plaintiff appealed to the Civil Appellate High Court against the order of the District Judge and at the end of the hearing, the learned **High Court Judges** delivered Judgment allowing the appeal and set aside the order of the learned District Judge and **granted the interim injunction** as prayed for by the Plaintiff. The Defendant Pradeshiya Sabha has appealed from the Judgment of the High Court to the Supreme Court and this Court granted leave to appeal on the following questions of law to be decided:-

1. Have the Hon. High Court Judges failed to appreciate that the Respondent had not established a prima facie case?
2. Have the Hon. High Court Judges failed to appreciate that the equitable considerations favour the refusal of the Interim Injunction prayed for?

The Plaintiff has proved his title to the portion of a land which is a paddy field. His land is also part of a whole big area of paddy lands. He received this paddy field by virtue of deed No. 2768 dated 14.09.1982. There is no dispute with regard to his title and the fact that he has also acquired prescriptive title to the

same. Along the Southern boundary of the land there is a water way , namely Kaheruwa Ela. As usual next to an Ela is an Ela Wella, meaning a road way anyone can walk on. This is also accepted by the Plaintiff. The subject matter of this case is the roadway which runs between the Kaheruwa Ela and the Kaheruwa Kumbura.

As alleged by the Plaintiff, on 29.12.2008, the officers of the Pradeshiya Sabha had marked a 24 feet wide roadway through the Plaintiff's land. The Plaintiff had complained to the Police. In the statement to the Police by the Plaintiff, which was marked as Pe 2, the Plaintiff who is a professor of a university had mentioned that the demarcations were about 12 feet wide and about 10 or 12 wooden poles had been planted along the edge of the land which is a paddy field named Kaheruwa Kumburu Yaya which belongs to him and his family members, meaning his brothers and sisters. According to the Plaint they had been owners for over twenty five years.

The Defendant Pradeshiya Sabha stated that notices in terms of Section 24 of the Pradeshiya Sabha Act, was given to the Plaintiff and that there existed a road way which had been gazetted in the year 1971.The said gazette was marked as **V 10** by the Defendant at the interim injunction inquiry. In **V 10**, namely gazette No. 14979 dated 08.10.1971. Part iv , under Division 15 – Weligalla – item 6 reads as " the **road** from the Kandy Road to Uthuwankanda Road across Udaththawa Wela, 12 feet wide and 45 chains long". It is a fact to be reckoned that there was a road demarcated along the Kaheruwa Ela by a government gazette as far back as in 1971. Later on, the same road was gazetted again in 2006 widening it up to 24 feet. This gazette was dated 30.06.2006 and marked in evidence by the Defendant as **V 13**. In that gazette again, it is specifically mentioned that the road **goes across the Kaheruwa Paddy Field (=Kaheruwa Wel Yaya = Kaheruwa Kumburu Yaya), and the width is 24 feet and the length is 780 meters.**

Sec. 17 of the Interpretation Ordinance provides as follows:

" Where any Enactment whether past, before or after the commencement of this Ordinance, confers power on any authority to make rules, the following provisions shall, unless the contrary intention appears to have effect with reference to the making and operation of such rules;

(a) All rules shall be published in the Gazette and shall have the force of law as fully as they had been enacted in the enactment of the Legislature and

(b) The production of the copy of the Gazette containing any rules or of any copy of any rule purporting to be printed by the Government Printer shall be prima facie evidence in all Courts and for all purposes whatsoever of the due making and tenor of such rule."

Therefore the Court should take judicial notice of the fact that, the road in issue had been used by the public from the year 1971 and it was widened and printed in the Gazette in 2006.

The photographs of the existing road was marked in evidence by the Defendant as V1 to V8. An affidavit signed by**200 persons** which can be considered as a large number **who use that road** was marked as V9 stating therein further that in 2006, the Timber Corporation felled the Jak trees etc. along the demarcated road and removed them in the same year.The 'Viharadhipathi' or the Chief Incumbent Prelate of the village temple of the area called Habbunkaduwa had given an affidavit confirming that he is aware that the said road was gazetted in 1971 and people have been using the said road for a very long time and demarcating the 24 feet wide road which had been in use without any objection by others whose lands/paddy fields are bordering the roadway ,does not in anyway damage the paddy field claimed by the Plaintiff, in his opinion. He has also mentioned that he also happens to be one of the co - owners of the big area covered by the paddy fields, i.e.' the Wel Yaya' but he is not objecting to the roadway being developed for the benefit of the villagers from three villages , namely Habbunkaduwa, Udaththawa and Dehimaduwa who had been using the same since it was gazetted in the year 1971. He adds that it is a very old road as well as the existence of the road bordering the lands/paddy fields does not in any way cause any damage to the paddy fields. The said Affidavit was marked as V11 and produced as part of the evidence at the inquiry.

I observe that, what the Plaintiff claims in his plaint is that the development of the roadway causes irreparable damage to his paddy field.

Moreover an ' order made by the District Judge in case No. 227/Land on 23.08.1999, regarding the existence of a roadway along the Kaheruwa Ela, after making a visit to see and examine the said road ', was produced by the Defendant as **V 12**. The visit details written down by the said judge in case No. 227/Land are very long and explains in detail how the road goes and he dismisses the suggestion made by the party who had claimed that there is no

road and had firmly made order contained in V12 to the effect that there exists a roadway which is used by the villagers. Both the 'notes and details' and the order are part of the record of the District Court case in the case in hand. The said case had been regarding the **same roadway before the same District Court from which there had not been an appeal.**

The District Judge in this case, at the end of the inquiry, made order by which he **refused** to issue an **interim injunction** against the Defendant, Pradeshiya Sabha. When the Plaintiff appealed from that order to the **Civil Appellate High Court**, the order was **reversed thus granting an interim injunction against the Pradeshiya Sabha** not to proceed with any developments of the roadway which is the subject matter of this case**.** The Defendant Appellant, the Pradeshiya Sabha is before this Court seeking relief.

The written law regarding the Interim Injunctions are contained in **Sec. 664 of the Civil Procedure Code**.The law on authorities created by this Court regarding interim injunctions are contained in many cases, some of which are as follows:

1. **JinadasaVsWeerasinghe 31 NLR 33.**
2. **DissanayakeVs. Agricultural and Industrial Corporation 64 NLR 283.**
3. **Bandaranayake Vs. State Film Corporation**
4. **Yakkaduwe Sri PragnaramaThero Vs. The Minister of Education and others.**
5. **JunaidVs. Seylan Bank Limited 2007 BLR 120.**

In **DissanayakeVs Agricultural and Industrial Corporation (supra),** it was held that " The proper question for a decision upon an application for an interim injunction is ' whether there is a serious matter to be tried at the hearing '. If it appears from the pleadings already filed that such a matter does exist, the further question is whether the circumstances are such that the decree which may ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction is not issued. ……. If a prima facie case has been made out, we go on and consider where the balance of convenience lie."

In **Yakkaduwe Sri Pragnarama Thero Vs. The Minister of Education and Others(supra),** it was held that " An interlocutory injunction will not be granted if there is no likelihood of irreparable damage being caused to the Petitioner. More over the burden of proof that the inconvenience which the

Petitioner will suffer by the refusal of the injunction is greater than that, which the Respondent will suffer if the Application is granted, lies on the Petitioner. "

In the case in hand,the District Judge had analysed the evidence produced by way of affidavits and documents by the Plaintiff to find whether there is **a prima facie case to grant an interim injunction** to stay the Pradeshiya Sabha developing the roadway as submitted by the Plaintiff. The District Judge's order dated 23.07.2009 is a short order.

He had commenced his order laying down the legal principle which has to be observed when granting interim relief to a Plaintiff. In simple language, on the face of the case before Court, the Plaintiff, seeking interim relief to stop the Pradeshiya Sabha proceeding with proper demarcations on the boundary of his part of the paddy field,had not proved at all, that the damage which will be caused to the Plaintiff is more than the benefit and/or damage which will be caused to the Defendant. The District Judge further states that the Plaintiff had totally failed to prove that any damage which will be caused to his paddy field because he has failed to bring forward a survey plan demarcating his land which he claims as a paddy field and failed to show how much of his paddy field would get attached to and/or covered by the road, its value and the damage etc. I opine that the District Judge had given good legal reasons for his order.

The Civil Appellate High Court Judges' order dated 26.04.2010 is also short. The Judges have stated that the road mentioned **in both gazettes are only 10 feet wide which is factually incorrect.** Reading the gazettes which are published by the Government and of which judicial notice should be taken by any Court, I find that the **1971 Gazette states that the road is 12 feet wide and the 2006 Gazette states that the road is 24 feet wide.**It is clearly seen that the Civil Appellate High Court had clearly **erred on facts before court.**Then, the High Court had reproduced the sections in the Pradeshiya Sabha Act and concluded that V13 Gazette is in violation of the Pradeshiya Sabha Act. The question before the High Court was not whether the Gazette was null and void or whether it is legally valid. The Defendant had come before the High Court only to get the interim injunction issued by the District Court against him, out of the way. I observe that the High Court Judges **have not looked into the matter** which was legally represented before the said Court by the parties, i.e. **whether there is a prima facie case to grant interim relief for the Plaintiff or not.** The High Court has clearly **erred in law as well as in facts**.

The fact that a roadway had existed for over a long period of time has been well established and therefore the Plaintiff is not in a position to claim that this roadway does not exist. The Plaintiff who appealed against the order which did not grant an interim injunction in the District Court had received an order of granting an interim injunction from the Civil Appellate High Court, which had so far prevailed for a very long time. Therefore the Pradeshiya Sabha, the Defendant Appellant had been unable to proceed with the development of this roadway which is used by a lot of members of the public who could have benefitted by a better roadway all this time i.e. for over 8 years to date.

I hold that the learned Judges of the Civil Appellate High Court had failed to appreciate that the Plaintiff Appellant Respondent had not established a prima facie case before the District Court. They have also failed to appreciate that the equitable considerations favour the refusal of the Interim Injunction prayed for by the Plaintiff Appellant Respondent. I answer the questions of law in the affirmative in favour of the Defendant Respondent Appellant and against the Plaintiff Appellant Respondent. I do hereby set aside the judgment of the Civil Appellate High Court dated 26.04.2010 and affirm the order of the District Court dated 23.07.2009.

Appeal is allowed with costs.

Judge of the Supreme Court

Upaly Abeyrathne J.
I agree.

Judge of the Supreme Court

H.N.J.Perera J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Mohammed Abdul Gaffoor
No.77/05, Vishaka Mawatha
Bandarawela

Defendant-Respondent-Appellant

S.C.APPEAL No.95/2013
SC/HC/CALA No.113/2012
HCCA CASE
NO.UVA/HCCA/BDL/74/2004[F]
D.C.BANDARAWELA
CASE NO.1/1413

Vs

Mohamed Jethum Umma
No.77/05, Vishaka Mawatha
Bandarawela

Plaintiff-Appellant-Respondent

BEFORE : **SISIRA J.DE.ABREW J.**
K.T.CHITRASIRI J.
NALIN PERERA J.

COUNSEL : Shantha Jayawardena with Duleeka Imbuldeniya for the Defendant-Respondent-Appellant

M.Nizam Kariapper with M.C.M.Nawas
for the Plaintiff-Appellant-Respondent

ARGUED ON : **07.06.2016**

WRITTEN SUBMISSIONS ON : 19.07.2013 by the Defendant-Respondent-Appellant
17.12.2013 by the Plaintiff-Appellant-Respondent

DECIDED ON : 21.06.2016

CHITRASIRI, J.

Plaintiff-appellant-respondent (hereinafter referred to as the plaintiff) filed this action in the District Court of Bandarawela by her plaint dated 16.02.1999 seeking for a declaration to the effect that she is the owner of the land morefully described in the first schedule to the plaint. She also sought to have the defendant-respondent-appellant (hereinafter referred to as the defendant) evicted from the land referred to in the second schedule in that plaint. The defendant filed his answer seeking to have the aforesaid plaint dismissed and also sought for a declaration that he is entitled to possess the land referred to in the schedule to his answer dated 26.04.1999. He did not claim title to the land that he alleged to have been in possession.

Plaintiff had relied on a Grant issued by the State which is named as "Jayaboomi Oppuwa" that was marked in evidence as P1, to establish her rights. (vide at page 251 in the appeal brief) Admittedly, the defendant had no title to the land that he claimed. According to him, he is in possession of a land belonging to the State.

Learned District Judge after a protracted trial, dismissed the plaint of the plaintiff. He had basically considered the possession of the respective parties when he dismissed the plaint. He had come to the conclusion that the disputed portion of the land referred to in the plan marked P7 had been in the possession of the defendant. It is also seen that the learned District Judge had

not properly addressed his mind to the entitlement of the plaintiff that she has claimed on the basis of the Grant marked P1 issued by the State. Neither has he considered the issue of identity of the land referring to the plan bearing No.157 marked P6 when he decided to dismiss the action of the plaintiff. Basically, it is only the possession of the land that had been considered by the learned District Judge to dismiss the action.

Being aggrieved by the aforesaid decision, the plaintiff filed an appeal in the High Court of the Uva Province (exercising its civil jurisdiction) to have the judgment of the learned District Judge reversed. Having considered the merits of the case, learned High Court Judges in the Civil Appellate High Court allowed the appeal of the plaintiff and set aside the judgment dated 06.10.2004 of the learned District Judge of Bandarawela.

Being aggrieved by the aforesaid decision of the learned Judges in the Civil Appellate High Court, the defendant preferred this appeal seeking to set aside the judgment dated 14.03.2012 of the Civil Appellate High Court. When the application for leave was considered by this Court on 07.06.2013, parties agreed that the only dispute in this case relates to the identity of the *corpus* subjected to in this case. Journal entry entered on that date reads thus:

> *"Parties agree that only dispute in this case relates to the corpus and the identity of the corpus. Under these circumstances leave is granted only on the question of law as to whether the corpus has been properly identified."*

At the outset, it must be noted that such a question of law upon which the leave was granted does not give rise to a specific question of law as such, but it is an issue that would depend basically on the facts and circumstances of the case. However, I do not say for a moment that an appellant is totally prevented from raising such a question that involves facts to determine his/her rights in an appeal. It is more so since some of the original court judges might tend to deviate or disregard completely the evidence before them when they are to decide cases filed in those courts. Trial judges should not be permitted to arrive at findings that would become perverse or irrational. In order to prevent such perverse or irrational decisions being made, questions involving facts are also permitted to argue in an appeal in a restricted manner. Accordingly, such an argument involving facts could be advanced even at the appeal stage upon framing a question to that effect. Framing of questions of law that are to be decided by an appellate court had been well considered in the determination made by a five Judge Bench of the Supreme Court in **Collets Ltd. Vs. Bank of Ceylon. [1982 (2) S L R 514]**

However, it must be noted that when such an issue involving facts and circumstances of a given case is to be determined, the Appellate Courts are always slow to interfere with such decisions of the trial Judges since trial judges are the judges who personally hear and see the witnesses giving evidence. Hence, they become the best judges as to the facts of the case. This position of the law had been well accepted in the cases of:

- **De Silva and others v. Seneviratne and another [1981 (2) SLR 8]**
- **Fradd v. Brown & Co.Ltd [20 NLR at page 282]**
- **D.S.Mahawithana v. Commissioner of Inland Revenue [64 NLR 217]**
- **S.D.M.Farook v. L.B.Finance [C.A.44/98, C.A.Minutes of 15.3.2013]**
- **W.M.Gunatillake vs. M.M.S.Puspakumara [C.A.151/98 C.A.Minutes of 9.5.2013].**

Furthermore, in the case of **Alwis v. Piyasena Fernando [1993 (1) SLR at page 119**, G.P.S.de.Silva, J (as he then was) held thus:

> "*It is well established that findings of primary facts by a trial Judge who hears and sees the witnesses are not to be lightly disturbed on an appeal".*

In the circumstances, I will now turn to consider whether it is correct to consider the material as to the ownership of the land in dispute and the identity of the same at the appeal stage as those would amount to be the facts of the case. Contention of the learned Counsel for the defendant-appellant in this case is that the boundaries referred to in the document marked P1 by which the plaintiff became entitled to the land in question are different to the boundaries referred to in the plans marked P6 and P7 which were produced to identify the land mentioned in the Grant marked P1. (filed at pages 53 and 61 respectively in the appeal brief). He submitted that the northern boundary in the Grant is the land belonging to Sudu Menika whilst the northern boundary in the plan marked P6 is a leased land of S.H.Dharmadasa. However, it is to be noted that the land of Sudu Menika is also found towards the north western direction in the plan marked P6. The eastern boundary both in the permit as well as in the plan is Pradeshiya Sabha road. There is no difference found

there. The southern boundary in the permit is the land belonged to M.Rafaideen whilst the land to the south in the plan is the land of Haniff Jawaldeen. The western boundary is different in both the plan and in the permit.

However, these discrepancies as well as the similarities found in the permit marked P1 and in the plan marked P6 had been carefully looked at by the learned High Court Judges in the Civil Appellate High Court. The learned High Court Judge in his judgment, the issue of identity of the land subjected to in this case had been dealt with in the following manner:

> *"The only confusion is as regards the identity of the corpus. The Court Commissioner in his evidence as well as in his plan and report marked P6 and P6A states that the boundaries are almost identical but later admits that there are minor discrepancies such as the boundary given as the northern boundary is more or less is towards the northwest and the western boundary which is given as Rafideen's land could not be identify as there was no person by the name Rafideen. Instead in his plan, the land on the west belongs to one Sitti Karesha and the southwestern boundary is the land belongs to Haneef Jawaldeen. However, the surveyor seems to be positive about the identity of the corpus. The next matter I wish to refer to is P7. P7 is a plan prepared by the Surveyor General on a request made by the Divisional Secretary with a view to settle the boundaries of the corpus. The same land possessed by the appellant is identified by the Surveyor*

General as the land that belongs to the appellant and the portion encroached by the respondent with a minor discrepancy in the extent as I have mentioned above. The only difference between the two plans visible to the naked eye is that there is a little tilt shown in the boundary between the portion now possessed by the appellant and the encroachment portion. However, my observation cannot be relied upon although I mentioned it as a passing matter. The Surveyor General's plan and her report has not been disputed. Hence we have to presume that the Surveyor General's plan is accurate as regards the boundaries of the corpus and the encroachment. Therefore, I am of the view that the little confusion express by the court commissioner has to be overlooked in the light of the Surveyor General's plan and report. The Surveyor General's plan has been made on 11/02/1998 after the survey in November/December 1997 before the institution of this action. As I mentioned before the fact that the Government Surveyor has stated in her report dated 03/05/1998 lot no. ඇ (B) should be given to the appellant from an out of the land occupied by the respondent does not mean in any way that lot no. ඇ (B) is a land of the respondent. The lot no. ඇ (B) and the rest of the land occupied by the respondent is also State land. Since, Lots B and C in P7 consists of the land described in the Grant to the appellant, for all purposes it should be considered that lots B and C consists of the land alienated to the appellant by the Grant. It should also be borne in mind that the illegal

possession of a person cannot restrict the State from disposing the State land according to the desires of the State. Therefore, I am of the view that the identity of the corpus covered by the Grant to the appellant is established. Hence, I am of the view that the Learned District Judge has erred in answering the issues no.1, 2, 3, 4, 5, 8, 11, 12 and 19 in favour of the respondent with cogent evidence. Therefore, I am of the view that issues 1, 2, 3, 4, 5, 8, 11, 12 and 19 should be answered in favour of the appellant."

When looking at the above consideration by the learned High Court Judge, I am of the view that the question of identity had been carefully and properly addressed to, by him. He has given ample reasons as to his findings in respect of the issue as to the identity of the *corpus*. I am unable to find such an analysis of the evidence by the learned District Judge, particularly in relation to the main relief prayed for by the plaintiff in this case. The aforesaid evaluation of the evidence by the learned High Court Judge show that he, in that appeal has intervened to correct an irrational findings of the learned District Judge. If the High Court was not allowed to consider the facts of this case, then there would have been a serious miscarriage of justice. Therefore, it is my opinion that it was a fit case to consider the facts of the case even by an appellate forum. In the circumstances, I am not inclined to interfere with the judgment of the learned High Court Judge.

Reason as to why I stated that the decision of the learned District Judge is irrational is seen when looking at the manner in which the trial had taken place in the District Court. It would become clearer when looking at the impugned judgment as well. Claim of the plaintiff is to obtain a declaration as to the ownership to a block of land found between the two lands possessed by the plaintiff and the defendant. The relief prayed for by the plaintiff was on the question of ownership to that block of land. Then the identity of the corpus is very material. Indeed, the issue No.4 had been raised to determine the identity of the corpus. That issue had been answered in the negative despite the fact that there were two plans namely the documents marked P6 and P7 had been produced in evidence to establish the identity of the corpus. Learned District Judge has basically considered the possession of the land disregarding the ownership that the plaintiff had claimed through a State Grant. Therefore, it is clear that the learned District Judge has misdirected himself even as to the main relief sought by the plaintiff. On the other hand, issue on the question of identity of the corpus had been well considered by the learned Judges in the Civil Appellate High Court. Having done so, they have come to the correct decision reversing the judgment of the learned district Judge.

In the circumstances, I do not see any reason to interfere with the judgment of the learned High Court Judges in the Civil Appellate High Court of the Uva Province. Accordingly, judgment dated 14.03.2012 of the Civil Appellate High Court is affirmed. The question of law on which the leave was granted by

this Court is decided in favour of the plaintiff-respondent. Defendant-appellant is not entitled to have the reliefs prayed for in his petition of appeal dated 24.0-3.2012. Accordingly, this appeal is dismissed with costs fixed at Rupees Seventy-Five Thousand. (Rs.75,000/-)

Appeal dismissed.

JUDGE OF THE SUPREME COURT

SISIRA J.DE ABREW, J

I agree

JUDGE OF THE SUPREME COURT

NALIN PERERA, J

I agree

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1A. Sarath Godagampala
14. Indra Srimathie Godagampala
15. Nandanie Sriyalatha Godagampala
16. G.D. Wijethunga
17. G. D. Chandraratne Wijethunga
All of
Thalgasmote
Veyangoda

Defendant-Petitioner-Appellants

SC.Appeal No.98/2007
SC (Spl) L.A.202/2007
C.A.Application No.188/98
D.C.Gampaha Case No.29416/P

Vs.

W.K.Peter Fernando
No.171, Thalgasmote,
Veyangoda

Plaintiff-Respondent-Respondent

2. G. D. Rosalin
3. G. D. Asilin
4. W.K.Jinadasa
5. W.K.Sunil
6. W.K.Kusumawathie
7. W.K.Vipulasena
8. W.K.Josephin
9. M.H.P.Jinel Nona
10. S.D.Nonis
11. S.D.Guneris
12. S.D.Lionel
13. S. Chandrasiri Udayaratne
All of
Thalagasmote
Veyangoda

Defendant-Respondent-Respondents

BEFORE : WANASUNDERA, PC, J.
GOONERATNE, J.
K.T.CHITRASIRI, J.

COUNSEL : S.C.B,Walgampaya, P.C.with Upendra Walgampaya for the 1A, 14th, 15th, 16th and 17th Defendant-Petitioner-Appellants

Dr. Jayatissa de Costa, P.C. with Wijeratne Hewage and Lahiru N. Silva for the Substituted-Plaintiff-Respondent -Respondent

J.C.Boange for the 9th, 11th, 12th and 13th Defendant-Respondent-Respondents

ARGUED ON : 16.03.2016

WRITTEN SUBMISSIONS ON : 30.03.2016 by the 1A, 14th, 15th, 16 and 17th Defendant-Petitioner- Appellants
25.04.2016 by the 10th, 11th, 12th and 13th Defendant Respondent-Respondents

DECIDED ON : 10.06.2016

CHITRASIRI, J.

1A and 14th to 17th defendant-petitioner-appellants (hereinafter referred to as the appellants) filed this petition of appeal dated 27th July 2007 seeking to set aside the judgment dated 18th June 2007 of the Court of Appeal. The appellants have also sought to have the judgment and the Interlocutory Decree entered on 10th December 1992 in the District Court of Galle, set aside. Having considered the material placed before this Court, it made order granting special leave to proceed with this appeal, on the

questions of law referred to in paragraph 24 of the petition dated 27th July 2007. Those questions of law read thus:

(a) Did the Honourable Court of Appeal err in not setting aside the interlocutory decree, whereby 11/12 shares have been allotted, exercising the powers of revision and/or restitutio in integrum, when on the face of the evidence led in the case is only 7/12 shares have devolved on the parties?

(b) Should the Court of Appeal have exercised the powers in revision and/or restitutio in integrum when admittedly a grave miscarriage of justice has occurred?

At the outset, it is to be noted that the consideration by the Court of Appeal of the application filed in that Court was basically of two fold.

- First being the mistakes and/or inaction of the registered attorney who marked his appearance in the District Court for the 1st, 14th to 17th defendants.
- Second being the issue of jurisdiction of the Court of Appeal to entertain the said application since it was an application for revision and/or restitutio in integrum in which that the appellants alleged to have failed to establish the existence of exceptional circumstances.

Hence, it is seen that the Court of Appeal has not addressed its mind to the alleged incorrect allocation of shares determined by the learned District Judge which is the issue raised in the revision application filed in that Court. It is on that issue, even the special leave was granted by this Court.

Therefore, I will first look at the correctness of the allocation of shares determined by the learned District Judge. Allocation of shares in a partition action depends on the title claimed by the parties to the action. It is trite law that the examination of such title of the parties is the duty of the trial judge though we follow the adversarial system in this jurisdiction. The aforesaid duty of the trial judge to examine the title of the parties' emanates from Section 25 (1) of the Partition Law No.21 of 1977 (as amended). It reads as follows:

> "*on the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right share or interest of each party to, of, or in the land to which action relates, and shall consider and decide which of the orders mentioned in section 26 should be made."*

Long line of authorities is found in support of this position of the law referred to in the Statute. A few of those decisions are cited below.

- **Peiris Vs. Perera (1) NLR 362**

  "The Court should not regard a partition suit as one of to be decided merely on issues raised by and between the parties and it ought not to make a decree unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned."

- **Silva Vs. Paulu 4 NLR 177**

  "In partition suits the Court ought not to proceed on admissions but must require evidence in support of the title of all the parties and allot to no one a share except on good proof."

- **Golagoda Vs. Mohideen 40 NLR 92**

  "The Court should not enter a decree in a partition action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property."

- **Juliana Hamine Vs. Don Thomas 55 NLR at 546**

  "We are of the opinion that a partition decree cannot be subject of a private arrangement between parties of matters of title which the courts is bound by law to examine. While it is indeed essential for parties to a partition action to state to the Court the points of contest and to obtain a determination on them, the obligation of the Court are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do, The interlocutory decree which the Court has to enter in accordance with its findings in terms of section 26 of the Act is final in character since no interventions are possible or permitted after such a decree. There is therefore, the greater need for the exercise of judicial caution before a decree entered. The Court of trial should be mindful of the special provisions relating to decrees as laid down in section 48 of the Act. According to its terms, the interlocutory and final decrees shall be good and sufficient evidence of the title of any person so as to the interests awarded therein and shall be final and conclusive for all purposes against all persons whom so ever, notwithstanding any omission or defect of procedure or in the proof of title adduced before the Court, and notwithstanding the provisions of section 44 of the Evidence Ordinance, and subject only to the two exceptions specified in sub-section 3 of section 48 of the Act."

- **Cooray Vs. Wijesuriya 62 NLR 158**

  "Section 25 of the Partition Act imposes on the Court the obligation to examine the title of each party to the action and section 26(f) gives legal action to a practice that existed in actions tried under the old Partition Ordinance of leaving a share unallotted. It is unnecessary to add that the Court before entering a decree should hold a careful investigation and act only on clear proof of the title of all the parties. It will not do for a plaintiff merely to prove his title by the product of a few deeds relying on the shares which the deeds purport to convey. It is a common occurrence for a deed to purport to convey either much more or much less than what a person is entitled to. Before

Court can accept as correct a share which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share. How then is the proof to be established in a Court of Law? It only too frequently happens, especially in uncontested cases, that the Court is far from strict in ensuring that the provisions of the Evidence Ordinance are observed; and when this happens where there is a contest in regard to the pedigree as in the present case, the inference is that the Court has failed totally to discharge the functions imposed upon it by section 25 of the Act. It cannot be impressed too strongly that the obligation to examine carefully the title of the parties becomes all the more imperative in view of the far reaching effects of section 48 of the new Act which seems to have been specially enacted to overcome the effect of the decisions of our Courts which tended to alleviate and mitigate the rigorous of the conclusive effect of section 9 of the repealed Partition Ordinance of No.10 of 1863."

- **Cynthia De Alwis Vs. Marjorie D'Alwis and Two others 1997 (3) SLR 113**

"A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. In the exercise of this sacred duty to investigate title a trial Judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases."

- **Piyaseeli Vs. Mendis and Others 2003 (3) SLR 273**

"(i) Main-function of the trial Judge in a partition action is to investigate title, it is a necessary pre-requisite to every partition action.

(ii) Partition decrees cannot be the subject of a private agreement between parties on matters of title which the Court is bound by law to examine. There is a greater need for the exercise of judicial caution before a decree is entered."

- **Faleel Vs. Argeen and others 2004 (1) SLR 48**

"It is possible for the parties to a partition action to compromise their disputes provided that the Court has investigated the title of each party and satisfied itself as to their respective rights."

- **Somasiri Vs. Faleela and others 2005 (2) SLR 121**

"(i) The error had arisen owing to the failure of the trial Judge to investigate title.

(ii) The trial Judge must satisfy himself by personal Inquiry that the plaintiff made out a title to the land sought to be partitioned and that the parties before Court are solely entitled to the land.

(iii) While it is indeed essential for parties to a partition action to state to court the points of contest inter-se and to obtain a determination on them the obligation of the courts are not discharged unless the provisions of Section 25 of the Partition Law are complied with quite independently of what parties may or may not do."

- **Karunarathna Banda Vs. Dassanayake 2006 (2) SLR 87**

1. .....

2. A partition suit is not a mere proceeding inter-parties to be settled of consent or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues.

3. The Court has to safeguard the interests of others who are not parties to the suit who will be bound by the decree.

4. The Court should safeguard that the plaintiff has made out his title to the share claimed by him.

- **Sopinona Vs. Cornelis and others *2010 BLR 109***

(a) It is necessary to conduct a thorough investigation in a partition action as it is instituted to determine the questions of title and investigation devolves on the Court.

(b) In a partition suit which is considered to be proceeding taken for prevention or redress of a wrong it would be the prime duty of the judge to carefully examine and investigate the actual rights and to the land sought to be partitioned.

The above authorities clearly indicate that it is the duty of the trial judge in a partition action to investigate title of the parties before determining the share allocation. Hence, I will now consider whether the learned District Judge has discharged the said duty upon analyzing the evidence led before him when he decided to allocate the shares among the parties.

At the commencement of the trial, it was recorded that the parties have resolved their disputes that they had in respect of the devolution of title as well as the corpus. Thereafter, they had decided to accept the evidence of the plaintiff without him being cross examined. The judgment of the learned District Judge show exactly what had taken place at the commencement of the trial. Relevant paragraph of the judgment dated 10.12.1992 is as follows:

> **"ඉන් පසු පැමිණිල්ලේ විසඳිය යුතු ප්‍රශ්ණ දෙකක්ද, 10, 11, 12 විත්තිකරුවන් වෙනුවෙන් විසඳිය යුතු ප්‍රශ්ණ දෙකක්ද, ඉදිරිපත් කරන ලදී. ඉන් පසුව නඩුව 1992.09.02 වෙනි දින විභාගයට ගත් අවස්ථාවේදී අංක 1234 පිඹුරේ පෙන්වා ඇති ඉඩම පිළිබඳව සහ එහි අයිතිවාසිකම් ලැබෙන අන්දම පිළිබඳව පාර්ශවකරුවන් අතර සමතයකට පත් වී ඇති බව සඳහන් කරමින් විසඳිය යුතු ප්‍රශ්ණ ඉල්ලා අස්කර ගන්නා ලදී. ඉන්පසුව පැමිණිලිකරු සාක්ෂි දීම සඳහා කැඳවන ලදී. ඔහු අධිකරණයට පැවසුයේ බෙදීමට ඉල්ලා ඇති කහටගහවත්ත නැමැති ඉඩම අංක 1234 දරණ පිඹුරේ නිසි ලෙස පෙන්වා ඇති බවත්, එය 'X' වශයෙන්ද, ඊට අදාල වාර්තාව 'X 1' වශයෙන්ද, ලකුණු කරන බවයි."** (vide at page 54 in the original District Court record)

As mentioned before, the evidence of the plaintiff was not subjected to cross-examination even though the 10th, 11th and 12th defendants and 14th to 17th defendants were represented by Counsel in the District Court. Attorney Prajapala Gunwardane had appeared for the 14th to 17th defendant-appellants. Subsequently, it was revealed that the 1st defendant had died by then though the Attorney Prajapala Gunawardena has marked his appearance on his behalf. 1A defendant who was subsequently substituted in the room of the deceased 1st defendant and the 16th defendant in the District Court action is one and the same person. Moreover, 14th to 17th defendant-appellants have claimed rights emanated from the 1st defendant. In the circumstances, the learned District judge is bound to accept the evidence of the plaintiff and to act accordingly.

The plaintiff, namely W.N.Peter in his evidence has stated that he cannot explain as to the devolution of title for 5/12 shares of the land subjected to in this case. Following evidence of the plaintiff recorded on 1.9.1992 show that it is so.

" මෙම ඉඩමේ 1/12 පංගුවක් හිමිව සිටිය වතුපිටි කන්දලාගේ රොමා පැ.1 විසින් 1940 දී අංක 25736 දරණ පැ. 1 ලෙස ලකුණු කරන ඔප්පුවෙන්, එම 1/12 පංගුව පැමිණිලිකාර මට පවරා තිබෙනවා. 1/12 කොටසක් පැ.2 ගඩිරියෙල්ට හිමිව තිබුනා. ඔහු විසින් 1947 දී අංක 33032 දරණ පැ. 2 දරණ ඔප්පුවෙන් එම 1/12 ක කොටස පැමිණිලිකාර මට පවරා තිබෙනවා. අනෙක් හිමිකරුවන් තමයි 1/12 ක කොටස බැගින් හිමිව සිටි රොයිදා, වලා, බ්‍රම්පි යන අයවළුන් සහ 1/6 කොටසක් හිමිව සිටි එම්.සි. සිංවියා. මේ ඉඩමේ 5/12 කොටසක අයිතිවාසිකම් පැවරෙන ආකාරය මා දන්නේ නැහැ." (vide at page 149 in the original District Court record)

Despite the evidence referred to above, learned District Judge made order having kept only 36/342 (1/12) shares un-allotted from the corpus. He has not given any reason either, to show why he kept only 1/12 shares un-allotted despite the fact that there were un-contradictory evidence of the plaintiff to state that he cannot explain as to the devolution of title for a share amounting to 5/12 fraction. Therefore, it is clear that the learned District Judge has not properly addressed his mind to the evidence when he made order to keep only 1/12 share un-allotted.

The decision referred to above of the learned District Judge clearly show that he has not performed his duty cast upon him under Section 25(1) of the partition law. I do not see any reason as to why the Court of Appeal, in the revision application did not consider such an error, which clearly amounts to a violation of a statutory provision of the law.

Court of Appeal was of the view that there were no exceptional circumstances for it to interfere with the judgment of the learned District Judge. I do not think it is a correct approach to the issue. Disregarding a statutory provision alone would amount to have established exceptional circumstances that are necessary to invoke revisionary jurisdiction. Revisionary jurisdiction is a discretionary remedy in which the Court is empowered to exercise its discretion to meet the ends of justice. The Courts are empowered to exercise its discretionary powers to correct errors even though the party who is affected by those errors has failed to exercise the right of appeal given to him/her by the Statute.

Error committed by the learned District Judge in this instance creates a fit and proper opportunity for the appellate Court to exercise its discretionary power to remedy such an error. As stated before, the error committed by the trial judge, it being a violation of a statutory provision of the law should be considered as exceptional circumstances and therefore the Court of Appeal could have corrected such a violation invoking its revisionary jurisdiction. Accordingly, I am unable to agree that there were no exceptional circumstances to invoke the jurisdiction as decided by the Court of Appeal. Hence, the judgment of the Court of Appeal is set aside.

Extent to which the courts are empowered to exercise revisionary power is found in many judicial pronouncements that include **Somawathie Vs. Madawala 1983 (2) SLR 15** and **Mariam Beeee vs. Seyed Mohamed 68 NLR 36.** In Mariam Beebee Vs. Seyed Mohamed, Sansoni C J held thus:

> *"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, I conceive, made any changes in this respect, and the power can still be exercised in respect of any order or decree of a lower Court."*

Having considered the law referred to above and the facts of this case, I am of the opinion that the decision as to the allocation of shares in this instance is contrary to the evidence and therefore it becomes an incorrect

decision. In the circumstances, learned District Judge is directed to carefully consider the evidence already led in this case and to allot shares according to the evidence, giving reasons thereto.

The Registrar of this Court is directed to return the original record to the District Court of Gampaha forthwith. The judgment dated 10.12.1992 of the District Court of Gampaha is set aside. Learned District Judge is directed to write a judgment afresh considering the evidence already recorded since the parties had agreed to accept the evidence of the plaintiff having resolved their disputes as to the corpus as well as the pedigrees of the respective parties. Accordingly, the questions of law raised in this Court are answered in favour of the Appellants.

Appeal allowed. No costs.

JUDGE OF THE SUPREME COURT

WANASUNDERA, P.C, J .

I agree

JUDGE OF THE SUPREME COURT

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 against the judgment dated 15.06.2012 of CA. (Writ) 463/10.

S.C. Appeal No. 100/2013

S.C. Spl. LA No. 136/2012
C.A. (Writ)l No. 463/2010
Debt Conciliation Board No. 41012

A.D. Damith Jayantha

Applicant-Debtor

1. H.A. Sachintha Perera
   (Wife of the Debtor)

2. A.D. Supun Sameera
   (Son of the Debtor)

3. A.D.C. Maduwanthi (Daughter)
   All 04 of No. 226/1, Bolabotuwana,
   Bandaragama.

Substituted Legal Heirs

Vs.

W.D. Dharmasiri Karunaratne,
57, Baseline Road, Colombo 08.

Creditor

And Thereafter in Revision

1. H.A. Sachintha Perera
2. A.D. Supun Sameera
3. A.D.C. Maduwanthi

Vs.

W.D. Dharmasiri Karunaratne,

Respondent- Creditor

And in the Court of Appeal

1. W.D. Dharmasiri Karunaratne,
   57, Baseline Road, Colombo 08.

2. H.D. Iranganee Wijewardena,
   397/3, Kotikawatta, Angoda.

Petitioners

Vs.

1. Debt Conciliation Board of Colombo

2. Mr. A. Dayantha De Alwis,
   Chairman of the Debt Conciliation Board

3. Mr. K.A.P. Rajakarua,
   Member of the Debt Conciliation Board

4. Mr. N. Balaraman.
   Member of the Debt Conciliation Board

5. The Secretary,
   The Debt Conciliation Board
   All 5 of No. 80, Adikarana Mawatha,
   Colombo 12.

6. H.A. Sachintha Perera

7. A.D. Supun Sameera

8. A.D.C. Maduwanthi
   All 03 of No. 226/1, Bolabotuwana,
   Bandaragama.

New Members Added

9. Mrs. Malaniee A. Ranathunga.
   The Chairperson

10. Mr. P. Samararatne

11. Mr. M.A.N.S. Gunawardena

12. Mr. D.M. Sarathchandra

Respondents

And Now Between

1. W.D. Dharmasiri Karunaratne,
   57, Baseline Road, Colombo 08.

2. H.D. Iranganee Wijewardena,
   397/3, Kotikawatta, Angoda.

Petitioner-Petitioners

Vs.

1. Debt Conciliation Board of Colombo

2. Mrs. Malaniee A. Ranathunga.
   The Chairperson

3. Mr. P. Samararatne

4. Mr. M.A.N.S. Gunawardena

5. Mr. D.M. Sarathchandra

   All 4 of Debt Conciliation Board,
   No. 80, Adikarana Mawatha,
   Colombo 12.

New Members of the Board

6. H.A. Sachintha Perera

7. A.D. Supun Sameera

8. A.D.C. Maduwanthi
   All 03 of No. 226/1, Bolabotuwana,
   Bandaragama.

9. Mr. K.A.P. Rajakarua,
   Re-Appointed Member of the Board

10. The Secretary of the Board
    Both of No. 80, Adikarana Mawatha,
    Colombo 12.

Respondent-Respondents

****

S.C. Appeal No. 100/2013

BEFORE : **Eva Wanasundera, PC. J**
Buwaneka Aluwihare, PC.J. &
Upaly Abeyrathne, J.

COUNSEL : S. Kumarasingham for the Petitioner -Appellant.

Javed Mansoor with Ms. C. Hettiarachchi for the 6th, 7th & 8th Respondent-Respondents.

Parinda Ranasinghe, DSG. for the 1st - 5th, 9th & 10th Respondent-Respondents.

ARGUED ON : **23.09.2015**

DECIDED ON : **03.02.2016**

EVA WANASUNDERA, PC.J.

The Appellants have sought relief from this Court by way of the Petition dated 20th July,2012. Special Leave was granted on the following questions of law on 30th July,2013 against the impugned judgment of the Court of Appeal dated 15.06.2012. They are as follows and contained in paragraph 42(i), (ii) and (iii) of the said Petition. It is pertaining to a decision made by the Debt Conciliation Board.

42(i) Did the Court of Appeal err in law in holding that even an unsigned and belated application tendered to the Board can be entertained by the Board against Section 15 of the Ordinance?

(ii) Did the Court of Appeal err in law in holding that no substitution of the legal heirs of the deceased Applicant were effected in substance by the Board before dismissing the application marked X2 or before its order marked X10?

(iii) Did the Court of Appeal err in law in ignoring and misinterpreting the legal provisions in Sections 15, 49, 50, 54 and 64 respectively of the Ordinance?

The main relief sought by the Appellants is to "set aside the judgment of the Court of Appeal dated 15.06.2012 in case No. CA. Writ 463/10."

In summary, the pertinent facts are that one A.D. Damith Jayantha had made an application to the Debt Conciliation Board under the Debt Conciliation Ordinance No. 39 of 1941 as amended, as provided for by Sec.14 thereof on 05th June,2008. The Applicant Damith Jayantha had died on 1st of August, 2008. On 27th August, 2008 the wife of the deceased namely Sachintha Perera, who is the 6th Respondent-Respondent in the case before this Court, had informed the Debt Conciliation Board that her husband the Applicant had expired. The Board had directed her to tender the necessary documents to the Board. Thereafter the Board made order dismissing the application on defects of the application on 17.8.2009 and later on, acted on a revision application made by the wife and children of the deceased applicant. The Board revised its own order and cancelled its previous order dated 17.8.2009, by its second order dated 21.04.2010.

Being aggrieved by the order dated 21.04.2010, the Appellants in this case invoked the jurisdiction of the Court of Appeal seeking a Writ of Certiorari to quash the order dated 21.04.2010, as well as a Writ of Mandamus directing the 1st to 5th Respondents to act in terms of the first order dated 17.8.2009 and also a Writ of Prohibition, prohibiting the Board from making the 2nd Appellant a party to the application for conciliation before the Board with regard the subject matter before the Board.

The Court of Appeal made order dismissing the Writ Application of the Appellants in this case and now they are before this Court challenging the judgment of the Court of Appeal dated 15.06.2012.

I have, very carefully gone through the written submissions of the Appellants dated 09.09.2013 and 21.10.2015 and considered the oral submissions made by the Counsel for the Appellants on 23.09.2015 and considered each and every argument made to this Court on their behalf. I have also considered the written submissions tendered by the Respondents to Court on 28.02.2014 and oral submissions made on 23.09.2015. I have specifically stated this fact since the Appellant submitted that the Court of Appeal had not gone through his submissions.

I am not going to refer to each and every submission and argument made by the respective parties in this judgment since it is not necessary for me to do so. Yet I emphatically state that the submissions made with regard to the impugned judgment has been well considered by me.

I observe that the Debt Conciliation Ordinance No. 39 of 1941 has got amended 9 times and the last amendment was by Act No. 29 of 1999. Section 54(1) was amended only once, by Section 2 of Law No. 41 of 1973. This Section comes under the sub title of "Review of Decisions of the Board" and reads as follows:-

Section 54(1)-The Board may, of its own motion or on application made by any person interested, within three months from the making of an order by the Board dismissing an application, or granting a certificate, or approving a settlement, or before the payment of the compounded debt has been completed, review any order passed by it and pass such other in reference thereto as it thinks fit.

[S 54(1) am by s 2 of Law 41 of 1973.]

The subject matter of the case before the Conciliation Board seems to be a transfer of an immovable property of an extent of 20 perches when the debtor obtained a loan of Rs.300,000/- from the creditor, the 1st Appellant for which interest was deposited regularly in a bank account in the name of another lady who is said to have been the creditor's mother, until the day the Applicant became aware of an attempt by the creditor to sell the said property to another outsider for Rs. 20 Lakhs. Since the Conciliation Board was of the view that this is a matter to be looked into under Section 21A of the Debt Conciliation Ordinance, the first order dated 17.08.2009 was later revised by the Board under Section 54(1).

When going through the Provisions of the Debt Conciliation Ordinance as amended, it is clear that it is an enactment of law which provided for the Board to "attempt to effect a settlement between the debtor and the secured or unsecured creditor". Firstly there is a preliminary hearing under Section 24. Section 27 provides that, where after holding the preliminary examination under Section 24, if the Board is of the opinion that it is not desirable to attempt to effect a settlement between the debtor and the creditor, that the Board could dismiss the application. Therefore I find that the Debt Conciliation Board Ordinance as amended even after 50 years in 1999 has been a creditable piece of legislation for about 65 years to date in serving the debtors and creditors whether secured or unsecured. It has worked well giving a lot of powers to the Debt Conciliation Board as well as privileges. I quote the following Sections to demonstrate the powers and privileges:-

Section 33 - Provisions Relating to settlements.

In any settlement under this Ordinance-

(a) All property which is exempt from seizure and sale under section 218 of the Civil Procedure Code shall not be taken into account; and

(b) A creditor shall be allowed, notwithstanding anything to the contrary in any other law, as interest such sum as appears to the Board to be reasonable, having regard to all the circumstances of the case.

[S 33(b) subs by s 6 of Act 29 of 1999.]

Section 53- Power of Board to state case on question of law for opinion of Court of Appeal:-

(1) The Board may in its discretion, at any time in the course of any proceedings under this Ordinance, state a case for the opinion of the Court of Appeal on any question of law arising for decision in such proceedings.

(2) The stated case shall set forth in writing the facts of the case as found by the Board and the question of law upon which the opinion of the Court of Appeal is sought, and shall, when signed by the Chairman of the Board be transmitted to the Court of Appeal, a copy of the stated case shall also be transmitted to each party to the proceedings.

(3) Any two Judges of the Court of Appeal may cause a stated case to be sent back for amendment by the Board and thereupon the case shall be amended accordingly.

(4) Any two Judges of the Court of Appeal may hear and determine any question of law arising on a stated case, and upon such determination the Registrar of the Court shall remit the case to the Board with the opinion of the Court of Appeal thereon. Such opinion shall be final and conclusive and shall be binding on the Board and on the parties to the proceedings.

(5) Any party to the proceedings may appear either personally or by pleader at the hearing before the Court of Appeal.

It is quite obvious that the Board has to weigh the question at hand on the weighing balance of “reasonableness”. The string that binds the provisions in each Section is nothing but reasonableness. The Board has full power to even reason out their faults and revise its own orders. It has to act as a Court to bring matters to a settlement. When doing so, technicalities in procedure should be pushed aside as much as possible.

In the present case, the Board has not acted wrongly. It has acted on powers granted to it by law. The Board having acted under Section 54(1) has acted reasonably in revising its own orders since its first order dismissing the application for want of the proper signature of the Applicant and/or for his wife having signed on the first page of the application etc, which are technical in nature was not reasonable. Moreover the 6th, 7th and 8th Respondents being heirs of the deceased debtor comes within the interpretation given to 'debtor' in Section 64.

Section 64 reads:-

In this Ordinance unless the context otherwise requires-

"Board" means the Debt Conciliation Board established under section 2;

……..
……
……
……..

"Debt" includes all liabilities owing to a creditor in cash or kind, secured or unsecured, whether payable under a decree or order of a civil court or otherwise, and whether mature or not, but does not include arrears of wages or any money for the recovery of which an action is barred by prescription;

"Debtor" means a person-

(i) Who has created a mortgage or charge over any immovable property or any part thereof and whose debts in respect of such property exceed the prescribed amount; or

(ii) Who is a transferee of a right of redemption on a conditional transfer, and **includes the heirs, executors and administrators of such person.**

[Subs by s 3 of Act 20 of 1983.]

"Mortgage" with reference to any immovable property, includes any transfer or conditional transfer of such property which, having regard to all the circumstances of the case, is in reality intended to be security for the repayment to the transferee of a sum lent by him to the transferor;

[Am by s 8(2) of Act 29 of 1999.]

It is observed that the Board has done its duty acting in compliance with Section 49 of the Ordinance, which reads:-

Section 49- Procedure before the Board.

> It shall be the duty of the Board to do substantial justice in all matters coming before it without regard to matters of form.

In this case, I am of the opinion that the Board has acted within the law, when it revised its first order and allowed in its second order for the heirs of the deceased debtor to be substituted in place of the deceased who came before the Board within the time limit of 3 years of the date of the notarially executed instrument ie. transfer deed No.27 dated 27.07.2007 in compliance with Section 19 A (1A).

When the right parties are before the Board, it can hear all the evidence and thereafter decide whether Deed No. 27 which is the document questioned in the application was a sale proper or a security for a loan. The order of the Board dated 21.04.2010 was made in the presence of the deceased debtor's wife, the 6th Respondent-Respondent as well as the creditor, allowing the application of the Attorney-at-Law of the debtor, to substitute the heirs of the deceased in place of the original Applicant who was deceased by then. The Attorney-at-Law has to now substitute the 6th, 7th and 8th Respondent-Respondents in the room and place of the deceased Applicant on the face of the application made to the debt Conciliation Board for the Board to proceed to hear the matter on its merits. An amended caption has to be filed before the Debt conciliation Board with the names of the wife and two children of the deceased Applicant, namely the 6th, 7th and 8th Respondents, as heirs of the Applicant-Debtor, A.D. Damith Jayantha.

I answer the questions of law in favour of the Respondents and against the Appellant. I find no merit in this appeal. The Court of Appeal judgment should stand as it is. This appeal is dismissed with costs limited to Rupees Fifty Thousand.

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

SC Appeal No.100/15
SC/SPL.LA/HC/254/14
High Court.
No.96/2014/PC/HCCA/KY
/RA
Kandy LT No. LT/88/2013

By way of Application of Special Leave to Appeal to set aside the order delivered on the 07/11/2014 by the Provincial High Court Holden of Central Province of the Democratic Socialist Republic of Sri Lanka sitting in Kandy, for Revisionary Action bearing No. 96/14/CP/HCCA/KY/(R/A)

U. B. Heenkenda
No. 77, Peralanda Road,
Pandiwatte,
Kundasale.

APPLICANT

V.

H. B. S. Motors (Private)
Limited
37, Cross Street,
Kandy

EMPLOYER

H. B. S. Motors (Private)
Limited
37, Cross Street,
Kandy

EMPOYER-PETITIONER-

V

U. B. Heenkenda
No. 77, Peralanda Road,
Pandiwatte,
Kundasale.

APPLICANT-PRESPONDENT-

B. M. Wipularatna Banda
No.106/1
Harnakahawa,
Kandy.

RESPONDENT

And Now Between

H. B. S. Motors (Private)
Limited
37, Cross Street,

EMPLOYER-PETITIONER-APPELLANT

V.

U.B. Heenkenda,
Pandiwatte,
Kundasale.

APPLICANT-RESPONDENT-RESPONDENT

B.M.Wipularatna Banda
No.106/1
Harnakahawa,
Kandy.

RESPONDENT-RESPONDENT

BEFORE: Aluwihare P.C., J
Gooneratne J. &
Perera J.

COUNSEL: E. B. Atapattu for the Employer-Petitioner-Appellant

Nimal Hippola for the Applicant-Respondent-Respondent

ARGUED ON: 23.06.2016

DECIDED ON: 02. 08. 2016

Aluwihare PC.J

The Employer-Petitioner-Appellant (hereinafter referred to as the employer) being aggrieved by the order handed down by the Provincial High Court of the Central Province holden in Kandy had sought special leave from this Court.

When the matter was supported on the 10th June 2015, special leave was granted on the questions of law set out in paragraph 18 (I) – (iv) and (vii) of the petition of the Appellant dated 1st December, 2014.

Applicant-Respondent-Respondent (hereinafter referred to as the applicant) who was an employee under the employer (a business establishment) filed an application in the Labour Tribunal of Kandy in terms of Section 31B of the

Industrial Disputes Act No.43 of 1950, alleging unjust termination of his employment and claiming various reliefs.

The inquiry commenced on 22nd January, 2014 and proceeded on several dates thereafter. On all those dates both the employer as well as the applicant was represented by their respective attorneys. When the matter was taken up for further inquiry on 2nd October, 2014 Mr. Gamini Samarathunga, Attorney-at-Law had appeared for the employer and one Wipularatna Banda (Respondent-Respondent to the instant application) represented the employer. An objection was raised by the counsel for the applicant that the representative of the employer, the aforesaid Wipularatne was not a proper person to represent the employer and the Learned President of the Labour Tribunal, having upheld the objection raised on behalf of the applicant, postponed the inquiry.

For ease of reference the questions of law on which leave was granted by this court are reproduced below.

18 (I) Whether the order dated 7/11/2014 of his lordship of the High Court of Kandy in the Central Province is contrary to law.

(II) Did his Lordship failed to correctly consider the provisions 46 (1) of the Industrial Disputes Act No. 43 of 1954 as amended.

(III) Did his Lordship failed to correctly consider the provisions 46 (2) of the Industrial Disputes Act No. 43 of 1954 as amended.

(IVI) Did his Lordship failed to correctly consider the provisions 1866 (1) of the Companies Act No. 7 of 2007

(VII) Did his Lordship failed to correctly consider and understand whether a member of the Board of Directors of a company invariably need not be present at the Labour Tribunal while an application under 31 (B) of the Industrial Disputes Act No.43 of 1950 as amended is being heard, when the Employer has appointed an attorney-at-Law to represent the Employer.

It is common ground that Wipularatne was neither a director nor an employee of the business establishment concerned. It would be pertinent to reproduce the relevant portion of the order of the learned President of the Labour Tribunal in relation to the objection referred to above.

"වගඋත්තරකාර නීතීඥ මහතා පෙන්වා සිටි පරිදි ආයතනයක් වෙනුවෙන් පෙනී සිටීමට , ආයතනයේ සේවයේ නිරත වන යම්කිසි පුද්ගලයෙකුට නෛතික හිමිකමක් පැවරීමට යම් ආයතනයක අධ්‍යක්ෂ මණ්ඩලයට හෝ පරිපාලනයට හැකියාව ඇත. නමුත් අද දින පැමිණ සිටින මෙම පුද්ගලයා මෙම වගඋත්තරකරුගේ ඥාතියෙකු බව ප්‍රකාශ කරයි. එවැනි පුද්ගලයෙකු නෛතික පුද්ගලභාවයක් ඇති අයෙකු ලෙස සලකා බැලිය නොහැකිය. එබැවින් ඉල්ලුම්කරු ප්‍රකාශ කර සිටින එකී විරෝධතාවය පිළිගනිමි. වගඋත්තරකරු හෝ වගඋත්තරකරු වෙනුවෙන් අධිකරණයට පිළිගත හැකි **නෛතික පුද්ගලයෙකු** ඉදිරිපත් නොවීම මත , මෙම නඩුවට, විභාගයට දිනයක් ලබා දෙමි."

For all intents and purposes, to my mind Wipularatne is a natural person. In short, the learned President of the Labour Tribunal has postponed the inquiry due to non-appearance of a "Legal Person" (නෛතික පුද්ගලයෙකු) acceptable to the Tribunal, on behalf of the Employer.

Although I am at a loss to understand what the learned President of the Labour Tribunal meant by the words "Legal Person" (නෛතික පුද්ගලයෙකු) acceptable to the Tribunal, I visit this issue on the basis that what the learned President of the Labour Tribunal presumably had in mind was that Wipularatne had no "*locus standi*" to represent the employer. Thus, the issue before this court is who could represent parties before a Labour Tribunal.

The order of the learned President of the Labour Tribunal, however, is not based on any legal provision. The applicable provision which is Section 46 of Industrial Disputes Act as amended is reproduced below:

46. Representation and appearance.

(1)Any party to any proceeding under this Act taken by or before any authorised officer, arbitrator, Industrial Court or ***Labour Tribunal*** *or the Commissioner may and shall if required so to do by*

such officer, arbitrator, court or tribunal, or the Commissioner, through representatives of the party.

(2) In any proceedings under this Act other than proceedings before the Commissioner or an authorized officer, an attorney-at-law may appear on behalf of any party to such proceedings or the representative of such party.

(3) The person or persons who shall represent a party for the purposes of this Act shall-

(a) where the party is a trade union , or consists of two or more trade unions, be an officer of such union, or of each such union;

(b) where the party consists partly of any trade union or unions and partly of employers or workmen who are not members of any such union , be an officer of such union or of each such union and a prescribed number of persons nominated in accordance with regulations by such employers or workmen ; and

(c) where the party consists of employers or workmen, be a prescribed number of persons nominated by such employers or workmen. (Emphasis added)

Section 46 of the Industrial Disputes Act confers on trade union officials, employer representatives and other para-professionals, an equal right of representation along with licensed practitioners. If that be the case, when the employer is represented by a lawyer, the contention that a person nominated by the employer cannot present himself at the inquiry to assist the counsel on behalf of the employer is illogical.

In the instant case, the counsel who represented the employer had submitted that the employer is a juristic person. He had submitted further that Wipularatne is representing the company sequel to a Board resolution passed by the Board of Directors of the Employer Company (P13). It was brought to the notice of the learned President of the Labour Tribunal that Wipularatne had been granted with written authority to represent the Employer before the Labour Tribunal.

In terms of Section 186 of the Companies Act No.7 of 2007 a Board of a company is empowered to delegate powers to a person and this person need not be an employee or a person who has some connection to the company.

Considering the above, it is clear that the objection raised by Attorney-at-Law Mr. Sumathipala on behalf of the applicant, is absolutely without any legal basis and had the Labour Tribunal President only paid attention to Section 46 of the Industrial Disputes Act, I am certain the order would have been different. This process has only led to procrastination of proceedings.

The criteria to be observed when a court exercises revisionary jurisdiction is, the legality of the order. When the order in question was clearly illegal, it is incomprehensible why the learned judge of the High Court did not exercise that jurisdiction and revised it. The reason given that exceptional circumstances are required, is specious at best and tantamount to refusal and reluctance to exercise its jurisdiction, whereas the order in question should have shocked the conscience of the court.

It is unfortunate that the President of Labour Tribunal herself has lost sight of the provisions of the Industrial Disputes (Hearing & Determination of Proceedings) Special Provisions Act No.13 of 2013.

The above Act had been enacted as the Legislature had noted the inordinate delay in disposing of applications made to Labour Tribunals and had thought it fit to enact a law to ensure expeditious disposal of such applications.

Section 3 of the Act reads thus:-

> ***Tribunal to proceed in the absence of any party.***
> *Where without sufficient cause being shown, a party to an application before a Labour Tribunal fails to attend or* ***is not represented at any hearing*** *of such tribunal the tribunal* ***may proceed with the hearing*** *and determination of the matter,* ***notwithstanding the absence of such party or any representative of such party.*** (emphasis added)

Hence, when the counsel for the employer resisted a postponement and sought permission to continue with the cross-examination of the applicant, the Labour Tribunal President, even assuming that she was not satisfied with the representation on behalf of the employer, ought to have proceeded with the inquiry in view of the clear wording of the Act.

When the Revision Application was supported before the High Court, the learned counsel for the Petitioner (the employer) had drawn the attention of the court to the relevant statutory provisions embodied in the Industrial Disputes Act as well as the Companies Ordinance. However the learned High Court Judge had refused to exercise the revisionary jurisdiction on the basis that the Petitioner (the employer) had not shown any exceptional circumstances.

It is trite law that "revision" being a discretionary remedy, a court exercising revisionary jurisdiction need not rectify every illegality to which the attention of the Court is drawn, in the order that is being canvassed before the court.

However, if the order that is being canvassed had been made in total disregard of the applicable statutory provisions, then the court must exercise its discretion in favour of the party that seeks redress, especially as the President of the Labour Tribunal in making her order, had manifestly fallen into error.

Considering the above, I hold in the affirmative, the questions of law raised in sub paragraphs (I) to (IV) and (VII) of paragraph 18 of the Petition of the Appellant.

Accordingly, both orders, that is the order of the learned High Court Judge dated 7th November, 2014, although the order, presumably due to inadvertence, is dated 7th October, 2014 and the order of the Labour Tribunal President dated 14th October, 2014 are set aside.

I hold further that there is no legal impediment for Wipularatne to represent the employer at the inquiry before the Labour Tribunal.

I make further order directing the Labour Tribunal President to give effect to Section 3 of the Industrial Disputes (Hearing and Determination of Proceedings) Special Provisions Act and to conclude the instant inquiry expeditiously.

Appeal allowed.

In the circumstances of this case I order no costs. Registrar of this court is directed to communicate this decision, both to the Provincial High Court of Kandy and the Labour Tribunal Kandy, forthwith.

JUDGE OF THE SUPREME COURT

Justice Anil Gooneratne

I agree

JUDGE OF THE SUPREME COURT

Justice H.N.J Perera

I agree

JUDGE OF THE SUPREME COURT

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

S.C. Appeal No. 104/2012
SC SPL LA Application No.133/2011
CA Appel No. 203/1998 (F)
D.C. Batticaloa Case No. 983/T

In the matter of an Application for Special Leave to Appeal from the Judgment of the Court of Appeal in CA Appeal No. 203/98(F) dated 26.05.2011

Parameshwary Upali De Silva (nee Parameshwary Velupillai) of
No. 6, Pansala Road,
Koddaimunai, Batticaloa,

Presently of No. 6, Ediriweera Avenue,
Dehiwala.

PETITIONER

Vs.

1. Savithiri Lokitharajah (nee Savithri Velupillai)

   Presently of 9A,
   Hydean Way,
   Stebanage, Harts, S.G.2, 9XH,
   United Kingdom.

2 Selvadurai Sivam Ganeshanandham

   Presently of No.10, Bryn Ogwer,
   Pearhes Garned
   Banger Gurnedd, LL-ST-2DX,
   United Kingdom.

3. Dr. Kandapper Murugupillai of
No. 4, Pansala Road,
Batticaloa.

RESPONDENTS

AND NOW BETWEEN

Parameshwary Upali De Silva (nee
Parameshwary Velupillai) of
No. 6, Pansala Road,
Koddaimunai, Batticaloa,

Presently of No. 6, Ediriweera Avenue,
Dehiwala.

PETITIONER-APPELLANT

Vs.

1. Savithiri Lokitharajah (nee Savithri
Velupillai)

Presently of 9A,
Hydean Way,
Stebanage, Harts, S.G.2, 9XH,
United Kingdom. (**DECEASED)**

SUBSTITUTED BY

Kandappan Lokitharajah
No. 33, Cheyney Avenue,
Cannors Park,
Edgware,
Middlesex HA8 6SA,
United Kingdom.

SUBSTITUTED 1ST RESPONDENT-RESPONDENT

2. Selvadurai Sivam Ganeshanandham

Presently of No. Bryn Ogwer,
Pearhes Garned
Banger Gurnedd, LL-ST-2DX,
United Kingdom.

2ND RESPONDENT-RESPONDENT

3. Dr. Kandapper Murugupillai of
No. 4, Pansala Road,
Batticaloa. **(DECEASED)**

3RD RESPONDENT-RESPONDENT

AND NOW BETWEEN

Parameshwary Upali De Silva (nee
Parameshwary Velupillai) of
No. 6, Pansala Road,
Koddaimunai, Batticaloa,

Presently of No. 6, Ediriweera Avenue,
Dehiwala.

PETITIONER-APPELLANT-APPELLANT

Vs.

1. Savithiri Lokitharajah (nee Savithri Velupillai)

Presently of 9A,
Hydean Way,
Stebanage, Harts, S.G.2, 9XH,
United Kingdom. (**DECEASED)**

SUBSTITUTED BY

Kandappan Lokitharajah
No. 33, Cheyney Avenue,
Cannors Park,
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Middlesex HA8 6SA,
United Kingdom.

SUBSTITUTED 1ST RESPONDENT-RESPONDENT-RESPONDENT

2. Selvadurai Sivam Ganeshanandham

Presently of No. Bryn Ogwer,
Pearhes Garned
Banger Gurnedd, LL-ST-2DX,
United Kingdom.

2ND RESPONDENT-RESPONDENT-RESPONDENT

BEFORE: Sisira J de. Abrew J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Manohara de Silva P.C., with Nirosha Munasinghe instructed
By K.U. Gunasekera for Petitioner-Appellant-Appellant

S. Mandaleswaran with P. Peramunagama for
1st Substituted-Respondent-Respondent-Respondent

ARGUED ON: 23.09.2016

DECIDED ON: 11.11.2016

GOONERATNE J.

This was a Testamentary case filed on or about 01.10.1986 in the District Court of Batticaloa to have the Last Will and Testament dated 27.04.1976 proved and for grant of letters of administration to the Petitioner-Appellant-Appellant, of her deceased father Dr. Alagaratnam Velupillai's last will. Petitioner-Appellant-Appellant pleads that she made the application to the District Court since the executor (2nd Respondent) of the last will of the said deceased, did not attempt to prove the last will.

Last will bearing No. 1058, according to the Petitioner-Appellant-Appellant, the testator had devised and bequeath the entire estate in equal share to the Petitioner and her younger sister the 1st Respondent. The 3rd Respondent was only a witness to the last will. Order Nisi of 01.10.1986 was issued and sent to all Respondents. The proceedings and material furnished to this court indicates that objections were filed by the Respondents admitting last will No. 1058, but pleaded that the testator had executed another last will subsequently on 23.05.1979, and had revoked and annulled all previous last wills and codicils inclusive of will No. 1058. However the District Court having fixed the matter for inquiry and after several days of inquiry had on 27.07.1998 dismissed the Petitioner-Appellant –Appellant's petition as she was absent from

court without reason and without giving instructions to her registered Attorney. Petitioner-Appellant-Appellant being aggrieved by the Order of dismissal appealed to the Court of Appeal and the Court of Appeal also dismissed her appeal on 26.05.2011 (X4).

This court on 12.06.2012 granted Special Leave to Appeal on the questions set out in paragraphs 18(a), (b), (d) & (e) of the petition.

The said questions are as follows:

(a) Did the Court of Appeal err by failing to appreciate that the learned District Judge has failed to adopt the correct procedure laid down in the Civil Procedure Code in determining the Petitioner's application before the District Court to have the last will and Testament dated 27.04.1976 proved and the letters of administration granted by her?

(b) Did the Court of Appeal err by failing to appreciate that the learned District Judge has failed to frame the issue which appeared to have arisen between the parties and direct them to be tried on the day appointed for inquiry/trial in terms of Section 533 of the Civil Procedure Code?

(c) Did the Court of Appeal err by failing to appreciate that Chapter XXXVIII of the Civil Procedure Code does not permit to contemplate dismissal of a testamentary action on default of the Petitioner to appear before the court?

(d) Did the Court of Appeal err by failing to appreciate that the learned District Judge has erred in ordering the Petitioner to pay a sum of Rs. 125,000/- to the 2nd Respondent for the expenses incurred by him for coming from England to give evidence in the case, since there was no proper legal basis for making such order?

The Petitioner-Appellant-Appellant argues that, what is relevant to this case are the provisions contained in Sections 532(1), 533 and 386 of the Civil Procedure. It is emphasised that Section 533 stipulates the procedure to be followed. In this regard it was submitted by learned President's Counsel that Section 533 of the Civil Procedure Code requires

(a) to frame issues which arise between parties.
(b) To fix a day to be appointed acting under Section 386 of the code.

It is the position of the learned President's Counsel that learned District Judge failed to follow the procedure as in (a) & (b) above, as such it is bad in law. Learned President's Counsel also argues that the Court of Appeal failed to appreciate the distinction between Section 533 and Section 386 of the Civil Procedure Code. Section 533 is the section which is specific to testamentary actions and Section 386 governs the procedure to be adopted in testamentary cases. The above appears to be line of argument taken by the learned President's Counsel on behalf of the Petitioner-Appellant-Appellant. He also cites several authorities, which will be considered by this court.

The 1st and 2nd Respondents on the other hand are seeking to justify the order of dismissal by the learned District Judge and the order of the Court of Appeal dismissing the appeal. I find that the main grounds as stated in their written submissions flow from the fact that the 3rd Respondent who was one of

the witnesses to both last wills bearing Nos. 1058 and No. 361 were executed by the testator the deceased Dr. Alagaratnam Velupillai. Last will bearing No. 361, the testator revoked and annulled all former wills and declared will No. 361 as his last will. It has been submitted on behalf of the above Respondents that Appellant's action be dismissed and proceedings be initiated to administer the estate of the said deceased in terms of last will No. 361 dated 23.05.1979. Objections were filed on the above basis. It is also the position of the Respondents that the Appellant has not shown any interest to prosecute the action.

One of the main points to be resolved is whether a testamentary case could be dismissed in the way it was dismissed by the District Court of Batticaloa. All questions of law are connected to above.

I state that it would be important to the case in hand to consider the provisions relating to hearing of the application as contained in the Civil Procedure Code relating to testamentary actions. Where objections are received in response to any application for the grant of letters of administration as specified in such notice, court shall proceed to hear and try such application according to the procedure laid down. Court will also for such purpose name a day for final hearing and disposal of such application. Court could also make such other order as it may consider (Section 532(1) of the Civil Procedure Code).

Section 532(2) requires the Probate Officer to submit all relevant papers to the application in question to the District Judge in his chambers for the purpose to name a date for hearing.

On the day appointed for hearing or on a date the case is adjourned for hearing, the parties filing objections are able to satisfy court that there are grounds for objecting to the application to be tried by viva voce evidence the court is required to frame issues which appear to arise between parties, and court shall direct issues to be tried on a day to be appointed for the purpose under Section 386 of the Civil Procedure Code. (Section 533 of the Code).

In terms of Section 386 of the Civil Procedure Code, when the Respondent's evidence has been taken court may adjourn the matter to enable the Petitioner to adduce additional evidence. If the court thinks it necessary, court could frame issues of facts between parties and adjourn the case to be tried by oral evidence.

There are two positions contemplated under Section 534 of the Code regarding grant of letters of administration. It could be stated as follows

(1) At the final hearing, on determination of issues it shall appear to court that prima facia proof of material averments in the application for letters of administration have not been rebutted, then the court will order the grant of letters of administration to the petitioner. (Section 534(1) (a))

(2) If prima facie proof of material averments in the petition have been rebutted court should dismiss the petition. If an objector establish his rights to have administration of the deceased's estate granted to him instead of the petitioner, court should make an order to that effect in his favour (Section 534 (1) (b))

I also note that dismissal of any application shall not be a bar for renewal of the application by the petitioner as in Section 534(2) of the Civil Procedure Code.

On the material submitted to this court (inclusive of the translation) it does not clearly appear to this court that the learned District Judge attempted to comply with (1) or (2) above. What happened in the District court (according to document 'Y') is that on 18.12.1997 an application was made by the 2nd Respondent under Sections 178/179 of the Civil Procedure Code. (evidence de bene esse) Learned District Judge allowed that application and 2nd Respondent's evidence was led. (2nd Respondent being resident in U.K) The record indicates that 2nd Respondent was cross-examined only by the Attorney-at-Law for the 1st Respondent. It is recorded that Attorney-at-Law for the Petitioner did not cross-examine the witness (2nd Respondent). Thereafter certain oral submissions had been made by the Attorneys-at-Law for 1st & 2nd Respondents. On 27.02.1998 learned District Judge made order dismissing the petition of the Petitioner and

ordered costs of the action and further Petitioner was directed to pay Rs. 125,000/- to the 2nd Respondent (Expenses incurred for travelling from U.K).

It may not be necessary for this court to refer to all the procedural steps taken by the parties concerned as regards the case in hand, i.e amended petition was filed, 3rd Respondent expired and failure to substitute etc. I observe that the learned District Judge erred in law by dismissing a testamentary case on assuming that there was a default and the District Judge seems to have acted under Chapter XII of the Code. If the petitioner was absent or the Petitioner has failed to prosecute the case, the grant of letters of administration to another suitable person in the case would be the next step for court to consider. In this regard court need to take the steps as contemplated in Section 534 (1) (a) and or 534 (1) (b) of the Civil Procedure Code. The relevant provisions do not contemplate a dismissal of the action.

Whatever the position taken up by the Respondents, I find that the following case law cited by the learned President's Counsel support the position of the Petitioner-Appellant-Appellant.

> *Perera Vs. Dias 2 NLR 66 As per Withers J.*, that "if an order nisi is properly supported, and the respondent has cause to show against its being made absolute, he must satisfy the Court by evidence, either by affidavit or oral testimony, that he has good cause"
> "When the respondent has put forward his evidence, the Court may do one of two things: either adjourn the matter to enable the petitioner, if he asks to be allowed to do so, to adduce additional evidence; or if the Court thinks it necessary, it may frame

issues to be tried between the petitioner and the respondent. It will depend on the issues framed whether the petitioner or the respondent is to begin".

In the matter of the Estate of the late *Sinne Tamby Poothepillai 2 NLR 214 as per Bonser CJ at page 216*

In *Kanagaratnam Vs. Ananthathurai 46 NLR 302* It was held that, in an application for the issue of probate of a Will or Codicil it is the duty of Court, when the respondent shows grounds of objection to the application, to frame issues as required by Section 533 of the Civil Procedure Code.

As per *Keuneman J.* "In this case the learned District Judge has failed to frame issues as he was required to do under Section 533 of the Civil Procedure Code"...

In *Wijewardena and another Vs. Ellawala 1991 (2) SLR 14* (CA), as per Wijetunga J. at page 27,

"Furthermore, the provisions of Sections 526, 533 and 534 of the Civil Procedure Code indicate that where there is prima facie proof of the due making of the will and order nisi is entered declaring the will proved, the burden is on the objector to rebut the prima facie proof of material allegations of the petition"

of a Will or Codicil it is the duty of Court, when the respondent shows grounds of objection to the application to frame issues as required by section 533 of the Civil Procedure Code.

A last will is clearly not a deed as lawyers understand it. 7 NLR at 45. A person may die testate or intestate. Where a person leaves a will during his life time, it cannot be revoked except by another will. A last will can be revoked by a declaration by the testator of his intention to revoke the

instrument and the execution of another will. The case in hand provides material to this court of the execution of another will (No. 361) by the testator. A last will is almost in every case connected to a family, and a Court of Law has no hand in it as regards the preparation of a last will by the testator. The court enters into this area only on the death of a testator, and according to the provisions of the Civil Procedure Code regarding testamentary actions. In the case in hand a last will No. 1058 was filed of record and the Respondents filed objections and also informed court of execution of another will No. 361 by the testator. As such whatever the delays that occurred, perhaps caused by the parties themselves, court cannot disregard built in statutory provisions. A will is not proved until probate has been granted by a Court of Competent Jurisdiction.

Irrespective of the question of a delay, I state that if the court is satisfied that there are grounds to object to an application, court should frame issues as in Section 533 of the Code and proceed with the matter. The District Court cannot dismiss the action. In the manner issues are framed District Court need to answer same and ensure Justice is done. The questions of law are answered as follows:

(1) Yes

(2) Yes

(3) Yes

(4) Court has the discretion in awarding costs, but it is not an unfettered discretion.

In all the facts and circumstances of this case and more particularly non-compliance of procedural requirements irrespective of delays, I set aside the Judgment of the Court of Appeal dated 26.05.2011 and the Order of the learned District Judge dated 27.02.1998. Appeal allowed as prayed for in the petition dated 06.07.2011 of the Petitioner-Appellant-Appellant.

Appeal allowed without costs.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew

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 from the High Court of Civil Appeal, Chilaw.

Daya Jayaratne,(nee Agampodi Silva), No. 24, Vanderwert Place, Dehiwela.

S.C. Appeal 105/2013

Plaintiff

S.C.(HC) C.A.L.A. Application No. 478/2011
H.C. (Civil) Appeal No. NWP/ HCCA/KUR/149/2004(F) and NWP/HCCA/150/2004/F
D.C.Chilaw No. 25218/F

Vs

1.Singha Arachchige Ajith Thilaksiri
2.Weerasinghe Mudiyanselage Dayawathie
3.Kuranage Densil Anton Perera
4.Adhikari Mudiyanselage Seneviratne
5.Suduwa Dewage Ranjith Gunaratne
6. Wijesuriya Arachchilage Lionel
7. Suduwa Dewage Nimal Rathne
8.Asarappulige Lalith Mahinda
9.Dapanage Chandana Pradeep Appuhamy
10.Hewawasam Hakgalage

Karalinahamy

11.Ranepura Hewage Gunajeeva
12. Hikkaduge Sunil Fernando
13. Jayasuriya Arachchige Don Lakshman Jayantha
14. Jayasuriya Arachchige Don Asoka Jayasinghe
15. Sebastian Lawrence
16. N.Joseph Michael Royala
17. Doresamy Kandasamy
18. Suriya Arachchige Sampath Appuhamy
19. Mutthai Waduwei Sarawanamuttu
20. Jayasuriya Arachchige Pelician Perera
21. Suduwa Dewage Lushan Fernando
22. Muthugalage Sisira Sarath
23. Sebesthian Pulle Selwaniathi
24. Hewabattage Premadasa Ediriweera
25.Madurasinghage Don Grace Ethala
26. Chakrawarthige Lal Fernando
27. Deepal Aravinda Suduwa Dewage
28. Kanvedige Velupille
29. W. Magrat
30.Ranathunga Arachchi Rohan Ajith Kumara
31. Ranathunga Arachchi Shantha Jagath
32.Dissanayakage Karunaratne
33. Suduwa Dewage Wijeratne
34. Kandai Shantha Kumaran
35. Peter Neville Patrick
36. Maheepala Mudalige Somaweera Chandradasa
37. Udunuwara Kankanamage Upali Ranjith

38. Polwatte Wickramasinghalage Siriwardena

39. Sethunga Mudalige Berti Joseph Perera
40. Ramasamy Kumaraswamy Selvadorai
41. Amarasingha Arachchige Keerthirathne
42. Nishanka Arachchige Janaka Chaminda Lal
43. Mattusamy Kanagaratnum
44. Kurana Arachchi Stanly Rodrigo
45. Kuruppu Arachchige Mary Agnes Rodrigo
46. Allimuttu Jeganathan
47. Warnakulasuriya Jude Nilantha Fernando

All of Musafar Estate alias Ebert Silva Estate, Chilaw.

Defendants

AND

1. Singha Arachchige Ajith Thilaksiri
2. Weerasinghe Mudiyanselage Dayawathie
3. Kuranage Densil Anton Perera
4. Adhikari Mudiyanselage Seneviratne
5. Suduwa Dewage Ranjith Gunaratne
6. Wijesuriya Arachchilage Lionel
7. Suduwa Dewage Nimal Rathne
8. Asarappulige Lalith Mahinda
9. Dapanage Chandana Pradeep

Appuhamy

10.Hewawasam Hakgalage Karalinahamy

11.Ranepura Hewage Gunajeeva
12. Hikkaduge Sunil Fernando
13. Jayasuriya Arachchige Don Lakshman Jayantha
14. Jayasuriya Arachchige Don Asoka Jayasinghe
15. Sebastian Lawrence
16. N.Joseph Michael Royala
17. Doresamy Kandasamy
18. Suriya Arachchige Sampath Appuhamy
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20. Jayasuriya Arachchige Pelician Perera
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23. Sebesthian Pulle Selwaniathi
24. Hewabattage Premadasa Ediriweera
25.Madurasinghage Don Grace Ethala
26. Chakrawarthige Lal Fernando
27. Deepal Aravinda Suduwa Dewage
28. Kanvedige Velupille
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30.Ranathunga Arachchi Rohan Ajith Kumara
31. Ranathunga Arachchi Shantha Jagath
32.Dissanayakage Karunaratne
33. Suduwa Dewage Wijeratne
34. Kandai Shantha Kumaran
35. Peter Neville Patrick
36. Maheepala Mudalige Somaweera

Chandradasa

37. Udunuwara Kankanamage Upali Ranjith

38. Polwatte Wickramasinghalage Siriwardena

39. Sethunga Mudalige Berti Joseph Perera
40. Ramasamy Kumaraswamy Selvadorai
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46. Allimuttu Jeganathan
47. Warnakulasuriya Jude Nilantha Fernando

All of Musafar Estate alias Ebert Silva Estate, Chilaw.

Defendants Appellants

AND

Daya Jayaratne,(nee Agampodi Silva), No. 24, Vanderwert Place, Dehiwala.

Plaintiff Respondent Petitioner

Vs

1.Singha Arachchige Ajith Thilaksiri
2.Weerasinghe Mudiyanselage Dayawathie
3.Kuranage Densil Anton Perera
4.Adhikari Mudiyanselage Seneviratne
5.Suduwa Dewage Ranjith Gunaratne
6. Wijesuriya Arachchilage Lionel
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8.Asarappulige Lalith Mahinda
9.Dapanage Chandana Pradeep Appuhamy
10.Hewawasam Hakgalage Karalinahamy
11.Ranepura Hewage Gunajeeva
12. Hikkaduge Sunil Fernando
13. Jayasuriya Arachchige Don Lakshman Jayantha
14. Jayasuriya Arachchige Don Asoka Jayasinghe
15. Sebastian Lawrence
16. N.Joseph Michael Royala
17. Doresamy Kandasamy
18. Suriya Arachchige Sampath Appuhamy
19. Mutthai Waduwei Sarawanamuttu
20. Jayasuriya Arachchige Pelician Perera
21. Suduwa Dewage Lushan Fernando
22. Muthugalage Sisira Sarath
23. Sebesthian Pulle Selwaniathi
24. Hewabattage Premadasa Ediriweera
25.Madurasinghage Don Grace Ethala
26. Chakrawarthige Lal Fernando

27. Deepal Aravinda Suduwa Dewage
28. Kanvedige Velupille
29. W. Magrat
30. Ranathunga Arachchi Rohan Ajith Kumara
31. Ranathunga Arachchi Shantha Jagath
32. Dissanayakage Karunaratne
33. Suduwa Dewage Wijeratne
34. Kandai Shantha Kumaran
35. Peter Neville Patrick
36. Maheepala Mudalige Somaweera Chandradasa
37. Udunuwara Kankanamage Upali Ranjith
38. Polwatte Wickramasinghalage Siriwardena
39. Sethunga Mudalige Berti Joseph Perera
40. Ramasamy Kumaraswamy Selvadorai
41. Amarasingha Arachchige Keerthirathne
42. Nishanka Arachchige Janaka Chaminda Lal
43. Mattusamy Kanagaratnum
44. Kurana Arachchi Stanly Rodrigo
45. Kuruppu Arachchige Mary Agnes Rodrigo
46. Allimuttu Jeganathan
47. Warnakulasuriya Jude Nilantha Fernando

All of Musafar Estate alias
Ebert Silva Estate,
Chilaw.

Defendants Appellants Respondents

BEFORE: PRIYASATH DEP PCJ.
S. EVA WANASUNDERA PCJ.
B.P.ALUVIHARE PCJ.

COUNSEL: Kapila Liyanagama for Plaintiff Respondent Petitioner
M.U.M. Ali Sabry, PC. with Nuwan Bopage for 3rd to 21st Defendants Appellants Respondents

ARGUED ON : 30. 05. 2016.

DECIDED ON: 08. 08. 2016.

S. EVA WANASUNDERA PCJ.

On the 10th of July, 2013, this Court had granted Leave to Appeal in this matter on one question of law, which was raised by the Counsel for the Plaintiff Respondent Appellant. It reads as follows:-

1. Did the Civil Appellate High Court err in dismissing the original action merely on the ground of misjoining of the parties and causes of action, having decided all other matters in favour of the Plaintiff Respondent Appellant?

Thereafter Court allowed another question of law which was formulated as follows by the Counsel for the Defendant Appellant Respondent:-

2. In a situation where a Court is inclined to the view that there has been a misjoining of parties and / or causes of action, could it have made any order other than dismissal, for the purpose of properly adjudicating the matter in issue in the case between the relevant parties?

The facts of this Appeal can be summarized in this way. The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) instituted this action in the year 1999, in the District Court of Chilaw seeking inter alia a declaration of title and ejectment of the 47 defendants who were occupying the land. The land in question is of an extent of 6 Acres 2 Roods and 3 Perches which is Lot 5 of Plan No. 454 dated 6.9.1981 with a servitude over Lot 3 of the said Plan No. 454,

according to the Plaint dated 1st October, 1999. All the 47 Defendants were occupying different portions of this large land. The 3rd to 21st Defendant Appellant Respondents (hereinafter referred to as the Defendants) filed a joint answer seeking the dismissal of the Plaint. Some other defendants also had filed answers as well. The District Judge granted the reliefs prayed for in the Plaint and further **placed a condition** to the effect that the Defendants are entitled to purchase their respective areas of land on which they were living at the rate of Rs. 6500/- per perch of the land within three months from the date of the judgment. The failure to buy the land by the occupants would entitle the Plaintiff to eject them in compliance with the judgment.

Both the Plaintiff and the Defendants appealed to the Civil Appellate High Court of the North Western Province holden in Kurunegala on different grounds.The two Appeals were amalgamated and heard as one case before the High Court. The Plaintiff pleaded that **the condition** placed in the judgment of the District Judge giving an entitlement to purchase parts of the land was **not prayed for in the Plaint and such relief was not claimed for in the plaint.** The Defendants pleaded that the Plaintiff had **misjoined the parties and misjoined the causes of action** which was decided by the District Judge in **the negative**.

The High Court held **that the District Judge had erred in granting to the Defendants what was not prayed for by the Plaintiff.** Further, the High Court considered the main ground pleaded by the Defendants against the Judgment appealed as **'misjoinder of parties and causes of action'**. The Plaintiff had pleaded in the answer that the 47 Defendants **acted in concert in entering upon the land in question.** The District Judge had held there was **no misjoinder of parties or causes of action** considering as the reason, **the basis** that all the defendants had claimed one million rupees each as damages in their seperate answers as well as in their joint answers. Many occupiers of the land had given evidence stating the year and the month they first came into the land which varied from one person to another and claimed prescriptive title to the different areas of the land commencing from various different years. The Civil Appellate High Court held that even though it was pleaded by the Plaintiff that the Defendants had acted in concert in entering upon the land in question, **she had not proved the same**. Further more, the High Court held that the District Judge was wrong in having held that there was no misjoinder of parties and causes of action having acted on a wrong basis about all of them claiming the same

amount as damages. Therefore the High Court held again that the **District Court had erred**. On both grounds as aforementioned the **High Court set aside the judgment of the District Judge and dismissed the action filed by the Plaintiff on the ground that there is a misjoinder of parties and causes of action**.

The High Court allowed both Appeals on different grounds **and confirmed that the District Judge was wrong and set aside the judgment of the District Court** as well as dismissed the Plaint. The Plaintiff is before this Court on the ground of dismissal of the Plaint.

I observe that the two questions of law revolves around "misjoinder of parties and causes of action". The Plaintiff Respondent Appellant argues that on the simple ground of misjoinder of parties and causes of action, no action instituted in the District Court can be dismissed. The Defendant Appellant Respondent argues that when the parties and causes are misjoined , no court can adjudicate on the matters in issue before court properly and in such an instance, there is no other order that can be granted but dismissal of the action.

I observe that Sections 14, 17, 18,22 and 36 of the Civil Procedure Code deal with joining of parties and causes of action with regard to cases filed in the District Court. I would like to reproduce them for clarification:

Sec. 14:
All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Sec. 17:
No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

If the consent of anyone who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint.

Sec.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.

(2) Every order for such amendment or for alteration of parties shall state the facts and reasons which together form the ground on which the order is made. And in the case of a party being added, the added party or parties shall be named with the designation " added party " in all pleadings or processes or papers entitled in the action and made after the date of the order.

Sec. 36:

(1) Subject to the rules contained in the last section, the plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants may unite such causes of action in the same action.

But if it appears to the court that any such causes of action cannot be conveniently tried or disposed of together, the court may, at any time before the hearing, of its own motion or on the application of any defendant, in both cases either in the presence of, or upon notice to, the plaintiff, or at any subsequent stage of the action if the parties agree, order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

(2) When causes of action are united, the jurisdiction of the court as regards the action shall depend on the amount or value of the aggregate subject matters at

the date of instituting the action, whether or not an order has been made under the second paragraph of subsection (1).

I find that the Plaintiff in this action claim a declaration of title to, and the ejectment of the Defendants. She alleges in paragraph 11 of the Plaint that all the 47 Defendants have built temporary buildings and are living on the land as tresspassers. **In paragraph 12, the Plaintiff alleges that they are acting in concert** contesting her title while they are possessing the land.

When an action is filed before the trial court , the Judge who sits in judgment has to get the issues raised and hear the evidence before deciding on each issue. For any matter to be decided the Judge has to make up his mind as to what the problem is, and which parties are affected by what reason. In other words the Judge has to identify the proper parties clearly and also identify the proper causes of action which he has to decide upon. I opine that no judge can just hear the case for the sake of hearing what is before him because it is the judge who is responsible for his judgment. When the problem is with regard to land, the extent of the land on which the alleged trespassers are occupying and why they are occupying in the manner which they are doing so has to be determined. In the case in hand, according to the evidence of the occupiers, it is clear that they had come into the land with different opinions, such as it is some abandoned state land and believing that they will some day get concessions from the state. Most of them did not know each other at all and whereabout each other were living on the land and which year or when they had entered the land. They were not friends. They had not done **anything together** with regard to building on the land, fencing the plots they are occupying or cultivating on the land etc. Each person had come and landed there **on their own**. Nobody had been acting in concert. The Plaintiff had totally disregarded what she herself had pleaded in her plaint in paragraph 12, that the occupiers had acted in concert in entering upon her land which is the subject matter of this case.

In fact this big land had been rather abandoned for quite some time without any owner coming into the site or looking after the interests. The Plaint explains in the

first 10 paragraphs, how the larger land of 50 Acres 2 Roods and 30 Perches which is morefully described in the first Schedule to the Plaint was the subject matter of a Testamentary case No. 16127/T before the year 1960. It is only in 1981 that the Plan No. 454 was drawn and an amicable Partition deed was written amongst all the parties who inherited from Agampodi Nomis de Silva at the end of the said testamentary case. It is only on 21.12.1994 that the Plaintiff got her rights by deed No. 67 attested by C.S.M.L. Perera, Notary Public, from one of the parties to the Partition Deed by way of a deed of gift . However, even though the District Judge had decided that the Defendants had prescribed to the land on their assertion while giving evidence, the High Court had over ruled the decision of the District Judge and opined that the Defendants have failed to establish their claim based on title by prescription.

It is an argument of the Plaintiff that while holding with the Plaintiff when the High Court Judges ruled out prescriptive title of the Defendants then there is no reason for the High Court Judges to dismiss the Plaint. It is observed by me that the High Court Judges has taken up every point and reached their decision.

The High Court held that the Defendants have failed to establish prescriptive title to the land. I find that the evidence does not point to that end because some of the Defendants had given evidence to the effect that they commenced their occupation in 1985 and 1987. On a balance of probability, when considering the evidence of the Plaintiff, the correct position is that some of them have prescribed and some of them have not. If there were separate actions against those who had built permanent buildings etc. it would have been not so difficult whether they had prescribed to the land or not. If court was enlightened on the extent of the portions of land the occupiers were holding onto, it would have been different. I opine that the High Court was wrong to have held that the occupiers had failed to establish prescriptive title.

The High Court had next analysed the other point and reached the decision that the Plaintiff had misjoined the parties and causes of action and dismissed the action for different reasons. The Plaintiff had given evidence to the effect that she did not know whether some of the parties to the action were on the land in 1985, 1987 etc. and also that she did not know how many more parties are on the land other than the 47 Defendants who are parties to this action.She did not know how many of the buildings were temporary and how many buildings were

permanent. The 13th Defendant, the 41st Defendant and the 33rd Defendant had given evidence to the effect that they came into the land in 1986, 1985 and 1987. I observe that some of the Defendants had proven prescriptive title over ten years but some have not but it is to my surprise that the Plaintiff's evidence was not good enough to prove her possession of the land at any time before 1994. She **specifically had given evidence that she came to find out about the land only after she got title in 1994**. I therefore conclude that the Plaintiff has different reasons to plead for ejectment of some of the Defendants who had been there for a short period and others who had been there for longer periods as against her paper title which she got in 1994. It would have been different if she proved her predecessor's possession to different parts of the land which were occupied by different Defendants.

The Counsel for the Plaintiff has quoted the following cases in favour of the stance taken by the Plaintiff that " no action should be dismissed for the reason that there is a misjoinder of parties or causes of action ".

1. Dingiri Appuhamy Vs Talakolawewe Pangananda Thero , 67 NLR 89.
2. Ameer Vs Kulatunga 1996, 2 SLR 398.
3. Adlin Fernando and Another Vs Lionel Fernando and Others 1995, 2 SLR 25.
4. Uragoda Vs Jayasinghe and Others 2004, 1 SLR 398.
5. J. M. Wimalasoma Vs E.D.Alapatha 45 CLW 67.

The Counsel for the Defendants has quoted the following cases in favour of the stance taken by the Defendants that " the failure of the Plaintiff to establish that the Defendants were acting in concert was fundamental to be proven, if the Defendants were to be joined in one action for one cause of action "

1. Lowe Vs Fernando 16 NLR 398.
2. J.M.Wimalasoma Vs E.D.Alapatha 45 CLW 67.
3. Uragoda Vs Jayasinghe and Others 2004 1 SLR 108.
4. Adlin Fernando and Another Vs Lionel Fernando and Others 1995, 2 SLR 25.

In the case of **Ameer Vs Kulatunga (supra),** it was a case of one Plaintiff who sued his tenant who occupied four premises at one and the same time. By mistake due to a typographical error, the Sinhala Plaint did not contain premises No. 71. It was

decided that there was no misjoinder of 'causes of action' and under Sec. 36 of the Civil Procedure Code, in one action, several different causes of action could be united against one Defendant by the Plaintiff. It is in this context that Court had held that court cannot dismiss an action merely on the ground of misjoinder of causes of action.

Justice G.P.S. de Silva referred to **Dingiri Appuhamy Vs Pagnananda Thero** (supra) in the aforementioned case. In this case, the Plaintiffs who were dayakayas of a Vihare, sued for a declaration that the 1st Defendant, who was a bhikku resident in the temple, was guilty of 'parajika' and had therefore , forfeited his right to be a bhikku. They also prayed for an order directing the 2nd Defendant, who had jurisdiction over the temple in his capacity as Mahanayaka Thero, to take the necessary measures if the 1st Defendant was declared to have forfeited his right to be a member of the Sangha. Justice Abeysundere in this judgment stated that, "I set aside the judgment and decree of the learned District Judge, **and I dismiss the action in so far as it is against the 2nd Defendant on the ground that there is a misjoinder of causes of action.** I direct the District Court of Kurunegala to give the Plaintiffs an opportunity to amend their plaint so that the action may be against the 1st Defendant only. " I observe that the Supreme Court in that case firstly decided that there was misjoinder and dismissing the same granted the Plaintiff to amend the Plaint.

In the case of ***Adlin Fernando and Another Vs Lionel Fernando and Others 1995, 2 SLR 25,*** the Plaintiff Petitioners instituted action against the Respondents jointly and severally for a declaration that several deeds of gift are null and void or, in the alternative, sought revocation of same and damages. The Petitioners, the donors alleged that the 1st Respondent acting jointly with the 2nd and 3rd Respondents obtained their signatures by deceit. **The Defendants raised the objection of misjoinder of parties and causes of action, which was upheld by Court.**

It is important to note that in this case, it was also held that "The provisions of the Civil Procedure Code relating to the **joinder of causes of action and parties are rules of procedure and not substantive law. Courts should adopt a common sense approach in deciding questions of misjoinder or non joinder."**

I quite agree with the said suggestion in Adlin Fernando case that courts should adopt a **common sense approach** in deciding questions of misjoinder.

In the case **of *Uragoda Vs Jayasinghe* (supra**), one Plaintiff who was supposed to have had tubercolosis according to the Doctor named Uragoda who acted in accordance with the report given by the Glass House and its workers filed action against Dr. Uragoda and the Glass House workers for negligence and damages. The Defendants pleaded misjoinder of Defendants and misjoinder of causes of action. In the context of this background, it was held that there was no misjoinder. It is important to note what Justice De Silva said about misjoinder of parties and causes of action. He said " It is abundantly clear from the above (meaning the wording in Sec. 14 of the CPC) that where a Plaintiff insists on proceeding with a trial on causes of action or defendants wrongly joined, Court has the discretion to give judgment in favour of one or more of the plaintiffs as may be entitled to the relief claimed on the evidence led at the trial under the provisions of Sec. 11 of the Code or give judgment against one or more defendants, as may be found to be liable according to their respective liabilities under Sec. 14. In other words it is the duty of court to deal with the matter in controversy so far **as regards the rights and interest of the parties actually before it ".**

In the case of ***J.M.Wimalasoma Vs E.D.Alapatha 45 CLW67***, the Plaintiff in one action sued two sets of defendants for a declaration of title to five lots of land possessed by the defendants separately. In his plaint he alleged that the defendants were acting in concert to deprive him of the entire land comprised of five lots, but was unable to substantiate it in his evidence. The issue of misjoinder of defendants and causes of action was raised at the commencement of the trial, but the learned District Judge at the conclusion of the trial on all the issues ruled against the defendants on the issue of misjoinder and also failed to discuss this point. The defendants appealed at at the conclusion of the argument in appeal, Counsel for the Plaintiff Respondent requested that the Plaintiff be allowed to amend his pleadings and restrict his claim against one set of defendants. Court held:

(1) That **the failure** of the Plaintiff to establish that **the defendants were acting in concert , was fundamental** to the recognition of his right to proceed

against all the defendants in the same proceedings, and as such, **there was a misjoinder of defendants and causes of action.**

(2) That the **discretion of the Court must be judicially exercised , after consideration of all relevant circumstances**, such as the conduct of the parties, and the belatedness of the application, and therefore, the application of the plaintiff to amend his pleadings should not be allowed.

Gratien J. in this judgment referred to the case of ***Lowe Vs Fernando1915, 16 NLR 389.*** In this case, it was held per Wood Renton J and Pereira J that where a plaintiff claimed the entirety of a block of land on one title and complained that the defendants were severally in possession of separate and defined portions of it, it would be misjoinder of defendants and causes of action to institute one action against all the defendants for the recovery of the whole block, **unless it could be shown that the defendants were acting in concert in depriving the plaintiff of the possession of the entire block.**

I observe that in the case in hand, the Plaintiff has pleaded in the Plaint that " the Defendants have **acted in concert** in occupying the land ". That is the reason for the Plaintiff to have filed one action against all the 47 Defendants together but the Plaintiff has **totally failed to establish that position** through oral evidence or otherwise. In that event, how could the Court 'deal with the matter in controversy so far as regards the rights and interest of the parties actually before it?'. It is my opinion that the trial judge should be placed in a position where he could give judgment in favour of the Plaintiff or in favour of any Defendant as may be found to be liable according to their respective liabilities. When each Defendant is an individual trying to place before court his position as against the Plaintiff in this case in hand and when the Plaintiff has failed to prove that all these 47 Defendants have acted in concert in having occupied the land, how can the trial judge deal with the matters in controversy amongst all the parties together? How can the Judge disect the case on his own when the Plaintiff has failed to prove that the Defendants have acted in concert? If the Plaintiff proved that all the Defendants got together and entered the land **acting in concert as pleaded by the Plaintiff ,** then the judge can decide **on the rights of the group of Defendants as against the Plaintiff**. Otherwise it is a task next to impossible to be handled by the judge even though there is provision in the Civil Procedure Code for a judge to order separate trials of any different causes of action on his own or at the instance of parties , if the parties agree to do so. In this case there had

been no application for such orders by any party at any stage of the hearing and the judge had not acted on his own. It is common sense to understand that the District Judge could not have suggested his method of amending the plaint and proceeding with several actions or dropping some defendants and proceeding against the others or any such solutions since the number of defendants are big in number and the specifics relating to the occupation of each defendant were not placed before court for the court to act judicially concerning the rights of parties connected to this matter.

In the circumstances, I hold that the High Court had decided correctly when it held that the Plaint should be dismissed on the ground of misjoinder of parties and causes of action because the Court could not have made any other order as the matters in issue between the relevant parties could not be legally adjudicated in any proper manner due to that reason. I answer the questions of law in favour of the Defendants Appellants Respondents and against the Plaintiff Respondent Appellant.

This Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

Justice Priyasath Dep
I agree

Judge of the Supreme Court

Justice B.P.Aluvihare
I agree

Judge of the Supreme Court

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Jayapathma Herath Mudiyanselage
Herath Banda
In front of Kotawehera Police Station,
Kotawehera

4thDefendant-Appellant-Appellant

S.C.Appeal No.108/2014
SC/HC/CALA No.201/13
HCCA APPEAL
NO.P/KUR/146/2007[F]
D.C.MAHO CASE NO.5098/P

Vs

Herath Mudiyanselage Menuhami
Andarakatuwa, Mahakirinda, Mahagiriulla

Plaintiff-Respondent-Respondent

1. Jayapathma Herath Mudiyanselage Dingiri Menika, Halambe, Monnakulama
1A. RasnayakeMudiyanselageKapuru Bandara Rasnayake,
No.279/4, Meda Ela Para,
Nikaweratiya
2. KulatungaRanasingheHerath MudiyanselageHerathBandage Somawathie
3. Herath Mudiyanselage Herathhamige Dingiri Amma, Diganna Watta, Digannewa
4. Jayapathma Herath Mudiyanselage Tikiri Banda, Mole Kade, Ihala Agarauda, Monnekulama
5. Jayapathma Herath Mudiyanselage Bandaranayake,
In front of Kotawehera Police Station,
Kotawehera

Defendant-Respondent-Respondents

BEFORE	**:**	**S.E.WANASUNDERA, PC, J.** **PRIYANTHA JAYAWARDANE, PC, J.** **K.T.CHITRASIRI, J.**
COUNSEL	**:**	Amrith Rajapaksha for the 4th Defendant-Appellant-Appellant D.M.G.Dissanayake with L.M.C.D.Bandara for the Plaintiff- Respondent- Respondent and for the 1st & the 3rd Defendant-Respondent-Respondent
ARGUED ON	**:**	**16.05.2016**
WRITTEN	**:**	10.12.2015 by the 4th Defendant-Appellant-Appellant
SUBMISSIONS ON	**:**	20.05.2016 by the Plaintiff-Respondent-Respondent along with 1A Defendant-Respondent-Respondent and the 3rd Defendant-Respondent-Respondent
DECIDED ON	**:**	**26.07.2016**

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 04.04.2013 of the High Court of the North Western Province exercising its Civil Appellate Jurisdiction and also to have the judgment dated 29.10.2007 of the District Court of Maho set aside. In addition, 4th Defendant-Appellant-Appellant [hereinafter referred to as the 4th defendant] has sought for a dismissal of the action filed by the plaintiff-respondent-respondent. [hereinafter referred to as the plaintiff]

When this matter was taken up in this Court on 03.07.2014, it made order granting leave to proceed on the following questions of law.

(a) Have their Lordships of the Civil Appellate High Court failed to

adopt legal principles and procedural guidelines governing the investigation of title in a partition action?

(b) Have their Lordships of the Civil Appellate High Court failed to consider that the petitioner has sufficiently established prescriptive rights to Lot 1 in plan No.3316 dated 7.7.2004.

Briefly, the facts of this case are as follows. Plaintiff filed the action bearing No.5098/P in the District Court of Maho seeking to have a partition decree for the land called Karuwalagahamulayaya which is morefully described in the schedule to the plaint dated 15.11.1999. Only the 1A, 4th defendant and the added 6th defendant filed their respective statements of claim. The claim of the 4th defendant was over lot No.1 in plan No.3153 marked P2. It is the same lot that is being shown as lot No.1 in plan No.3316 [P3] as well. Learned District Judge having referred to the plans produced in evidence finally decided that the land sought to be partitioned comprises of lots 1, 2 and 3 of the plan bearing No.3316 dated 7.7.2000 which is marked as P3 in evidence. The said decision as to the corpus has not been challenged in this appeal.

Thereafter, learned District Judge having considered the evidence, made order to partition the land allotting 1/6th share to the plaintiff and another 1/6th share to the 3rd defendant. 1st defendant was given 2/6 share while the 2nd defendant was allotted the balance 2/6th share of the land. 4th defendant was not given any right over the land. Then the 4th defendant filed an appeal in the Civil Appellate High Court

canvassing the aforesaid decision of the trial Judge. Learned Judges in the High Court dismissed the appeal having affirmed the decision of the learned District Judge.

The claim of the 4th defendant that was pursued in the District Court was to lot No.1 in plan 3316. The said claim by the 4th defendant was on the basis of prescription to the said lot No.1 in that plan 3316. The aforesaid claim of the 4th defendant had been on a pedigree, different to the pedigree filed by the other parties. In his statement of claim, he has stated that neither the plaintiff nor the 1st defendant is entitled to the land subjected to in this case.

When the matter was taken up for hearing in this Court on 16.05.2016, learned Counsel for the 4th defendant-appellant submitted that he is not pursuing the prescriptive claim though it was one of the claims advanced during the trial in the District Court. He further submitted that the sole contention of the plaintiff is to move for a dismissal of the action filed in the District Court on the ground of the failure of the plaintiff to establish his pedigree.

Accordingly, it is not necessary to consider the 2nd question of law framed at the time of granting leave by this Court which is referred to hereinbefore in this judgment. Therefore, the remaining question is only to ascertain whether or not the learned District Judge has discharged the

duty cast upon him to investigate title of the parties to the action which is referred to in Section 25 (1) of the Partition Law No.21 of 1977 (as amended). The said Section 25 reads thus:

> *"on the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right share or interest of each party to, of, or in the land to which action relates, and shall consider and decide which of the orders mentioned in section 26 should be made."*

In a recent judgment delivered in the case of **Sarath Godampola and others Vs. W.K.Peter Fernando,** [S.C. Appeal No.98/07 Supreme Court minutes dated 10.06.2016] I have referred to many decisions that supports the above position of the law referred to in Section 25(1) of the Partition Law. Hence, I do not wish to repeat the same by which judgment the manner in which Section 25(1) of the Partition Law had been interpreted. The decisions referred to in that judgment include the following:

- **Peiris Vs. Perera 1 NLR 362**
- **Silva Vs. Paulu 4 NLR 177**
- **Golagoda Vs. Mohideen 40 NLR 92**
- **Juliana Hamine Vs. Don Thomas 55 NLR 546**
- **Cooray Vs. Wijesuriya 62 NLR 158**
- **Cynthia De Alwis Vs. Marjorie D'Alwis and Two others 1997(3) SLR 113**
- **Piyaseeli Vs. Mendis and Others 2003(3) SLR 273**
- **Faleel Vs. Argeen and others 2004 (1) SLR 48**

- **Somasiri Vs. Faleela and others 2005 (2) SLR 121**
- **Karunarathna Banda Vs. Dassanayake 2006 (2) SLR 87**
- **Sopinona Vs. Cornelis and others 2010 BLR 109**

In the circumstances, I shall now consider whether the learned District Judge has investigated the title of the parties to this action as referred to in Section 25(1) of the Partition Law when he allotted the shares in his judgment dated 29.10.2007. Learned Counsel for the appellant, at the outset submitted that he is not disputing the original ownership of the land which is mentioned in paragraph 3 of the plaint dated 15.11.1999. Therefore, it is admitted by all the parties that the original owner of the land sought to be partitioned was Herath Mudiyanselage Appuhamige Gamarala.

Having admitted the original ownership of the land, 4th defendant in his statement of claim has stated that the aforesaid Gamarala sold his entitlement to one Harold David Neil Auwardt. However, it is important to note that the 4th defendant has failed to produce the aforesaid deed by which Neil Auwardt alleged to have become the owner of the land claimed by the 4th defendant. Without producing the said deed by which Harold David Neil Auwardt became the owner, 4th defendant has produced the deed bearing No.1087 marked P4 by which Harold David Neil Auwardt had sold the land to Jayamaha Mudalige Don George Stephen Appuhamy. Argument of the 4th defendant was that the plaintiff and the first two defendants have no right or title to the land sought to be partitioned in

view of the execution of the said deed 1087 by which 4th defendant's predecessor became entitled to the land in question.

Plaintiff has not accepted the position that Gamarala sold his rights to Harold David Neil Auwardt. His position was that the original owner Gamarala died leaving three children. Accordingly, the plaintiff contented that the devolution of title of this land should take place through those 3 children of Gamarala.

Argument advanced by the learned Counsel for the 4th defendant-appellant was that the plaintiff has not established that there were three children to the original owner Gamarala and therefore the plaintiff has failed to prove his chain of title. Accordingly, the 4th defendant has stated that the plaintiff cannot rely on rights and entitlements of those 3 children shown in the pedigree of the plaintiff. Reason to advance such a contention was that there was no documentary evidence, produced in Court to prove that there were three children to the original owner Gamarala.

When looking at the impugned judgment, it is seen that all the issues as to the pedigrees put forward by the plaintiff and the 4th defendant had been dealt with carefully by the learned District Judge. His findings on that are as follows:

“මෙම බෙදුමට යටත් මෙම ඉඩම 4 විත්තිකරු කියා සිටින පරිදි නීල් අවුට්ට හෝ ස්ටිවන් අප්පුහාමිට හිමිව තිබී ඇති බව ඔප්පු නොවන අතර ගමරාලගේ හිමිකම පසුව දරුවනට ලැබී ඇති බව පිලිගැනීමට ඇති හැකියාව වැඩිය. ගමරාලගේ දරුවන් පිය උරුමයට මුදියන්සේ, උක්කුහාමි, ඩිංගරීමැනිකාට ලැබුන බව පැමිණිලිකරු කියා සිටී. 4 විත්තිකරු මෙය පිලිගෙන නැති අතර, ඔහුගේ සාක්ෂියෙන් හිතාමතාම පෙර උරුමකරුවන් සහ මවගේ සහෝදර සහෝදරියන් මවගේ මව සම්බන්ධව තොරතුරු වසන් කර ඇති බව පැහැදිලිය. එබැවින් ගමරාලගේ දරුවන් ලෙස මුදියන්සේ, උක්කුහාමි සහ ඩිංගිරීමැණිකා බවට උප්පැන්න සහතික ඉදිරිපත් කර නැතත්, පිලිගැනීමට ඇති හැකියාව වැඩිය. **මේනුහාමි මෙන්ම 1 වන විත්තිකාරිය වෙනුවෙන් රත්නායකද කියා සිටියේ ගමරාලගේ දරුවන් ඔවුන් බවයි. රත්නායක කියා සිටියේ ඩිංගිරිමැනිකා තමාගේ මව බවයි. ඇය මියගොස් බවත්, තමාට සහෝදරියින් 07 ක් සිටින බවත් කියා ඇත. හේරත් බන්ඩා ඔහුගේම අක්කාගේ පුතා බවද මොහු කියා ඇත. 6 විත්තිකරුගේ සාක්ෂියෙන් ගමරාලගේ අයිතිය පිලිගෙන සෝමාවති තමාගේ මව බවත්, ඇයට ඉඩම කිරීබන්ඩා පවරා ඇති අතර, ඔහුට මුදියන්සේ ලබාදී ඇති බවත්, පසුව සෝමාවතීට ලැබී තමාට එය විකුණූ බවයි.** ‘6වි1’ 1946 ලියා ඇති ඔප්පුවක් වන අතර, ගමරාලගේ පිය උරුමය මත තමාට ලැබුන නොබෙදූ 1/3 කිරීබන්ඩාට විකුණා පසුව 6වි2 (31863) මගින් 1978/5/7 වන දින සෝමාවතීට විකුණා ඇත. එබැවින් බෙදුමට යටත් ඉඩමෙන් නොබෙදූ 1/3 ක් සෝමාවතීට ලැබී ඇති බව පෙනේ.”

[emphasis added]

The above consideration by the learned District Judge shows that he was very much mindful of the pedigrees advanced by the respective parties. 4th defendant himself has stated that her mother Tikiri Menike is a sister of the 1A defendant. 1A defendant was substituted in place of the 1st defendant and that was also admitted by the 4th defendant in his evidence. Moreover, 4th defendant has admitted that Dingiri Menika is the correct name of the 1st defendant who is one of the children of Gamarala. (vide at pages 99 and 100 in the appeal brief).

Such evidence supports the fact that there were children to Gamarala. Accordingly, even though no documentary evidence had been produced to establish the heirs of Gamarala (original owner) there were enough evidence to prove that there had been three children to Gamarala. In the circumstances, I do not see any error when the learned District Judge came to the conclusion that there were 3 children to Gamarala despite the fact that there was no documentary evidence to establish the same. Therefore, it is clear that the learned District Judge had carefully considered the entirety of the evidence as to the devolution of title of the parties to the land sought to be partitioned as required under Section 25(1) of the Partition Law. His findings are neither irrational nor perverse.

At this stage, it is also necessary to mention that the appellate courts are always slow to interfere with the findings made by the original courts unless it is irrational or perverse when it comes to questions of facts. The question of law upon which the leave was granted and pursed in this case

relates only to the facts of the case. In the case of **Alwis vs Piyasena Fernando [1993 (1) S.L.R.at page 119] G.P.S. De Silva C J** held thus:

> *"it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings in this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the Court of Appeal could have reversed the findings of the trial Judge."*

Long line of authorities could be seen to support this position of the law. A few of those are;

Frad vs. Brown & Co [28 N.L.R. 282] Mahavithana vs. Commissioner of Inland Revenue [64 N.L.R.217] De Silva vs. Seneviratne [1981 (2) S.L.R. 8]

For the reasons set out above, I am not inclined to interfere with the judgment of the learned District Judge and the judgment of the learned Judges of the Civil Appellate High Court.

Accordingly, this appeal is dismissed. No costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC, J.

I agree

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDANE, PC, J.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 111/09

SC/ HCCA/LA/ 1/2009

NCP/HCCA/ARP/66/07

DC Polonnaruwa/5555/L

D. K.Peiris Wijerathna,

R.D. 06, Alapara,

Kumburu Niwasa, Kawdulla.

Plaintiff

Vs.

A. Bandara Menike,

Gabada Handiya,

Kawdulla.

Defendant

AND

A. Bandara Menike,

Gabada Handiya,

Kawdulla.

Defendant Appellant

Vs.

D. K.Peiris Wijerathna,

R.D. 06, Alapara,

Kumburu Niwasa, Kawdulla.

Plaintiff Respondent

AND NOW BETWEEN

D. K.Peiris Wijerathna,

R.D. 06, Alapara,

Kumburu Niwasa, Kawdulla.

Plaintiff Respondent Appellant

Vs.

A. Bandara Menike,

Gabada Handiya,

Kawdulla.

Defendant Appellant Respondent

BEFORE	:	CHANDRA EKANAYAKE, J. B. ALUWIHARE, PC, J. UPALY ABEYRATHNE, J.
COUNSEL	:	Rohan Sahabandu PC with Hasitha Amarasinghe for the Plaintiff Respondent Appellant Ms. Sudarshani Cooray for the Defendant Appellant Respondent
WRITTEN SUBMISSION ON:		13.11.2009 (Plaintiff Respondent Appellant)

25.11.2009 (Defendant Appellant Respondent)

ARGUED ON : 29.01.2016

DECIDED ON : 29.03.2016

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of North Central Province holden at Anuradapura dated 27.11.2008. By the said judgment the Civil Appellate High Court has set aside the judgment of the learned District Judge of Polonnaruwa dated 17.01.2002 and allowed the appeal of the Defendant Appellant Respondent (hereinafter referred to as the Respondent) and dismissed the action filed by the Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) without costs. The Appellant sought leave to appeal from the said judgment of the Civil Appellate High Court and this Court granted leave to appeal on the questions of law set out in paragraph 20 (a) (b) (c) and (d) of the Petition dated 06.01.2009. Said questions of law are as follows;

(a) Has the Plaintiff identified the land in dispute to obtain a decree of declaration of title?

(b) Was there a dispute between parties with regard to the identification of the corpus?

(c) Could the High Court in the circumstances hold that the corpus has not been identified when both parties were agreed on the corpus?

(d) In the circumstances pleaded is the judgment of the High Court correct and according to law?

It is apparent from the said questions of law that the dispute between the parties revolves around the identification of the corpus. The Appellant has sought a declaration of title to the land in dispute upon a land permit issued under the Land Development Ordinance. The Respondent has taken up the position that the Appellant is not the permit holder of the land in dispute.

The Appellant has produced the said land permit at the trial marked P1. The Respondent contended that alleged land permit P 1 is not a valid land permit issued in terms of Section 19(2) of the Land Development Ordinance. It is pertinent to note that although the Respondent challenged the title of the Appellant she has not claimed any title to the land in dispute. She has claimed only the right of *jus retentionis* in the event the case is decided in favour of the Appellant subject to the payment of compensation as prayed for in the answer.

The Civil Appellate High Court has come to the conclusion that although P 1 is a valid land permit issued in terms of the Land Development Ordinance, the Appellant has failed to identify that the land described in P 1 is the land in dispute which is described in the schedule to the plaint. The submission of the learned counsel for the Appellant is that said finding of the High Court is perverse.

I now deal with the said submission. According to the schedule to the amended plaint dated 26th May 1993, the Appellant has sought a declaration of title to an allotment of land bearing No C38 depicted in plan prepared by Surveyor General, situated at Kawdulla in 124 Weheragala Grama Niladari Division of Sinhala Pattu in Medirigiriya Divisional Revenue Officer's Division in the District of Polonnaruwa, bounded on the North by Haye Ela, on the East by paddy land of

Dowita Appuhamy on the South by paddy land bearing No 37 on the west by Kunu Ela and containing in extent 05 acres and 16 perches.

In order to prove his title to the aforesaid allotment of land, the Appellant has produced a land permit said to be issued in terms of Section 19(2) of the Land Development Ordinance. In the said permit the land has been described as "an allotment of land bearing No C38 depicted in plan prepared by Surveyor General, situated at Kawdulla in 124 Weheragala Grama Niladari Division of Sinhala Pattu in Medirigiriya Divisional Revenue Officer's Division in the District of Polonnaruwa". It is surprising to note that four boundaries of the said allotment of land have not been described in the said land permit P 1. It is clear from the side note at the margin of the said land permit P 1 where boundaries of the land have to be mentioned that the boundaries of the land would be entered therein if the land is surveyed only. This clearly shows that if the land described in the permit has not been surveyed, then boundaries of such land would not appear in such permit like in the present permit P 1. In such instances a holder of such permit would not be in a position to identify the land granted under such permit by reference to physical metes and bounds.

On the other hand although the said permit P 1 describes "an allotment of land bearing No C38 depicted in plan prepared by Surveyor General", it does not refer to the number and the date of the Surveyor General's plan. In the absence of such descriptions which are necessarily required in identifying the land described in P 1, need not to say that the identity of the allotment of land described in P 1 is also in the dark.

In the above context it is clear that the Appellant is not in a position to identify the allotment of land bearing No C38 depicted in plan prepared by

Surveyor General, situated at Kawdulla in 124 Weheragala Grama Niladari Division of Sinhala Pattu in Medirigiriya Divisional Revenue Officer's Division in the District of Polonnaruwa" since the land permit P 1 does not refer to the number and the date of the Surveyor General's plan and also in P 1, the land is not described by reference to physical metes and bounds.

It is well settled law that a plaintiff should clearly identify the land and prove his title to the land in an action for declaration of title. In the circumstance I am of the view that the Appellant has failed to identify the land described in the schedule to the plaint. Hence I uphold the said judgment of the High Court of Civil Appeal and answer the said questions of law in favour of the Respondent. Accordingly the appeal of the Appellant is dismissed with costs.

Appeal dismissed.

Judge of the Supreme Court

CHANDRA EKANAYAKE, J.

I agree.

Judge of the Supreme Court

B. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for Special Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

S.C Appeal No.111/2010
S.C.(Spl)L.A.No.101/2010
C.A. Writ Application No. 624/2007

DR. DARSHANA WICKRAMASINGHE
"Lions Paradise"
Wewala, Hikkaduwa.

PETITIONER

VS.

01. UNIVERSITY OF RUHUNA
02. PROF. SUSIRITH MENDIS
Vice Chancellor
03. PROF. GAMINI SENANAYAKE
Deputy Vice Chancellor
04. PROF. S.W. AMARASINGHE
Dean-Humanities & Social Sciences
05. PROF.MRS. R.T. SERASINGHE
Dean-Agriculture
06. PROF.P.L. ARIYANANDA
Dean-Medicine
07. PROF.R.N. PATHIRANA
Dean-Science
08. PROF.P.R.T. CUMARANATUNGE
Dean-Fisheries and Marine Sciences and Technology
09. MRS.H.S.C. PERERA
Dean-Management and Finance

10. **DR. A.M.N. ALAGIYAWANNA**
    Dean-Engineering
11. **PROF.T.R. WEERASOORIYA**
12. **PROF.W.D.G. DHARMARATHNE**
13. **REV. WALIPITIYE RATNASIRI**
14. **MR. M.A. THASIM**
15. **MR. SUNIL JAYARATHNE**
16. **MR. RASIK SAROOK**
17. **MR.C. MALIYADDA**
18. **MR. KULATUNGE RAJAPAKSE**
19. **MR.CHULA DE SILVA**
20. **MR. RAJA HEWABOWALA**
21. **MR.H.G.S.JAYASEKERA**
22. **MR. D.W. PRATHAPASINGHE**
23. **MR.W.K.K. KUMARASIRI**
24. **MR. THILAK JAYARATHNE**
25. **MR.O.V.L.P. ANURA**
    Assistant Internal Auditor

    All of the University of Ruhuna
26. **MR.GODAHEWA**
    Inquiry Officer,
    "Prasad", Talpawila,
    Kakanadura.
27. **PROF.(MRS) MIRANI WEERASOORIYA**
    Faculty of Medicine,
    Karapitiya,
    Galle.

RESPONDENTS

AND NOW BETWEEN

01. UNIVERSITY OF RUHUNA
02. PROF. SUSIRITH MENDIS
Vice Chancellor
03. PROF. GAMINI SENANAYAKE
Deputy Vice Chancellor
10. DR. A.M.N. ALAGIYAWANNA
Dean-Engineering
12. PROF.W.D.G. DHARMARATHNE
15. MR. SUNIL JAYARATHNE
21. MR.H.G.S.JAYASEKERA
25. MR.O.V.L.P. ANURA
Assistant Internal Auditor

All of the University of Ruhuna
27. PROF.(MRS) MIRANI WEERASOORIYA
Faculty of Medicine,
Karapitiya,
Galle.

RESPONDENTS-PETITIONERS

1. PROF.R.M. RANAWEERA BANDA
2. PROF.MANGALA SOYZA
3. PROF.T.R.WEERASOORIYA
4. DR.P.A.JAYANTHA
5. .DR.TILAK P.D.GAMAGE
6. M.W. INDRANI
7. PROF.R.N.PATHIRANA
8. REV. MALIMBODA GNANALOKA THERO

9. **KAPUGAMA SARANTHISSA THERO**
10. **K.A.J.ABEYGUNAWARDENE**
11. **BUDDHAPRIYA NIGAMUNI**
12. **H.G.GUNASOMA**
13. **CHANDRASIRI HEWAKANDAMBI**
14. **M.G. PUNCHIHEWA**

(All of University of Ruhuna)

ADDED-PETITIONERS

VS.

DR.DARSHANA WICKRAMASINGHE
"Lion's Paradise",
Wewala,
Hikkaduwa

PETITIONER-RESPONDENT

4. **PROF. S.W.AMARASINGHE**
   Dean-Humanities & Social Sciences
5. **PROF.MRS.R.T. SERASINGHE**
   Dean-Agriculture
6. **PROF.P.L. ARIYANANDA**
   Dean-Medicine
7. **PROF.R.N. PATHIRANA**
   Dean-Science
8. **PROF.P.R.T. CUMARANATUNGE**
   Dean- Fisheries and Marine Sciences and Technology
9. **MRS.H.S.C.PERERA**
   Dean-Management and Finance

11. PROF.T.R.WEERASOORIYA
13. REV.WALIPITIYE RATNASIRI
14. MR.M.A.THASIM
16. MR.RASIK SAROOK
17. MR.C. MALIYADDA
18. MR.KULATUNGE RAJAPAKSE
19. MR. CHULA DE SILVA
20. MR.RAJA HEWABOWALA
22. MR.D.W. PRATHAPASINGHE
23. MR.W.K.K.KUMARASIRI
24. MR.THILAK JAYARATHNE

All of the University of Ruhuna
26. MR. GODAHEWA
Inquiry Officer,
"Prasad", Talpawila,
Kakanadura.

RESPONDENTS-RESPONDENTS

BEFORE: Sisira J. De Abrew,J.
K.T. Chitrasiri, J.
Prasanna Jayawardena, PC, J.

COUNSEL: Shaheeda Mohamed Barrie, Senior State Counsel, for the Respondent-Appellant
K.G. Jinasena for the Petitioner-Respondent.
D.K. Dhanapala for the 17th and 19th Respondents-Respondents.

ARGUED ON: 13th July 2016

WRITTEN SUBMISSIONS TENDERED ON: By the Petitioner-Respondent on 23rd August 2016
By the Respondent- Appellant on 25th October 2016

DECIDED ON: 09th December 2016

Prasanna Jayawardena, PC. J

The Petitioner-Respondent was a Lecturer (Probationary) of the Faculty of Medicine of the University of Ruhuna. His services were terminated by the University with effect from 15th May 2007.

The Petitioner-Respondent then made an Application to the Court of Appeal praying for Writs of Certiorari quashing the Charge Sheet issued to him by the University and the decision of the Council of the University to terminate his services. The Petition filed by the Petitioner-Respondent in the Court of Appeal named the University of Ruhuna as the 1st Respondent and the Vice Chancellor as the 2nd Respondent. A total of 27 Respondents were named in the Petition. The 1st and 2nd Respondents, the 26th Respondent and the 27th Respondent in the Court of Appeal, filed their Statements of Objections.

On 05th May 2010, the Court of Appeal delivered its Judgment, issuing the Writs of Certiorari sought by the Petitioner-Respondent.

The University of Ruhuna and several of the other Respondents made an application to this Court seeking Special Leave to Appeal from the Judgment of the Court of Appeal. This Court granted Special Leave to Appeal on several Questions of Law, which will be referred to later on in this Judgment.

When this Appeal was argued before us, we heard learned Senior State Counsel appearing for the 1st Respondent-Appellant [University of Ruhuna] and the other Respondents-Appellants, learned Counsel appearing for the Petitioner-Respondent and learned Counsel appearing for the 17th and 19th Respondents-Respondents. The Respondents-Appellants and the Petitioner-Respondent have also filed their written submissions after the Appeal was argued.

I will first set out the facts which are relevant.

The Petitioner-Respondent is an alumnus of the University of Ruhuna, having obtained his MBBS Degree from that University in 2000. He interned at the General Hospital, Kalutara and completed his internship in 2002. On 01st April 2002, he was appointed to the post of Lecturer (Probationary) of the University of Ruhuna, which was his *alma mater*.

The Letter of Appointment issued by the University of Ruhuna to the Petitioner-Respondent was marked as **"P4"** with his Petition to the Court of Appeal. **"P4"** is signed by the Vice Chancellor of the University and expressly states that, the appointment is made by the Council of the University of Ruhuna. It is also relevant to note that, "**P4"** specifies that, the appointment is made by the Council *"in terms of the powers vested in it by Section 71 (1) of the Universities Act No. 16 of 1978, as amended by Act No. 7 of 1985 and Act No. 1 of 1995.*

Next, it should be mentioned that, **"P4"** goes on to state that, the Petitioner-Respondent's appointment was subject to a period of probation of three years – *ie:* up to 31st March 2005 – unless the appointment was confirmed earlier than that. Further, **"P4"** specifies that, the University had the right to terminate the Petitioner-Respondent's services at any time prior to that without the University having to assign any reason for doing so.

The Petitioner-Respondent was attached to the Department of Parasitology of the Faculty of Medicine of the University. The 27th Respondent-Appellant, who was the Professor of Parasitology, was the Head of the Department. The Petitioner-Respondent worked under the directions of the 27th Respondent-Appellant.
At that time, the Department of Parasitology was engaged in several projects to research the incidence of Filariasis in the Southern Province. These projects were funded by research grants received from the Government and local and foreign donors. The 27th Respondent-Appellant headed the team of researchers engaged in these projects. The Petitioner-Respondent was one of the members of the team.

The day to day work on the research projects required that, members of the research team had to obtain cash advances from the Bursar of the University, from time to time, to meet expenses incurred in carrying out research work, especially field work. Naturally, the monies obtained on such cash advances had to be promptly accounted for by the submission of bills to establish the legitimate expenses on which the monies were spent and, further, any unused monies had to be returned without delay.

While working as a Lecturer (Probationary), the Petitioner-Respondent registered as a Ph.D. student at the University of Ruhuna and also sought to obtain a Diploma in Microbiology from the Post Graduate Institute of Medicine.

In September 2004, the Petitioner-Respondent was awarded a Presidential Scholarship to follow a Master's Degree/Doctoral Degree at a foreign university. The Petitioner-Respondent claims that, soon thereafter, the cordial relationship which existed between the 27th Respondent-Appellant and him, *"disappeared"*. He also claims that, the 27th Respondent-Appellant *"insisted"* that he travels to Japan on 13th October 2004 to follow a six week training programme despite his request that he be permitted to stay in Sri Lanka with his family since his wife was pregnant and the baby was due in December.

The Petitioner-Respondent claims that, *"As soon as"* he left Sri Lanka to attend the training programme in Japan, the 27th Respondent-Appellant had ordered that a cupboard in which the Petitioner-Respondent stored documents, be opened. Shortly thereafter, on 19th October 2004, the 27th Respondent-Appellant had made a written complaint to the then Dean of the Faculty of Medicine stating that, she had *"detected some financial misappropriations in the bills submitted by Dr.D.Wickremasinghe, Lecturer Department of Parasitology. I hereby request you to get the Internal Audit, University of Ruhuna to investigate this matter and to take necessary action"*. This complaint is filed with the 1st and 2nd Respondents' Statement of Objections in the Court of Appeal marked **"2R1"**.

Acting upon the 27th Respondent-Appellant's complaint and at the request of the then Dean of the Faculty of Medicine, the then Vice Chancellor of the University directed the Assistant Internal Auditor of the University [the 25th Respondent-Appellant] to carry out an audit investigation of two of the research projects. The Report dated 10th March 2005 of the Assistant Internal Auditor was marked **"P10"** with the Petition. The entire Report with its Annexures has been filed with the 1st and 2nd Respondents' Statement of Objections marked **"2R2"**.

A perusal of this Report shows that, the first research project had a team of five researchers headed by the 27th Respondent-Appellant. The Petitioner-Respondent was a member of that team. The Report states that, the applicable regulations had not been followed when cash advances were taken and that two cash advances (of Rs.50,000/- and Rs.25,000/-) had not been accounted for/repaid despite a period of three-four months having lapsed. The Report also stated that, some bills submitted when accounting for cash advances had been fraudulently altered. The Report states that, a fraud had taken place.[වංචාවක් සිදුවී ඇති බව නිරීක්ෂණය කරමි.] Further, the Report states that, an unnecessarily large sum of money had been spent on the hire of vehicles for research work; that, applicable regulations had not been followed when vehicles were hired; and that some Claim Forms had been altered in a manner which made it impossible to determine the amounts of the payments made to the hirers.

Next, the Report states that, the second research project was carried out by only the Petitioner-Respondent under the supervision of the 27th Respondent-Appellant. The Report states that, here too, applicable regulations had not been followed when cash advances had been taken and one cash advance (of Rs.10,000/-) had not been accounted for/repaid despite a period of five months having lapsed. The Report also stated that, there were discrepancies and fraudulent alterations in some of the bills submitted when accounting for cash advances and, further, that several bills submitted with regard to laboratory expenses, had been fraudulently altered. The Report states that, a fraud had taken place.[වංචාවක් සිදුවී ඇති බව නිරීක්ෂණය කරමි.] The Report also states that, irregularities similar to those which had occurred in the first research project, had taken place with regard to the hiring of vehicles for this second research project too.

The Report concludes that, there had been misconduct amounting to *"negligence"* and "*lack of integrity"* (as defined in Section 2:2:3 and Section 2:2:4 of Chapter XXII of the Universities Establishment Code) on the part of *"the relevant officers"* engaged in the two research projects. The Report recommended that, disciplinary action be taken against *"the relevant officers"*. [The full title of the "Universities Establishment Code" referred to in the Report is the "Establishments Code of the University Grants Commission and the Higher Educational Institutions". It will be referred to in this Judgment as the "Universities Establishments Code"].

It is to be noted that, the Report of the Assistant Internal Auditor does **not** identify the *"the relevant officers"* who committed the acts of misconduct and does **not** identify the *"the relevant officers"* against whom disciplinary action should be taken for 'negligence' and 'lack of integrity'.

After the aforesaid Report of the Assistant Internal Auditor was submitted, there was a meeting of the Council of the University which took place on 18th April 2005. The relevant extract of the minutes of this meeting was marked **"P11"** with the Petition and as **"2R3"** with the 1st and 2nd Respondents' Statement of Objections.

The extract reveals that, the then Vice Chancellor [*not* the 2nd Respondent-Appellant who later assumed the office] advised the Council that, the Assistant Internal Auditor had reported that **the Petitioner-Respondent had committed a fraud**. Thereafter, the Vice Chancellor had recommended that, disciplinary action be taken against the Petitioner-Respondent. [උපකුලපති කරුණු දක්වමින් වෛද්‍ය පීඨයේ පර්යේෂණ ව්‍යාපෘතියක නිරත වෛද්‍ය දර්ශන වික්‍රමසිංහ මහතා මුදල් වංචාවක් සම්බන්ධයෙන් අභ්‍යන්තර විගණක අංශය විසින් වාර්තා කර ඇති බවත් ඒ අනුව විනයානුකූලව කටයුතු කිරීමට සිදුව ඇති බවත් පැවසීය].

However, as observed earlier, the Report marked **"P10"** of the Assistant Internal Auditor did *not* state that the Petitioner-Respondent was guilty of a fraud. The Report only made findings with regard to *"the relevant officers"* engaged in the two research projects. It would be useful to reiterate that, the Petitioner-Respondent was one of a team of five engaged in the first research project, which was headed by the 27th Respondent-Appellant. Although the second research project was carried out only by the Petitioner-Respondent, it was supervised by the 27th Respondent-Appellant. Thus, the Assistant Internal Auditor's Report did *not* single out or identify the Petitioner-Respondent as the miscreant.

In these circumstances, I regret to state that, the then Vice Chancellor's statement made to the Council, was factually incorrect.

The extract of the minutes goes on to record that, the Council discussed the issue and decided that, it should act in terms of the Report of the Assistant Internal Auditor and commence disciplinary proceedings against the Petitioner-Respondent by issuing a Charge Sheet to him. [මේ සම්බන්ධයෙන් සාකච්ඡා කළ පාලක සභාව අභ්‍යන්තර විගණක පරීක්ෂණ වාර්තාවේ නිරීක්ෂණ අනුව විධිමත් විනය පරීක්ෂණයක් පැවැත්වීමට විශ්වවිද්‍යාල ආයතන සංග්‍රහයේ රෙගුලාසි අනුව විධිමත් චෝදනා පත්‍රයක් නිකුත් කිරීමට පාලක සභාව අනුමැතිය දෙන ලදී].

However, the extract of the minutes marked **"P11"/"2R3"** does not record that, the Report of the Assistant Internal Auditor was placed before the Council prior to the Council taking the aforesaid decision that a Charge Sheet should be issued to the Petitioner-Respondent.

In paragraph [32] of his Petition, the Petitioner-Respondent has averred that, the Assistant Internal Auditor's Report marked **"P10"** was not placed before the Council. Although the 1st and 2nd Respondents-Appellants have denied the averments in that paragraph, they have not stated that, the Report was placed before the Council. I would think that, *if* the Assistant Internal Auditor's Report had been placed before the Council, that fact would have been specifically recorded in the minutes. At the very least, the 1st and 2nd Respondents-Appellants would have expressly averred that fact, in their Statement of Objections.

In these circumstances, it can be reasonably concluded that, the Report marked **"P10"** of the Assistant Internal Auditor was *not* placed before the Council and was *not* considered by the Council before it took a decision to commence disciplinary proceedings against the Petitioner-Respondent and issue a Charge Sheet to him.

This leads to the inescapable conclusion that, at the meeting held on 18th April 2005, the Council took its aforesaid decision solely upon the aforesaid factually incorrect statement made to the Council by the then Vice Chancellor. Thus, the Council's decision to commence disciplinary proceedings against the Petitioner-Respondent and issue a Charge Sheet to him, was taken based upon a false and mistaken premise.

At this point, it will be also relevant to highlight that, Section 8:1 read with Section 8:2 of Chapter XXII of the Universities Establishments Code makes it clear that, a decision to issue a Charge Sheet to an employee could be validly taken *"If the preliminary investigation discloses a prima facie case against the suspect person….. "*. This makes it essential that, the Council should have, properly and reasonably, arrived at an objective finding that a *prima facie* case against the Petitioner-Respondent had been disclosed. Section 8:2 makes it clear that, a Charge Sheet could be properly issued only if that requirement was first satisfied.

However, in the present case, the Assistant Internal Auditor's Report marked **"P10"** [which must be taken as the report of the preliminary investigation] did *not* identify that the Petitioner-Respondent was the specific person who committed the acts of misconduct. Instead, the Report marked **"P10"** only places culpability at the door of *"the relevant officers"* and makes *no* specific finding against the Petitioner-Respondent.

In these circumstances, it appears to me that, a *prima facie* case had *not* been made out against the Petitioner-Respondent when the Council decided, on 18th April 2005, to issue a Charge Sheet to him. It will follow that, under and in terms of the requirements of Section 8:2 of Chapter XXII of the Universities Establishments Code, there was *no* valid ground upon which the Council could have properly decided to issue a Charge Sheet to the Petitioner-Respondent. As mentioned earlier, the Council took this decision based upon a false and mistaken premise.

For the aforesaid reasons, I am of the view that, the decision taken by the Council, on 18th April 2005, to issue a Charge Sheet to the Petitioner-Respondent, was ultra vires.

In any event, a Charge Sheet dated 18th August 2005 was later *issued* to the Petitioner-Respondent. It has been filed with the Petition marked **"P13"**. This Charge Sheet is signed by the then Vice Chancellor. It sets out six Charges made against the Petitioner-Respondent, which relate to the alleged alteration of bills, discrepancies in bills and discrepancies in claims for payment of expenses.

In the first paragraph of the Charge Sheet, the then Vice Chancellor has stated that, the Petitioner-Respondent is required to show cause as to why disciplinary action should not be taken and the Petitioner-Respondent be punished in terms of Section 4:1:2 of Chapter XXII of the Universities Establishment Code on account of the Petitioner-Respondent being guilty of the Charges set out in the Charge Sheet. The then Vice Chancellor goes on to state that, he issues the Charge Sheet upon directions given to him by the Council of the University under and in terms of Section 8.2 of Chapter XXII of the Universities Establishment Code.

In paragraphs [49] and [50] of his Petition to the Court of Appeal, the Petitioner-Respondent submits that the aforementioned first paragraph of the Charge Sheet marked **"P13"** makes it clear that, the proposed Charge Sheet was *not* considered and approved by the Council before it was issued by the then Vice Chancellor. In paragraphs [18] and [19] of their Statement of Objections in the Court of Appeal, the 1st and 2nd Respondents-Appellants have replied with a general denial of these averments. Thereafter, the Respondents-Appellants, somewhat ambiguously, state that, *"….. all the decisions were made by the Council as is clear from the Council meetings."* But, the 1st and 2nd Respondents-Appellants have *not* averred that, in fact, the proposed Charge Sheet was placed before the Council and was considered and approved by the Council *before* it was issued by the then Vice Chancellor.

More significantly, in the usual course of procedure, it was only at a meeting of the Council, that the Council could have had the opportunity of considering and approving a proposed Charge Sheet *before* it was issued. However, the Respondents-Appellants do *not* claim that, such a meeting took place. The significance of the Respondents-Appellants' silence is telling. Particularly so, in the light of their statement that, all decisions taken by the Council are clear from the proceedings of the *meetings* of the Council. *If*, in fact, the Council had, at a meeting, considered and approved the proposed Charge Sheet before it was issued by the then Vice Chancellor, the 1st and 2nd Respondents-Appellants would have, no doubt, established that by producing an extract of the minutes of the meeting where that happened. But, they have been unable to do so.

In these circumstances, it can be reasonably concluded that, the Council did *not* consider or approve the Charge Sheet marked **"P13"** *before* it was issued by the then Vice Chancellor.

When he received the Charge Sheet, the Petitioner-Respondent denied that he was guilty of the Charges of Misconduct. This was done by his letter dated 17th November

2005 addressed to the then Vice Chancellor, which is filed with the Petition marked **"P14"**.

The letter marked **"P14"** was tabled at the meeting of the Council held on 21st November 2005. The extract of the minutes of this meeting, which has been filed with the Petition marked **"P17"** [and with the 1st and 2nd Respondents-Appellant's ' Statement of Objections marked **"2R7"**] reveals that, the Council considered the Petitioner-Respondent's reply marked **"P14"** and approved the holding of a disciplinary inquiry against the Petitioner-Respondent and appointed the 26th Respondent-Respondent as the Inquiring Officer. The 26th Respondent-Respondent was an Inquiring Officer authorised by the Ministry of Public Administration and Home Affairs to conduct disciplinary inquiries of this nature. [වෛද්‍ය පීඨයේ පර්යේෂණ ව්‍යාපෘතියක අක්‍රමිකතාවයන්: මෙයට අදාළව චෝදනා පත්‍රයට පිළිතුරු ලැබී ඇති බවත්, එම පිළිතුරු පාලක සභාව සලකා බැලීමෙන් පසු මේ සඳහා විධිමත් විනය පරීක්ෂණයක් පැවැත්වීමට පාලක සභාවට අනුමැතිය දෙන ලදී. ඒ අනුව රාජ්‍ය පරිපාලන චක්‍රලේඛය අනුව එම්. ගොඩහේවා මහතා පත් කිරීමට ද පාලක සභාව අනුමැතිය දෙන ලදී.]

The extract of the minutes of the meeting held on 21st November 2005 marked **"P17"** does not state that, the Charge Sheet marked **"P13"** [which had been issued by then] was placed before the Council at that meeting either. A perusal of the 1st and 2nd Respondents-Appellants' Statement of Objections, shows that, they do not claim that, the Charge Sheet was placed before the Council at this meeting and considered by the Council, before the Council decided to hold a disciplinary inquiry against the Respondent-Petitioner.

In these circumstances, it can be also reasonably concluded that, the Council did *not* consider the Charge Sheet marked **"P13"** before it decided, at its meeting held on 21st November 2005, to hold a disciplinary inquiry against the Respondent-Petitioner.

The disciplinary inquiry commenced on 12th December 2005 and ended on 22nd November 2006 with 20 dates of inquiry. The 26th Respondent-Respondent was the Inquiring Officer. The University was represented by a prosecuting officer of its choice. The Petitioner-Respondent was represented by a defending officer of his choice. The Assistant Internal Auditor, the 27th Respondent-Appellant, another member of the research team on the first research project and the Respondent-Petitioner gave evidence. 63 documents were produced in evidence. At the conclusion of the inquiry, the parties tendered their written submissions. These facts are evident from the Report dated 10th May 2007 of the Inquiring Officer, which has been filed with the Statement of Objections marked **"2R8"**. The Inquiring Officer's Report is addressed to the then Vice Chancellor.

A perusal of this Report marked **"2R8"** shows that, the Inquiring Officer had considered the evidence placed before him and the submissions made to him. Having done so, the

Inquiring Officer has concluded that, the six Charges against the Petitioner-Respondent had *not* been proved.

In addition to this determination, the Inquiring Officer has commented that, there had been a cordial teacher-student relationship between the 27th Respondent-Appellant and the Petitioner-Respondent [ගුරුගෝල සම්බන්ධතාවයක්] but that, this relationship had soured. The Inquiring Officer has commented that, since then, the 27th Respondent-Appellant and the Petitioner-Respondent had been hostile towards each other.

Four days after the Inquiring Officer's Report marked **"2R8"** was submitted, it was considered by the Council at its meeting held on 14th May 2007. An extract of the minutes of the meeting relating to the Council's discussions and decision with regard to the Report and the disciplinary action to be taken against the Petitioner-Respondent, has been filed with the Petition marked **"P23A"** and with the Statement of Objections marked **"2R9"**. The extract is lengthy and need not be reproduced in this Judgment.

The salient facts to be related with regard to the Council's discussions and decision, as reflected in this extract of the minutes, are:

(i) The Vice Chancellor placed, before the Council, the Inquiring Officer's Report and the entire record of the disciplinary inquiry, including the proceedings which set out the evidence, the documents which were produced and the written submissions;

(ii) The Council had a lengthy discussion with regard to the Inquiring Officer's Report;

(iii) After having considered the Inquiring Officer's Report and the evidence, the Council rejected the Inquiring Officer's determination that, the first, second, fifth and sixth Charges against the Petitioner-Respondent had not been proved;

(iv) The Council decided that, the evidence led at the disciplinary inquiry was adequate to prove the first, second, fifth and sixth Charges against the Petitioner-Respondent;

(v) The Council decided to act in terms of Section 12.1 of Chapter XXII of the Universities Establishment Code and revise the Inquiring Officer's Report and determine that, the Petitioner-Respondent was guilty of the misconduct set out in the first, second, fifth and sixth Charges [ඉහත කී කරුණු සැලකිල්ලට ගත් පාලක සභාව විශ්වවිද්‍යාලීය ආයතන සංග්‍රහයේ xxii වන පරිච්ඡේදයේ 12.1 උපවගන්තියට අනුව චූදිතට එරෙහිව ඇති චෝදනාවන් කිහිපයක් ඔප්පු කිරීමට ප්‍රමාණවත් සාක්ෂි ඉදිරිපත් වී ඇති හෙයින් පරීක්ෂණ වාර්තාව ප්‍රතිශෝධනය කිරීමට තීරණය කරන ලදී. ඒ අනුව චෝදනා අංක 1,2,5,හා 6 චෝදනා ඔප්පු වී ඇති බවට පාලක සභාව නිගමනය කරන ලදී];

(vi) The Council decided that, since the Petitioner-Respondent was subject to a period of probation, the aforesaid misconduct on his part merited the termination of his services, in terms of Section 4:1:2 of Chapter XXII of the Universities Establishment Code;

(vii) The Council decided to the terminate the services of the Petitioner-Respondent with effect from 15th May 2005;

(viii) The Council noted that, Ministry of Public Administration and Home Affairs prepares the list of authorised Inquiring Officers and decided to advise the Secretary of the Ministry that, the Inquiring Officer had conducted the Disciplinary Inquiry in a biased manner.

In pursuance of the aforesaid decisions, the Vice Chancellor [the 2nd Respondent-Appellant who had succeeded to that office] issued a letter dated 15th May 2015 terminating the services of the Petitioner-Respondent. This letter has been filed with the Petition marked **"P23"**.

As mentioned above, the Council purported to act in terms of the power conferred upon it by Section 12.1 of Chapter XXII of the Universities Establishments Code when the Council decided to revise the Inquiring Officer's Report and hold that, the first, second, fifth and sixth Charges against the Petitioner-Respondent had been proved.

However, Section 12:1 and 12:2 of Chapter XXII of the Universities Establishments Code state:

"12:1 The Disciplinary Authority is free to accept or reject or revise any or all of the findings of the Tribunal/Inquiry Officer.

12:2 If the Disciplinary Authority requires further clarification on any point, he may refer the matter back to the Tribunal/Inquiry Officer. Or for further inquiry as necessary. If circumstances justify, the Disciplinary Authority may quash any inquiry proceedings and order a fresh inquiry." .

Section 12:1 certainly empowered the Council to decide to "*reject"* the Inquiring Officer's determination that, the first, second, fifth and sixth Charges against the Petitioner-Respondent had not been proved, provided the Council had reasonable grounds to reach that conclusion.

However, I do not think that, the authority given to the Council by Section 12:1 to *"revise"* the determination of the Inquiring Officer can be reasonably or properly taken as empowering the Council to reject the Inquiring Officer's determination and then immediately proceed to substitute its own and entirely different determination in place of the Inquiring Officer's determination.

It is clear to me that, when the Council decided to reject the Inquiring Officer's determination, the Council was required to act in terms of Section 12:2 and refer the matter back to the Inquiring Officer for *"further inquiry"* or *"quash"* the Report marked **"2R8"** of the Inquiring Officer and order a *"fresh inquiry"*.

Accordingly, I am of the view that, the aforesaid decisions taken by the Council, at its meeting on 14th May 2007, to determine that, the Petitioner-Respondent was guilty of the misconduct set out in the first, second, fifth and sixth Charges; and to, therefore, terminate his employment; were manifestly unreasonable, ultra vires and are bad in Law.

There is another aspect of the events which requires to be mentioned. This is:

(a) As set out above, the Petitioner-Respondent had been awarded a Presidential Scholarship to follow a Masters' Degree/Doctoral Degree at a foreign university.

However, more than two months prior to the Assistant Internal Auditor finalizing his Report marked **"P10"**, the then Dean of the Faculty of Medicine, [who is the 2nd Respondent-Appellant in this Appeal], had written a letter dated 04th January 2005 to the Additional Secretary to Her Excellency, the President stating that, the Petitioner-Respondent "*…. is under investigation by the University of Ruhuna for serious misappropriation of funds….*and requesting that, the scholarship be withheld until a final decision can be taken after *"the completion of the formal disciplinary inquiry*".

This letter, which has been filed with the Petition marked **"P9"** reveals that, long before the Assistant Internal Auditor had submitted his Report, the 2nd Respondent-Appellant had decided that, a formal disciplinary inquiry should be held against the Petitioner-Respondent. This raises the inference that, the 2nd Respondent-Appellant had `pre-judged' that the Petitioner-Respondent was guilty of misappropriation of funds or, at the very least, that there was *prima facie* case to such effect.

Subsequently, the 2nd Respondent-Appellant participated as a member of the Council, at the meeting held on 21st November 2005, when the Council decided to hold a disciplinary inquiry against the Petitioner-Respondent.

The 2nd Respondent-Appellant was later appointed Vice Chancellor and he presided over the Council, at the meeting held on 14th May 2007, when the Council decided to reject the Report of the Inquiring Officer, hold the Petitioner-Respondent guilty of four Charges and terminate his services.

I am of the view that, in the aforesaid circumstances, the 2nd Respondent-Appellant should not have participated as a member of the Council, at the

meeting held on 21st November 2005. In particular, the 2nd Respondent-Appellant should not have presided over the Council, at the meeting held on 14th May 2007. The Council and the 2nd Respondent-Appellant should have observed the golden rule set out in Lord Hewart's dictum in R vs. SUSSEX JUSTICES [1924 1KB 256 at p.259] that, *"Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice"*;

(b) Next, long before the Council decided to hold a disciplinary inquiry against the Petitioner-Respondent, the 27th Respondent-Appellant, in her capacity as the Head of the Department of Parasitology, had written two letters dated 04th August 2005 and 07th September 2005 to the Post Graduate Institute of Medicine stating that, she was unable to recommend the Petitioner-Respondent to register to obtain a Post Graduate Diploma in Medical Microbiology. The 27th Respondent-Appellant has gone on to state, with regard to the Petitioner-Respondent, *"Very soon he will face a formal inquiry by the university"* and that, the 27th Respondent-Appellant *"…. is unable to give a good certificate or recommend a fraudulent Probationary Lecturer of this caliber ….."*. These two letters have been filed with the Petition marked **"P12"** and **"P15"**.

These letters marked **"P12"** and **"P15"** reveal that, the 27th Respondent-Appellant had known that a disciplinary inquiry would be held against the Petitioner-Respondent long before the Council had decided to do so. The letters also reveal that, even before a disciplinary inquiry reached a finding on whether or not the Charges against the Petitioner-Respondent had been established, the 27th Respondent-Appellant did not hesitate to state to the Post Graduate Institute of Medicine that, the Petitioner-Respondent was a fraudulent man of low caliber.

The 27th Respondent-Appellant wrote another letter dated 09th May 2007 to the Vice Chancellor [the 2nd Respondent-Appellant]. This letter is part of the document marked **"27R12"** filed with her with the Statement of Objections in the Court of Appeal. In this letter, the 27th Respondent-Appellant makes several complaints against the Petitioner-Respondent. She goes on to state that, *"I was not at all satisfied about the conduct of the Inquiry Officer who appeared to be biased towards the accused and obstructive towards me"* and *"At this juncture I wish to document that I am inclined to have no faith in the inquiry and the final report to be submitted"*.

The 27th Respondent-Appellant has despatched copies of this letter to all the members of the Council. This letter has sent just a few days before the Council was scheduled to meet on 14th May 2007.

The 27th Respondent-Appellant was a senior academic holding professorial rank who undoubtedly wielded considerable influence in the

University of Ruhuna. Further, the 27th Respondent-Appellant's husband, who is the 11th Respondent-Respondent, was also a professor at the same University and was a member of the Council of the University.

In these circumstances, it is not unreasonable to suspect that, the 27th Respondent-Appellant's unfavourable perception of the Petitioner-Respondent is likely to have influenced the manner in which the Council dealt with him. Further, it is very probable that, the 27th Respondent-Appellant's aforesaid letter dated 09th May 2007 was in the minds of the members of the Council when they decided, on 14th May 2007, to reject the Report of the Inquiring Officer, hold the Petitioner-Respondent guilty of four Charges and terminate his services.

(c) A perusal of the minutes of the meeting of the Council held on 14th May 2007 shows that, the 11th Respondent-Respondent [the 27th Respondent-Appellant's husband] recused himself from participating at that meeting when the issue of the Petitioner-Respondent was discussed. Thereby, the 11th Respondent-Respondent himself has recognised fact that, he should not participate in discussions of the Council regarding disciplinary action being taken against the Petitioner-Respondent.

However, prior to that, the 11th Respondent-Respondent did participate in the meetings of the Council held on 18th April 2005 and 21st November 2005 at which the Council decided to issue a Charge Sheet to the Petitioner-Respondent and to hold a Disciplinary Inquiry against him.

It can be reasonably concluded that, the circumstances set out in (a), (b) and (c) above, when taken together, are sufficient to raise a suspicion that, there was real likelihood of bias in the manner in which disciplinary action was taken by the Council against the Petitioner-Respondent.
In this connection, it is apt to cite Fernando J in DISSANAYAKE vs. KALEEL [1993 2 SLR 135 at p.204] who stated that, a likelihood of bias would be held to exist, *"….. if there are circumstances which in the opinion of the court would lead a reasonable man to think it likely or probable that the adjudicator would or did favour one side unfairly".*

In his Petition to the Court of Appeal, the Petitioner-Respondent urged that, he was entitled to the aforesaid Writs of Certiorari on, *inter alia*, the following grounds:

(a) That, since he was a "teacher" employed by the University as defined in Section 147 of the Universities Act No. 16 of 1978, his `Disciplinary Authority' was the Council of the University, as specified by Section 45 (2) (xii) of the same Act.

The Petitioner-Respondent contended that, therefore, the Council was mandatorily required to have first considered and approved the Charge Sheet *before* it was issued. He submits that, the Council could not lawfully

delegate the power of issuing the Charge Sheet to the Vice Chancellor. He submitted that, however, the Council had not considered and approved the Charge Sheet *before* it was issued and that, this omission rendered the Charge Sheet marked **"P13"** null and void;

(b) That, the Council had misinterpreted evidence and failed to consider relevant evidence, before taking its decision to terminate the employment of the Petitioner-Respondent and that this decision of the Council was unreasonable, arbitrary and illegal;

(c) That, the 2nd Respondent-Appellant and the 27th Respondent-Appellant were biased against the Petitioner-Respondent and that they unduly influenced the Council against the Petitioner-Respondent and that, in these circumstances, the decision of the Council was biased;

(d) That, the fact that, the 11th Respondent-Appellant [who was the husband of the 27th Respondent-Appellant] participated in the meetings of the Council held on 18th April 2005 and 21st November 2005, violated the Rule of Natural Justice enunciated in the maxim *"Nemo judex in sua causa"*;

In their Statement of Objections in the Court of Appeal, the 1st and 2nd Respondents-Appellants urged, *inter alia*: that, since the Petitioner-Respondent was on probation at the time his employment was terminated, he is not entitled to any reliefs; that, *"it was the decision of the Council as a whole, to issue a charge sheet to the Petitioner based on the Audit Report"* and *"all the decisions were made by the Council as is clear from the Council meetings"* and *"at the 231st Council meeting the Council approved the decision to issue charges"*; that, the 11th Respondent-Respondent did not *"get involved in"* the decisions taken by the Council to issue a Charge Sheet to the Petitioner-Respondent and to hold a disciplinary inquiry against him; and that, the Council had considered and discussed the Inquiring Officer's Report and the evidence and was entitled to act in terms of Section 12.1 of Chapter XXII of the Universities Establishment Code and revise the Inquiring Officer's determinations and find the Petitioner-Respondent guilty of the first, second, fifth and sixth Charges.

In a lengthy Statement of Objections in the Court of Appeal, the 27th Respondent-Appellant takes up positions on the same lines as those urged by the 1st and 2nd Respondents-Appellants. She also states that, the Inquiring Officer was hostile to her and was partial towards the Petitioner-Respondent. The 27th Respondent-Appellant makes several allegations against the professionalism and competence of the Petitioner-Respondent. She highlights her own contribution to the research projects conducted by the Department of Parasitology, her many academic achievements and her high academic status and renown. She states that, she duly reported the irregularities she detected which indicated financial misappropriations by the Petitioner-Respondent. She stated that, she had a duty to write the letters marked **"P12"** and **"P15"**.

In his Statement of Objections in the Court of Appeal, the 26th Respondent-Respondent [Inquiring Officer] states that he properly analyzed the evidence placed before him at the disciplinary inquiry and correctly determined that, the Charges against the Petitioner-Respondent had not been proved.

In the Court of Appeal, Sri Skandarajah J held that, the failure of the Council of the University to consider or approve the Charge Sheet marked **"P13"** before it was issued by the then Vice Chancellor, resulted in the Charge Sheet having been issued without proper authority and *ultra vires*. In arriving at this determination, the learned Judge followed the decision of this Court in JINASENA vs. UNIVERSITY OF COLOMBO [2005 3 SLR 9] and held that, the Council was the `disciplinary authority' in terms of the Universities Act No. 16 of 1978 and that, the Council has not delegated its disciplinary authority to the Vice Chancellor.

On that basis, His Lordship held that, all proceedings and decisions arrived at on the basis of the Charge Sheet marked **"P13"** were a nullity. Accordingly, the Court of Appeal issued the Writs of Certiorari prayed for by the Petitioner-Respondent quashing the Charge Sheet, the decision to terminate the services of the Petitioner-Respondent and the letter of termination.

In view of the aforesaid determination, Sri Skandarajah J did not proceed to consider the other grounds urged by the Petitioner-Respondent.

This Court has given the Respondents-Appellants Leave to Appeal on the following nine Questions of Law:

(i) Has the Court of Appeal erred in law by misapplying the dicta of the Supreme Court in JINASENA vs. UNIVERSITY OF COLOMBO in holding that the Charge Sheet must be framed by the University Council ?

(ii) Has the Court of Appeal erred in fact and in law in holding that the Respondent has not annexed the minutes of the 231st Council Meeting and drawing an adverse inference therefrom, when in fact the said minutes were annexed marked as "**2R3"** ?

(iii) Has the Court of Appeal erred in law in imposing a precondition to the issuance of Charge Sheets, not sanctioned or contemplated by statute ?

(iv) Has the Court of Appeal erred in fact and in law in failing to appreciate that the Council had in fact decided to issue a Charge Sheet in terms of "**2R3"** ?

(v) Has the Court of Appeal erred in fact and in law in failing to consider the provisions of Section 8.2 of Chapter XXIII of the Universities Establishments Code, wherein the Chief Executive Officer of a Higher Educational Institute is specifically empowered to issue a Charge Sheet ?

(vi) Has the Court of Appeal erred in fact and in law in failing to consider whether no prejudice had been caused to the Respondent by the procedure followed and that consequently the Respondent was not entitled to any prerogative relief, even if there had been a procedural impropriety ?

(vii) Has the Court of Appeal erred in fact and in law in failing to consider the fact that the Petitioner-Respondent had approbated and reprobated the applicability and validity of the Universities Establishments Code and as such was not entitled to discretionary relief ?

(viii) Has the Court of Appeal erred in fact and in law in failing to consider whether the Respondent's conduct in relation to the Charge Sheet was such that it precluded him from raising an objection and obtaining prerogative relief ?

(ix) Has the Court of Appeal erred in fact and in law in failing to consider whether in the totality of circumstances of this case, the Petitioner-Respondent was accorded treatment in consonance with the rules of natural justice ?

Questions of Law No.s (i), (iii), (iv), (v) and (viii) all raise the issue of whether the aforesaid determination of the Court of Appeal was correct in fact and in Law. Therefore, these five Questions can be conveniently considered together.

The Petitioner-Respondent was employed by the University of Ruhuna as a *"teacher"* within the meaning of the definition in Section 147 of the Universities Act.

S: 45 (2) (xii) of the Universities Act specifies that, it is the Council of the University which *"….. shall exercise, perform and discharge ….. the powers, duties and functions ….. to appoint persons to, and to suspend, dismiss or otherwise punish persons in the employment of, the University: Provided that, except in the case of Officers and teachers, these powers may be delegated to the Vice Chancellor: ….."*

Thus, it is very clear that, by operation of the provisions of the Universities Act, the Disciplinary Authority in respect of the Petitioner-Respondent was the Council of the University of Ruhuna. It is equally clear that, the Council is prohibited from delegating its disciplinary powers in respect of the Petitioner-Respondent since he was a *"teacher"*. This position is reflected in Section 1:1 and 1:1 (b) of Chapter XXII of the Universities Establishments Code which specifies that, the Council of an University will be the Disciplinary Authority in respect of all staff of that University and that, a Council cannot delegate it disciplinary powers in respect of *"teachers".*

The phrase *"….. the powers, duties and functions ….. to appoint persons to, and to suspend, dismiss or otherwise punish persons….. "* used in S: 45 (2) (xii) of the Universities Act refers to the imposition of the punishment, which is the final step of disciplinary action taken against an employee of an University. It is only logical that, the authority which is vested with the power, duty and function of taking that final step in disciplinary action, will also be the authority vested with the power, duty and function of

taking the preceding steps which are required when disciplinary action is taken. It would be entirely illogical to contend otherwise.

This principle was expressed by the Madhya Pradesh High Court in SHARDUL SINGH vs. THE STATE OF MADHYA PRADESH [AIR 1966 MP 193 at p.195] where Dixit CJ stated *"Now the exercise of disciplinary powers, or the field of disciplinary action, is not confined merely to the passing by the appointing authority of an ultimate order imposing disciplinary punishment against the employee. It extends even to the very initiation of disciplinary action against a civil servant or employee by framing charges against him and holding, or directing the holding of an enquiry into those charges. The framing of charges, the holding of an enquiry into them, the suspension of the civil servant during the enquiry, the notice to show cause, are all steps in the exercise of the disciplinary powers. These steps must be taken by the disciplinary authority and not by a delegate of that authority".*

The issuing of a Charge Sheet is one of the main steps in the process of disciplinary action. The Charge Sheet sets out and defines the scope of the alleged acts of misconduct which have necessitated taking disciplinary action. All subsequent steps in the process of disciplinary action flow from and are usually circumscribed by the Charges set out in the Charge Sheet. The punishments that may be imposed at the end of the disciplinary action, are dependent on the Charges sets out in the Charge Sheet.

Therefore, on an application of the aforesaid principle, it is clear that, in the present case, the Charge Sheet marked **"P13"** had to be considered and approved by the Council since the Council was the Disciplinary Authority in respect of the Petitioner-Respondent. This had to be done *before* a Charge Sheet was issued by the Vice Chancellor. It is only if that was done that, the Charge Sheet marked **"P13"** could be duly and lawfully issued.

However, earlier in this Judgment, I have held that, the material placed before us establishes that, the Council did *not* consider or approve the Charge Sheet marked **"P13"** *before* it was issued by the then Vice Chancellor.

This omission rendered the Charge Sheet marked **"P13"** liable to be quashed since it was issued ultra vires by the Vice Chancellor.

I find authority for this conclusion in the decision of this Court in JINASENA vs. UNIVERSITY OF COLOMBO [2005 3 SLR 9] where it was held that, in a case in which the Council of the University of Colombo was the disciplinary authority of an employee, the fact that the Council had not approved the Charges set out in the Charge Sheet marked P9 issued to that employee, invalidated that Charge Sheet. S.N.Silva CJ stated [at p.12], *"The Council could not have approved of any charges that were not submitted to it"* and *"In the circumstances, we are of the view that the Petitioner has established that the decisions in P8 and P9 have not flowed from the proper authority namely the*

Council of the University and as such are ultra vires and liable to be quashed by a Writ of Certiorari".

On the same lines, in SHARDUL SINGH vs. THE STATE OF MADHYA PRADESH, Dixit CJ stated [p.195], *"….. the disciplinary authority, if it decides that disciplinary action should be taken against a civil servant, must itself frame the charges and hold an enquiry into them or direct another to hold an enquiry into those charges.".*

At this point, it will be useful to clarify that, when the Madhya Pradesh High Court stated the Disciplinary Authority must itself *"frame"* the Charges, it should be understood that, the Disciplinary Authority need not perform the task of actually drafting or framing the Charges itself. This may be lawfully done by another person. However, what must happen is that, once the Charges have been drafted or framed, they must be then placed before the Disciplinary Authority for its consideration and approval.

The Respondents-Appellants have submitted that, the fact that the Council decided, at the meeting held on 18th April 2005 to *issue* a Charge Sheet to the Petitioner-Respondent, was adequate authority for the Vice Chancellor to have lawfully and validly issued the Charge Sheet marked **"P13"**. This submission has no merit since it is patently clear that, a decision that a Charge Sheet should be *issued* to an employee is very different to an approval of the Charges to be set out in the proposed Charge Sheet. It is the *contents* of the Charge Sheet – namely the Charges set out in it – which must be considered and approved by the Council before the Charge Sheet is issued. As mentioned earlier, there is no indication whatsoever that, at the meeting held on 18th April 2005 or at any point thereafter, the Council considered and approved the Charges set out in the Charge Sheet marked **"P13"**.

The Respondents-Appellants have also submitted that, Section 8.2 of Chapter XXIII of the Universities Establishments Code specifically empowered the Vice Chancellor to issue a Charge Sheet and that, therefore, the Council was not required to consider and approve the Charge Sheet marked **"P13"** . I cannot agree with this contention since, as stated earlier, Section 45 (2) (xiii) of the Universities Act and Section 1:1 and 1:1 (b) of Chapter XXII of the Universities Establishments Code both specifically prohibit the Council from delegating its disciplinary powers in respect of *"teachers"*.

In the light of this specific prohibition on the delegation of disciplinary powers, it is evident that, Section 8.2 only refers to the fact that, after a Charge Sheet has been considered and approved by the lawful Disciplinary Authority, the Charge Sheet is to be signed and issued by the Vice Chancellor. Where the Disciplinary Authority is the Council, Section 8.2 cannot be reasonably interpreted to mean that, the Vice Chancellor can validly and lawfully issue a Charge Sheet unless the Charge Sheet has been first considered and approved by the Council. This is in line with the general principle enunciated in decisions such as GENERAL MEDICAL COUNCIL v. U.K. DENTAL BOARD [1936 Ch.41] that, a restrictive interpretation will be usually accorded to provisions which deal with the delegation of disciplinary functions.

Since the Charge Sheet marked **"P13"** was the foundation of the process of disciplinary action which followed, the fact that **"P13"** was issued ultra vires and is a nullity, will render invalid all the proceedings and decisions which are based on **"P13"** or are a result of **"P13"**.

Further, since the Charge Sheet marked **"P13"** was issued ultra vires and is a nullity, the fact that, the Petitioner-Respondent faced the disciplinary inquiry which followed, cannot bestow validity upon **"P13"**. The Petitioner-Respondent had no choice but to face the Inquiry.

Thus, I am in respectful agreement with Sri Skandarajah J when His Lordship held, *"In this instant application too the charge sheet issued to the Petitioner was not approved by the Council hence the charge sheet was not issued by the proper authority and it is ultra vires. The acquiescence of the Petitioner cannot give validity to a charge sheet that is ultra vires. The proceedings and the decisions arrived at on the basis of this charge sheet are a nullity.".*

Accordingly, I answer Questions of Law No.s (i), (iii), (iv), (v) and (viii) in the negative.

Questions of Law No.s (vi) and (ix) raise issues of whether the Petitioner-Respondent was not entitled to prerogative relief for the reason that, no prejudice had been caused to the Petitioner-Respondent during the course of the disciplinary action taken against him and whether the rules of natural justice and law had been observed.

As stated above, I am of the view that, decision taken by the Council, on 18th April 2005, to issue a Charge Sheet to the Petitioner-Respondent and the decisions taken by the Council, on 14th May 2007, to determine that, the Petitioner-Respondent was guilty of the misconduct set out in the first, second, fifth and sixth Charges; and to, therefore, terminate his employment; are also ultra vires and bad in Law. Further, as stated above, there are sufficient grounds to raise a suspicion that, there was real likelihood of bias in the manner in which disciplinary action was taken by the Council against the Petitioner-Respondent.

Accordingly, I answer Questions of Law No.s (vi) and (ix) in the negative.

In the aforesaid circumstances, I need not consider the remaining Questions of Law No.s (ii) and (vii).

The Respondents-Appellants have also submitted that, the Petitioner-Respondent being a probationer at the time his employment was terminated, disentitled him from obtaining any relief and, further, that, the Council had ratified the Charge Sheet marked **"P13"**. However, this Court has not given the Respondents-Appellants leave to appeal on these issues. Therefore, I am not required to consider these issues.

For the aforesaid reasons, the Appeal is dismissed. The 1st Respondent-Appellant will pay the Petitioner-Respondent Costs in a sum of Rs.50,000/-.

Judge of the Supreme Court

Sisira J. De Abrew J.
I agree

Judge of the Supreme Court

K.T.Chitrasiri J.
I agree

Judge of the Supreme Court

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

S.C (Appeal) No. 112/2011
S.C (HC) C.A.L.A. 13/2011
WP/HCCA/MT/28/04(F)
D.C. Mt. Lavinia Case No. 618/00/RE

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) Amendment Act No. 54 of 2006

Maddumage Chandralatha Perera
No. 714/4, Medawala Road,
Erawwala, Pannipitiya.

PLAINTIFF

Vs.

Ratmalana Pedige Margaret Fernando
No. 168, (Assessment No. 312)
Dehiwala Road, Bellanwila,
Boralesgamuwa.

DEFENDANT

AND BETWEEN

Maddumage Chandralatha Perera
No. 714/4, Medawala Road,
Erawwala, Pannipitiya.

PLAINTIFF-APPELLANT

Vs.

Ratmalana Pedige Margaret Fernando
No. 168, (Assessment No. 312)
Dehiwala Road, Bellanwila,
Boralesgamuwa.

DEFENDANT-RESPONDENT

AND

Maddumage Chandralatha Perera
No. 714/4, Medawala Road,
Erawwala, Pannipitiya.

PLAINTIFF-APPELLANT-PETITIONER

Vs.

Ratmalana Pedige Margaret Fernando
No. 168, (Assessment No. 312)
Dehiwala Road, Bellanwila,
Boralesgamuwa.

DEFENDANT-RESPONDNET-RESPONDENT

BEFORE: Sisira J. De. Abrew J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Ranjan Suwandaratne for the Plaintiff-Appellant-Petitioner

Rohana Jayawardena for the Defendant-Respondent-Respondent

ARGUED ON: 29.04.2016

DECIDED ON: 03.11.2016

GOONERATNE J.

Plaintiff-Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court of Mt. Lavinia against the Defendant-Respondent (hereinafter referred to as the Defendant) seeking a declaration of title to the property described in the schedule to the plaint and eviction of the Defendant from the said property inclusive of a prayer for damages. However the District Court, Mt. Lavinia case bears the No. 618/00 RE. The Defendant who claims to be the tenant of the property was a successful litigant both in the District Court and in the Civil Appellate High Court of Mt. Lavinia. On 22.08.2011 the Supreme Court granted Leave to Appeal on the following questions of law set out in paragraph 36(a), (b) & (c) of the petition dated 11.01.2011. The said questions reads thus:

(a) Have the Hon. High Court Judge of the Civil High Court erred in law by not taking into consideration of the fact that the Respondent who is claiming tenancy of the premises in suit had done unlawful constructions without obtaining permission written or otherwise from the Petitioner who is the landlord in arriving at their final conclusion?

(b) Have the Hon. High Court Judges misdirected themselves and/or erred in law by not considering the several acts of repudiation of tenancy by the Respondent tenant throughout the District Court action in arriving at their final conclusion?

(c) Have the Hon. High Court Judges erred in law by failure to evaluate the evidence led at the trial on balance of probabilities?

The case of the Plaintiff to state briefly is that the property in dispute is in extent of about 15 perches and as pleaded in the plaint, the Plaintiff has clear title to the said property and also relies upon a final decree in District Court, Colombo Case 8797 Partition. Plaintiff gets title by a deed of gift 5093 (P1) by her father N. Aron Perera the original owner of the property which deed was executed on 12th January 1974. The said property is described as lot (5) in Plan (P2). It is also stated by the Plaintiff that the Defendant is in unauthorised and illegal occupation of premises in dispute which bears the No. 168 (Assessment No. 312) Dehiwala Road, Bellanwila. Premises is situated within the territorial jurisdiction of the Kesbewa Pradeshiya Sabah. It is pleaded that the house in question has been constructed without the approval of the said Pradeshiya Sabah and no certificate of conformity had been issued. Further in terms of the Provisions contained in the Housing and Town Improvement Ordinance the premises/structure is an unauthorised structure and the Defendant thereby has no right to claim the protection of the Rent Act in relation to the said premises.

In the plaint it is pleaded that the Defendant had on or about 15.11.2000 who is an unauthorised occupant without obtaining prior permission of the Plaintiff illegally commenced a construction which caused the Plaintiff an

irreparable loss. As pleaded, the Plaintiff had complained to the said Pradeshiya Sabah and the Kohuwela Police (paragraph 10 of plaint).

The position of the Defendant was that she is a protected tenant as per the Rent Laws of Sri Lanka. Further the Defendant is not a tenant of the Plaintiff. Defendant pleads that she is the tenant of Plaintiff's mother Nancy Balachandran and was also a tenant of her husband Aron Perera. The mother of the Plaintiff namely 'Nancy' had never intimated to the Defendant that rents should be paid to the Plaintiff. Defendant's father was the tenant of Plaintiff's father Aron Perera in 1968 on a rental of Rs. 25/-. Defendant 's father died on or about 1974. On the demise of Defendant's father Defendant succeeded to the tenancy and paid rent to Nancy Balachandran (Plaintiff's mother). Rent at Rs. 35/-. The said Nancy accepted rents but subsequently had refused to accept rent. As such Defendant deposited rent as from 1987 April at the Boralesgamuwa Pradeshiya Sabah which is a sub-office of the Piliyandala Pradeshiya Sabah. (Rent deposited in favour of 'Nancy').

It is also pleaded that the Defendant requested 'Nancy' to effect repairs to the premises in dispute and she refused to do so. Premises consist of zink roof and due to heavy rains sheets had been blown off due to the wind. Therefore Defendant spent about Rs, 75,000/- and put a roof with Asbestos

sheets erecting columns round the house for better protection and to strength the structure. Defendant vehemently denies it is an unauthorised structure.

Parties proceeded to trial on three (3) admissions and 14 issues. It was admitted that the original owner was Aron Perera (Plaintiff's father) who obtained good title on Partition Decree 8797/P and that the premises in dispute is situated within the territorial jurisdiction of the Kesbewa Pradeshiya Sabha. The learned trial Judge however has answered issue No. (1) regarding title to the premises in dispute as 'yes' in favour of the Plaintiff, but all other issues answered against the Plaintiff.

It is important to ascertain the position on which leave was granted by this court and it is equally important to consider the basis and nature of the action filed in the Original Court. Although the case number in the District Court bears 618/00 RE, action instituted in the District Court is an action for a declaration of title. The whole basis of an action of this nature and perhaps described as an action rei vindicatio with a thin area of difference, is the title or rather the superior title of Plaintiff and a denial of that title or an interference with Plaintiff's right under it by the Defendant. Burden of proof vests in the Plaintiff. If the Plaintiff is successful as required as above the burden will shift to the Defendant to prove his or her legal right to occupy or possess the property in dispute.

The main argument advanced on behalf of the Plaintiff by his learned counsel was on the footing (oral/written submissions) of repudiation of tenancy and unlawful construction, and he submitted to court that ownership of land lord or land lady to the premises in dispute is being challenged by the Defendant. Further the learned counsel for Plaintiff submitted to court that Respondent insisted the Petitioner to prove title to the old Deed No. 5093 at the trial. Defendant was not prepared to accept the title of the Plaintiff to the premises despite submitting title deeds. Therefore the contention of Plaintiff was that there is no basis at all for Defendant to claim tenancy in relation to the premises owned by the Plaintiff, and conduct of Defendant amounts to repudiation of tenancy. To explain above, learned counsel for Plaintiff inter alia submitted.

(a) In the District Court Defendant filed a statement of objections supported by an affidavit (to contest application for injunctive relief) challenging the title deed of petitioner referred to in the plaint and deed being executed in 1974, and demanded to prove ownership.

(b) Defendant claims tenancy from the time of Plaintiff's father and Defendant's father. Aron Perera who was Plaintiff's father and Defendant's father Simon Fernando was his tenant. Therefore on demise of Plaintiff's father, Plaintiff's mother Nancy succeeded as land lady and Defendant paid rents to her and on

her refusal to accept rent deposited rent in the local authority under her name or in her favour. Plaintiff argues in view of above Defendant was well aware of Plaintiff's relationship to above persons who were land lords, and that Plaintiff became owner.

Attention of court was drawn to Section 116 of the Evidence Ordinance and to the following authorities. Section 116 reads thus:

> No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property and – of licensee of person in possession – no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

The Acts of Repudiation of Tenancy was considered in the following decided cases. I note the following:

1. *Ranasinghe vs. Premadharma and Others 1985(1) SLR 63 & at 70*

In a suit for rent and ejectment the tenant claimed he had constructed the premises and was entitled to occupy them free of rent until the cost was set off. In effect he claimed a jus retentionis and denied tenancy.

Held – (Wanasundera, J. dissenting) –

The tenant is not entitled to notice because he had repudiated his tenancy. In such a case the land lord need not establish any one or more of the grounds of ejectment stipulated in section 22 of the Rent Act No. 7 of 1972 for success in his suit for ejectment.

In the case of Doe v. Frowd (9) Best, C.J., ruled that –

> "a notice to quit is only requisite where tenancy is admitted on both sides and if defendant denies the tenancy there can be no necessity for a notice to end that which he says has no existence."

When the defendant disclaims the tenancy pleaded by the plaintiff he states definitely and unequivocally that there is no relationship of landlord and tenant between the plaintiff and him to be protected by the Rent Act.

The rationale of the above principle appears to be that a defendant cannot approbate and reprobate. In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one he cannot afterwards assert the other; he cannot affirm and disaffirm. Hence a defendant who denies tenancy cannot consistently claim the benefit of the tenancy which the Rent Act provides. For the protection of the Rent Act to be invoked the relationship of landlord and tenant, between the plaintiff and him which is governed by the Rent Act should not be disputed by the defendant.

2. Subramaniam Vs. Pathmanathan 1984(1) SLR at 252& 253

The appellant was the tenant of certain premises under one R. who was the owner. R. by deed No. 17 of 1.4.1971 transferred the premises to his wife the respondent who called upon the appellant to attorn to her form 1.1.1972. After some earlier correspondence, the appellant on 13.3.1974 wrote P5 to the respondent's attorney-at-law requesting confirmation of R's signature on a letter calling upon him (the appellant) to attorn to the respondent and of the fact that the premises had not vested in the Commissioner of National Housing. By his letter (P6) of 17.9.1974 the respondent's attorney-at-law gave the required confirmation. The appellant however did not pay any rents to the respondent. On 20.12.74 the respondent filed action in the District Court of Colombo seeking the ejectment of the appellant and damages. The respondent filed answer bringing in to the credit of the case the rent from 1.1.1972 to 31.10.1975. Though the

pleadings in the case lacked clarity the Court of Appeal held this was a tenancy action. Title had been pleaded to show that the respondent was the new owner and repudiation of the contract of tenancy had been pleaded to show that such a tenant is not entitled to notice to quit nor to claim any rights to a tenancy.

Held –

(1) The appellant's failure to pay the rents even after he received confirmation by P6 that it was R who had signed the letter requesting attornment to the respondent and that the premises had not vested in the Commissioner of National Housing, was a repudiation of his tenancy and such a person is not entitled to notice. Pleading a termination in the plaint therefore did not arise.

3. *Thamodarampillai Meigananasunderam and Thamayanthi V. Suppiah Selvadurai 1986 The Colombo Appellate Law Report Vol. 1 Part 1 pg. 311*

In an action for ejectment and damages the District Judges held on evidence that the Defendants had neither attorned to the Plaintiff nor paid rent and therefore, there being no contract of landlord and tenant between the parties the Defendants could not maintain that the Plaintiff should give the Defendants notice to quit. The District Judge therefore held that, being in illegal occupation, the Defendants were liable to pay damages and be ejected. The Defendants appealed against this order

Held-

The Judgment of the District Judge on the basis of the reasons given is valid and should therefore be upheld.

I find two main conditions attached to Section 116 of the Evidence Ordinance. It could be classified as

(a) <u>Subsisting of tenancy</u> at all relevant times of the action

(b) Landlord or landlady as the case may be, should be <u>the owner</u> of the property in dispute.

Both conditions in (a) & (b) above need to be satisfied to get the benefit of the above section. If (a) & (b) could be proved estopel will operate which is to the Plaintiff's advantage if proved.

In the case in hand there cannot be any difficulty where title to the property in dispute is concerned. Even the learned District Judge takes the view that the Plaintiff has title to the property and Plaintiff became owner of the property in dispute by a deed of gift (P1) on or about 1974. What need to be focused is whether there was a valid tenancy subsisting, at all relevant times between the Plaintiff and the Defendant and or the illegal constructions done by the Defendant-Respondent amounts to repudiation of the tenancy and sue Defendant-Respondent as a trespasser.

There is nothing to prevent an owner not being the landlord of a property in dispute, and vice versa. However the landlord's ownership cannot be denied in law by the tenant as long as a valid tenancy, subsists. Problems arise where ownership of premises is acquired by a subsequent transferee from the original owner-landlord. In these situation, the question of "attornment" by the tenant to the new owner-landlord of the premises in question may become relevant. Classic examples are found in the above decided cases, in which a Defendant tenant has no right to argue that notice to quit was not sent as he

has repudiated tenancy. As such tenant need to be evicted and also cannot claim the protection given to a tenant under the Rent Laws of Sri Lanka.

The option to file a tenancy action or a vindicating action is a matter for the title holder of the land in dispute. Before I proceed any further the following dicta in *Gunasekera Vs. Jinadasa 1996 (2) SLR 115* need to be considered in its entirety to appreciate the facts of the case in hand, which is somewhat similar to the present case.

Pgs. 115 &116

The premises were let in 1960 by the Plaintiff Respondent Appellants' father to the father of the Defendant Appellant Respondent. Later in 1970, the Plaintiff's father gifted the premises to him, but they neither informed the Defendant's father nor called him to attorn, the latter died in 1973, the Defendant then attorned to the Plaintiff's father, the Defendant continued to pay rent to the Plaintiff's father, when the Plaintiff's father refused to accept rent from 1980, the Defendant deposited the rent with the authorised person, to the credit of the Plaintiff's father. The father and son by their letter of 23.10.81, informed the Defendant of the Transfer and called upon him to pay rent to the Plaintiff with effect from 16.11.81. The Defendant did not reply but continued to occupy the premises, he deposited the rent in the father's name and continued to do so even after his answer was filed.
The Plaintiff instituted vindicatory action, the Trial Judge held that both the Plaintiff and his father had called upon the Defendant to attorn, to the Plaintiff and that the Defendant having failed to attorn to the Plaintiff was a trespasser, and gave judgment for the Plaintiff.

On appeal the Court of Appeal reversed the judgment, holding that the Defendant had become aware of the Plaintiff's title in 1973, and that the father continued to collect rent as the Plaintiffs agent, and that the Defendant had not deliberately refused to accept him as landlord

and had not refused to pay him rent; and that therefore the Defendant had not been transformed from a tenant into a trespasser; on Appeal.

Held:

Per Fernando, J.

"I do not agree that simply because the Rent Act now gives tenants more extensive privileges, the common law should now be interpreted differently, either to assist the transferee or the occupier, the question before us must be approached without any predisposition towards an interpretation which would favour either Plaintiffs or owners, on the one hand or Defendants or tenants on the other.

(i) While it is legitimate initially to infer attornment from continued occupation, thus establishing privity of contract between the parties, another principle of law of contract comes into play in such circumstances to which the presumption of attornment must sometimes yield. When the occupier persists in conduct which is fundamentally inconsistent with a contract of tenancy, and amounts to a repudiation of that presumed contract the transferee has the option either to treat the tenancy as subsisting and to sue for arears of rent and ejectment or to accept the occupiers repudiation of the tenancy and to proceed against him as a trespasser.

Per Fernando, J.

"The court must not apply the presumption of attornment as a trap for the transferee, allowing the occupier who fails to fulfil the obligation of a tenant, if used on the tenancy, to disclaim tenancy and assert that he can only be sued for ejectment and damages in a vindicatory action, but if faced with an action based on title to claim that notwithstanding his conduct he is a tenant and can only be sued in a tenancy action, since it is the occupiers conduct which gives rise to such uncertainty, equitable considerations confirm the option which the law of contract gives to the transferee.

In the case in hand it is important to examine the evidence of the Plaintiff to decide on repudiation of tenancy by the Defendant. The following to

be noted. The Plaintiff testified about the deed of gift in her favour from her father (P1) in the year 1974. Land is situated within the Kesbewa Pradeshiya Sabha. Having given a description of the land and that construction done on or about November 2000, Plaintiff testified that there was no approved Survey plan or a certificate of confirmation (86/87). It is in evidence that Plaintiff received a letter from the Chairman Kesbewa Pradeshiya Sabha (P3) regarding unauthorised construction (P3). However as the Defendant objected to P3 the trial Judge disallowed (as not listed) the letter P3 to be admitted as evidence (89). About the unlawful construction the Plaintiff states, without demolishing the old structure a new structure was erected right round the old house. Defendant never obtained Plaintiff's permission to effect construction of building as stated above (90). Plaintiff states the roof was replaced by asbestos sheets. Earlier it was a cadjan hut, with zink sheets for the roof. The new construction was four times bigger than the old hut. As such Plaintiff informed the authorities concerned about the unlawful construction (92/93).

It is stated by the Plaintiff in her evidence that Defendant and her husband came to see her at her residence at No. 714/4, Pannipitya and informed Plaintiff that it is necessary to construct the house (94). Defendant came to see Plaintiff only once (95) and informed Defendant orally that rent should be paid to Plaintiff (95) Request to effect construction was refused and rejected by

Plaintiff as rent was not paid (95) photographs of new construction was taken and produced in court as P6 to P10 (96/97) without any objection.

The following matters, surfaced in cross examination of Plaintiff. In order to have more clarity on the issue I would itemize such evidence, in cross-examination, of Plaintiff as follows:

(a) Defendant's father was a tenant in 1968 under Plaintiff's father Aron Perera (P8)
(b) Plaintiff's father died in May 1975
(c) After father's demise Nancy Balachandra (Plaintiff's mother) played the role of landlord (P9).
(d) On Plaintiff becoming owner in 1974 rent collected by mother (99) (ඔව් මව කුලී ගත්තා (99) collected by mother.
(e) Plaintiff mentions that Defendant visited her at her house (100)
(f) Mother informed Defendant <u>verbally</u> to pay rents to Plaintiff (100) වාචිකව දැන්වීම් කලා.
(g) Mother informed me that Defendant did not pay her the rent (101)
(h) Mother spoke with tenant. Plaintiff was near her mother මම ඒ ළඟම සිටියා (101)
(i) To a question posed to Plaintiff whether a letter was written by a lawyer on her behalf as regards payments of rent, the answer was it was done verbally. Plaintiff has no letter to produce in this regard 102/103.
(j) Plaint is silent as to whether Defendant tenant was informed of new owner or payment of rent to Plaintiff. The answer of Plaintiff was she has no knowledge of it (103) ඒ ගැන මට අවබෝධයක් නැහැ.
(k) Plaintiff was never paid rent (104)

(l) Another question whether Defendant deposited rent with Boralesgamuwa Rent Board. Plaintiff's answer was 'yes' and deposited in the name of mother (104)

I note the following questions for which there was no answer by Plaintiff (104)

(m) ප්‍ර : විත්තිකාරිය අද වෙනකල් කුලි තැන්පත් කරලා තිබෙනවා

උ : උත්තරයක් නැහැ

ප්‍ර : කිසිම හිගයක් නැහැ

උ : උත්තරයක් නැහැ

(n) Letters V8 and V9 produced through Plaintiff (114/115). V8 dated 26.7.1997 and V9 dated 6.8.1999. These are letters written by Plaintiff's mother and a reply to same by Defendant.

These letters indicate the continuous tenancy between Defendant and Plaintiff's mother. No reference in either letter to Plaintiff's position although Plaintiff had title. The said letters were dispatched over 20 years after Plaintiff obtained title to the land in dispute (letters exchanged between Plaintiff's mother and Defendant). Mother was not called as a witness, irrespective of her age.

The action filed by the Plaintiff was for a declaration of title and eviction of the Defendant Respondent. The dicta in Gunasekera Vs. Jinadasa 1996(2) SLR 116 recognises in law and fact that Defendant-Respondent who is the occupier fails to fulfil the obligation of a tenancy, and with such conduct of the Defendant-Respondent it would amount to repudiation of the contract of tenancy, the transferee (Plaintiff-Appellant) has the option to sue by a tenancy

action or proceed against the Defendant-Respondent as a trespasser as in a vindicatory suit. There is no doubt that title to the property was vested with the Plaintiff-Appellant. There are important questions of law, on which the Supreme Court granted leave. These question go to the root of the case in hand. There is evidence of construction on the property in dispute. Such a construction cannot be done without the consent/permission of the owner of the property. This is the position of the Plaintiff-Appellant. The Defendant-Respondent attempts to demonstrate that there is no requirement to get approval from the relevant local authority, prior to construction, since the relevant gazette pertaining to the local authority was not produced and there is no requirement under the prevalent law to obtain permission from the local authority of the area in question. This is not a rent and ejectment action, but an action for a declaration of title and eviction. An independent witness from the Kesbewa Pradeshiya Sabha M. Somalatha gave evidence at the trial.

The evidence of Somalatha Peiris reveal that a complaint by Plaintiff was made by letter P3 of unauthorised construction by the Defendant-Respondent. The local authority warned Defendant based on P3 to remove illegal construction by P5, and the local authority conducted two inquiries. The first was based on the report P9 where the field officer of the Pradeshiya Sabha had reported of an unauthorised construction. The Second inquiry the witness

herself, Chairman of the Pradeshiya Sabha and another official had visited the scene or the premises in dispute. These items of evidence reveal a complete change to the premises and a change of character of the premises in dispute, as observed by the witness. The relevant evidence reproduced as follows in the verbertim.

ප්‍ර: ප්‍රථම පරීක්ෂණයෙන් කුමක්ද කලේ ?

උ: අදාල ස්ථානය පරීක්ෂා කලා. දැනට පවතින කුඩා ගෙය වට කර මැදිකර ගඩොලින් ගොඩනැගිල්ල ගොඩ නගා පැවතියා වහල ඉහළට. නව වහළ සීට් දැමීමට තිබුනා. එම ඉදි කිරීම සම්බන්ධයෙන් පුර්ව අනුමැතියක් ලබා නොගෙන කටයුතු කර තිබුන නිසා ඉදි කිරීම් වහාම නතර කර ඒ සදහා අනුමැතිය ගන්නා ලෙස වාචිකව දැනුම් දුන් අතර ලිඛිතව දැනුම් දෙන්න සූදානම් වුනා.

ප්‍ර . තමන් කිව්වා දෙවනි වතාවටත් ගිය බව පරීක්ෂණය කරන්න?

උ: දෙවැනි වතාවටත් ගියා

ප්‍ර: දෙවැනි වතාවටත් ගියේ කවුද?

උ: සභාපති, මා, කාර්යාලයේ නිලධාරියෙක්

ප්‍ර: ඒ ගිය අවස්ථාවේදි තමන් නිරීක්ෂණය කලේ මොන වගේ කාරණයක්ද ?

උ: ඔව් නිරීක්ෂණය කලා

ප්‍ර: කුමක්ද නිරීක්ෂණය කලේ

උ: ඇත්ත වශයෙන්ම කුඩා ගෙය ඉවත් කර වෙනත් නිවසක් ඉදි කර ගෙන යනවා

ප්‍ර: තමන් ගිය අවස්ථාවේදී වෙනත් නිවසක් ඉදි කර ගෙන ගියා

උ: අපි යන අවස්ථාවේදි ඉදි කරගෙන ගියා

ප්‍ර: ඉදි කලේ අත්තිවාරම් බිත්ති මත?

උ: ඔව්

ප්‍ර: තමන් යන අවස්ථාවේදී ඒතැන එහෙම තිබුනා. කලින් අවස්ථාවේදී තිබුනේ වෙනත් නිවසක්?

උ: ඔව්

I have considered the cross-examination of the witness. The line of cross-examination had been not to deny any construction as aforesaid but to project that no authority was required to be obtained and not bound to grant permission as the prevalent law does not apply to the Kesbewa Pradeshiya Sabha. Even if one accept the above position, the question of construction and changing the original character of the premises cannot be disputed based on evidence. This is a highly unsatisfactory and unacceptable state of affairs. On the other hand it is too high handed on the part of the tenant Defendant-Respondent to affect a complete structural alterations.

By the Rent (Amendment) Act No. 26 of 2002, structural alteration without prior permission by the tenant would be a ground to evict a tenant (Section 22(2) (e)). The case in hand consists of uncontradicted evidence of structural alterations which according to evidence the above witness, altogether a new house had been constructed. This court is more than convinced of such evidence led from an independent witness.

The acts of the Tenant-Defendant-Respondent amounts to wilful or reckless or deliberate acts which amount to illegality, not available to a protected tenant, and which operates in detriment to his position. Law cannot tolerate and entertain such high handed acts of the so called protected tenant. Therefore continued possession of the property in dispute by the Defendant-

Respondent is illegal. There is no evidence placed before the District Court that the Defendant-Respondent sought permission from the land lady prior to effecting any construction at the relevant time (November 2000) on the land in dispute. Nor is there any evidence that suggests permission was sought from the Plaintiff-appellant though attempts were made to deny title of Plaintiff-Appellants. In these circumstances Defendant-Respondent cannot refuse to surrender possession. This being an action for declaration of title and eviction of the Defendant-Respondent, irrespective of any authority or consent from a local authority to build or construct on land, the required consent and authority should initially flow and be made available only by the owner of the property in dispute or land lord as the case may be prior to any authorisation given by the local authority. Any tenant or occupier who acts contrary to above has to suffer the legal consequences.

The learned District Judge as well as the High Court Bench has failed to appreciate and consider the items of evidence led from the independent witness who was called to give evidence from the Kesbewa Pradeshiya Sabhahawa as discussed above. In a case of this nature the question of attornment may be useful from the tenant's point of view, but in the absence of proper authorisation to build by the land lord would also be a breach of conditions laid down by the Rent Act- vide Section 22 (2)(e) of the Rent Act

evidence led does not even indicate that the tenant sought permission from the land lady (Nancy) in the year November 2000 to effect construction. In these circumstances the title holder the Plaintiff-Appellant would have a right to evict the Defendant-Respondent and consider and treat the Defendant-Respondent as an unauthorised occupier. I also note that though a gazette was not produced to prove the applicability of the Town and Improvements Ordinance to the premises in dispute and the Defendant-Respondent's position was that no requirement to submit a plan for approval since the Kesbewa Pradeshiya Saba area is not covered by the relevant statute, witness from the Pradesiya Sabha mentained in evidence that approval of the local authority was essential for any structural alterations, and it was not obtained by the Defendant-Respondent.

In all the above circumstances and having considered all the evidence placed before the District court and the positions placed before the High Court by either side, the questions of law are considered as follows:

(a) Evidence placed before the trial court does not suggest in any way that Defendant-Respondent sought permission from the Plaintiff-Respondent for the construction. Nor was permission sought from Plaintiff-Respondent's mother to whom rent was paid by Defendant-Respondent until rent was deposited with the local authority. As such I hold that the construction on the premises in dispute is unlawful and unauthorised, irrespective of any authority from the local authority. Therefore the High Court has erred both in fact and in law.

(b) In view of the answer to (a) above it does not arise. This is an action for a declaration of title and eviction. Title to the disputed property is proved and established in favour of the Plaintiff-Appellant. As discussed in this judgment refusal to surrender possession by the Defendant-Respondent is illegal and the Defendant-Respondent by such unauthorised construction cannot be considered in law as a protected tenant.

(c) Yes

The judgment of the District Court and the High Court are set aside. This appeal is allowed with costs and relief granted as per sub-paras 'b', 'c' & 'd' of the prayer to the petition.

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

Sisira J. De Abrew 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 to the Supreme Court of the Democratic Socialist Republic of Sri Lanka from the judgment dated 24.11.2010 of the Court of Appeal in terms of Article 128 of the Constitution.

Karunasinghe Herathge Lalitha Padmini
No.91/1Keedagammulla, Gampaha
Plaintiff-Appellant-Petitioner-Appellant

SC Appeal 118/2011

SC/SPL/LA/03/2011
CA 688/2000 F
DC Gampaha 35792/L

Vs

1. Wijesinghe Arachchige Wijedasa
   No.5 Sri Dharmapala Mawatha,
   Gampaha

2. Bandaranayake Mudiyanselage Bandara
   Manawatta.
   No.45, Diyawanna Road, Etul Kotte, Kotte

Defendant-Respondent-Respondent-Respondents

Before : Eva Wanasundera PC J
Sisira J De Abrew J
Upaly Abeyratne J

Counsel : Harsha Soza PC with Upendra Walgampaya for the Plaintiff-Appellant-Petitioner-Appellant
Athula Perera with Chathurani De Silva for the Defendant-Respondent-Respondent-Respondents

Argued on : 7.12.2015

Written Submissions
tendered on : By the Plaintiff-Appellant-Petitioner-Appellant on 17.10.2011
By the Defendant-Respondent-Respondent-Respondents on 23.1.2012
Decided on : 31.3.2016

Sisira J De Abrew J.

This is an appeal to set aside judgment of the Court of Appeal dated 24.11.2010. The Court of Appeal, by the said judgment affirmed the judgment of the learned District Judge who dismissed the plaintiff's action. Being aggrieved by the said judgment of the Court of Appeal, the Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) has appealed to this court. This court, by its order dated 5.9.2011, granted special leave to appeal on the questions of law set out in paragraphs 22(i),(ii),(iii) and (iv) of the petition of appeal dated 4.1.2011 which are set out below.

1. Has the Court of Appeal failed to appreciate that there has been no proper evaluation of the evidence in this case?
2. Has the Court of Appeal failed to consider that well before 28.12.1992 the 1st Defendant has unequivocally refused to fulfill his obligations and breached in law the agreement P1?
3. Has the Court of Appeal failed to consider that in law it is the 1st Defendant who is in *mora* , and that he cannot take advantage of his own wrongdoing?
4. Has the Court of Appeal erred in law holding that no cause of action had occurred to the Plaintiff as at 28.12.1992?

Facts of this case may be briefly summarized as follows: The 1st Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the 1st

Defendant) is the owner of the land described in the 1st schedule to the plaint. It can be described as Lot No.8 of plan No.88/68 dated 3.6.1968 of CL Wickramaratne Licensed Surveyor. Sangapala Archchige Jayasiri Dissanayake was the owner of blocks of land described in the 2nd and 3rd schedules to the plaint. For the purpose of convenience they can be described as Lots 7 and 9 of Plan No.88/68 of CL Wickramaratne Licensed Surveyor dated 3.6.1968. The 2nd Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the 2nd Defendant) is the holder of Power of Attorney of said Sangapala Archchige Jayasiri Dissanayake (SAJ Dissanayake).

On 22.8.1991, the 1st and the 2nd Defendants entered into an agreement with the Plaintiff-Appellant marked P1 (Deed No.4091) for the sale of Lots 7,8 and 9 of Plan No.88/68 of CL Wickramaratne Licensed Surveyor dated 3.6.1968. The said Lots 7 and 9 were sold and conveyed by the 2nd Defendant to the Plaintiff-Appellant after fulfilling the terms of the said agreement (agreement to sell). The sale of Lot 8 of the said Plan No.88/68 did not take place as per the agreement to sell. The Plaintiff-Appellant filed the present case against the 1st Defendant on the ground that the 1st Defendant failed and neglected to perform his obligations arising on the agreement. He sought a direction from the District Court on the 1st defendant to transfer the property described in the 1st schedule (Lot No.8 of the plan No.88/68 of CL Wickramaratne Licensed Surveyor dated 3.6.1968) to the plaintiff after fulfilling the terms of the said agreement.

Both parties admit that the value of three blocks is Rs.15,17,500/-; that Rs.50,000/- was paid to the 2nd Defendant on the day that the agreement was signed; and that Rs.400,000/- was deposited on 20.2.1992 (prior to the signing of the agreement to sell) in the account of SAJ Dissanayake. One of the

conditions of the agreement to sell was that the Plaintiff-Appellant should, before **31.12.1992**, pay the balance to the 1st and the 2nd Defendants (clause No.6). According to clause No.7 of the agreement to sell, after the payment of the balance amount by the Plaintiff-Appellant, the 1st and the 2nd Defendants must, by deeds of transfer, convey the property to the Plaintiff-Appellant. The 2nd Defendant sold and conveyed Lots 7 and 9 of Plan No. 88/68 to the Plaintiff-Appellant as the balance amount was paid to him. The Plaintiff-Appellant maintains the position that although she requested the 1st Defendant to accept the balance amount, the 1st Defendant failed and neglected to accept the balance amount.

One of the important issues that must be decided in this case is whether the 1st Defendant failed and neglected to accept the balance amount. The 1st Defendant himself, in his evidence, admits that the balance amount that should be paid to him was Rs.170,000/-. The Plaintiff-Appellant, by his letter dated 8.12.1992, requested the 2nd Defendant to come and accept the balance amount due to him at Bank of Ceylon Ja-ela branch and to inform the 1st Defendant too about her intention to pay the balance due to him and the writing of the deeds. The 2nd Defendant accepted the balance amount due to him and transferred lots 7 and 9 of Plan No.88/68 of CL Wickramaratne Licensed Surveyor dated 3.6.1968. The Plaintiff-Appellant, by his letter dated 8.12.1992 addressed to the 1st Defendant, also informed her intention to pay the balance amount due to him. She, by the said letter, further requested the 1st Defendant to make arrangements to write the deed before 15.12.1992. As the 1st Defendant did not accept the balance amount, the Plaintiff-Appellant deposited money with R Abeysinghe Attorney-at-Law. R Abeysinghe Attorney-at-Law, by his letter dated 21.12.1992 (P11), informed the 1st Defendant that the Plaintiff-Appellant had

deposited Rs.170,000/- with him and requested him to collect the said amount immediately and transfer the property by a deed as per the agreement to sell (deed No 4091). The evidence of R Abeysinghe Attorney-at-Law was not challenged in court. The 1st Defendant did not comply with the said request. He (the 1st Defendant) maintained the position that he never received letters alleged to have been sent by the Plaintiff-Appellant and R Abeysinghe Attorney-at-Law. But the Plaintiff-Appellant produced the relevant registered postal article receipts. SK Jayadasa, an officer from Post Office Gampaha confirmed in evidence that the relevant letters had been delivered to the 1st Defendant. From the above facts it is clear that the 1st Defendant had failed and neglected to accept the balance amount from the Plaintiff-Appellant and that the Plaintiff-Appellant had the bona fide intention to pay the balance amount and that she had made all endeavours to pay the balance amount to the 1st Defendant. As the 1st Defendant did not comply with the request of R Abeysinghe Attorney-at-Law, the Plaintiff-Appellant, on 28.12.1992, deposited in the District Court Rs.170,000/- which is the balance amount that should be paid to the 1st Defendant and filed the present case in the District Court of Gampaha. The case was filed on **28.12.1992**.

The main contention of learned counsel for the 1st Defendant was that no cause of action had accrued to the Plaintiff-Appellant as at 28.12.1992. The learned District Judge too had come to the same conclusion. He had also come to the conclusion that it was open for the 1st Defendant to perform his obligation on the agreement to sell on or before 31.12.1992. The Court of Appeal too came to the same conclusion. Learned counsel for the 1st Defendant too advanced the same contention before us. I now advert to this contention.

An examination of clause 6 and 7 of the agreement to sell clearly indicates that the Plaintiff-Appellant should pay the balance amount to the 1st Defendant before 31.12.1992 and the 1st and the 2nd Defendant should thereafter transfer the property by transfer deeds. The said clauses do not state that the 1st and 2nd Defendants should transfer the property after 31.12.1992. Thus whenever the balance payment was made, the 1st and 2nd Defendants were obliged to transfer the property to the Plaintiff-Appellant. According to clause 6 and 7 of the agreement to sell, the Plaintiff-Appellant need not wait till 31.12.1992 to make the balance payment; the 1st and 2nd Defendants are not empowered to wait till 31.12.1992 to write the deed of transfer upon payment of the balance amount; and no sooner the balance amount is paid the 1st and 2nd Defendants are obliged to transfer the property to the Plaintiff-Appellant by way of transfer deeds. It appears that both the District Court and the Court of Appeal have failed to appreciate the above contention. As I pointed out earlier the 1st Defendant had failed and neglected to accept the balance amount. The Plaintiff-Appellant showing her bona-fide intention to pay the balance amount had written letters to the 1st Defendant and finally deposited the money with R Abeysinghe Attorney-at-Law and later deposited in the District Court.

For the aforementioned reasons, I hold that the 1st Defendant had failed to perform his obligations on the agreement to sell and therefore the Plaintiff-Appellant is entitled to relief claimed in his plaint.

For the above reasons, I set aside both the judgments of the District Court and the Court of Appeal and grant relief claimed by the Plaintiff-Appellant in his plaint. The learned District Judge is directed to enter decree accordingly. In view of the conclusion reached by me, I answer the questions of

law in the affirmative. I allow the appeal. The Plaintiff-Appellant is entitled to recover costs of the actions in all three courts.

Judge of the Supreme Court.

Eva Wanasundera PC, J

I agree.

Judge of the Supreme Court.

Upaly Abeyratne J

I agree.

Judge of the Supreme Court.

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. D. A. Suranga Mojith Kumara
2. L. Nilmini Nirosha
   Gulankanda, Horangalla, Thalagaswala

Defendant-Respondent-Appellants

S.C.APPEAL No.123/15
SC/HCCA/GA/0082/2006 (F) Vs.
DC ELPITIYA L 26/2001

K. B. Ariyarathna
Horangalla, Thalagaswala

Plaintiff-Appellant-Respondent

BEFORE : **B.P.ALUWIHARE, PC, J.**
SISIRA J.DE.ABREW, J.
K.T.CHITRASIRI, J.

COUNSEL : Widura Ranawaka
for the Defendant-Respondent-Appellants
Baghya Herath
for the Plaintiff-Appellant-Respondent

ARGUED ON : 13.01.2016

WRITTEN : 25.08.2015 by the Defendant-Respondent-Appellants
SUBMISSIONS ON : 23.12.2015 by the Plaintiff-Appellant-Respondent

DECIDED ON : 29.03.2016

CHITRASIRI, J.

Plaintiff-Appellant-Respondent (hereinafter referred to as the plaintiff) filed action bearing No.26/L in the District Court of Elpitiya seeking for a declaration that he is entitled to the land morefully described in the schedule to the plaint dated 7.9.2001. In that plaint, he also has sought to have the defendant-Respondent-Appellants (hereinafter referred to as the defendants) evicted from the said land. He has claimed damages as well from the defendants.

Plaintiff claimed title to the aforesaid land upon a decree entered in an earlier action filed in the District Court of Balapitiya which bears the No.503/L. He also has pleaded prescriptive title to the land in question. However, learned Counsel for the plaintiff submitted to this Court that the plaintiff is not relying on prescription though such a claim had been averred in the plaint. Claim on prescription has not been agitated in the Provincial Civil Appellate High Court either. Issue raised by the plaintiff on his prescriptive claim at the commencement of the trial in the original court had been answered in the negative. In the circumstances, the claim of the plaintiff, as it stands now is limited to the rights emanated from the decree dated 23.7.1990, entered in the case bearing No.503/L filed in the District Court of Balapitiya. (at page 185 in the appeal brief) It is on the strength of the aforesaid decree entered in the case 503/L that the plaintiff has sought to establish his title against the defendants in this case and not on any other ground.

The two defendants in their answer dated 01.09.2003, sought only to have the plaint dismissed. In that answer, they have stated that the 2nd defendant was permitted to possess this land by her father, who had been in possession of the same since the year 1973 having built a house on it. However, it is important to reiterate that the defendants have prayed only to have the plaint dismissed without having claimed any right or title over the land in dispute despite the fact that they and their predecessors in title alleged to have been living on that land since the year 1973.

Learned District Judge having considered the evidence recorded before him, dismissed the plaint on the ground that the plaintiff cannot rely on the judgment delivered in the case 503/L since the defendants in this case were not made parties to the said case 503/L. However, learned High Court Judges in the Civil Appellate High Court decided the other way around. They have stated that the plaintiff is in a position to have title to the land referred to in the schedule to the plaint on the strength of the decree entered in the case 503/L despite the fact that the defendants were not parties to that earlier action bearing No.503/L.

In the circumstances, the only issue in this appeal is to ascertain whether the plaintiff could rely on a decree in a *rei vnidicatio* action which was in his favour to establish title to the same land in a subsequent case when the defendants in the subsequent case were not parties to that earlier

action. This is the crux of the questions of law upon which the leave to proceed with this appeal was granted by this Court.

It is trite law that the burden of proving the case is on the plaintiff who claim title to a land in a *rei vindicatio action*. **[De Silva Vs. Goonatilake 32 NLR 217, Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167, Luwis Singho and Others Vs. Ponnamperuma 1996 (2) SLR 320, Dharmadasa Vs. Jayasena 1997 (3) SLR 327]** Hence, I will now turn to consider whether the plaintiff in this case has discharged the said burden in this instance.

As mentioned above, the plaintiff relies on the decree entered in the case 503/L to establish title to the land in suit. Significantly, the defendants in this case were not made parties to the aforesaid action 503/L even though they or their predecessors had been in possession of the land in question since the year 1973. The plaintiff in his evidence has admitted that the said action 503/L was filed in the year 1980 without making the defendants as parties to the action though they were in possession of the land even by then. Such possession of the defendants to the land is clearly evident by the documents marked 1V1 and 1V2 filed in this case. (Vide at pages 175 and 176 in the appeal brief). No explanation is forthcoming as to why the defendants in this case were not joined as parties to the action 503/L despite the fact that they were

in physical possession of the land in dispute long prior to the case 503/L was filed. On the other hand, the plaintiff has stated that he had never been in possession of this land. (Vide at pages 192 and 193 in the appeal brief).

It was alleged by the defendants that the earlier case 503/L was a collusive action in which the parties were two brothers and one of them had been the plaintiff. Judgment in that case was delivered on 20.01.1993. (Vide at page 185 in the appeal brief). It had been delivered without any issue been raised and therefore, the decree entered in that case was a consent decree. In terms of the decree entered in 503/l, the plaintiff in this case was declared entitled to Lot 88B in Plan No.1294A which is the subject matter in this case.

In that case, the Court has considered only the rights of the persons who were made parties to that action. Rights of the defendants in this case could not have been looked at in that action 503/L since they were not made parties in that action. Accordingly, their rights to the property had not been looked into, in that case. In other words, decision in 503/L had been made without giving an opportunity for the defendants in this case to present their case. Therefore, such a decision would certainly not bind the defendants in this case.

The decree entered in 503/L, it being a *decree in personam* would bind only the parties namely, B.Siripala and B.Ariyaratne in that action. Said Ariyaratne is the plaintiff in this case. Moreover, the plaintiff in this case has

admitted that he did not move court to have the decree executed in that earlier case. Had he made such an application to obtain possession of the land in suit pursuant to the decree been entered in that case, the defendant in this case or his predecessors in title could have objected to the writ being executed in that case since they were not parties to that earlier action and also because they were in possession of the land for a long period of time. Such circumstances lead to think that the plaintiff had an ulterior motive to have filed the action 503/L without the persons who were in possession being made parties to the same and also by obtaining a consent decree in that case.

Those circumstances show that the plaintiff in this case has obtained a consent decree in his favour without giving the defendants who had been in possession of the land in question, an opportunity to assert their rights to the land in dispute. Hence, it is abundantly clear that the decree in the case 503/L had been entered without making the persons who have interests in the land, as parties to the action. Those persons who claim interest to the land, at least by been in possession include the defendants in this case or their predecessors in title. Under those circumstances, it is incorrect to rely on the decree entered in 503/L and to decide this case in favour of the plaintiff even though the learned High Court Judges have decided so.

I arrived at the findings referred to above on the basis that a decree in a case in which a declaration of title is sought, binds only the parties in that action. Such a proposition is not applicable when it comes to a *decree in rem* which binds the whole world. Effects and the consequences of *actions in* rem and *actions in Personam* are quite different. *Action in rem* is a proceeding that determines the rights over a particular property that would become conclusive against the entire world, such as the decisions in courts exercising admiralty jurisdictions and the decisions in partition actions under the partition law of this country. Procedure stipulated in Partition Law contains provisions enabling the interested parties to come before courts and to join as parties to the action even though the plaintiff fails to make them as parties to it. Therefore, there is a rational to treat the decrees in partition cases as *decrees in rem*.

Actions in personam are a type of legal proceedings which can affect the personal rights and interests of the property claimed by the parties to the action. Such actions include an action for breach of contract, the commission of a tort or delict or the possession of property. Where an *action in personam* is successful, the judgment may be enforced only against the defendant's assets that include real and personal or moveable and immoveable properties. Therefore, a decree in a *re vindicatio* action is considered as a decree that would bind only the parties to the action. In the circumstances, it is clear

that the plaintiff cannot rely on the decree in 503/L to establish rights to the property in question as against the defendants in this case are concerned.

At this stage, it is also necessary to refer to the consideration made by the learned Civil Appellate High Court Judges as to the inability of the defendants to prove their possession to the land in suit. Such a consideration in this instance is completely irrelevant since the defendants have not claimed any right relying upon their possession to the land though such a possession was not in dispute. It had no bearing to establish or to contradict the claim of the plaintiff either. Hence, I cannot see any reason as to why the learned High Court Judges in the Civil Appellate High Court had stated that the defendants have failed to establish prescriptive title to the land. No such a claim had been made by the defendants in this case. Therefore, it is clear that the learned Judges in the Civil Appellate High Court have completely misunderstood the issue that was to be looked into in the appeal before them.

When looking at the matters referred to hereinbefore, it is clear that the plaintiff cannot rely on the aforesaid judgment in the case 503/L to establish his title to the land in question as against the defendants in this case. Therefore, the action of the plaintiff should necessarily fail as the reliefs prayed for are directly against the defendants. It is the decision arrived at by the learned District Judge as well. Hence, the decision of the learned District Judge should remain intact.

For the aforesaid reasons, judgment dated 16.09.2014 of the learned High Court Judges of the Civil Appellate High Court in Galle is set aside. Defendant-respondent-appellants are entitled to the costs of both appeals filed in this Court and the Civil Appellate High Court.

Appeal allowed.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PC, J.

I agree

JUDGE OF THE SUPREME COURT

SISIRA J.DE.ABREW, J.

I agree

JUDGE OF THE SUPREME COURT

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 / 124/11

SC/ HC/LA/ 209/2010

DC/Ratnapura/11409/P

1. Wathukarage Sirisena
2. Wathukarage Ariyasena (Deceased)

2A.A. Nanda Jayawardena,

Both of Maddakanda,

Balangoda.

Plaintiffs

Vs.

1. Wathukarage alias Rantheiyalage Karolis Fernando,

1A.W. Jayasooriya,

Wathukarakanda, Maddekanda,

Balangoda.

2. Wathukarage Robet,
C/o W. Seelawathie,
Wathukarakanda, Maddekanda,
Balangoda.

3. M. M. A. Haramanis

3A.Muhubada Manik Arachchige
Padmalatha

4. Wathukarage Seelawathie,
5. Wathukarage Jayasinghe,
6. Wathukarage Wimalasena,
7. P.A. Karunaratne,
All of Wathukarakanda,
Maddekanda, Baolangoda.

Defendants

AND

W. Jayasooriya,

Wathukarakanda, Maddekanda,

Balangoda.

Substituted 1A Defendant Appellant

Vs.

1. Wathukarage Sirisena

2. Wathukarage Ariyasena (Deceased)

2A.A. Nanda Jayawardena,

Both of Maddakanda,

Balangoda.

Plaintiffs Respondents

2. Wathukarage Robet,
C/o W. Seelawathie,
Wathukarakanda, Maddekanda,
Balangoda.

3. M. M. A. Haramanis

3A.Muhubada Manik Arachchige
Padmalatha

4. Wathukarage Seelawathie,
5. Wathukarage Jayasinghe,
6. Wathukarage Wimalasena,
7. P.A. Karunaratne,
All of Wathukarakanda,
Maddekanda, Baolangoda.

Defendant Respondents

AND NOW BETWEEN

W. Jayasooriya,

Wathukarakanda, Maddekanda,

Balangoda.

Substituted 1A Defendant Appellant Petitioner

Vs.

1. Wathukarage Sirisena

2. Wathukarage Ariyasena (Deceased)

2A.A. Nanda Jayawardena,

Both of Maddakanda,

Balangoda.

Plaintiffs Respondents-Respondents

2. Wathukarage Robet,
C/o W. Seelawathie,
Wathukarakanda, Maddekanda,
Balangoda.

3. M. M. A. Haramanis

3A. Muhubada Manik Arachchige Padmalatha

4. Wathukarage Seelawathie,
5. Wathukarage Jayasinghe,
6. Wathukarage Wimalasena,
7. P.A. Karunaratne,
   All of Wathukarakanda,
   Maddekanda, Baolangoda.

Defendant Respondents-Respondents

BEFORE : CHANDRA EKANAYAKE, J.

SISIRA J DE ABREW, J.

UPALY ABEYRATHNE, J.

COUNSEL : Rohan Sahabandu PC with Hasitha Amarasinghe for the substituted 1A Defendant Appellant Petitioner

Harsha Soza PC with Anuruddha Dharmaratne for the Plaintiff Respondent Respondent

ARGUED ON : 17.03.2015

WRITTEN SUBMISSION ON: 10.04.2015 (Appellant)

13.12.2011 (Respondent)

DECIDED ON : 19.02.2016

UPALY ABEYRATHNE, J.

This is an appeal from the judgment of the learned Judges of the High Court of Civil Appeal of the Sabaragamuwa Province holden at Ratnapura dated 01.06.2010. By the said judgment the High Court of Civil Appeal has refused an appeal preferred by the substituted 1A Defendant Appellant-Appellant (hereinafter referred to as the Appellant) from the judgment of the learned Additional District Judge of Ratnapura dated 01.04.2004. The learned Additional District Judge, by the said judgement, has dismissed the Appellant's claim and allowed the partition of the corpus as prayed for in the paint.

This court granted leave to appeal from the said judgment of the High Court of Civil Appeal on the following grounds of law set out in paragraph 21 (a), (b), and (c) of the petition of appeal dated 07.07.2010.

(a). Is the land referred to in the schedule to the plaint different from the land shown in the preliminary plan No. 3303?

(b). Did the District Court and the High Court err in law and facts in not appreciating that the Plaintiff has not been able to identify the land?

(c). In the circumstances should Lots 5A and 5B be excluded from the corpus?

The Appellant contended that Lot 313 and Lot 314 in Final Village Plan (FVP) bearing No. 461 dated 27.05.1939 should be excluded from the corpus

of the action since said lots had been settled on Raththarana, the original owner, in 1934 after the execution of the title deed bearing No. 108 dated 18.09.1923 (P3). The Appellant's contention was that since the Plaintiffs Respondents-Respondents (herein after referred to as the Respondents) had based their title solely on the said deed P 3 and by that time said Raththarana had no title to Lot 313 and Lot 314 in Final Village Plan No. 461 as the said crown grant was in 1939 and hence the corpus of the present action should be confined to soil rights of Raththarana which could have been transferred by said deed No 108 (P 3).

According to the plaint of the Respondents they have sought to partition a land called "Gedarewatta" bounded on the north by Mahakumbura on the east by Agala and Tewaththe Maima (The boundary of Tea Estate) on the south by Heraligaswetiya and Agala on the east by Maduge and Mahagala containing in extent 10 Kurunis of Kurakkan sowing.

The Respondents in paragraph 2 and 3 of the said plaint dated 16th of March 1993 have averred that Wathukarage Ransiya who being the original owner of the said land, by deed of gift bearing No 1905 dated 15.12.1872, had gifted toWathukarage Kirimenika, the land called "Gedarawatta" bounded on the north by Kumbura on the east by Agala on the south by Agala and Heraligaswetiya on the west by Maduge and Mahagala containing in extent 4 Kurunis of Kurakkan sowing. In proof of that the Respondent had produced an extract of the Register of Land marked P 1.

It is important to note that Northern and Eastern boundaries and the extent of the land described in the schedule to plaint differ with the Northern and Eastern boundaries and the extent of the land described in the schedule to P 1.

Accordingly it is clearly apparent that the Respondents have sought to partition a larger land than the land described in the schedule to the P 1.

Said Wathukarage alias Rankeiyalege Kirimenika by deed of gift bearing No 796 dated 19.07.1903 had gifted the said land to Wathukarage alias Rankeiyalage Raththarana. In proof of that the Respondent has produced the said deed marked P 2. According to the schedule of the said deed of gift a land called "Gedarawatta" bounded on the north by Mahakumbura on the east by Agala and Tewaththe Baundariya (The boundary of Tea Estate) on the south Heraligaswetiya and Agala on the east by Maduge and Mahagala containing in extent 10 Kurunis of Kurakkan sowing.

It must be noted that by P 2 said Kirimenika had gifted a larger land containing in extent 10 Kurunis of Kurakkan sowing instead of her rights of 4 Kurunis of Kurakkan sowing which devolved on her by P 1. It also must be noted that Northern and Eastern boundaries in P 2 differ with the boundaries described in the schedule to the deed of gift P1.

The Respondents have further averred said Raththarane by deed of gift bearing No 108 dated 18.09.1993 (P 3) had gifted the said land to;

1. Wathukarage alias Rankeiyalage Pemanis alias Punchisingho Jayasinghe alias Pieter Jayasinghe,
2. ditto Kirisantha,
3. ditto Arnolis Fernando
4. ditto Carolis Fernando the 1st Defendant,

and accordingly each of them became entitled in the proportion of ¼ , ¼, ¼ and ¼ of the corpus respectively.

The ¼ share of said Pieter Jayasinghe had devolved on the 1st Plaintiff by deeds of gift bearing No 857 dated 06.03.1973 (P4) and No. 10416 dated 21.09.1984 (P 5) respectively and ¼ share of Kirisantha had devolved on the 2nd Plaintiff by deed of gift bearing No 13693 dated 28.12.1987 (P6). Since said Aranolis Fernando died intestate his ¼ share devolved on Wathukarage Robert, Wathukarage Seelawathie, Wathukarage Jayasinghe and Wathukarage Wimalasena the 2nd and 4th to 6th Defendants and Wathukarage Yasawathie in the proportion of undivided 1/20, 1/20, 1/20, 1/20 and 1/20 of the corpus respectively. Said Wathukarage Yasawathie had died intestate and her 1/20 share devolved on the 3rd Defendant Wathukarage Haramanis.

It is clear from the points of contest raised at the trial before the District Court that the pedigree and the devolution of title set out by the Respondents have not been set in question by the Appellant. The Appellants have admitted that Lot No 306 and 307 was belonged to said Raththarana.

The Respondents contended that the corpus of the action is comprised of Lots 1, 2, 3, 4 and 5 as depicted in Preliminary Plan bearing No 3303 dated 26.10.1995 (X) made by M.S. Diyagama, Licensed Surveryor. In the contrary the Appellant contended that Lot No 313 and 314 depicted in plan bearing No 3303 (superimposition) dated 11.02.1997 made by M.S. Diyagama Licensed Surveyor do not belong to the corpus and should be excluded from the partition. Plan No 3303 (superimposition) marked 'Y' has been prepared superimposing on preliminary plan No 3303 marked 'X' by M.S. Diyagama Licensed Surveyor. The Appellant's position was that Lot No 313 and 314 depicted in FVP No 461 was belonged to State and settled on Raththarana in 1934.

It is pertinent to note that at the trial, the Jamis Pillai Company had not set out a claim against Lot 317. Even the Surveyor M.S. Diyagama in his report of the said plan bearing No 3303 (superimposition) dated 11.02,1997 has not made any reference to the effect that Lot No. 317 was belonged to Jamis Pillai Company. Also, none of the documents produced by the Appellant marked V 1 to V 4, Y, Y 1, 1V 1A, or 1V 1A 1has established the fact that said Lot No. 317 was belonged to Jamis Pillai Company.

In connection with Lot No 313 and 314 the Appellant heavily relied upon the documents marked V 1, V 2 and V 2A. The Appellant has produced V 1 in order to prove that aforesaid Lot 314 was belonged to State and also to prove that the said Lot 314 was settled on Said Raththarana. V 1 is an extract from the "Ceylon Government Gazzette" No. 8517of September 29, 1939 which contained Settlement Order No 257 (Ratnapura) published under "Land Settlement Ordinance, 1931. Said gazette notification reveals that Lot No. 314 depicted in FVP No. 461 was settled on Wathukarage Raththarana of Wathukarakanda.

V 2 is a Crown Grant dated 19th of January 1934. Grantee of V 2 is Wathukarage Raththarana of Maddekanda. V 2A is a plan dated 19th of January 1934 made by R.W.E. Ruddock, Acting Surveyor General. Said plan V 2A has depicted an allotment of land called Gedarawattehena in maddekanda bounded on the north by Lots 309 and 312 on the east by T.P. 109316 on the south by T.Ps. 109316 and 45275 and on the west by Lots 314 and 307 containing in extent 02 Acres and 04 Perches. According to 2 VA said Gedarawattahena is Lot No 313 in FVP No 461.

On the other hand the 1st Plaintiff Respondent-Respondent in his evidence at pages 88 and 89 of the brief admitted that Lot No. 313 and 314 do not

form part of the corpus and expressed his willingness to exclude Lot 313 and 314 from the partition.

Further more the 1st Respondent in his evidence at page 70 and 71 of the brief has admitted that he has no any rights to "Gedarewaththahena" and Lots No 5A and 5B in said plan No 3303 (superimposition) form parts of 'Gedarawaththahena' and it has to be excluded from the partition. In the said superimposed plan Lots 5A and 5B has been identified as Gedarawaththahean and form parts of Lot 313 in FVP No 461. It is also important to note that at the trial, none of the parties to the present action has challenged the said superimposition plan No 3303.

In the circumstances it is my firm view that said evidence has clearly established the fact that Lot No 313 had been settled on Raththarana, the original owner, by a Crown Grant (V 2) in January, 1934, after said Raththarana exhausted his rights by executing the deed bearing No. 108 dated 18.09.1923 (P 3). It is apparent from the Preliminary Plan No 3303 that Lot 313 in Final Village Plan (FVP) bearing No. 461 dated 27.05.1939 has also been included in the corpus of the present action. Also V 1 has clearly established the fact that Lot 314 in FVP No 461 had been settled on Raththarana in September, 1938. Since the Appellant has based his title solely on the said deed P 3 and by that time said Raththarana had not acquired any title to Lot 313 and Lot 314 in Final Village Plan No. 461, Raththarana could not transfer lots 313 and 314 by deed P 3. Hence the corpus of the present action should be confined to the soil rights of Raththarana which could have been transferred by said deed No 108 (P 3).

In the aforesaid circumstances Lot No. 5 depicted in said Preliminary

Plan No 3303 has to be excluded from the partition. But the learned Judges of both Courts have failed to evaluate the said evidence of the case in a correct perspective.

Therefore I hold that Lot No. 5 depicted in said Preliminary Plan bearing No 3303 should be excluded from the partition and the corpus of the action should be comprised of Lots 1, 2, 3, and 4 of the said Preliminary Plan bearing No 3303 dated 26.10.1995. Learned District Judge is directed to amend the interlocutory decree accordingly. I answer the said questions of law set out in paragraph 21(a) and (b) in the negative and 21(c) in the affirmative. Subject to the above variations the appeal of the Appellant is dismissed without cost.

Appeal dismissed subject to variations.

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

S.C. Appeal No. 124/2012
S.C (Spl.) L.A Case No. 30/210
C.A. Case No. 358/97 (F)
D.C. Colombo Case No. 4047/ZL

In the matter of an Application for Special Leave to Appeal.

Ranamukadewage Anoris Fernando
No. 232, Wanawasala Road,
Kelaniya.

PLAINTIFF

Vs.

1. Hewadewage Peiris Fernando
2. Nammunidewage Martin Fernando

DEFENDANTS (DECEASED)

1. Ranamukadewage Emi Nona

1.(a)Hewadewage Chandrani Kusumalatha

2.(b)Hewadewage Chandra Piyaseeli

3.(c)Hewadewage Chandrasiri Jayalath
4.(d)Hewadewage Kamala Kanthi

All of No. 243/1, Sirikotha Mawatha,
Wanawasala, Kelaniya.

SUBSTITUTED-DEFENDANTS

AND NOW BETWEEN

Ranamukadewage Anoris Fernando
No. 232, Wanawasala Road,
Kelaniya.

PLAINTIFF-APPELLANT (DECEASED)

Ranamukadewage Somasiri Karunaratne
No. 232, Wanawasala Road,
Kelaniya.

SUBSTITUTED-PLAINTIFF-APPELLANT

Vs.

1.(a)Hewadewage Chandrani
Kusumalatha

2.(b)Hewadewage Chandra Piyaseeli

3.(c)Hewadewage Chandrasiri
Jayalath
4.(d)Hewadewage Kamala Kanthi

All of No. 243/1, Sirikotha Mawatha,
Wanawasala, Kelaniya.

SUBSTITUTED-DEFENDANTS-RESPONDENTS

AND NOW BETWEEN

Ranamukadewage Somasiri Karunaratne
No. 232, Wanawasala Road,
Kelaniya.

SUBSTITUTED-PLAINTIFF-APPELLANT-PETITIONER

Vs.

1.(a)Hewadewage Chandrani
Kusumalatha

2.(b)Hewadewage Chandra Piyaseeli

3.(c)Hewadewage Chandrasiri
Jayalath
4.(d)Hewadewage Kamala Kanthi

All of No. 243/1, Sirikotha Mawatha,
Wanawasala, Kelaniya.

**SUBSTITUTED-DEFENDANTS-
RESPONDENTS-RESPONDENTS**

BEFORE: S. E. Wanasundera P.C., J.
Sisira J. de Abrew J. and
Anil Gooneratne J.

COUNSEL: Kamran Aziz for the Substituted Plaintiff-Appellant-Appellant

Chula Bandara for the 1(a) and 2(b) Substituted Defendant-Respondent-Respondent

D. K. Dhanapala with Sarath Gunawardena for the 3(c) Defendant-Respondent-Respondent

WRITTEN SUBMISSIONS OF THE 3(C) SUBSTITUTED DEFENDANT-RESPONDENT-RESPONDENT FILED ON: 30.08.2012

WRITTEN SUBMISSIONS OF THE 1(A) & 2(B) SUBSTITUTED DEFENDANTS-RESPONDENTS FILED ON: 11.09.2012

WRITTEN SUBMISSIONS OF THE SUBSTITUTED PLAINTIFF-APPELLANT-APPELLANT FILED ON: 12.10.2012

ARGUED ON: 25.05.2015 & 01.02.2016

DECIDED ON: 26.02.2016

GOONERATNE J.

This was an action instituted in the District Court of Colombo for a declaration of title to the land described in the schedules to the amended plaint and for eviction of the Defendant-Respondents from the said lands. To state the facts very briefly, is that the land described in schedule 1 of the amended plaint was a land granted by the crown by deed No. 1322 dated 07.08.1862, and by that crown grant one Walimuni Dewage Puncha became the owner which land is morefully described in plan marked P1 bearing No. 56939. It was the position of the Plaintiff (Anoris Fernando) that ultimately he became entitled to the land in dispute by devolution of title and by deed marked P3 bearing No. 191. Original ownership by crown grant to above named 'Puncha', and on 'Puncha's death his sole heir was his daughter Enso Fernando and on Enso Fernando's death on or

about 1896, leaving as her heirs were Emi Nona, Marthelis and Charles, are all admitted facts recorded as admission in the District Court.

The position of the Defendant-Respondent was that Puncha Fernando the original crown grantee also owned a land called 'Rukgahadeniya'. On 'Puncha's death 'Enso' (sole heir of 'Puncha') the Defendants state the said 'Enso' divided both lands adjacent to each other by plan No. 199 of 24.04.1935 (V2) in favour of Emi Nona, Marthelis and Charles. By the said partition plan the lands were divided as lots 'A', 'B' & 'C ', and the 1st Defendant became entitled to the said lots in the manner pleaded in the amended answer (para 12 to 17). Parties proceeded to trial on 28 issues. The learned District Judge by his Judgment dated 28.01.1997 dismissed the Plaintiff's case, and being dissatisfied with the said judgment. Plaintiff-Appellant appealed to the Court of Appeal. The Court of Appeal affirmed the Judgment of the District Court and dismissed the appeal on 13.01.2010. The Supreme Court on 16.07.2012 granted Special Leave to Appeal from the Judgment of the Court of Appeal on the questions of law set out in paragraph 12 of the amended petition dated 13.01.2011. The said paragraph contains subparagraphs (a) to (h) and about eight questions of law as follows are suggested.

(a) Is the Judgment of the Court of Appeal contrary to law and against the weight of the evidence adduced?

(b) Have the learned Judges of the Court of Appeal misdirected themselves by failing to appreciate, that deed marked as P3 (deed No. 191 dated 18.12.1981) was a valid deed, executed in accordance with the law, whereby, Meugine Fernando transferred her share of the land to Anoris Fernando (the Plaintiff), thereby entitling the Plaintiff to the land more fully described in the plaint and that this fact alone was sufficient in establishing the Plaintiff's claim to the property concerned?

(c) Have the learned Judges of the Court of Appeal misdirected themselves in law, by requiring the Plaintiff to establish possession of the land concerned in a rei vindicatio action in addition to proving ownership of the land?

(d) Have the learned Judges of the Court of Appeal misdirected themselves by failing to appreciate, that even assuming without conceding, that the Plaintiff's evidence was untrustworthy, this fact is no ground to reject the authenticity of deed marked P3 having particular regard to the fact that there was no evidence to disprove its genuineness?

(e) In any event and without prejudice, have the learned Judges of the Court of Appeal misdirected themselves in law by failing to appreciate that document marked as P3 was duly proved, or deemed to be duly proved, having particular regard to the fact that the Defendants did not object to the said document being received as evidence at the close of the Plaintiff's case and/or at the conclusion of the trial, and that therefore the said document was duly proved for all purposes of the law?

(f) Have the learned Judges of the Court of Appeal misdirected themselves in failing to take adequate consideration of the fact, that the evidence in the case suggests that the identity of the corpuses in this case, as claimed by the parties, are completely different, having particular regard to the boundaries and extents of the lands as claimed by the Plaintiff, as opposed to the boundaries and extents as claimed by the Defendants, which evidently do not form part of one another?

(g) Have the learned Judges of the Court of Appeal therefore misdirected themselves, by failing to appreciate that the Defendants have no entitlement to the land claimed by the Plaintiff (in terms of P3), upon the premise that the land claimed by the Defendants is completely different to the land claimed by the Plaintiff?

(h) In any event, have the learned Judges of the Court of Appeal misdirected themselves in law, by failing to appreciate that the rejecting of the evidence of Siri D. Liyanasuirya, Licensed Surveyor and accepting the evidence of S. Burah, Licensed Surveyor, was unreasonable and contrary to the totality evidence as adduced by the said two (2) Licensed Surveyors, having particular regard to the fact that Plan marked as X submitted by the former, clearly sets out the correct metes and boundaries, and also having specific regard to the fact that the latter had admittedly not even surveyed the land more fully described in the schedule to the plaint?

The original court as well as the Court of Appeal considered the question of identity of the land in dispute. This is the base and most important aspect to be correctly established in any land case. Failure to correctly prove

identity of the land in dispute is fatal. Plaintiff called Surveyor Liyanasuriya to give evidence and the Defendant party relied on the evidence and plan of Surveyor Burah. The trial Judge very correctly and as well as the Court of Appeal had examined and analysed the evidence of the two Surveyors. Plaintiff maintains that the land in dispute is depicted in Survey General's plan No. 56939 dated 1862-6-14 (P1). Defendant party rejects this position and argue that the land described in plan P1 along with another land called 'Rukgahadeniya' were amalgamated and depicted in plan V2 of Survey Ranasinghe in the year 1935 which is a partition plan, and accordingly divided portions are possessed and owned by Defendant-Respondent for which Plaintiff has no claim.

I will consider the findings of the learned District Judge as regards the oral testimony of Surveyor Liyanasuriya and Surveyor Burah. It is in evidence that Surveyor Liyanasuriya, could not correctly effect a superimposition on his plan since he could not obtain the correct data. It was admitted in evidence by him that the boundaries on the west, south and east were not definite. He admitted in his evidence that his superimposition is a questionable superimposition. Trial Judge having examined both plans of the abovenamed Surveyors, observe that Surveyor Liyanasuriya's plan does not show the temporary shed within the subject matter of the case but Surveyor Burah has clearly identified same on his plan. There is reference to a 'well' where the two

surveyors give different position in their plans. Trial Judge having compared Liyanasuriya's plan X and Burah's plan V10, observes that Surveyor Burah has obtained acceptable data than Surveyor Liyanasuriya and on that basis Surveyor Burah's plan V10 is the more satisfactory plan.

Trial Judge observes that Surveyor Burah had superimposed plan 56940 on his plan V10 and had thereby identified lot described in plan No. 56393. Further plan V2 had also been superimposed on plan V10. V2 is Surveyor Ranasinghe's partition plan (V2) which shows the 3 divided lots as per the partition plan. (It is also relevant to note that original plan 56393 and its western boundary is the land shown in plan No. 56940). I observe that the learned trial Judge has considered both oral and documentary evidence of the two Surveyors and arrived at a conclusion to accept and rely on Plan V10 and V10a, being Surveyor Burah's plan. Even the Court of Appeal accept such a position and I see no valid reason to observe otherwise and take a different view. It may be for this reason that the learned counsel for the Plaintiff-Appellant submitted to court and indicated to court that he would rely on plan V10 to argue his case, whether it may be and whatever position taken on deed marked P3 would not take the Plaintiff-Respondent's case any further due to a serious lapse of identity of the land in dispute not being established by the Plaintiff-Appellant. Such a defect

cannot be cured in the appeal merely by shifting the stance of identification at a very late stage of this case, in appeal in the Appex Court.

In a partition case as well as a case pertaining to declaration of title, identity of corpus is paramount since both type of cases need to establish title to the land in dispute. In this regard the dicta in *Jayasuriya Vs. Ubaid 61 NLR 352*

Held:

> In a partition action there is a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open to him to call for further evidence (in a regular manner) in order to make a proper investigation.

Piyasena Perera Vs. Margret Perera 1984 (1) SLR S7 held:

Held:

> The finality attached to an interlocutory decree of partition under section 48(1) of the Partition Law No. 21 of 1977 does not preclude an appeal court from interfering with such decree by way of revision of *restitutio* in *integrum* where a miscarriage of justice has occurred in this case the corpus to be partitioned had not been sufficiently identified either by means of the stated boundaries or by extent and the land of the petitioner appeared to be included in the corpus. Therefore there has been a miscarriage of justice.

The other issue that needs to be considered seriously is deed marked P3 from which Plaintiff claims to have got title from the said deed and also whether rights/title derived by Plaintiff from the aforesaid Marthelis.

Plaintiff claims that Marthelis died issueless. As stated above the devolution of title by deed V2 amongst Enso Fernando's three children Eminona, Merthelis and Charles, are admitted and parties to this suit are not at variance. Charles, Marthelis and Eminona are brothers and sister. It is from this point that the real problem surface. In deed P3 and the pedigree of Plaintiff demonstrate that Marthelis and Eminona died issueless (Eminona's husband predeceased Eminona). Deed P3 refers to the fact that the Plaintiff being a sibling of Charles and after the demise of Charles an un-administrable estate including the lands described in the schedule to P3 devolved on the Plaintiff and his sister (children of Charles). Plaintiff's sister sold her share of the land to Plaintiff and Plaintiff thereby became the owner, as the land devolved on him, both from Charles and Marthelis. (as it was represented as submitted that Marthelis died issueless and as such Charles inherited his share)

However in cross-examination of Plaintiff at the trial the position that 'Marthelis' died issueless proved to be false, and the trial Judge very correctly inter alia disbelieved the Plaintiff. The learned trial Judge observes that the land described in the crown grant and another land which were amalgamated (Rukgahadeniya) was inherited by Enso Fernando's children Marthelis, Charles and Eminona. This was Defendent's position which had not been rejected by the Plaintiff-Respondent. The Plaintiff had been cross-

examined at length by learned counsel for the Defendants. Marthelis was Plaintiff's father's brother. Plaintiff's father was 'Charles'. Plaintiff was confronted about Marthelis' marital status and it was suggested that Marthelis was married. The Marriage Certificate of Marthelis had been shown to Plaintiff and daughter of Marthelis, was present in court on the trial date. Plaintiff being confronted with such a position had been very evasive in his answers to court. Daughter's name was Geetha Wimalawathie. I will incorporate in this Judgment for purposes of clarity that part of the Judgment of the learned District Judge to demonstrate above (folio 521).

මර්තේලිස් යනු පැමිණිලිකරුගේ පියාගේ සහෝදරයෙකි. එම සහෝදරයාගේ විවාහය ගැන හෝ ඔහුට දරුවෙක් සිටි බවට පැමිණිලිකරු පිළි ගැනීමට මැලිකමක් මුල් අවස්ථාවේදී දක්වා ඇත. විත්තිය විසින් මර්තේලිස්ගේ විවාහ සහතිකය පෙන්වූ අවස්ථාවේදී ද, ඉන්පසුව විවෘත අධිකරණයේ මර්තේලිස්ගේ ගැහැණු දරුවා පෙන්වා සිටි අවස්ථාවේදී ද එම ප්‍රශ්ණාවලින් මිදීමට පැමිණිලිකරු යම් අසාර්ථක වෑයමක් දරා ඇත. පැමිණිලිකරුගේ මෙම සාක්ෂිය දෙස බලනකල ඔහු සත්‍යය එලෙසම ප්‍රකාශ කරන විශ්වාසදායක සාක්ෂිකරුවෙකු බව අධිකරණයට පිළි ගැනීමට නොහැකිවී ඇත.

ගීතා විමලාවතී යන මර්තේලිස්ගේ දුව සම්බන්ධයෙන් ද ප්‍රශ්ණ කල අවස්ථාවේදී ඔහු එම ප්‍රෂ්ණාවලට උත්තරදීමට යම් පැකිලීමක් පෙන්වා ඇත. කෙසේ වෙතත් එක් අවස්ථාවකදී පැමිණිලිකරු මෙසේ සඳහන් කර ඇත. "මම පිළිගන්නවා මර්තේලිස්ගේ අයිතිවාසිකම් වැන්දඹූ ස්ත්‍රියට සහ දුව වන ගීතා විමලාවතීට හිමිවිය

යුතු බව.” පැමිණිලිකරුගේ මෙම සාක්ෂිය සඳහන් වන්නේ 1985.12.10 වැනි දින දරණ සාක්ෂියේ 15 වැනි පිටුවේය.

The learned trial Judge no doubt was entitled to reject the evidence of Plaintiff to be unreliable and untrustworthy. As such Plaintiff has failed to discharge the burden of establishing his case on a balance of probability and the trial Judge was inclined to accept the case of the Defendants. On perusing deed P3, I find an incorrect false statement which is contrary to Plaintiff's own oral evidence demonstrated above. In the deed P3 it is stated (P3, 2nd pg.) that Marthelis died unmarried and issueless and Charles (Plaintiff's father) became sole owner of the land and premises described in the schedule to deed P3. It is from Plaintiff's father Charles, that he inherited the property in dispute in the manner stated in deed P3.

The trial Judge's position was that deed P3 was not duly proved. Whatever it may be the material contained in deed P3 in view of above on a balance of probability cannot favour the Plaintiff. Deed P3 had been executed on incorrect details and data. Plaintiff's own oral testimony establish a serious lapse in the chain of title relied upon by him. Our courts have time and again held that in an action rei vindicatio the Plaintiff should set out his title on the basis which he claims a declaration of title to the land and must prove that title to the land against the Defendant in the action. The Defendant in a rei vindicatio

action need not prove anything still less, his own title. Plaintiff cannot ask for a declaration of title in his favour merely on the strength that the Defendant's title is poor or not established. Plaintiff must establish his case. Vide Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167; Deeman Silva Vs. Silva 1997 (2) SLR 382.

The evidence adduced by the Defendant party was more reliable than the evidence called by Plaintiff. The only deed produced by the Plaintiff being deed P3 was highly questionable, and Plaintiff's Surveyor Liyanasuriya failed to establish identity of property. The Defendant in this case died at a certain stage and 1A to 1C Defendants were substituted. 1B Defendant gave evidence in detail and was subject to a lengthy cross-examination but Plaintiff's party could not demolish his case. I am convinced of the manner in which the learned trial Judge approached and accepted as proved Defendant's case. I note the following from his Judgment.

චිත්තිය විසින් හිමිකම් කියන අයුරුම පෙර කී මර්තේලිස්, චාර්ල්ස් සහ එම් අංක 199 දරණ බෙදුම් ඔප්පුව පිළිගැනීම කළ බව ද, එකී බෙදුම් ඔප්පුව අනුව චාර්ල්ස් ප්‍රනාන්දු (පැමිණිලිකරුගේ පියා) 1935 අංක 6225 යෙදූ 'වී1' ඔප්පුව මත ඔහුගේ අයිතිවාසිකම් භාර්යාව වන රෙජෝ ප්‍රනාන්දු යන අයට පවරා ඇත. පැමැණිලිකරු 'වී1' ලේඛණයේ ඔහුගේ පියාගේ අත්සන පිළිගෙන ඇත.

'වී 2' පිඹුරේ 'ඒ' කැබැල්ල හිමිකරන ලද මර්තේලිස් අංක 6273 යෙදූ ඔප්පුවෙන් ඔහුගේ අයිතිවාසිකම් ද රෙජෝ ප්‍රනාන්දුට පවරා ඇත. රෙජෝ ප්‍රනාන්දු එකී 'ඒ' සහ 'බී' ඉඩම කොටස් අංක 9180 යෙදූ ඔප්පුව මගින් (වී 7) 1 වැනි විත්තිකාර හේව දේවගේ පීරිස් ප්‍රනාන්දු ට පවරා ඇත. එම්නෝනාට 'වී 2' ලේඛණයෙන් හිමි වූ 'සී' අක්ෂරය කැබැල්ල ඇය විසින් 'වී 6' ලේඛණය මත ජේම්ස්ට විකුණන ලදී. ජේම්ස්, පීටර් ප්‍රනාන්දු නම් වූ එකම උරුමක්කරු සිටියේදී මිය ගිය අතර ඔහුගේ අයිතිවාසිකම් 'වී 7' නම් වූ අංක 1518 ඔප්පුවෙන් 1 වෙනි විත්තිකරුට හිමිකරනු ලැබ ඇත.

The question of law as per paragraph 12 of the petition are answered as follows in favour of the Defendant party.

(a) No

(b) No. The marital status of Marthelis was established and the position he died issueless was disproved as stated above. Incorrect misstatement in deed P3 cannot be considered to overcome marital status of Marthelis (admitted by Plaintiff that Marthelis was married in cross-examination). Plaintiff has not established his case on a balance of probability.

(c) Even if the Court of Appeal erred on the question of possession, on a balance of probability Plaintiff has not established title and his case.

(d) No. On a balance of probability Plaintiff's case has not been proved.

(e) No. Even if document P3 was proved as stated in this Judgment civil cases are proved on a balance of probability. Plaintiff has failed to discharge his burden of proof.

(f) No. It has resulted in a miscarriage of justice as the corpus had not been identified.

(g) No. As stated above.

(h) No.

In all the facts and circumstances of this case I am not inclined to disturb the findings of the learned District Judge and that of the Court of Appeal. Both Judgments are affirmed and this appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S .E. Wanasundera P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC APPEAL NO. 128/13

SC.SPL. LA. No. 122/2011
CA (Writ) No. 878/08

1. The Municipal Council of Moratuwa,

2. His Worship Lord Mayor Moratuwa,

3. The Municipal Commissioner,

All are of
Moratuwa Municipal Council,
Galle Road, Moratuwa.

Respondent-Petitioners

Vs.

Weerahennadige Shian Hiresh Fernando,
No. 04, De Vos Avenue,
Colombo 04.

Petitioner-Respondent

BEFORE : Sisira J. de Abrew, J.
K. T. Chitrasiri, J. &
Prasanna S. Jayawardena, PC, J.

COUNSEL : Rasika Dissanayake for the 1st – 3rd Respondent-Appellants.

Chrishmal Warnasuriya with Jayathu Wickramsuriya for the Petitioner-Respondent.

ARGUED & DECIDED ON : 25.07.2016

Sisira J. de Abrew, J.

Both Counsel submit that the parties in the case SC. Appeal 130/2013 would abide by the judgment in the case SC. Appeal 128/2013. Having allowed the said application, Court decides to take up for argument SC. Appeal 128/2013.

Heard both Counsel in support of their respective cases.

The Petitioner-Respondent filed an application in the Court of Appeal seeking a writ of mandamus issued on the 1st to 3rd Respondents. The Petitioner-Respondent in his petition filed in the Court of Appeal, inter alia, has sought the following relief referred to in paragraph "c" in the prayer.

> "Grant and issue writs of mandamus compelling the 1st to 3rd Respondents or any one and/or more of them to dully perform their statutory duties by demolishing/clearing the unauthorized constructions on the Petitioner's land and premises presently bearing assessment Nos. 35/18 and 35/19, Jubilee Road, Moratuwa". (vide paragraph 'C' of the prayer to the petition)

The Court of Appeal, by its judgment dated 12th May 2011,

issued a writ of mandamus as per the said paragraph 'c' of the prayer to the petition referred to above.

Being aggrieved by the said judgment the Respondent-Appellant has filed this appeal.

This Court by its order dated 23/09/2013, granted leave to appeal on the following questions of law:

1. Did the Court of Appeal err in rejecting the affidavits of the 2nd and 3rd Respondents-Appellants in the circumstances of this case?

2. Did the Court of Appeal err in Law in granting a writ of mandamus without satisfying itself of the existence of the requirements necessary for the grant of the writ?

3. Did the Court of Appeal have any other alternative but to grant the relief prayed for in the absence of any valid affidavits as admitted by the Respondent in the Court of Appeal?

After considering the said questions of law, we would like to consider first, the 2nd question of law as set out above. It is an undisputed fact that premises Nos. 35/18 and 35/19 belong to the Petitioner-Respondent. The Petitioner-Respondent has sought a writ of mandamus to demolish the said houses. The Petitioner-Respondent submits that the said premises are unauthorized constructions. The Petitioner-Respondent in para '9' of the petition filed in the Court of Appeal admits that one Mr. Dickman Cooray is presently in unlawful

occupation of the said premises.

Learned Counsel appearing for the Petitioner-Respondent submitted that he did not make Dickman Cooray a party, as he is in unlawful occupation of the said premises. In short he submitted that Dickman Cooray is an unlawful occupier of the said premises.

The question that arises for consideration is whether there is any judicial pronouncement to the effect that Dickman Cooray is an unlawful occupier of the said premises. This question has to be answered in the negative. There is no judicial pronouncement that Dickman Cooray is an unlawful occupier of the said premises.

Court of Appeal has issued a writ of mandamus without giving a hearing to Dickman Cooray who is presently occupying the said premises. In the event of this order being carried out Dickman Cooray will definitely be affected.

It is an accepted principle in law that when Court makes an order, the party that may be affected by the said order must be given a hearing. In the present case Court of Appeal has failed to grant a hearing to Dickman Cooray. Furthermore, the Petitioner has failed to name Dickman Cooray as a party to the action filed in the Court of Appeal.

In these circumstances, we hold that the Court of Appeal has not followed the rules of natural justice. We therefore hold the view that we are unable to permit the judgment of the Court of Appeal to stand.

For the above reasons, we answer the 2nd question of law set out above in the affirmative. In view of the conclusion reached above, the 1st and 3rd questions do not arise for consideration.

For the reasons set out above, we set aside the judgment of the Court of Appeal. We allow the appeal with costs fixed at Rs. 75,000/-.

JUDGE OF THE SUPREME COURT

K. T. Chitrasiri, J.

I agree.

JUDGE OF THE SUPREME COURT

Prasanna S. Jayawardena, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

Ahm

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

In the matter of an appeal

Thajudeen Apukar

Phimbiya

Ratmale

Defendant-Appellant-Petitioner-Appellant

SC Appeal 129/2010

SC (HC) CALA 17/2010

HC Appeal (NWP/HCCA/KUR/80/2002(F)

DC Kuliyapitiya 12909/L

Vs

Viharadhipathy

Jankurawela Siriniwasa Thero

Bodhiyanganaramaya,

Pihimbiya

Plaintiff-Respondent-Respondent-Respondent

Before: Sisira J De Abrew J

Upaly Abeyratne J

Anil Gooneratne J

Counsel: Upali Jayamanne for the Defendant-Appellant-Petitioner-Appellant

Chula Bandara with Gayaththri Kodagoda for the

Plaintiff-Respondent-Respondent-Respondent

Written Submission

tendered on : 23.2.2012 by the Appellant

22.2.2012 by the Respondent

Argued on : 23.9.2016

Decided on : 23.11. 2016

Sisira J De Abrew J

The Plaintiff-Respondent-Respondent- Respondent (hereinafter referred to as the Plaintiff-Respondent) filed this action against the Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) seeking a declaration, inter alia, that the land described in the schedule 'C' to the plaint is a land belonging to Pihimbiya Bodhiyanganarama Temple (hereinafter referred to as the temple) and to eject the Defendant-Appellant from the said land. The Plaintiff- Respondent is the Viharadhipathi of this temple. The learned District Judge by his judgment dated 30.10.2002, decided the case in favour the Plaintiff-Respondent. Being aggrieved by the said judgment, the Defendant-Appellant appealed to the Civil Appellate High Court (hereinafter referred to as the High Court) and the High Court by its judgment dated 9.12.2009, dismissed the appeal. Being aggrieved by the said judgment of the High Court, the Defendant-Appellant has appealed to this court. This court, by its order dated 11.10.2010, granted leave to appeal on the

questions of law set out in paragraph 9(a) and 9(b) of the petition of appeal which are set out as follows:

1. Has the Respondent (the Plaintiff-Respondent) proved title to Lot 71 in FVP 2086? If not as the Respondent (the Plaintiff-Respondent) failed to prove title to the land described in schedule C to the plaint, should the declaration sought by the Respondent (the Plaintiff- Respondent) from the District Court be refused?

2. In as much as the said action was a rei vindicatio action should the Respondent (the Plaintiff- Respondent) be granted a declaration of title only to Lot 70 in FVP 2086 and not to Lot 71 and should the judgment of the District Court be amended accordingly?

The land described in schedule 'C' of the plaint is an amalgamation of two lands described in schedule 'A' and 'B' of the plaint. Learned counsel appearing for the Defendant-Appellant submitted at the hearing of this appeal that he would not challenge the title of the Plaintiff-Respondent in respect of the land described in schedule 'A' of the plaint. He also admitted that this land is the land described as lot 70 in Final Village Plan (FVP) 2086. But he challenged the title of the land described in schedule 'B' of the plaint and submitted that the said land does not belong to the temple. The land described in schedule 'B' of the plaint is the Lot 71 in FVP 2086. The Plaintiff-Respondent takes up the position that the title of this land (Lot 71 in FVP 2086) was conveyed to the temple by a document dated 28.6.1917 marked P2 wherein Sooriyahetti Mudiyanselage Kiri Ethana, Mudalihamy, Podihamy, Dingiri Manike and Ran Manike had dedicated a land called Wilandagahamulahena to the temple and the Sangha. The Plaintiff Respondent

takes up the position that the said land described is in schedule ‘B’ of the plaint and that it is not Lot No.71 in the FVP No.2086. But the Defendant Appellant takes up the position that the land called Wilandagahamulahena is not Lot No. 71in FVP 2086 and it is Lot No.65. To prove this position he relies on document marked Z2 which is a Register of Settlement. I now advert to this contention. Although according to the document marked Z2 Wilandagahamulahena is Lot No.65, Navaratne the Surveyor who prepared plan No.4313 on a commission issued by court stated in evidence that Lot No.71 in FVP 2086 is the land called Wilandagahamulahena. He has also stated the same thing in his plan No.4313 which was marked as X at the trial. Therefore it is clear that the land called Wilandagahamulahena is Lot No.71 of FVP 2086. The document marked P2 refers to Wilandagahamulahena. When I consider the above facts, I hold that the land described in the document marked P2 is Lot No.71 of FVP 2086 and that it is the land described in schedule B of the plaint. Therefore it can be said that the title of the land described in P2 which is the land described in schedule ‘B’ of the plaint had been conveyed to the temple by the document marked P2.

It has to be considered here whether the title of the property described in the document marked P2 could be transferred to the temple and Sangha since it is not a document executed by a Notary Public and whether the document marked P2 contravenes Section 2 of the Prevention of Fraud Ordinance. A similar situation arose in the case of Randombe Dharmawansa Thero Vs Rupasinghe Mudiyanselage Ukku Banda 57 CLW 55 wherein Justice HNG Fernando (with whom Justice TS Fernando agreed) held thus:

"That a dedication once made is not rendered ineffective by the absence of a notarial document executed in accordance with the Prevention of Fraud Ordinance."

In Saranankara Unnanse Vs Indajothi Unnanse 20 NLR 385 at page 396 accepted the view that property becomes Sangika by virtue of the formal ceremony of dedication. In Dhammavisuddi Thero Vs Dhammadassi Thero 57 NLR 469 Supreme Court held that the property was Sangika although no notarial document was produced in proof of a transfer to the sangika or to a particular priest on behalf of the Sanga.

Applying the principles laid down in the above judicial decisions, I hold that when a person dedicates an immovable property to the Sangha or to a Buddhist Temple on behalf of Sanga, such a dedication does not become invalid by the absence of a notarial document. The Defendant-Appellant did not challenge the document marked P2.

For the above reasons, I hold that the title of the land described in the document marked P2 which is the land described in the schedule 'B' of the plaint had been conveyed to the temple by the five persons mentioned in P2 and that the owner of the land described in schedule 'A' and 'B' of the plaint is the temple.

In an action for rei-vindicatio the plaintiff must prove that he is the owner of the property. This view is supported by the following judicial decisions.

In De Silva Vs Gunatilake 32 NLR 217 at 219 Macdonell CJ held thus:

"There is abundant authority that, a party claiming a declaration of title

must have title himself. ... The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie."

In Peiris Vs Savunahamy 54 NLR 207 Dias SPJ (with whom Justice Gratiaen agreed) held thus:

"Where in an action for declaration of title to land, the Defendant is in possession of the land in dispute the burden is on the plaintiff to prove that he has dominium."

In Abeykoon Hamine Vs Appuhamy 52 NLR 49 Dias SPJ (with whom Jayatilake CJ agreed) observed thus:

"This being anion for rei vindicatio, and the defendant being in possession, the initial burden of proof was on the plaintiff to prove that he had dominium to the land in dispute."

In Wanigaratne Vs Juwanis Appuhamy 65 NLR 167 Supreme Court held thus:

"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."

The Defendant-Appellant admits that he is in possession of the land in dispute. The Plaintiff-Respondent in this case has proved that the property in dispute belongs to the temple and that the Defendant-Appellant is in possession of the property. Therefore the burden shifts to the Defendant-Appellant to prove that he is in possession of the land on a legal right.

The Defendant-Appellant in this case tries to take up the position that Pemananda Thero who is the owner of the property in question transferred this property to the father of the Defendant-Appellant on 9.10.1954 by deed No.2081 marked V1 and that he has become the owner of the property (vide paragraph 3 of his answer). Paragraph 3 of the answer clearly states that the name of the said land is 'Lindapitiyehena'. But the lands described in the schedule 'A 'and 'B' of the plaint are respectively 'Veherawatta and Wilandagahamulahena. This clearly demonstrates that the Defendant-Appellant is not the owner of the lands described in schedule 'A' and 'B' of the plaint which are respectively Lot No.70 and 71 in FVP 2086. It appears from the evidence led at the trial that the Defendant-Appellant is the owner of Lot No.73 in FVP 2086. It is interesting to note that what transpired in the cross-examination of the Defendant-Appellant. It was suggested to him during the cross-examination that he was in unlawful possession of the lands in suit. He did not deny this suggestion. The answer to this question was that he was living in the land given to him by his father. Failure to deny the above suggestion and the answer given to the question can be, in my view, considered as an implied admission that his possession in the land in suit (Lot No. 70 and 71 in FVP 2086) is unlawful. Courts cannot and should not recognize the claim of an unlawful occupier of a land in a rei vindicatio action. In my view, in a rei vindicatio action a person in unlawful possession of the land in suit has no right to challenge the title of the plaintiff. Therefore I hold that the Defendant-Appellant in this case has no right to challenge the title of the Plaintiff-Respondent.

From the above facts it is clear that the Defendant-Appellant claims prescription to the land called 'Lindapitiyehena' and not to the lands described

in schedules ‘A’ and ‘B’ of the plaint. When I consider all the above matters, I hold that the Defendant-Appellant is not the owner of the lands described in schedules ‘A’ and ‘B’ of the plaint; that he cannot claim prescription to the lands described in schedules ‘A’ and ‘B’ of the plaint; and that he is in possession of the said lands without any legal right.

The Defendant-Appellant has raised the following questions of law and leave to appeal was granted on the said questions.

1. Has the Plaintiff-Respondent proved title to Lot No.71 in FVP 2086? If not as the Plaintiff-Respondent failed to prove title to the land described in schedule to the plaint should the declaration sought by the Plaintiff-Respondent from the District Court be refused?

2. In as much as the said action was a rei vindication action should the Plaintiff- Respondent be granted a declaration of title only to Lot No.70 in FVP 2086 and not to Lot No.71 and should the judgment of the District Court be amended accordingly?

Having considered the aforementioned matters, I answer the above questions of law as follows.

1. The Plaintiff-Respondent has proved title to Lot No.70 and Lot. No71 in FVP 2086.

2. The Plaintiff-Respondent should be granted a declaration of title to Lot No.70 and Lot No.71 in FVP 2086.

For the above reasons, I affirm the judgment of the District Court and the judgment of the Civil Appellate High Court. I dismiss the appeal of the Defendant-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court

Upaly Abeyratne 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

DFCC Bank (PLC)
Head Office, P.O.Box 1397
Colombo 03

Defendant-Appellant

S.C.Appeal No.133/2014
SC/HA/LA No.44/2014
H.C.(Civil) Case No.44/2014/MR

Vs

1. Fathima Ruzana Fakurdeen alias Faleel Ariff Pathuma Rushana alias Fathima Ruzana Ariff
   No.27, Keththarama Mawatha
   Grandpass
   Colombo 14.
2. Mohamed Sarook Mohamed Fakurdeen
   No. 27, Keththarama Mawatha
   Grandpass
   Colombo 14

Plaintiff-Respondents

BEFORE : **SISIRA J.DE ABREW,J**
PRIYANTHA JAYAWARDENA, PC, J.
K.T.CHITRASIRI,J.

COUNSEL : Nigel Hatch P.C with Ms.Siroshni Illangage and Thejaka Perera for the Defendant-Appellant
Farman Cassim with Charaka Jayaratne and Damithree Welikala for the Plaintiff-Respondents

ARGUED ON : 07.02.2016

WRITTEN SUBMISSIONS ON : 12.09.2014 by the Defendant-Appellant

DECIDED ON : 24.03.2016

CHITRASIRI, J.

Two Plaintiff-Respondents (hereinafter referred to as the plaintiffs) are husband and wife. They carried on business in partnership under the name and style "Eat More Restaurant". The defendant-appellant namely the DFCC Bank PLC (hereinafter referred to as the defendant) had extended financial facilities to the said partnership at the request of its partners who are the two the plaintiffs in this case. However, in the plaint filed in the High Court of the Western Province exercising its civil jurisdiction, [herein after referred to as the High Court] two distinct entities are mentioned as the defendants to the action and those are namely;

DFCC Bank PLC

DFCC Vardhana Bank PLC.

The aforesaid manner in which the defendant had been identified in the plaint is a question of law raised by the defendant in the High Court as well as in this Court. Therefore, I will advert to this point later in this judgment.

As mentioned before, upon a request been made by the plaintiffs, defendant bank extended financial facilities to the two plaintiffs in accordance with the terms and conditions referred to in the agreement marked B12 which was annexed to the petition filed in this Court. The aforesaid terms and conditions found in the document marked B12 had been agreed and accepted by the parties. Such consensus is evident by the letter dated 10th January

2011 filed, marked B11. Accordingly, a loan of Rupees Twenty Million (Rs.20,000,000/-) had been granted to the two plaintiffs having them mortgaged the properties referred to in the Mortgage Bonds bearing Nos.3160 and 810. Those two Mortgage Bonds are marked as B12 and B13 with the petition filed in this Court.

Admittedly, the two plaintiffs have failed to service the facilities as agreed. Accordingly, the defendant took steps to auction the properties mortgaged in order to recover its dues, in terms of the provisions contained in the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990. Initially, the defendant had sent the letter dated 5.7.2013 to the plaintiffs informing them that the properties in question are to be auctioned pursuant to a decision of the Board of Directors of the defendant Bank. The aforesaid decision of the Board was marked as P14, with the plaint filed in the High Court. The said decision which is dated 26.6.2013 of the Board of Directors had been published in the newspapers as required by law and the newspaper article was marked as P16A with the plaint.

Pursuant to the receipt of the aforesaid letter dated 5.7.2013, the plaintiffs filed this action on 10.2.2014 in the High Court by the plaint dated 07.02.2014. In paragraphs 19 to 28 of that plaint, the plaintiffs have stated the reasons that made them to file this action. Having averred so, the plaintiffs, among other reliefs, have sought for an enjoining order and for an

interim injunction preventing the aforesaid auction being held. Learned High Court Judge issued an *ex parte* enjoining order against the defendant Bank and fixed the matter for inquiry in respect of the issuance of the interim injunction sought by the plaintiffs. Parties moved to have the said interim injunction inquiry concluded by allowing them to file written submissions on the matter. Accordingly, learned High Court Judge issued the interim injunction as prayed for in paragraph "ඇ" in the prayer to the plaint dated 7.2.2014 having considered the material before him including that of the submissions filed by the parties.

Being aggrieved by the said decision of the learned High Court Judge, the defendant Bank filed this application seeking to set aside the aforesaid order dated 04.07.2014 of the learned High Court Judge. This Court granted leave to proceed with the said application on the following questions of law.

(a) The Commercial High Court erred in law in failing to take into account that the plaintiffs have filed action against a legally non-existent Defendant;

(b) The said order is contrary and repugnant to the Recovery of Loans by Banks (Special Provisions)Act No.4 of 1990 in holding that the petitioner does not have the power to auction two properties under one Board Resolution;

(c) The Commercial High Court erred in law in misinterpreting and/or misconstruing the provisions of section 4 and/or section 10 of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990;

(d) The Commercial High Court misconstrued and/or misinterpreted the provisions of the Recovery of Loans by Banks (Special Provisions)Act No.4 of 1990;

(e) The Commercial High Court misdirected itself in law in not considering that the plaintiffs are guilty of suppressing and misrepresenting material facts and/or documents in seeking an equitable remedy;

(f) The Commercial High Court erred in law in not considering that the plaintiffs are guilty of severe delay and/or laches;

(g) The Commercial High Court misdirected itself in law granting the Interim Injunction;

(h) The Commercial High Court erred in law in failing to take cognizance of the fact that the petitioner had acted within the rights vested in it by the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 at all material times.

The first question of law referred to above is whether the learned trial judge has failed to take into account the manner in which the defendant had been named in the caption to the plaint filed in the High Court. In that plaint the parties are named as follows in its caption:

1. ෆාතිමා රුසානා ෆකුර්ඩීන් හෙවත්
ෆලිල් ආරීෆ් පාතුමා රුසානා හෙවත්
ෆාතිමා රුසානා ආරීෆ්
අංක **27,** කෙත්තාරාම මාවත
ගෘන්ඩ්පාස්
කොළඹ **14**

2. මොහමඩ් සරුක් මොහමඩ් ෆකුර්ඩීන්
අංක **27,** කෙත්තාරාම මාවත,
ගෘන්ඩ්පාස්
කොළඹ **14**

පැමිණිලිකරුවන්

එරෙහිව

ඩී.එෆ්.සී.සී. බෑන්ක් පී එල් සී
(ඩී.එෆ්.සී.සී. වර්ධන බෑන්ක් පී එල් සී)
ප්‍රධාන කාර්යාලය,
තැ.පෙ. 1397,
අංක 73/5, ගාලු පාර,
කොළඹ 03.

විත්තිකරුවන්

Learned President's Counsel for the defendant Bank submitted that the caption in the plaint indicates two different legal personalities. On the face of it, names of two entities are mentioned in the caption even though only the DFCC Bank PLC had been noticed to appear and defend this action. Even the reliefs prayed for in the plaint are directed towards one entity, namely DFCC Bank Plc. Furthermore, no specific reason is given to explain as to why the names of DFCC Bank PLC and DFCC Vardhana Bank PLC are being mentioned as one defendant.

I will now advert to the provisions of law relevant to the naming of defendants. Section 6 of the Civil Procedure Code stipulates that every application to court for relief or remedy obtainable through the exercise of the court's power or authority, constitutes an action. Therefore, cause of action upon which an action is instituted should necessarily give rise to an enforceable claim. This position was accepted in the case of **Pless pol Vs. Lady De Zoysa [9 NLR 316 at 320]** Under those circumstances, when the person against whom the claim is made has not been correctly identified in

the plaint, then the relief sought in that plaint will not become enforceable. Therefore, a claim made in such a plaint should necessarily fail.

Section 14 of the Civil Procedure Code describes the word defendants. In that Section, the manner in which the defendants could be joined is stipulated. Though two entities are being mentioned as defendants in this case, the plaint does not show whether such an addition is in conformity with the law referred to in Section 14 of the Civil Procedure Code. Moreover, Section 15 of the said Code describes the manner in which a person can be joined as a party to an action. Therefore, the way in which the parties are named in the plaint is contrary to those provisions contained in the Civil Procedure Code. Accordingly, I am of the view that the plaint filed in this case is defective.

This matter has not been addressed at all, by the learned High Court Judge. Had he looked at this issue, he could have addressed his mind as to the maintainability of the action at the very outset, as an issue of law. With having those errors of law which could have easily been identified at the very outset, it is incorrect to have issued an interim injunction as prayed for in such a defective plaint.

Questions of law referred to in items (b) (c) (d) and (h) mentioned hereinbefore are directed towards the law found in the provisions contained in the Recovery of loans by Banks (Special Provisions) Act No.4 of 1990. This

particular Act was enacted to provide for the recovery of loans granted by banks for the economic development of Sri Lanka and for the matters connected therewith or incidental thereto. It was brought into operation as a Special Act having given the title (Special Provisions) in its name. Basically, a special procedure had been laid down in the Act in order to have a speedy process to recover the moneys due to the Banks. This procedure is applicable only to the Banks referred to in Section 22 of the Act and not to any other financial institutions. Certainly, this procedure may help achieving the purpose of enacting this Act when compared with the procedure that are available to recover dues such as the Regular Procedure found in the Civil Procedure Code. Therefore, it is the duty of the court to ensure that those provisions in the Act No.4 of 1990 are implemented in the way that the legislature had intended.

Contention of the learned Counsel for the plaintiffs is that the defendant has violated Section 10 of the aforesaid Act No.4 of 1990. He has no complaint as to any other violation of the provisions contained in the Act. Section 10 of the Act reads thus:

> *10. (1) If the amount of the whole of the unpaid portion of the loan, together with the interest payable and of the moneys and costs, if any, recoverable by the Board under Section 13 is tendered to the Board at any time before the date fixed for the sale, the property shall not be sold, and no further steps shall be taken in*

pursuance of the resolution under Section 4 for the sale of that property;

(2) If the amount of the installment in respect of which default has been made, and of the moneys and costs, if any, recoverable by the Board under Section 13 is tendered to the Board at any time before the date fixed for the sale, the Board may in its discretion direct that the property shall not be sold and that no further steps shall be taken in pursuance of the resolution under Section 4 for the sale of that property.

Sub section (1) above provides for the borrower to prevent the auction being held provided he/she tenders to the Board unpaid portion of the loan together with interest and the costs incurred thereto. Sub section (2) allows the borrower to pay the installment in respect of which default has been made with the moneys and costs recoverable by the Bank and then to request the Board to halt the auctioning of the property mortgaged using its discretion referred to therein. Therefore, it is clear that the borrower should have paid the unpaid installments if he/she has not paid the entire unpaid amount, in order to move under Section 10 of the Act No.4 of 1990.

No material is found to establish that the plaintiffs have paid at least the unpaid installments up to the time this action was filed in the High Court. They have not even stated in the plaint that they have paid dues accordingly,

to fall within the ambit of Section 10 of the Act. Learned President's Counsel for the defendant bank submitted that the plaintiffs have failed to pay any money since the Board resolution was passed even though they became aware of the resolution by the letter dated 05.07.2013. In such a situation, it is incorrect to state that the plaintiffs were not given the chance of inviting the Board of Directors to have the benefit of the aforesaid Section 10 of the Act. Accordingly, the questions of law referred to above in items (b) (c) (d) and (h) are answered in favour of the appellant.

Remaining questions of law mentioned in items (e) (f) and (g) referred to above, relate to the law applicable when issuing interim injunctions. Upon a perusal of the impugned order, it is evident that the learned High Court Judge has relied only on two decisions namely, **Rajan Vs. Sellasamy [1994 (2) SLR 378]** and **American Cyanamid Co. Vs. Ethicon Ltd. [1975 (1) AER 504]** when he decided to grant the interim injunction in favour of the plaintiffs. In both those decisions, it seems that the only criteria that is necessary to issue an interim order is the presence of an arguable issue or the presence of a serious question to be tried at the trial.

I am unable to agree with the aforesaid position that it is the only matter that should be considered when issuing an interlocutory order. I must state that the law in this regard has developed in many ways even in other

jurisdictions since the American Cyanamid case was decided in the year 1975. However due to time constraints, I am unable to refer to those subsequent decisions in other Common law countries at this stage but I will now refer to some of our decisions in connection with issuing of interim injunctions.

J.F.A.Soza,J in his article published in the Bar Association Law Journal [Volume 1 Part II, July August 1983] has stated thus:

> *"Our early Judges trained in the English traditions were quick to import the English approach to our country without paying overmuch attention to the verbal niceties of the provisions of our statute law which at that time were embodied in sections 86 and 87 of the old Court Ordinance."*

Similarly, our Judges kept on considering possible answers to three main questions when issuing interim injunctions, as done by the Judges in England. Those 3 questions are:

- Has the applicant made out a *prima facie* case?
- Where does the balance of convenience lie?
- Do equitable considerations favour the grant of an injunction?

This is the practice that had been adopted in this country and it is clearly evident by the decision in the case of **Felix Dias Bandaranayake v. The State Film Corporation and another [1981 (2) SLR at 287]**

Therefore, I am unable to agree that it is only the presence of a serious question to be tried that is necessary to issue an interim injunction as stated by the learned High Court Judge. In **Felix Dias Bandaranayake v. The State Film Corporaton and another (supra at page 302),** Soza, J stated as follows:

> *"In Sri Lanka we start off with a prima facie case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and* ***that he has a good chance of winning."***
> [emphasis added]

Accordingly, it is necessary to ascertain the matters that constitute a *prima facie* case which lead for a plaintiff to win the case finally. Before looking at those matters, it is necessary to refer to Section 54 of the Judicature Act in which the manner in which injunctions are granted is stipulated. Under paragraph (a) of section 54(1) of our Judicature Act, it must appear from the plaint that the plaintiff is entitled to judgment, that is, the plaintiff must show that a legal right of his is being infringed and that he will probably succeed in establishing his right.

Under paragraph (b) of the same section 54(1) it must appear that during the pendency of the action there is or there is about to be done or committed by the defendant or at his instance or with his acquiescence an act in violation of the plaintiff's rights in respect of the subject-matter of the action and tending to render the judgment ineffectual. Once again he must

establish his entitlement to the legal right which is being or about to be violated and the alleged violation must be such as would tend to render the judgment ineffectual. Here too the probability of victory for the plaintiff must be there. It is only then it would be possible to say that the violation or threatened violation would tend to render the judgment ineffectual.

Under paragraph (c) of section 54(1) of the Judicature Act, it must appear that during the pendency of the action the subject-matter of the suit is about to be removed or disposed of to defraud the plaintiff. The plaintiff cannot complain of the likely removal or disposal of the subject-matter to defraud him unless he has established a good case of legal entitlement to the subject-matter with the likelihood of success in the suit.

Therefore, the *prima facie* case meaning is that a serious question to be tried and at the same time the probability of success in the case also should be established when issuing injunctions in terms of Section 54 of the Judicature Act. In **Jinadasa v. Weerasinghe, [31 NLR 33 at page 34]** it was held as follows:

> *"In such a matter the Court must be satisfied that there is a serious question to be tried at the hearing and* ***that on the facts before it there is a probability that plaintiff is entitled to relief."***
> [emphasis added]

The said comment is a quotation from the decision in **Preston vs. Luck [1884 (27) Ch. D.497 at 506**]

Furthermore, in **Hubbard Vs. Vosper (1972) 2 Q.B.84 at 96, Lord Denning MR** said:

> *"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done".*

In the case of **Kalutara Bodhi Trust v. Kalutara Multi Purpose Co-operative Society Ltd (2012) BLR at 175** held that:

> *"The establishment of a prima facie alone would not be sufficient for the grant of an interim injunction".*

Therefore, establishing *prima facie* case is a *sine qua non* when granting an interim injunction. Considering the decisions referred to above, it is my opinion that the presence of a serious question to be tried is only one among other ingredients to ascertain whether the applicant has made out a *prima facie* case. In other words, mere presence of a serious question before Court is not sufficient to establish a *prima facie* case. Furthermore, it must be noted that if the plaintiffs are not in a position to have the final reliefs that he/she has sought for, then granting an interim relief may also cause irreparable damage to the party against whom the interim injunction is issued,

In this instance, learned High Court Judge has not addressed his mind at all, to ascertain whether the plaintiffs would succeed in having final reliefs sought for in the plaint. As referred to hereinbefore in this judgment, serious

defects are found in the plaint filed by the plaintiffs. Those defects alone would be a reason to have the plaint dismissed. Under those circumstances, it is clear that the plaintiffs have not made out a *prime facie* case for them to have an interim injunction. In the circumstances, it is my opinion that the learned High Court Judge has misdirected himself when he issued an interim injunction as prayed for in the plaint.

For the aforesaid reasons, I answer all the questions upon which leave was granted in favour of the defendant-bank. Accordingly, this appeal is allowed with costs fixed at Rupees Fifty Thousand (Rs.50,000/-), The order of the learned High Court Judge dated 04.07.2014 is set aside. Interim injunction prayed for in the plaint is refused. Learned High Court Judge is directed to hear and conclude this case expeditiously.

Appeal allowed.

JUDGE OF THE SUPREME COURT

SISIRA J.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

S.C. Appeal No. 137/2014
SC/ HCCA/LA No.443/2013
WP/HCCA/GPH - 131/2009(F)
D.C. Negombo Case No. 6825/D

In the matter of an Application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006

Meringnage Rohan Fernando
144, Old Negombo Road,
Kanuwana,
Ja-Ela.

PLAINTIFF

Vs.

Patikiri Arachchige Dona Indrani
Chandralatha Amarasekera
No. 52, Weragala,
Padukka.

DEFENDANT

AND

Patikiri Arachchige Dona Indrani
Chandralatha Amarasekera
No. 52, Weragala,
Padukka.

DEFENDANT-APPELLANT

Vs.

Meringnage Rohan Fernando
144, Old Negombo Road,
Kanuwana,
Ja-Ela.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Meringnage Rohan Fernando
144, Old Negombo Road,
Kanuwana,
Ja-Ela.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Patikiri Arachchige Dona Indrani
Chandralatha Amarasekera
No. 52, Weragala,
Padukka.

DEFENDANT-APPELLANT-RESPONDENT

BEFORE: S.E. Wanasundera P.C., J.
Priyantha Jayawardena P.C., J. &
Gooneratne J.

COUNSEL: Dr. Sunil Cooray for the Plaintiff-Respondent-Appellant

P.K. Prince Perera for the Defendant-Appellant-Respondent

ARGUED ON: 20.05.2016

DECIDED ON: 28.07.2016

GOONERATNE J.

This was a divorce action filed in the District Court of Negombo, by the Plaintiff husband against his wife based on the allegation of malicious desertion. In the District Court, Plaintiff succeeded in obtaining a divorce, but the Defendant wife having appealed to the Civil Appellate High Court was able to convince the High Court, and get a Judgment in her favour wherein the High Court set aside the Judgment of the learned District Judge. However the Supreme Court on 04.08.2014 granted leave on questions of law set out in paragraph 11(a) and (b) of the petition dated 2610.2013. The said question reads thus:

(a) Did the learned High Court err in holding that the Defendant had no mental element to desert her Plaintiff husband;
(b) Did the learned High Court err in holding that the learned District Judge had written the Judgment without considering the laid down principles in respect of aspect of matrimonial fault of malicious desertion.

The material placed before this court indicates that parties concerned had met in Hong Kong and had an affair and decided to marry. Both of them came to Sri Lanka in 1996 and got married on or about 24.10.1996. It is stated by the Plaintiff that after a period of two months both of them left for

Hong Kong. Plaintiff also allege that after the marriage both were not staying together but stayed separately from each other. Learned District Judge has in his Judgment stated that both parties due to disputes between them had no connection with each other as from 05.12.2000. Plaintiff further states that as from the said date the Defendant-wife refused to live with him, and thereby maliciously deserted him. The version of the Defendant wife very briefly was that both of them lived in Hong Kong for a period of 8 years and the Plaintiff left Hong Kong for Sri Lanka on or about June 2003. Defendant wife had on or about 17.08.2006, returned to Sri Lanka, but the Plaintiff never came to the Airport to pick her up and as such the Defendant with her relatives visited the house of Plaintiff but he had avoided meeting her. It is also stated in evidence that, she came to know that her husband had contracted another marriage.

The pith and substance of the evidence led before the trial court indicates that both of them allege desertion of each other but the wife's version of the husband avoiding her has been corroborated in some way by the evidence of the wife's brother. It is stated by this witness that both of them came to Sri Lanka in 1998 and both of them stayed in his house for several days. Two matters are corroborated by this witness.

(a) Avoidance by Plaintiff of his wife at the time and period she came in search of him to Sri Lanka.

(b) Contracting of another marriage by the husband and told by the husband to the witness.

This witness also states that he had arranged a meeting for both of them at Galle Face on a particular day but the Plaintiff husband failed to turn up. Evidence led at the trial also indicates that both of them complain of each other being involved with other persons, wife having an affair with her employer and the husband having left the wife, has got involved with another lady and has a child. These allegations are of course mere allegations without cogent reasons to support such allegations and it remains not established in the way it should be established in a court of law. The points suggested by Plaintiff husband of Defendant's desertion are mere assertions and allegations which should have been corroborated in the context of this case.

I am inclined to accept the views expressed by the learned High Court Judge in the Judgment dated 20.09.2013. I agree with the learned High Court Judge's views that the Defendant wife has not maliciously deserted the Plaintiff as from 05.12.2000. Plaintiff has not established that fact of malicious desertion. On a balance of probability there must be definite and strong proof to establish that the Defendant intended to terminate the marriage as from 05.12.2000.

Instead there is evidence furnished before the trial court that the Defendant wife came in search of him to Sri Lanka and the way the Plaintiff avoided the Defendant. This aspect no doubt has been corroborated by the other witness called by the Defendant, which Defence version appears to be more probable. No doubt there is a vast difference in the age between them to be 12 years. The wife being the elder partner to the husband, it is very strange as to why such an age factor was never discussed at the time of marriage? These are not matters that could have been discovered especially when the age gap is more than 10 years. In any event that is no barrier for marriage, and not a ground for divorce.

My writing this Judgment is not an exercise to explain and expand jurisprudence on matrimonial relations, but to explain the simple truth that if the deserting spouse leaves the matrimonial home with the fixed intention of terminating the marriage, malicious desertion could be proved. The facts made available to this court does not in any way demonstrate the intention of the Defendant wife to terminate marital relations with the husband. A mere desertion for a period would not amount to malicious desertion. There has to be proof of no return or the point of no return to the other spouse which should be apparent. In order to further fortify my views I refer to the *Attanayake Vs. Attanayake (1937) 16 CL Rec 206*. In this case Plaintiff had been taken to her

mother's house by the Defendant after a quarrel and left there. At a subsequent date the Defendant wrote a letter to Plaintiff's mother and accused of adultery and declared "I do not want your adulterous daughter". Poyser J. held Defendant had shown a deliberate intention to repudiate the marriage since the factum of desertion too had been established, a divorce was granted. In another case Canekaratne Vs. Canekaratne 66 NLR 380 held whether they are leading separate lives on account of a mutual agreement or due to force of circumstances, if an intention to put an end to the marriage is manifested, desertion will be established. What is absent and lacking in the case in hand is an intention to put an end to marital relations. I am not in a position to act on mere assertions in the absence of strong evidence to terminate the marriage. That may be the reason for the Defendant to only seek dismissal of the action without a cross claim for divorce. The function of the court is to determine the relative importance of the acts complained of as items of evidence to support an inference of desertion, which amounts to malicious desertion and not just mere desertion.

The learned High Court Judge has considered the case of *Silva Vs. Missinona 26 NLR 113.*

Held:

> Desertion to be a ground for divorce must be malicious, that is to say, it must be deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state. It must be sine animo revertendi. Divorce should only be

granted if the desertion complained of was a repeated desertion, and the offending spouse has contumaciously refused to return to married life.

At pgs. 117 & 118

If one now refers to the facts in the light of these principles, it is clear that no case of malicious desertion has been made out. There may have been desertion, but it was certainly not malicious, and, in particular, it is certainly not established that it took place sine animo redeundi. The institution of marriage would be in a perilous position if, when husband and wife quarrelled about the place where they should reside, and the wife, during a state of friction took refuge with her parents, it was held that these facts of themselves entitled the husband to a decree for divorce. I am not able to see in this case that during the material period the husband ever definitely put at the disposal of his wife a home where she could go and live with him. She left him at a period of mutual exasperation, when he himself was anxious to get rid of his wife, and it seems to me quite impossible that her conduct should be regarded as malicious. Even in this very action he himself declared in his evidence. "If I take my wife with me there is no doubt that she would kill me. I am not willing now to take her to a house at Kataluwa. She would poison me. I am not now willing to live with her in any house." These are clearly not circumstances in which the remedy of the Roman-Dutch law would be granted.

I observe that the situation of the parties to this marriage is very unfortunate. No doubt there is an age difference. When times were good the age was not a barrier but with the effluxion of time it is seen as a human problem. Material placed before court suggest that the Plaintiff-husband attempted to sever all connections with the Defendant wife. Legally he is at a disadvantage in the absence of proving actual and definite acts of repudiation

of obligation of marriage with an intention not to resolve disputes between them on the part of the Defendant wife. In desertion the element of malice is an important aspect. Entire episode is without malice on the part of the Defendant wife.

I cannot say the same as regards the Plaintiff husband. Evidence show that he has intended to put an end to all marital relations. The reasons do not clearly surface in evidence for his benefit. I answer the question of law as follows:

(a) No. Learned High Court Judge's conclusions are supported by legal principles relevant to 'Malicious Desertion' as referred to in the decided cases cited in the Judgment of the High Court.

(b) No.

It is the view of this court, and as expounded by jurist that desertion is a continuing offence and as such could be terminated at any time on proof of a change of animus or factum. In these circumstances either party has a right to reinstitute fresh proceedings. The plaint filed in the year 2006 with all procedural steps and positions in law urged by either party at the trial and in the appeal to the High Court, ultimately concluded in the Apex Court only by mid-2016. This, certainly is a long lapse of time, to a litigant involved in matrimonial disputes. It is desirable for the parties concerned to do what is best for each other and consider realities of life.

In all the above facts and circumstance I affirm the Judgment of the High Court and dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S. E. Wanasundara 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

In the matter of an application for Leave to Appeal under section 5(c) (1) of the High Court of the Provinces (Special Provisions Act) No.19 of 1990 as amended by Act No. 54 of 2006.

SC. Appeal No. 138/11

S.C Leave to Appeal

Application No. HC.CALA.No.98/11

Civil Appellate High Court of Jaffna

Case No. 83/09

District Court of Jaffna

Case No. 664/Land

1. Mr. MariyammahSandiyapillai
   No.16/2, New Chemmani Road,
   Nallur North, Jaffna.
2. Mr. KarthigesuSivanesan
   No.16/4, New Chemmani Road,
   Nallur North, Jaffna.
   Presently resident abroad
   (The 2nd Plaintiff appears by his Power of Attorney holder

KarthigesuPulendrarajah of the same address)

Plaintiff-Appellants-Petitioners

Vs.

1. KarunakaranNavartnasingham
2. Mrs. GuneluxumyMaheswaran (Widow)
3. VinayagamoorthyKumaraguru
4. Wife Thanaluxumy

All of New Chemmani Road
Nallur North, Jaffna.

Defendant-Respondents-Respondents

BEFORE : SISIRA J.DE ABREW,J.
UPALY ABEYRATHNE,J. &
NALIN PERERA, J.

COUNSEL : Dr. Sunil F.A. Cooray instructed by S.Kumarasingham for the Plaintiff-Appellants-Petitioners.

G. Jeyakumar with P.Krishanthan for the Defendant-Respondents-Respondents.

Written Submissions of
the Appellants filed on : 08/11/2011

Written Submissions of
the Respondents filed on : 15/02/2012

ARGUED ON : 20.09.2016.

DECIDED ON : 3.11.2016

SISIRA J.DE ABREW J.

Plaintiff-Appellant-Petitioners(hereinafter referred to as the Plaintiff-Appellants) filed action in the District Court of Jaffna against the Defendant-Respondent-Respondents (hereinafter referred to as the Defendant-Respondents) for, inter alia, a declaration of title that the Plaintiff-Appellants are entitled to 1/3 share of the land described in the schedule to the plaint. On the date of the trial the Defendant-Respondents submitted that the proxy of the Plaintiff-Appellant was defective. The learned District Judge agreed with the said submission and by his order dated 27.3.2009, dismissed the action of the Plaintiff-Appellants. Being aggrieved by the said order of the learned District Judge, the Plaintiff-Appellants appealed to the Civil Appellate High Court of Jaffna (hereinafter referred to as the High Court) and the said High Court by its judgment dated 11.2.2011, affirmed the order of the learned District Judge and dismissed the appeal.Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellants have appealed to this court. This court, by its order

dated 28.9.2011, granted leave to appeal on the questions of law set out in paragraph 53(a) to (f) of the petition dated 16.3.2011 which are set out below:

1. Is the judgment in case No. 83/09 in the Civil Appellate High Court of Jaffna one entered in disregard of the well established principle emerging from the decided cases that as long as there is authorization given to the registered Attorney to act on their behalf by the party/parties concerned the proxy is valid and the defects in such a proxy are curable?
2. Hasthe Civil Appellate High Court of Jaffna erred in holding that the proxy is invalid and non existence merely for the reason that it does not contain the necessary details?
3. Has the Civil Appellate High Court of Jaffna erred in failing to consider that the proxy has been signed by the 1st Plaintiff and the Attorney (Power of Attorney holder) for the 2nd the Plaintiff indicating authorization given by them to their Registered Attorney S. Kanagasingham and in as much as there is authorization the absence of necessary details which can be supplied with the permission of court will not render the proxy invalid?
4. Has the Civil Appellate High Court of Jaffna erred in failing to provide an opportunity to fill the omissions in the proxy and thereby repeated the same error by the District Court of Jaffna in the said case No.664/L?
5. Has the Civil Appellate High Court of Jaffna erred in failing to consider the said Registered Attorney from the date of filing the action on 30.2.2006 up to the filing of the Petition of Appeal and thereafter in pursuing the appeal had continued to do several acts and

taken several steps on behalf of the Plaintiff-Appellant in the said case NO.664/L and DC Jaffna (as reflected in journal entries and proceedings) and had stood authorized by the petitioners to do so and for that reason dismissal of the action is unjustifiable merely on the ground of absence of necessary in the proxy filed by the Petitioners?

6. Has the Civil Appellate High Court of Jaffna erred in not considering the effect of the case law relating to the question of proxy and given its judgment contrary to the decided cases?

The 2nd Plaintiff-Appellant in this case has given a Power of Attorney to K Pulendrarasa to file the case. The learned District Judge, in his order, held that the proxy filed on behalf of the Plaintiff-Appellants was defective as it did not contain the date and the place where the authority was given to the Registered Attorney-at-Law by the Plaintiff-Appellant. The learned District Judge also held that the name that appears in the Power of Attorney is Puliyendrarasa but the name that appears in the proxy is Pulendrarasa. The learned High Court Judges summarized the grounds on which the case was dismissed bythe learned District Judge. The said grounds are as follows:

1. The name of the Power of Attorney filed by the Plaintiff-Appellants differed from the caption.
2. The proxy of the Plaintiff-Appellants did not contain necessary details and was not signed properly.

The learned High Court Judges however did not agree with the 1st ground stated above as they were of the opinion that a correct Power of Attorney could be filed and that the caption could be amended with permission of court. The

learned High Court Judges held that the proxy was defective and made the following observation.

"This is a case of want of proxy as opposed to a defect in the proxy."

Learned counsel for the Plaintiff-Appellants submitted that the defect of a proxy could be cured and that a case should not be dismissed on the ground that a proxy was defective. Learned counsel forthe Plaintiff-Appellants did not make submission on the basis that the proxy was correct. He admitted that there were certain defects in the proxy which could be cured. The most important question that must be decided in this case is whether or not the defective proxy filed on behalf of the Plaintiff-Appellant could be rectified and that opportunity should be given to the Plaintiff-Appellant to rectify the proxy. I now advert to this question. It is undisputed that Mr. Kanagasingham Attorney-at-Law has filed the proxy on behalf of the Plaintiff-Appellants and he was present throughout the case. It is also undisputed that there is a dispute between parties with regard to the land described in the plaint and it has been brought before court. When this type of dispute is brought before court, it becomes the duty of court to resolve the dispute. This duty of court which is considered to be sacred should not be trammelled by technical objections. To support this view, I rely on the judgment of Abrahams CJ in the case of Vellupillai Vs The Chairman Urban District Council Jaffna 38 NLR 464 wherein His Lordship observed thus: "This is a court of Justice, it is not an Academy of Law". In my view, when court observes a defect in a proxy filed on behalf of a litigant, an opportunity should be given to the litigant to rectify the error without suppressing the dispute between parties being resolved. However before I conclude, I would like to consider certain judicial decisions.

In Treaby Vs Bawa 7 NLR 22 it was observed that

> ‘*The plaintiff having, by an oversight, omitted to insert in the proxy which he had signed the name of the proctor whom he employed to appear before the Court and conduct his case, and the defendant having objected in his answer to the maintenance of the action against him:’*
>
> *It was held “that the proper course to adopt in such a case was not to order the plaint to be taken off the file and cast the plaintiff in costs, but to supply the omissions then and there and proceed with the case in due course.”*

In K. Kadirgamadas Vs K Suppaiah 56 NLR 172 the following facts were observed:

> *‘When the petition of appeal was filed on behalf of the defendants, the Proctor who presented it had not been appointed in writing, as required by section 27 of the Civil Procedure Code, to act for some of the appellants. He was so appointed after the appealable time had expired. He had, however, without objection from any of the parties, represented all the defendants at various stages of the proceedings earlier.*
>
> *Supreme Court held “that the irregularity in the appointment of the Proctor was cured by the subsequent filing of a written proxy.”*

In Paul Coir (Pvt) Ltd Vs Waas [2002] 1SLR 13 the following facts were observed:

> *'The plaintiff filed action on 24. 12. 1992 to recover Rs. 400,000/- plus interest andcosts from the defendant company (the defendant). On15. 12. 1994, the date of trial, objection was taken for the first time by the plaintiff's counsel that the proxy of the defendant was defective. The counsel moved that the proxy and the answer filed by the defendant be rejected and the action be fixed for trial ex parte. Both parties filed written submissions on this application, and the same attorney-at-law for the defendant filed a fresh proxy in his favour, along with his written submissions. The fresh proxy ratified and confirmed that the same attorney-at-law had earlier acted on behalf of the defendant with his authority, consent, concurrence and approval.*
>
> *While the first proxy was signed by one Director with his rubber stamp affixed but not bearing the common seal of the company, the fresh proxy bore the common seal of the company with signatures of two Directors as required by section 34 (1) (a) of the Companies Act, No. 17 of 1982 and Article 110 (1) of the Articles of Association of the Company'.*
>
> *Supreme Court held:*
> *"(1) If according to the intention of parties the attorney-at-law had in fact the authority of his client to do what was done on his behalf although in pursuance of a defective appointment, in the absence of*

a legal bar, the defect could be cured. The provisions of section 34 (1) (a) of the Companies Act, though specific, are similar to the general provisions of section 27 of the Code. So are the provisions of Article 110 (1) of the defendant's Articles of Association. Such provisions are directory and not mandatory.

(2) The fresh appointment (proxy) filed in this case cured any defect arising out of alleged non-compliance with section 34 (1) (a) of the Companies Act and Article 110 (1) of the Articles of Association of the defendant Company."

For the above reasons, I hold that defects in a proxy filed on behalf of a party in a case could be rectified and that an opportunity should be given to the party to rectify the defects. In my view the learned District Judge has fallen in to grave error when he dismissed the case without giving an opportunity to Plaintiff-Appellants to rectify the defects in the proxy. The learned Judges of the High Court too have fallen into the grave error when they dismissed the appeal without considering the above legal literature. When I consider aforementioned matters, I hold that the District Court and High Court should have permitted the Plaintiff-Appellants to rectify the defects in the proxy and proceeded with the case. In these circumstances I answer the 1st to 4th and the 6thquestions of law raised by the Plaintiff-Appellants in the affirmative. The 5th question of law does not arise for consideration in view of the answer given to the 1st to 4th and 6th questions of law.

For the above reasons, I set aside the order of the District Court dated 27.3.2009 and the judgment of the High Court dated 11.2.2011 and direct the

learned District Judge to give an opportunity to the Plaintiff-Appellants to rectify the defects in their proxy and proceed with the case. I allow the appeal. The Plaintiff-Appellants are entitled to recover the costs of the action in this court.

Appeal allowed.

Judge of the Supreme Court.

Upaly Abeyratne J

I agree.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court.

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 141/09

SC/ HCCA/LA/ 153/2008

SP/HCCA/KEG/507/2007/F

DC Kegalle 26317/P

Pahalayaya Nandasena,
Kumbaldiwela,
Molagoda.

Plaintiff

Vs.

1. Karunanayaka Hitiralalage Ananda Bandara of Edalla Watta, Suriyagama, Dewalagama.
2. Sunethra Kumari,
3. Mayura Kumari,
4. Abekoon Bandara,
5. Galagoda Bandara,
6. Y. M. Dingiri Kumarihamy,
   All of Kabaldiwela,
   Molagoda.

Defendants

AND

Pahalayaya Nandasena,

Kumbaldiwela,

Molagoda.

Plaintiff Appellant

Vs.

1. Karunanayaka Hitiralalage Ananda Bandara of Edalla Watta, Suriyagama, Dewalagama.
2. Sunethra Kumari,
3. Mayura Kumari,
4. Abekoon Bandara,
5. Galagoda Bandara,
6. Y. M. Dingiri Kumarihamy, All of Kabaldiwela, Molagoda.

Defendant Respondents

AND NOW BETWEEN

1. Karunanayaka Hitiralalage Ananda Bandara of Edalla Watta, Suriyagama, Dewalagama.
2. Sunethra Kumari,
3. Mayura Kumari,
4. Abekoon Bandara,
5. Galagoda Bandara,
6. Y. M. Dingiri Kumarihamy, All of Kabaldiwela, Molagoda.

Defendant Respondent Appellants

Vs.

Pahalayaya Nandasena,

Kumbaldiwela,

Molagoda.

Plaintiff Appellant Respondent

BEFORE	:	PRIYASATH DEP PC, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, 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	:	23.03.2015
WRITTEN SUBMISSION ON:		13.01.2010 (Defendant Respondent Appellant) 22.02.2010 (Plaintiff Appellant Respondent)
DECIDED ON	:	19.02.2016

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the learned Judges of the High Court of Civil Appeal of Sabaragamuwa Province holden in Kegalle dated

13.10.2008. By the said order the Civil Appellate High Court has set aside the judgment of the learned District Judge of Kegalle dated 03.04.2002 and allowed the appeal of the Plaintiff Appellant Respondent (hereinafter referred to as the Respondent). The 1st to 06th Defendant Respondent Appellants (hereinafter referred to as the Appellants) sought leave to appeal from the said judgment of the Civil Appellate High Court and this Court granted leave to appeal on the questions of law set out in sub paragraph (f) and (g) of paragraph 10 of the Amended Petition dated 3rd of August 2009. Said questions of law are as follows;

(f) Where a co-owner of a larger land who in lieu of his undivided share, had acquired a prescriptive title to a divided portion of such larger land, execute a deed expressed to be conveying his undivided share of such larger land instead of the divided portion to which he had acquired sole ownership by prescriptive possession, can such deed be construed as conveying his sole ownership to such divided portion as held by the majority of a Divisional bench of the then Supreme Court in Girigoris Perera Vs Rosalin Perera (1952) 53 NLR 536 and later by the Court of Appeal in Ponnambalam Vs Vaithaliagam 1978/79 2 SLR 166?

(g) Did the Provincial High Court in its judgment in the present case err by holding that even if the predecessor in title of the contesting Defendants had prescribed to a specific lot of the corpus, yet, as the deed on which they acquired title was for an undivided share they could not rely on the prescriptive title of their predecessor as was held in Mustapha Vs Rajapaksa (1985) 2 SLR 25?

The Respondent (Plaintiff) in this case instituted the said action against 01st to 5th Defendants in November, 1994, seeking to partition a land called 'Beligaswatta' containing in extent of one pela of paddy described in the schedule to the plaint. The 06th Defendant had been added during the pendency of the action in the District Court. In the plaint, the Respondent averred that Weligalle Muhandiramalage Punchimahattaya and Koralalage Dingiri Amma were the original owners in the proportion of ½ and ½ shares respectively. Said Punchimahattaya by deed bearing No 15695 dated 24.01.1925 (P 1) transferred his undivided ½ share to Tikiribanda and said Tikiribanda by deed bearing No 4350 dated 13.05.1926 (P 2) transferred said undivided ½ share to Dingiribanda. Also said original owner Dingiriamma by deed bearing No 26213 dated 30.01.1925 transferred her undivided share to said Dingiribanda and two others namely Tikiribanda and kirimudiyanse and each of them became entitled in the proportion of 1/6, 1/6 and 1/6 respectively of the corpus. Said Dingiribanda who became entitled to undivided 4/6 (1/2 + 1/3) share by deed bearing No 52402 dated 02.06.1961 (P 4) transferred his said undivided share to Samson Seneviratne and he by deed bearing No 7068 dated 02.09.1993 (P 5) transferred to the Plaintiff Appellant Respondent. Accordingly the Respondent became entitled to 4/6th share of the said land to be partitioned. Upon the death of said Tikiribanda, his 1/6th share devolved on his four children 1st 2nd 3rd and 4th Respondent. Accordingly the 1st to 4th Defendant Respondent Appellants became entitled in the proportion of 1/24, 1/24 and 1/24 respectively of the corpus.

The Appellants filed their second statement of claim dated 3rd of September 1997 admitting the said two original owners and also the devolution of title up to said Dingiribanda, Tikiribanda and kirimudiyanse. The Appellants' position was that said original owner Dingiriamma by deed bearing No 26213

dated 30.01.1925 transferred her undivided share to said Dingiribanda, Tikiribanda and kirimudiyanse and after the death of said original owner Dingiri Amma since she died intestate the balance ½ share also devolved on said Dingiribanda, Tikiribanda and kirimudiyanse. But the Appellants had not explained that how said Dingiriamma became entitled to balance ½ share since she had exhausted her rights to the corpus by executing the said deed bearing No 26213.

The appellants raised the issues on the basis that their predecessors in title namely Tikiribanda and Kirimudiyanse had possessed lot 1 and 2 depicted in the preliminary Plan bearing No. 3399 as separate entities and thereby had acquired prescriptive title to lot 1 and 2 of the said plan No 3399. The finding of the trial Judge was that the Appellants had established a prescriptive title to lot 1 and 2 of the said plan and the Respondent cannot have and maintain a partition action against the Appellants. The learned Counsel for the Respondent strenuously contended that this finding of the trial judge cannot be supported on the evidence adduced before court and invited this court to hold that these Appellants have not prescribed to said lot 1 and 2 and to uphold the aforesaid judgment of the High Court of Civil Appeal.

It also must be noted that according to the title deeds of the Appellants which were produced at the trial marked 1V1, 5V1 and 6V1, the predecessors in title of the Appellants had conveyed their undivided shares of the corpus by deeds 1V1, 5V1 and 6V1. Also it was an undisputed fact that their predecessors in title had not transferred a divided portion of land of the corpus or undivided shares of a divided or separate portion of the corpus to the Appellants.

The Appellants heavily relied upon the majority decision of the case of Girigoris Perera Vs Rosalin Perera (1952) 53 NLR 536 in which it was held by

Gunasekara J. and Choksy A.J. (Nagalingam A.C.J. dissenting) “where deeds dealing with shares in an allotment of land purport to convey undivided shares of a larger land of which the allotment had at one time formed a part, a Court administering equity has the power, in a partition action relating to the allotment, to rectify the mutual mistakes of the parties in the description of the property, even though no plea of mistake and claim for rectification is set up in the suit.”

With respect to their Lordships I am not inclined to agree with the said findings. Is it correct to interpret a deed against the will and/or intention of the person who execute it? My answer is ‘no’. It is my considered view that the Court should interpret a deed in order to give effect to the intention of the vendor of a deed. It is not the function of the Court to ascertain the intention otherwise than from the words used in the deed. The intention which is being given effect to must be ascertained in accordance with established principles. The Court's powers do not extend to making alterations as are necessary to bring the deed in accord with the idea of what is just or equitable. Where a deed employs language not obscure but perfectly plain and the construction placed thereon is in accordance with its plain meaning, in such case courts give neither a strict nor a broad construction but simply according to the plain language that has been used in the deed and then it is neither a strict nor a broad interpretation of the words but the one and only interpretation of them.

It must be noted that even Gunasekara J in Girigoris Perera Vs Rosalin Perera (supra)(at page 544) observed that “I have had the advantage of reading the draft of the Acting Chief Justice's judgment and, if I may say so with respect, I agree with what he has said regarding the interpretation of deeds. It seems to me, however, that, rightly understood, the controversy with which we are concerned relates not to the construction of a deed but to the nature and extent of

the Court's power to give relief against mistake when it appears that as a result of mutual mistake the parties have expressed in the deed an intention different from their actual intention. As for the admissibility of evidence of such mistake it would not be correct, I think, to state as a general proposition without qualification that "no authority can be found that in the absence of ambiguity in the deed evidence could be received of the existence of facts and circumstances tending to contradict or modify the terms of the deed".

On other hand it appears that in the case of Girigoris Perera Vs Rosalin Perera there had been no plea of mistake set out at the trial. It also seems that mistake of fact had been raised for the first time in appeal. No doubt that a plea of mistake of fact could only be established by leading of evidence to that effect. It is my considered view that Appellate Courts should not go in to the facts of the case unless the trial judge has failed to evaluate the evidence led at the trial and thereby has made an error on facts of the case in reaching to a right conclusion.

In the case of Alwis vs. Piyasena Fernando (1993) 1 SLR 119 G. P. S. de Silva, C.J. held that "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

In the case of Setha vs. Weerakoon 49 NLR 225 Howard C.J. stated that "A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more."

In the case of Candappa vs. Ponambalampillai (1993) 1 SLR 184 Supreme Court held that “A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law.”

In Girigoris Perera Vs Rosalin Perera (supra) Nagalingam ACJ following series of decisions and also as observed in the case of Simpson Vs. Foxon 1[(1907) Probate 54.], " What a man intends and the expression of his intention are two different things he is bound and those who take after him are bound by his expressed intention", held that “construing the deed, which in its terms are clear, unambiguous and precise, the only conclusion one can come to is that the deed conveyed to the 8th defendant a 1/20 share of the larger land, and if the vendor had no title to the entirety of the larger land, but title only to a smaller portion of it, the deed can only convey to the vendee the same fractional share in the smaller lot, and the deed must be held to be operative only to the extent of a l/20th share in the lot now in dispute.”

I shall now pass on to a consideration of the various authorities cited by Nagalingam ACJ when arriving at the aforesaid conclusion on construction of deeds where the vendor who was entitled to a divided lot in lieu of his undivided interests in a larger land conveyed an undivided share of the larger land. In the case of Fernando Vs. Christina [(1912) 15 N. L. R. 321.] where Pereira J. was invited as in the present case to construe a conveyance of ‘an undivided four-sixths of one-third share of the defined southern portion of Mawatabadawatta’ as conveying the entirety of the divided portion of the land which the vendor had possessed in lieu of his undivided interests. His Lordship refused to accede to the request and held that "Whatever the parties may have intended to convey, the property in fact

conveyed was an undivided four-sixths of one-third of that portion, that is, of the divided lot.”

In the case of Bernard Vs. Fernando [(1913) 16 N. L. R. 438] where too the vendor who was entitled to two divided lots A and D in lieu of his undivided interests in a larger land conveyed a one-fifth share of the larger land, and where it was contended that the deed must be construed as conveying to the vendee the entirety of the lots A and D. Pereira J., with whom de Sampayo J. was associated, in delivering judgment said in emphatic terms " It is, of course, obvious that, having purchased an undivided share in the entirety, they cannot establish title to the divided lots A and D."

A similar view was taken in Fernando Vs. Podi Sinno [(1925) 6 C. L. R. 73]. In this case the Court was called upon to construe a deed conveying undivided shares in a bigger extent of land as in fact conveying divided lots to which the vendors were entitled. Bertram C.J., with whom Jayawardene J. was associated, repelled the contention and expressed himself thus :" If persons who are entitled by prescription of a land persist after they have acquired that title, in conveying an undivided share of the whole land of which what they have possessed is a part; and if the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves acquired a title by prescription must be bound by the terms of their deeds."

Dalton and Akbar JJ. arrived at a like conclusion in respect of this question in Perera Vs. Tenna [(1931) 32 N.. L. R. 228:]. The facts here were that the vendors conveyed an undivided half share of the entire land when in point of fact they were entitled to two divided lots D and Dl. The Judges rejected the

argument that the deed must be construed as operating to convey the divided lots D and D1.

In the case of Mudalihamy Vs. Appuhamy [(1934) 36 N. L. R. 33.] where Maartensz A.J. used language which is self-explanatory of the facts. His Lordship expressed the view that "At the same time having failed to take the necessary steps to have lot A3 declared bound and executable and sold he cannot claim the entirety of lot A3. Having purchased an undivided 2/3 share of the whole land when the execution debtor was entitled to lot A3, he is only entitled to an equivalent share, namely 2/3 of A3." In the said case Dalton J. also expressed the same view that “the plaintiff himself purchased only an undivided share in the entirety, he is entitled as a result to an undivided share only in the share in severalty."

In the case of Dona Elisahamy Vs Don Julis Appuhamy (1950) 52 NLR 332 it was held that " If persons who are entitled by prescription of a land persist, after they have acquired that title, in conveying an undivided share of the whole land of which what they have possessed is a part and if the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves have acquired a title by prescription, must be bound by the terms of their deeds"

In the case of Jayaratne Vs Ranapura (1951) 52 NLR 499, where one of six co-owners of a common property had, following upon an amicable partition, acquired prescriptive title to a divided portion of the land. He thereafter intended to convey an undivided 1/6 share in that divided portion to a third party, but the deed of conveyance wrongly described the share so conveyed as an undivided 1/36 share in the larger land. An action was later instituted for the partition of the

divided portion in which all the parties derived their title from the same predecessor-i.e., the original co-owner who had acquired prescriptive title to the corpus. It was held that "the Court was entitled so as to give effect to the real intention of the deed of conveyance, to construe it as having conveyed an undivided 1/6 share and not merely an undivided 1/36 share in the divided portion sought to be partitioned."

Thus G.P.S. De Silva J in Mustapha Asma Umma Vs Rajapaksa (1985) 2 SLR 25, following the decision of Bertram CJ in Fernando Vs Podisinno (1925) CLR 73, held that "Even if the predecessor in title of the contesting defendants had prescribed to a specific lot of the corpus yet as the deed on which they acquired title was for undivided shares, they could not rely on the prescriptive title of their predecessor. They would have to establish prescription by their own possession for over the prescriptive period. But here the partition suit had been filed before they could have prescribed to the specific lot; as they have not acquired prescriptive title, they must be bound by the terms of their own deed."

For the forgoing reasons I hold that the majority decision in Girigoris Perera Vs Rosalin Perera (1952) 53 NLR 536 is not the correct construction of a deed in which a vendor who was entitled to a divided lot in lieu of his undivided interests in a larger land conveyed an undivided share of the larger land. Applying the principle laid down in Fernando Vs. Podisinno (supra) by Bertram CJ, I hold that in the present case too, the predecessors in title of the Appellants who claimed to be entitled to divided lots 1 and 2 in lieu of their undivided interests in the corpus, by deeds 1V1, 5V1 and 6V1, had conveyed their undivided shares of the corpus to the Appellants. The deeds 1V1, 5V1 and 6V1should be construed according to the ordinary connotation of the language used in them and the

intention ascertained from the words employed by the parties. Hence the Appellants cannot claim a prescriptive title to lot 1 and 2 of the said preliminary plan No 3399 based on the possession of their predecessors in title. Accordingly I answer the aforesaid questions of law set out in sub paragraph ‘f’ and ‘g’ of paragraph 10 of the amended petition of appeal in the negative. The instant appeal of the appellants is dismissed with cost.

Appeal dismissed.

Judge of the Supreme Court

PRIYASATH DEP 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 Application for leave to appeal.

SC.Appeal No. 142/2012

SC/HCCA/LA/295/2011

SP/HCCA/Ma/290/04(F)
DC/Hambanthota No. 3136/L

1. Vitiyala Kankanamge Heenhamy alias Hamine.

2. Chandrasiri Senanayake, Both of 18 Ela, No.507, Padalangala.

DEFENDANTS-RESPONDENTS-PETITIONERS

-Vs-

Seena Patabendige Roshini of "Ediriwarna Niwasa", Baragama, Ambalanthota.

PLAINTIFF- APPELLANT-RESPONDENT

Before: : **Sisira J de Abrew, J**

Upaly Abeyrathne, J &

Prasanna Jayawardena, PC, J

Counsel: : Rohan Sahabandu PC for the Defendant-Respondent- Appellants.

Vidura Gunarathne for the Plaintiff-Appellant-Respondent.

Argued &

Decided on: : 20.07.2016

Sisira J. de Abrew, J

Heard both counsel in support of their respective cases. The most important question that must be decided in this case is whether the 1st and 2nd Defendants-Respondents-Petitioners (hereinafter referred to as the 1st and 2nd Defendants) who are the heirs of Saradiyas Senanayaka are entitled to cultivate the land in question as the Ande Cultivators. In short whether the 1st and 2nd Defendants become the successors of the original Ande Cultivator with regard to the land in question. Under Act No. 58 of 1979 there were provisions to succeed to the Ande Cultivatorship. This Act was repealed by Act No. 46 of 2000 which came into operation on 18.08.2000. The action was filed on 18.12.2001. Saradiyas died on 15th of April 2001. Provisions relating to succession that contained in Act No. 15 of 1979 are not found in Act No. 46 of 2000. Therefore it appears when the action was filed, the law that was in operation was Act No. 46 of 2000. Under Act No 46 of 2000, there is no provision for succession to the Ande Cultivatorship. We therefore hold that the 1st and 2nd Defendants are not entitled to succeed to the Ande Cultivatorship. We further hold that they are no longer the Ande Cultivators of Saradiyas Senanayake with regard to the land in question.

Considering all these matters, we hold that the Plaintiff in this case is entitled to use the possession of the land in question as per the letters of administration issued in case No. T 01/93 in the District Court of Hambanthota. We further hold that the Plaintiff is entitled to eject the 1st and 2nd Defendants and their agents and representatives from the land in question.

Considering all these matters, we come to the conclusion that the 1st and the 2nd Defendants should hand over the vacant possession of the land in question. The 1st and 2nd Defendants now agree to handover the vacant possession of the land in question to the Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff) before 31st of August 2016. If the 1st and the 2nd Defendants fail to hand over the vacant possession of the land in question to the

Plaintiff, the Plaintiff is entitled to take a writ from the District Court without notice. The District Judge is hereby directed to issue a writ, if the 1st and 2nd Defendants fail to hand over the vacant possession of the land to the Plaintiff on or before 31.08.2016 . After considering the submissions made by both parties, we hold that the Plaintiff is not entitled to the relief claimed in paragraph iii of the prayer to the plaint. However the Plaintiff is entitled to recover a sum of Rs. 200,000/- from the 1st and the 2nd Defendants. Mr. Sahabandu, President's Counsel appearing for 1st and the 2nd Defendants submits that the 1st and the 2nd Defendants would pay Rs. 200,000/- to the Plaintiff before 30.09.2016. If the 1st and the 2nd Defendants fail to pay the said amount to the Plaintiff on or before 30.09.2016, the Plaintiff is entitled to take the writ out in respect of the said amount with costs that would be incurred in taking the writ.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne, J

I agree.

JUDGE OF THE SUPREME COURT

Prasanna Jayawardena, PC, J

I agree.

JUDGE OF THE SUPREME COURT

kpm/-

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 143/2012

SC/ HCCA/LA/ 424/2011

SP/HCCA/MAR/40/2008(F)

DC Matara No/17865/P

Andra Hennedige Chandrarathne,

Nakulugamuwa,

Kudawella South.

Plaintiff

Vs.

1. Dayathileke Patabendige Edirisooriya,
   "Dayani",
   Dodampahala,
   Dickwella.
2. Kusuma Abeysooriya,
   Dodampahala North,
   Dickwella.

Defendants

AND

Andra Hennedige Chandrarathne,

Nakulugamuwa,

Kudawella South.

Plaintiff Appellant

Vs.

1. Dayathileke Patabendige Edirisooriya,
   "Dayani",
   Dodampahala,
   Dickwella.
2. Kusuma Abeysooriya,
   Dodampahala North,
   Dickwella.

Defendant Respondents

AND NOW BETWEEN

Kusuma Abeysooriya,
Dodampahala North,
Dickwella.

2nd Defendant Respondent Appellant

Vs.

Andra Hennedige Chandrarathne,

Nakulugamuwa,

Kudawella South.

Plaintiff Appellant Respondent

1. Dayathileke Patabendige Edirisooriya,
   "Dayani",
   Dodampahala,
   Dickwella.

1st Defendant Respondent-Respondent

BEFORE	:	CHANDRA EKANAYAKE, J. B. P. ALUWIHARE, PC, J. UPALY ABEYRATHNE, J.
COUNSEL	:	Dr. Sunil Cooray with Ms. Sudarshani Cooray for the 2nd Defendant Respondent Respondent Appellant Erasha Kalidasa instructed by Anusha Wickremasinghe for the Plaintiff Respondent- Respondent
WRITTEN SUBMISSION ON:		17.09.2012 (2nd Defendant Respondent Appellant) 07.11.2012 (Plaintiff Appellant Respondent) 07.11.2012 (1st Defendant Respondent Respondent)
ARGUED ON	:	01.10.2015
DECIDED ON	:	30.03.2016

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of Southern Province holden at Matara dated 27.09.2011. By the said judgment the Civil Appellate High Court has set aside the judgment of the learned Additional District Judge of Matara dated 05.09.2007 and allowed the appeal of the Plaintiff Appellant Respondent (hereinafter referred to as the Respondent) and to partition

the land described in the plaint as prayed for. The 2nd Defendant Respondent Appellant (hereinafter referred to as the Appellant) sought leave to appeal from the said judgment of the Civil Appellate High Court and this Court granted leave to appeal on the questions of law set out in paragraph 16 (a) (b) (c) (d) (e) and (g) of the Petition of Appeal dated 24.10.2011. Said questions of law are as follows;

(a) Did the learned High Court Judges err in holding that "It is not possible to suggest that the 2nd Defendant did not intend to transfer beneficial interests of the land" whereas the 2nd Defendant's position was never challenged by any evidence at the trial in the District Court of Matara?

(b) Did the learned High Court Judges err in holding that since the 2nd Defendant agreed to transfer on a specific condition she has intended to part with the beneficial interest, whereas in evidence it was revealed that the 2nd Defendant tried her best to pay back the entire agreed amount according to the said condition in the deed?

(c) Did the learned High Court Judges err in holding that if the 1st Defendant failed or refused to accept the repayment the 2nd Defendant should have initiated appropriate action to protect her rights which had not been done?

(d) Did the learned High Court Judges err in holding that the position of the 2nd Defendant in the statement of claim cannot be accepted as there is no legal basis?

(e) Did the learned High Court Judges err in holding that document marked as P3 has been executed duly within one and half years whereas in evidence it was revealed and un-contradicted that the

1st Defendant has fraudulently sought to execute the said deed marked as P 3 without accepting the money of the 2nd Defendant?

(g) Did the learned High Court Judges err in holding that the learned Additional District Judge has come to a wrong conclusion in dismissing the Plaintiff's action after answering the issue No 1 and 2 in the affirmative, whereas those issues do not directly connect to the real dispute in this case?

According to the facts of the case the Plaintiff Respondent instituted an action in the District Court of Matara seeking to partition the land described in paragraph 02 of the plaint between the Plaintiff Respondent and the 1st Defendant Respondent. The 2nd Defendant Appellant had been added as a party only for the notice of the Partition Action. In her statement of claim the Appellant averred that by a deed bearing No 971 dated 02.03.1979 she became the owner of the land in dispute. On 15.12.1984 she borrowed a sum of Rs 10,000/- with the interest at the rate of 16% per annum from the 1st Defendant Respondent and executed the deed of transfer bearing No 3915 dated 13.10.1984 as a security to the said loan upon the condition of retransferring the said property after the repayment of the said loan of Rs 10,000/- with the interest.

Both parties admitted that the said deed of transfer No 3915 Marked P 2 has been executed subject to a condition. According to P 2 the vendor has reserved the right of retransferring the property upon the repayment of the sum mentioned in P 2 with the interest at the rate of 20% per annum within one year and six months of the date of execution of P 2. Although the facts remained as it is the Appellant in her statement of claim and also in her evidence at the trial, took up the position that there had been no time period fixed for the repayment of the loan obtained from the 1st Defendant Respondent. With regard to the execution of Deed

P 2 the Appellant's position was that her signature was obtained upon a blank sheet. She averred that she did not place her signature upon a deed which contained such a condition.

At the hearing of this appeal the learned Counsel for the Appellant contended that the Appellant did not intend to dispose of the beneficial interest of the property in question. But at the trial, the Appellant had failed to prove the aforesaid position taken up by her on a balance of probabilities. The Appellant in her evidence has complained of the 1st Defendant Respondent's unwillingness to fulfil the conditions contained in P 2 and to retransfer the property whenever she was ready to repay the money she obtained. In this regard it must be noted that the present action has been filed in the District Court on 04th of October 1995 after 10 years from the date of execution of deed P 2. If the Appellant's position was that she had no knowledge about a time period for the repayment of the money burrowed upon P 2, it is surprising to note that she had not taken any action against the 1st Defendant Respondent over the refusal to retransfer the property, even up to the date of filing the present partition action. If there had been no time period for the repayment of money, the Appellant had ample opportunities during the said period of 10 years to fulfil the conditions even after the deadline given in P 2. By adducing evidence to such effect the Appellant had the opportunity of establishing the fact that there was no time period to fulfil the conditions in P 2. But the Appellant has failed to do so. When I consider the said circumstances I am of the view that the Appellant's contention that there was no specific period of time for the repayment of money should fail. Hence it is safe to conclude that the Appellant was well aware of the period of one year and six months laid down in P 2 and also the consequences in the event she failed to make the repayment of money within the stipulated period of time in P 2.

On the other hand the 1st Defendant Respondent had transferred one acre and twenty perches out of one acre and thirty nine perches to the Plaintiff Respondent by the deed of transfer bearing No 8222 dated15.12.1994 (P 3). It is also pertinent to note that said deed P 3 had been executed ten (10) years after the execution of P 2. It also seems from the length of time taken to execute the deed of transfer P 3 that the 1st Defendant Respondent was not in an indecent hurry to dispose of the property transferred to him by deed P 2. In the circumstances since there had been no evidence to show that the Appellant was making efforts to repay the money obtained, it cannot be concluded that the 1st Defendant has fraudulently sought to execute the said deed marked as P 3 without accepting the money from the 2nd Defendant. Hence I am of the view that the Appellant has failed to adhere to the conditions contained in P 2.

In the circumstances it can reasonably be inferred consistently with the attendant circumstances that the Appellant intended to dispose of the beneficial interest in the property in question to the 1st Respondent after the expiration of the period of one year and six months as agreed in deed of transfer P 2.

At the trial before the District Court the Plaintiff Respondent has raised the issues No 1 and 2 as follows;

1. Was the original owner of the subject matter of this action Edirisooriya Patabendige Milinona?
2. Did the said right devolve on the Plaintiff and the 1st Defendant according to the pedigree set out in the plaint?

The learned District Judge has answered the said two issues in the affirmative. As correctly observed by the High Court of Civil Appeal if the said two issues were answered in the affirmative the learned District Judge had no

option but to deliver a judgment in favour of the plaintiff and to proceed with partition of the corpus as set out in the plaint. Having come to the conclusion that the rights of the original owner, Edirisooriya Patabendige Milinona, devolved on the Plaintiff and the 1st Defendant as set out in the pedigree of the Plaintiff in the same breath the learned trial judge has come to the conclusion that the property in question is held by the Plaintiff and the 1st Defendant in trust for the benefit of the 2nd Respondent. Said findings of the learned District Judge clearly demonstrate that he has erred in law.

In the circumstances I see no reason to interfere with the said judgment of the High Court of Civil Appeal dated 27.09.2011. Hence the questions of law set out in paragraph 16 (a) (b) (c) (d) (e) and (g) of the Petition dated 24.10.2011 are answered in the negative. Instant appeal of the appellant is dismissed with costs.

Appeal dismissed.

Judge of the Supreme Court

CHANDRA EKANAYAKE, J.

I agree.

Judge of the Supreme Court

B. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal in terms of section 5C of the Act No. 19 of 1990 amended by the Act No. 54 of 2006 of the Provincial High Court of the North Western Province (exercising Civil Appellate jurisdiction at Kurunegala) in Case No. NWP/HCCA/KUR/73/2009 (F). DC Kuliyapitiya Case No. 13044/L.

W.M. Raymond Peter Fernando, of
Karanthippola
Kuliyapitiya

Plaintiff-Respondent-Appellant

SC Appeal No. 145/12
SC. HC CALA 509/2011
NWP/HCCA/KUR/73/2009F
DC Kuliyapitiya Case No.13044/L

Vs.

K. Stanley Wilfred, of
No. 94, Hettipola Road
Kuliyapitiya

Defendant-Appellant-Respondent

Before	:	K. Sripavan, CJ Priyasath Dep, PC. J H.N.J. Perera, J.
Counsel	:	Dr. S.F.A. Coorey with Ms. Sudarshani Coorey for the Plaintiff-Respondent-Appellant. Faiz Musthapa PC with Anuruddha Dharmaratne for the Defendant-Appellant-Respondent
Argued on	:	13.07.2016
Decided on	:	08.11.2016

Priyasath Dep, PC. J

01. The Plaintiff –Respondent- Appellant (herein after referred to as the 'Plaintiff') instituted action in the District Court of Kuliyapitiya in Case bearing No. 13044/L against the Defendant –Appellant –Respondent. (herein after referred to as the 'Defendant'). The learned District Judge gave judgment in favour of the Plaintiff. The Defendant being aggrieved by the judgment filed an appeal to the Provincial High Court of North Western Province holden in Kurunegala in Case bearing No. NWP/HCCA/KUR/73/2009F. The learned Judges of the High Court set aside the judgment of the District Court and dismissed the Plaintiff's action. Being aggrieved by the judgment, the Plaintiff filed a leave to Appeal Application and obtained Leave.

02. The Plaintiff in his Plaint averred that;

i) The land described in the 1st schedule to the plaint which is 18 ½ acres in extent was at one time owned by three brothers namely: Warnakulasooriya Mahalekamge John Fernando, Warnakulasooriya Mahalekamge Kasmeru Fernando and Warnakulasooriya Mahalekamge Peduru Fernando.

ii) The land referred to in the first schedule was amicably partition among the three co owners and each co-owner became entitled to 1/3 of the land and the father of the Plaintiff Warnakulasooriya Mahalekamge John Fernando thus became entitled to 1/3 of the land which is described in the Second schedule to the Plaint.

iii) Warnakulasooriya Mahalekamge John Fernando by his last will which was proved in the District Court of Kuliyapitiya in Case No 4962/T bequeathed his share of the land to his son the Plaintiff who became the owner of the land described in the 2nd schedule to the plaint.

iv) The Plaintiff from time to time sold portions of land and what remain with him is described in the 3rd Schedule to the plaint which comprised 3 Roods and 20.05 Perches in extent.

v) Warnakulasooriya Mahalekamge John Fernando in 1942 had given leave and license to Jeramius Fernando, the father of the Defendant who had been an employee of his to occupy the hut in a portion of land within the 2nd schedule to the Plaint which is presently falling within the land now referred to in the 3rd schedule to the Plaint.

vi) Jeramius Fernando lived in the house with his wife and children including the Defendant until his death in 1985. After his death the Defendant chased out his mother and sisters and occupied the house.

vii) The Defendant on or about August 1993 without the consent of the Plaintiff started to build a permanent house on the rear side of the hut situated on the land described in the 3rd schedule to the plaint.

viii) The Plaintiff objected to the construction of the house and a dispute arose between the parties and the police filed action in the Magistrate Court of Kuliyapitiya in Case No3775/66 under section 66 of the Primary Court Act. The Court made order restoring the possession to the Defendant.

ix) The Plaintiff thereafter instituted this action against the Defendant. The Plaintiff sought the following reliefs:

(a) Declaration of title to the land more fully described in the 3rd schedule to the plaint,
(b) Ejectment of the defendant and all those who are holding under him.
(c) Damage in a sum of Rs. 25,000/- up to the date of filing the plaint, and
(d) Costs of suit and such other reliefs as to court shall deem meet.

The Defendant in his answer stated:

03. The Defendant whilst admitting that he is living in the given address, denied that he is in possession of a portion of land described in the third schedule to the Plaint. The Defendant further averred in his answer that his father Jeramious Fernando had been an employee (driver) of Warnakulasooriya Mahalekamge Kasmeru Fernando (one of the co-owners of the land described in the 1st schedule to the Plaint) who permitted him to reside in the land and that the said Jeramious Fernando had been living in the land with his family since 1942. The said Jeramious Fernando had prescribed to the land in question and as the Defendant being one of his children, he too has prescribed to the land in question. The Defendant in his answer stated that the Plaintiff should get his land properly surveyed and produce a survey plan to identify his land.

04. In addition to his plea of prescription, the Defendant also took up the position that if the Defendant is in occupation of the land with leave and license of the Plaintiff as stated by the Plaintiff, the Plaintiff should take steps according to law to send a notice to quit. The Defendant stated that due to this reason, the Plaintiff cannot have and maintain this action.

05. The Defendant in his answer prayed for:

(a) Permit him to join other members of his family who also had prescribed to the land as Defendants.

(b) a declaration that he and members of the family had prescribed to the land which they are in possession.
(c) dismissal of the action of the plaintiff

06. At the trial the following admissions were recorded.

1. Jurisdiction of Court
2. A case was filed in the in the Magistrates Court of Kuliyapitiya bearing No. 3775/66.
3. The Defendant was given possession of the land in dispute by the judgement of the said case.
4. The Defendant's father one Jeremious Fernando was employed as a driver under Kasmeru Mudalali
5. Jeremious Fernando had died.
6. The Plaintiff's father is John Fernando.

07. The case proceeded to trial on 22 issues. Thirteen issued were raised by the Plaintiff and 9 issues were raised by the Defendant.

08. The action filed by the Plaintiff against the Defendant is a re-vidicatio action. In order to succeed in his action, he has to establish the title to the land, identity of the land and that the defendant is in unlawful possession of the land.

In *Wanigaratne Vs. Juvanis Appu* it was held that:

> "in an action re vindicate 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."

This decision was followed in Dharmadasa Vs. Jayasena (1997 3 SLR 327), Lathif Vs. Mansoor (2010 2 SLR page 332) and several other cases.

09. In order to prove his case, the Plaintiff himself gave evidence and called Licensed Surveyor Ranjith Yapa, Kumara Seneviratne, representative of the Registrar, District Court of Kurunegala, B.A. Meththananda, representative of the Secretary Kuliyapitiya Urban Council and one Simon Singho Kotalawala and read in evidence documents marked Pe 1- 16 (G).

10. The Plaintiff in his evidence stated that his father Warnakulasooriya Mahalekamge John Fernando, Warnakulasooriya Mahalekamge Kasmeru Fernando and Warnakulasooriya Mahalekamge Pedruru Fernando became the owners of the land by virtue of the deeds marked P11 and P12. His father Warnakulasooriya Mahalekamge John Fernando died leaving a Last Will wherein he bequeathed the property to the Plaintiff. The last will was proved in DC Kuliyapitiya 4962/T and thereby he became co-owner of 1/3rd of the property depicted in schedule 1. Thereafter this land was amicably partitioned and he became the owner of Lot B which is depicted in schedule 2 of the plaint.

11. The Plaintiff from time to time sold portions of this land and what remains is depicted in schedule 3 to the Plaint and the extent is 3 roods and 20.5 perches. Before the institution of the action he got this land surveyed by Licensed Surveyor Y.M. Ranjith Yapa who prepared the plan No. 7173B which was marked as P1. In the course of his evidence, the Plaintiff also marked as P9 the Plan No.3120 made by G.A.N. Gunasiri, Licensed Surveyor dated 10/01/2003 on a commission issued by the Court on the application made by the Defendant.

12. Plaintiff stated that the defendant is occupying a portion of the land belonging to him within the land depicted in schedule 3 to the plaint. He stated that the Defendant's father occupied the portion of the land initially with leave and license of his father and thereafter under him.

13. In the year 1993, the defendant started constructing a new house behind the hut occupied by him and as a result a dispute arose between the parties and the matter was referred to the Magistrate Court. In the Magistrate Court case bearing No. 3775/66 the possession was given to the Defendant. Thereafter the Plaintiff filed this action to vindicate his title and to evict the Defendant from the land described in the third schedule.

14. Licensed Surveyor Y.M. Ranjith Yapa who was summoned by the Plaintiff gave evidence to the effect that he on the request of the Plaintiff surveyed the land depicted in the third schedule and he prepared the plan No. 7173B which was marked as P1. The extent of the land is given as 3 roods and 20.5 perches. The land was divided into 2 lots and the defendant is occupying a portion of the land on the northern side of lot 2.

15. The plaintiff summoned B.H. Meththananda, an officer of the Kuliyapitiya Urban Council, who gave evidence regarding the entries made in the assessment register pertaining to the land and premises bearing assessment No. 94 Hettipola Road, Kuliyapitiya. He produced a certified copy of the Rates Register marked P2. According to the Register from 1959 to 14.07.1996 the owner of the premises bearing assessment No. 94 which had a cadjan thatched house was W.M.J. Fernando (father of the Plaintiff). The defendant's name Stanley was inserted in the register as the owner of the premises from 1996.07.15onwards. The defendant after obtaining possession from the Magistrates Courts, on the strength of the order got his name entered as the owner of the premises and the house was described as a cadjan thatched house. From the year 2000 the house was described as 'tiled house' instead of cadjan thatched house.

16. The Plaintiff made a complaint to the police on 20th August 1993 which was marked as (P 14A) when the defendant started to construct a new house. The defendant in his statement to the police admitted that he is occupying a portion of land belonging to the Plaintiff. However, he took up the position that he and his

predecessors had prescribed to the land. (P14 D). The Plaintiff closed his case reading in evidence "Pe 1" to "Pe 14g".

(17) Thereafter the Defendant gave evidence. The Defendant denied that he is in occupation of a portion of land belonging to the Plaintiff. He stated that his predecessors and he prescribed to the land depicted in the Plan No.3120 made by G.A.N. Gunasiri Licensed Surveyor.

(18) The Defendant marked as V11 a Transfer Deed No. 1949 dated 12-02-1996 attested by G.P. Gunathileke, Notary Public by which the Defendant had transferred the land in question to one Mary Lily Violet. The Defendant had transferred 14 perches by the said Deed which is out of six acres and three perch land. According to the schedule the transfer is in respect of the land and premises bearing assessment no 94, Hettipola road. This transfer was subject to the condition that it will be transferred back to the Defendant.

(19) The learned Counsel for the Plaintiff submitted that the extent of land in the schedule which is a larger land is exactly the extent given in the 2nd schedule to the Plaint. It was submitted by the learned Counsel for the Plaintiff that it is abundantly clear that the Defendant is residing in a portion of the land belonging to the Plaintiff

(20) The learned trial judge in his judgment had commented on the contradictory positions taken up by the Defendant regarding the extent of land claimed by him based on prescription. In his answer dated 05-03-2002 he had taken up the position that Kasmeru Fernando, an uncle of the Plaintiff under whom Jeramius Fernando, the Defendant's father was employed permitted his father to reside in 6 perches of land which the defendant claims that his father and family members had prescribed. In the Plan No. 3120 dated 10-012003 prepared by Licensed Surveyor Gunasiri, relied on by the defendant and in his evidence he claims that he is occupying 20 perches of land. However, this being a re vindicate action Plaintiff cannot rely on the weaknesses of the defendant's title.

(21) The learned District Judge rejected the plea of prescription put forward by the defendant. The learned District Judge held that only in 1993 the defendant disputed the title of the Plaintiff when he started to construct a new house to which the plaintiff objected to. The Plaintiff instituted this action on 19th September 2001.

(22) The defendant raised an objection to the maintainability of the action. The Defendant in his answer took up the position that the Plaintiff cannot maintain the action due to the failure on his part to issue a quit notice as the Plaintiff had claimed that the defendant is a licensee. Learned Judge correctly held that as the defendant had denied the title of the Plaintiff, there is no legal requirement to terminate the license or to send a quit notice. The learned District Judge relied on the judgements in Fredrick vs Mendis 62 NLR 471, Sundra Amal vs. Jusey Appu 36 NLR 400.

(23) After both parties filed their written submissions, the learned District Judge in his judgment held with the Plaintiff and gave judgment in favour of the Plaintiff.

(24) Being aggrieved by the said Judgement, the Defendant appealed to the High Court of North Western Province. After hearing the arguments, the learned High Court Judges held that there is no evidence that the Defendant is in occupation of the land in dispute or whether the Defendant is residing within the boundaries as described in the 3rd schedule to the Plaint. The learned Judges held that this could have been easily ascertained by superimposing one plan on the other. The learned High Court Judges allowed the appeal of the Defendant and the Plaintiff's action was dismissed.

(25) Being aggrieved by the said Judgement of the High Court, the Plaintiff filed this leave to appeal application and obtained leave on all questions of law set out in the Petition. This matter was argued before us and both parties submitted comprehensive written submissions.

(26) As this is a re vindicatio action, the Plaintiff has to prove that he has title to the land and establish the identity of the land and that the Defendant is unlawfully in possession of the land. The Plaintiff by giving evidence and producing title deeds established the title to the land referred to in schedule 3 of the Plaint. The question that arises is whether the Defendant is residing within the land described in the 3rd Schedule or not.

(27) The Plaintiff by calling the Licensed Surveyor Ranjith Yapa produced the plan bearing7173/B dated 21-11-2000 and established the identity of the land and according to the surveyor the defendant is residing within Plaintiff's land.

(28) It is an admitted fact that the Defendant is occupying the land bearing assessment No. 94, Hettipola Road, Kuliyapitiya. The representative of the Urban Council Kuliyapitiya produced the assessment register and proved that the original owner was Plaintiff's father and thereafter the defendant had got his name entered as the owner in 1996 on the strength of the order given by the Magistrate restoring him to the possession of the premises.

(29) When the Plaintiff made a complaint against the defendant when the Defendant commenced constructing the house, the defendant in his statements to the police had admitted that he is in possession of the land owned by the Plaintiff and that he had prescribed to the land. This admission can be used against him under Section 17 read with section 21 of the Evidence ordinance.

(30) The Plan No. 3120 prepared by P.A.N. Gunasiri, licensed surveyor on a commission issued by Court on an application made by the defendant also strengthened the case for the Plaintiff. This plan was marked as P 9 by the

Plaintiff and marked as V13 by the Defendant. According to the Surveyor he surveyed the land bearing assessment No.94 as shown by the Defendant. In these two plans two boundaries tally. Western boundary is the Kuliyapitiya - Hettipola Road and the northern boundary is a parapet wall. The land on the eastern and southern side of the corpus belongs to the Plaintiff. As regards to these two boundaries the Defendant had stated to the Surveyor that land belongs to the Plaintiff and he had sold the land and he does not know who are the present owners. This itself indicates that the defendant is living in a portion of land belongs to the plaintiff.

(31) When considering the totality of the evidence it was proved on a balance of probability that the defendant is living in a land falling within the 3rd schedule. In the circumstances, there is no need to superimpose the plan No. 3120 drawn by P.A.N. Gunasiri, licensed Surveyor on the plan no. 7173/B drawn by Licensed Surveyor Ranjith Yapa.

For the reasons stated above, I hold that the learned High Court judges erred when they held that the Plaintiff failed to establish that the Defendant is in possession of the land in dispute or whether the Defendant is residing within the boundaries as described in the 3rd schedule to the Plaint. Therefore, I set aside the judgment of the Provincial High Court of North Western Province in Case No. NWP/HCCA/KUR/73/2009 (F) and affirm the Judgement of the District Court of Kuliyapitiya in Case No. 13044/L.

Appeal allowed. No costs.

Judge of the Supreme Court

K.Sripavan,C.J.
I agree.

Chief Justice

H.N.J. Perera, J
I agree.

Judge of the Supreme Court

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

S.C. Appeal 146/2014
Leave to Appeal Application SC/HCCA/LA/280/2014
WP/HCCA/Col/07/2009/RA
DC/Colombo/1396/DR

Nations Trust Bank PLC
No. 242, Union Place,
Colombo 2.

PLAINTIFF

Vs.

Pulukkuttige Don Dinesh Shammika
Kumara Piyathilake
No. 493, Old Kottawa Road,
Udahamulla.
Nugegoda.

DEFENDANT

Then

In the matter of an application for revision under and in terms of Article 138 and 145 of the Constitution read with Section 5A of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006 of an order of the District Court of Colombo in case No. 1396/DR

Nations Trust Bank PLC
No. 242, Union Place,
Colombo 2.

PLAINTIFF-PETITIONER

Vs.

Pulukkuttige Don Dinesh Shammika
Kumara Piyathilake
No. 493, Old Kottawa Road,
Udahamulla.
Nugegoda.

DEFENDANT-RESPONDENT

AND NOW

Nations Trust Bank PLC
No. 242, Union Place,
Colombo 2.

PLAINTIFF-PETITIONER-PETITIONER

Vs.

Pulukkuttige Don Dinesh Shammika
Kumara Piyathilake
No. 493, Old Kottawa Road,
Udahamulla.
Nugegoda.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: B.P. Aluwihare P.C., J.
Upaly Abeyratne J. &
Anil Gooneratne J.

COUNSEL: Chandaka Jayasundera with Rehan Almeida
For the Plaintiff-Petitioner-Petitioner instructed by Nalin Peiris

Defendant-Respondent-Respondent is absent and unrepresented

ARGUED ON: 18.07.2016

DECIDED ON: 05.10.2016

GOONERATNE J.

This was an action filed in the District Court of Colombo by the Plaintiff-Petitioner-Petitioner, in terms of the Debt Recovery Act No. 2 of 1990 as Amended, and bearing case No. 1396/DR seeking a judgment in a sum of Rs. 861,600/27. The District Judge had on 18.09.2006 issued Order 'Nisi' in compliance with the provisions of Debt Recovery Act, returnable for 02.11.2006. The Respondent however without obtaining Leave to appear and defend the action, on 29.08.2006 filed a statement of objection, incorporating inter alia the following main points.

(a) Petitioner instituted Case No. 60787/MR on 22.11.2007
(b) Case No. 60787/MR was withdrawn on 11.03.2008 without reserving the right to institute a fresh action.
(c) This action instituted after case No. 69787/MR. As such Petitioner has no right to file a fresh action.

However with the above matters urged by Respondent the learned District Judge by his Order of 25.03.2009 held that the Petitioner had no right to file the present action, having withdrawn case No. 69787/MR without reserving the right to institute a fresh action against the Respondent. Petitioner's position

was that the action under the Debt Recovery Act, action was filed before filing case No 60787/MR. Petitioner made an application to the District Court to set aside the above order as it is made per incuriam. This application of the Petitioner was also refused by the learned District Judge by his Order dated 22.04.2009 (D). Aggrieved by the above Order the Petitioner filed a revision application in the High Court to revise the above Order. However by Order dated 12.05.2014 learned High Court Judge affirmed the Order of the District Court and dismissed the revision application. This court on 28.08.2014 granted leave on the following questions of law.

> "Was the learned High Court Judge in error in finding that the withdrawal of D.C. Colombo Case No. 60787/MR is a bar to the continuation of the District Court of Colombo Case No. 1396/DR filed prior to the withdrawal".

The material furnished to this court is to the effect that the Debt Recovery Case bearing No. 1396/DR was filed on 13.07.2006. An amended plaint filed on 29.05.2008 in the Debt Recovery case. The other case alleged to be withdrawn was instituted on 22.11.2007. This is about 17 months after the filing of the Debt Recovery Case 1396/DR. The Order 'nisi' in the Debt Recovery Case had been issued by the District Court on 18.09.2006. That is also about 15 months prior to the institution of case No. 60787/MR. Learned High Court Judge also states and finds in the Judgment of the High Court that Case No. 1396/DR

was instituted on 13.07.2006 and case No. 60787/MR instituted on 22.11.2007. Order 'nisi' issued on 13.09.2006 over 14 months before institution of Case No. 60787/MR.

In these circumstances the question is whether the provisions contained in Section 406(2) of the Civil Procedure Code would apply.

Section 406(2) reads thus:

> If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

The emphasis in the context of this case should be "fresh action" in relation to the action which was withdrawn. The action withdrawn (Case No. 60787/MR) was the subsequent suit. As such there appears to be some misunderstanding that led both courts to hold against the Petitioner.

On the other hand the District Court having issued order 'nisi' the Defendant should strictly follow the available statutory provisions in terms of the Debt Recovery Act and the Respondent should obtain Leave to appear and defend the action. The requirement to do so are spelt out in Section 6 of the said Act which reads:

Thus:

1. In an action instituted under this Act the defendant shall not appear or show cause against the decree nisi unless he obtains leave from the court to appear and show cause.
2. The court shall upon the filing by the defendant of an application for leave to appear and sow cause supported by affidavit which shall deal specifically with the plaintiff claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the decree nisi, either –

   (a) Upon the defendant paying into court the sum mentioned in the decree nisi; or
   (b) Upon the defendant furnishing such security as to the court may appear reasonably and sufficient for satisfying the sum mentioned in the decree nisi in the event of it being made absolute; or
   (c) Upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence which is prima facie sustainable and on such terms as to security, framing and recording of issues, or otherwise as the court thinks fit.

3. Where the defendant either fails to appear and show cause or having appeared, his application to show cause is refused, the court shall make the decree nisi absolute. For this purpose, the judge shall endorse the words “Decree nisi made absolute” (or words to the like effect) upon the decree nisi and shall date and sign such endorsement.

> Provided that a decree nisi, if it consists of separate parts, may be discharged in part and made absolute in part and nothing herein enacted shall prevent any order being made by consent of the plaintiff and the defendant on the footing of the decree nisi.

It is imperative for the Defendant to have resorted to Section 6 of the said Act and show cause as in Section 6(2) (a) or (b) or (c) above. The failure to do so would result in decree 'nisi' being made absolute. The learned Counsel for the Petitioner in his submission drew the attention of this court to the following decided cases, and assisted this court in all respects.

Ramanayake v. Sampath Bank Ltd. 1993 (1) SLR 145

> "The defendant shall not appear or show cause against the order nisi unless he obtains leave from the court. Leave to appear and defend has to be granted upon the defendant paying into court the sum mentioned in the decree or furnishing reasonable and sufficient security for satisfying the decree. Leave may be granted unconditionally where the court is satisfied that the defendant's affidavit and other material raise an issue or question which ought to be tried (section 6(2) (c) of the Act). The purpose of section 6 is to prevent frivolous or untenable defences and dilatory tactics".

Furthermore it was held that the Court has to first:

> "Decide which of the alternatives under section 6(2) – whether (a), (b) or (c) – has to be followed and the court has to exercise its discretion judicially. The court must briefly examine the facts of the case, set out the substance of the defence and disclose reasons in support of the order".

W.K.M.D. Perera vs. People's Bank 1994 (2) SLR 344

> "A defendant has no status in terms of Section 6 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 to participate in proceedings in an action instituted under the Act until such time he obtains leave of Court. He has first to make an application for the purpose. If he seeks to apply for leave to appear unconditionally, he has to file an affidavit which -
>
> (a) Deals specifically with the plaintiff's claim stated in the plaint.
> (b) Sets out his own defence to the plaintiff's claim; and
> (c) States what the facts are on which he relies to support his defences.
>
> There is no provision to lead oral evidence on any of these matters at this stage. It is only upon court being satisfied on the material placed before it by the defendant that there is an issue or a question in dispute which ought to be tried that leave to appear and show cause against the decree nisi will be granted".

The learned High Court Judge takes the view that Petitioner withdrew the case (No. 60787/MR) without reserving the right to file a fresh action. It is also stated that 18 months later thereafter the Petitioner has taken steps in respect of the original case 1396/DR by tendering an amended plaint. High Court observes that duly signed amended order 'nisi' has been served on the Respondent.

I wish to observe that Section 406(2) contemplates the filing of a fresh action. High Court is in error by stating that the Petitioner has taken steps in respect of the original case 1396/DR by tendering amended plaint. The taking of steps and filing a fresh action are not one and the same thing required by law.

Having filed plaint parties could move court to file amended plaint according to law. If the Plaintiff moves to file amended plaint it would be subject to objection of the Defendant and one cannot express the view that filing an amended plaint is to file a fresh action.

The material placed before court does not indicate that Defendant objected to the amended plaint. Amending pleadings is a right available to parties in the process of a step taken in an action subject to the provisions contained in the Civil Procedure Code. The bar contemplated in Section 406(2) is the filing of a fresh action. Is it fundamental to amendment of pleadings that an amendment of pleadings is not allowed which has the effect of converting an action of one character into an action of another or inconsistent character *Wijewardena vs. Lenora 60 NLR 457; 66 NLR 285.* An amendment is permissible in the same action for the purpose of raising the real question between parties and that an amendment which works an injustice to the other side should not be allowed. High Court misunderstood and erred in law by attempting to equate amendment of plaint as a fresh action. Law recognises the rules governing amendment of pleadings in one and the same action and a variety of rules are based on the provisions of the Civil Procedure Code and Section 93 of the Code.

In *Ordiris Silva & Sons Ltd. Vs. Jayawardena 55 NLR 355* where a plaint mistakenly named the Defendant as "*Ordiris Silva & Sons"* where in fact,

the Defendant was *Odris Silva & Sons Ltd*. and the court allowed the Plaintiff to amend the caption of the plaint – held for the purpose of reckoning the period of prescription, the action against the company must be taken to have been instituted on the date of the original plaint and not upon the amendment of the caption of the plaint.

When a plaint is returned for amendment and is duly amended, the date of institution of the action is the date on which the plaint was first presented to court. But when the plaint is rejected and a new plaint is filed date of institution of action is the date of new plaint. In the case in hand there is no new plaint or a plaint, but an amended plaint, which action survives from the original date of plaint.

In all the facts and circumstances of the case,Section 406 of the Civil Procedure Code does not apply to the circumstances of the case in hand as action was filed in the Debt Recovery case before case No. 60787/M. Respondent cannot utilise an incorrect procedure. The provisions of the Debt Recovery Act must be strictly complied with in the context of the case in hand.

The only question of law is answered in the affirmative and this appeal is allowed as per the relief prayed for in the Petition of Appeal.

Appeal allowed.

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 SUPRME COURT

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA.

In the matter of an application for leave to appeal under S.5C of the High Court of the Provinces (Special Provisions) Act No, 19 of 1990, as amended by Act No. 54 of 2006, against judgment dated 31/01/2012 of the Provincial High Court of the Western Province in Case No.WP/HCCA/GPH/CALA/48/2012 DC Gampaha Case No.1457/L.

SC/Appeal/146/12

SC/HCLA no 89/2012

CaseNo.WP/HCCA/LA89/2012

DC GampahaCaseNo.1457/L

Koswatte Gamage Jayanath
Kulasiriwardena,
"Weerasiri"
Pinwatte, Waturagama.

Plaintiff

Vs.

1. Jayasinghe Arachchige Ranjanie Jayasinghe

2. Ellapperuma Arachchige
Shashi Jana Aadarshi
Ellapperuma Arachchi.

3. Ellapperuma Arachchige
Dayananji Sudakshana
Ellaperuma Arachchi

4. Ellaperuma Arachchige
Dananja Nilashen Ellaperuma
Arachchi

All of No.73/3 , Indigolla,
Gampaha

Defendants

Koswatte Gamage Jayanath
Kulasiriwardena,
"Weerasiri"
Pinwatte, Waturagama.

Plaintiff-Petitioner

Vs.

1. Jayasinghe Arachchige Ranjanie
Jayasinghe

2. Ellapperuma Arachchige
Shashi Jana Aadarshi
Ellapperuma Arachchi.

3. Ellapperuma Arachchige
Dayananji Sudakshana
Ellaperuma Arachchi

4. Ellaperuma Arachchige
Dananja Nilashen Ellaperuma
Arachchi

All of No.73/3 , Indigolla,
Gampaha

Defendant- Respondents

AND NOW BETWEEN

Koswatte Gamage Jayanath
Kulasiriwardena,
"Weerasiri"
Pinwatte, Waturagama.

Plaintiff-Petitioner-Petitioner

Vs.

1. Jayasinghe Arachchige Ranjanie
Jayasinghe

2. Ellapperuma Arachchige
   Shashi Jana Aadarshi
   Ellapperuma Arachchi.

3. Ellapperuma Arachchige
   Dayananji Sudakshana
   Ellaperuma Arachchi

4. Ellaperuma Arachchige
   Dananja Nilashen Ellaperuma
   Arachchi

All of No.73/3 , Indigolla,
Gampaha

<u>Defendant- Respondent-
Respondents</u>

BEFORE:- Eva Wanasundera P.C J

Buwaneka Aluwiliare P.C J

K.T. Chitrasiri J

COUNSEL:- Dr. Sunil Cooray with Ms. Sudarshani Cooray for Plaintiff Petitioner- Petitioner- Appellant.

Dinesh de Alwis with K.Perera instructed by Janaki Sandakelum for 1st to -41h Defendants-Respondents-Respondents

ARGUED ON: - 03 -02-2016

DECIDED ON:- 17-02-2016

ALUWIHARE PC J.

The Plaintiff-Petitioner-Petitioner-Appellant (hereinafter referred to as the Appellant) instituted action in the District Court of Gampaha for declaration of title, ejectment and damages against the Defendant- Respondent Respondents (hereinafter referred to as the Respondents). When the matter was taken up for trial before the learned District judge, in the course of the Appellant's testimony, a listed document, a statement purported to have been made by the 1st Respondent to the police, was sought to be marked and produced on behalf of the Appellant. This was objected to on behalf of the Respondent. The objection so raised was upheld by the learned District Judge and being aggrieved by the said order the Appellant sought leave to appeal from the High Court of Civil Appeals (hereinafter the High Court). The High Court granted leave in

the first instance. After the hearing of the appeal, the High Court upheld the earlier order of the learned District judge and accordingly dismissed the appeal.

The Appellant being aggrieved by the said judgement of the High Court sought leave from this court and leave was granted on the following questions of law set out in sub paragraphs (a), (b) and (c) of paragraph 9 of the Petition of the Appellant dated 09th March 2012 which are reproduced below, verbatim:

(a) Did the Provincial High Court err and misunderstood the decided case of Sivarathnam and others Vs. Dissanayeke and others which was cited by the Petitioner in support of his argument:

(b) Did the Provincial High Court err in deciding that the court has to be satisfied of the fact that the author of the said police statement, has made the statement, which is not the case in marking an admission as against the maker (author) during the course of evidence and in terms of the evidence ordinance;

(c) Did the provincial High Court err in holding that the Petitioner has the opportunity to call the police at a later stage to prove the said statement which will not prohibit the Petitioner from marking the said statement as against the 1st Defendant-Respondent, irrespective of the fact that it is admitted to be made by her or not;

Upon scrutinising the respective orders made by both the learned District judge and the High Court, I find that each court has refused the Appellant permission to mark the impugned statement for

different reasons. Thus, for clarity I wish to refer to the nature of the objection raised against admitting the impugned statement.

In the course of the Appellant's evidence in the District Court, a series of title deeds were marked and produced subject to proof. The Appellant also testified that over their dispute in relation to the corpus, the parties came to the police station and the Respondents (witness has spoken in plural terms) made a statement to the police in the presence of the Appellant and that he could identify the statement so made. At this point objection was taken that the Appellant is not entitled to mark and produce the document (the statement made to the police by the 1st Respondent) as the Appellant was not the author of the document.

Having considered the objection, the learned District judge held that the witness, not being its author, could not testify as to the contents of the document and also that the impugned statement was not a listed document.

The statement in question however was a document that had been listed by the plaintiff. The impugned statement being a statement made to and reduced to writing by a police officer, would attract Section 91 of the Evidence Ordinance, which expressly states no evidence shall be given in proof of such matter except the document itself. Thereby Section 91 of the Evidence Ordinance excludes oral evidence in relation to proof of a document that comes within its ambit. Statements made to the police officers are required by law to be reduced to writing. Although it may not be strictly relevant in the context of the issues before us in this case, a line of decisions which has now settled the law, excludes oral evidence with regard to the discovery of facts in consequence of statements that come within the ambit of Section 27 of the Evidence Ordinance. The exclusion of oral evidence is based on

the prohibition referred to above, under Section 91 of the Evidence Ordinance.

In view of the foregoing, I am of the view that, the reasoning of the learned District Judge, that the document could not be permitted to be marked and produced through the witness for the reason that he cannot comment on the contents, is not the correct legal position.

When considering the Respondent's objection the court should also have addressed its mind to the two questions raised in Section 154(3) of the Civil Procedure Code before giving a ruling, the questions being;

(a) Firstly, Whether the document is authentic

(b) Secondly, whether it constitutes legally admissible evidence.

The order of the learned District judge has not received the close attention of Section 154 of the Civil Procedure Code it should have received, before the court gave its ruling. I hold that the said order of the learned District Judge cannot stand for the aforesaid reasons.

The High Court on the other hand concurred with the decision of the learned District judge but for different reasons.

I feel it would be pertinent at stage, for this court to dwell on the difference between Admissions as defined in Section 17 of the Evidence Ordinance and admissions recorded by the contesting parties in a case. Commenting on recording of admissions by parties, Abdul Majeed in his book, A Commentary on Civil Procedure Code and Civil Law in Sri Lanka at page 459 states,*"When a case is taken up for trial and before the issues are framed, if there are any admissions in the pleadings of the parties, those admissions must be recorded as 'admissions". The recording of the admitted facts is not in accordance with any provisions of*

the Civil Procedure Code. However, the recording of admissions has become a long established practice in civil trials."

In arriving at their decision, the High Court of Civil Appeals has clearly failed to appreciate the vital difference.

This is apparent from the observation made by the High Court, in its judgement which reads "*the author of the impugned document, though it has been listed, is not the Plaintiff. It is important to be noted that it becomes an admission once the author admit that he has made the said statement."*

A statement falling within the meaning of Section 17 of the Evidence Ordinance is an evidentiary fact, and would be relevant and may be proved against the person who made the statement in terms of Section 21 of the Evidence Ordinance.

Admissions recorded by the parties in any proceeding, are not the same as Admissions contemplated in section 17 of the Evidence Ordinance, but are "admitted facts" within the meaning of Section 58 of the Evidence Ordinance. Section 17 of the Evidence ordinance defines Admissions and Confessions and is a provision governing relevancy. Section 17 (1) read with Section 21 of the Evidence Ordinance merely permits a "statement" to be admitted as evidence if that "statement" falls within the definition of an Admission in terms of section 17 of the Evidence Ordinance. That is to say the trial judge is required to evaluate the item of evidence so adduced under section 21 and consider the probative value that should be attached to it. It is entirely at the discretion of the judge to decide whether or not to act upon the Admission as an item of evidence, having given due consideration to the statement.

On the other hand, admissions recorded by contesting parties to any proceeding fall within the ambit of Section 58 of the Evidence Ordinance, a provision governing proof and has no bearing on the issue of relevancy.

Section 58 of the Evidence Ordinance says, "no *fact* need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing..." Thus, there is no duty cast on the court to consider either the credibility or the probative value of such facts but is required to treat such facts as "proved facts".

In the instant case when the matter was taken up for trial before the District judge, a statement purported to have been made by the 1st Respondent to the police, was sought to be adduced as evidence on the basis that the impugned statement qualifies as an Admission in terms of Section 17 of the Evidence Ordinance and therefore would be relevant and admissible under section 21 of the Ordinance.

When the impugned statement in this instance was sought to be adduced as an Admission the court was required to give its mind to two aspects before proceeding to admit the statement,

(a) As the impugned statement is one reduced to writing the court is required to consider whether admitting the document is obnoxious to the provisions governing admission of documents (mode of proof)

(b) Secondly court is required to give its mind as to whether the impugned statement suggests any inference as to any fact in issue *or* relevant fact and if so, whether the statement is relevant under section 17 read with Section 21 of the Evidence Ordinance. (Relevancy)

If the statement is relevant and admissible, then the court has no discretion, but to admit it. The court, however, is at liberty to consider the probative value of the contents upon evaluation and decide either to act on them or to reject it.

In the present case, both the District court as well as the High Court of Civil Appeals refused to have the impugned statement marked and produced on the first aspect referred to above, that is the mode of proof. As such this court wishes to confine itself only to consider whether the District Court and the High Court of Civil Appeals erred in refusing to have the statement marked and produced through the Appellant when he was giving evidence.

Although this court is not required to consider the relevancy of the impugned statement, but only the mode of proof, for the sake of completion, I wish, briefly to address the aspect of relevancy as well.

The High Court appears to have relied heavily on the decision of Sivarathnam Vs. Dissanayake & others, 2004 1 S.L.R pg. 145, in deciding the issue of admissibility of the impugned statement.

In the case of Sivarathnam vs. Dissanayake & others a party made an attempt to equate a statement (an affidavit) made by a party to the case, which presumably would have been relevant in terms of Section 21 of the Evidence Ordinance, to that of an admission by the parties within the meaning of Section 58 of the Evidence Ordinance.

His Lordship justice Amaratunga having discussed the issue, made his pronouncement with precision and clarity and a passage from that judgement is reproduced below-;

"At any time before the hearing of' the action, the parties are at liberty to admit in writing any fact to be determined at the trial (Section 58 of the Evidence Ordinance). Such admissions are also formal admissions made outside Court. At the commencement of the trial the parties may state to court the facts they admit and then such admissions are recorded by Court. Even in the course of the trial such admissions e.g. genuineness of documents, may be made. All admissions described above are formal admissions. Section 58 of the Evidence Ordinance enacts that 'NO fact need be proved in any proceedings which the parties thereto or their agents agree to admit at the hearing, or, which before the hearing, they agree to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.: .....

It appears to me that this leave to appeal application has been made on the assumption that the learned judge's ruling has the effect of wiping out the evidentiary value of the admission made in the defendant's affidavit. But the learned judge's ruling does not have such far reaching effects. The effect of the ruling is only confined to the refusal to take the admission into consideration for the purpose of recording admissions. The ruling does not debar the plaintiffs from using the contents of the affidavit according to the rules of evidence. They are entitled, if they are so advised, to formally mark the affidavit in evidence at the trial through the justice of the Peace who attested it. They may also use the affidavit as a former statement to impeach the testimony of the defendants at the time they give evidence at the trial. Therefore, if the affidavit is used at the trial in accordance with the law of evidence, the trial Judge will decide the weight to be attached to the admission in deciding the issues raised in the action, bearing in mind that "admissions are not conclusive proof of the matters admitted, but they may operate as estoppels " (section 31 of the *Evidence* Ordinance) *or that*

the affidavit contains material relevant to the weight to be attached to The evidence of The persons who had made those admissions,"

In the case referred to, the issue arose as a result of the District judge refusing to record a fact contained in an affidavit filed relating to the action before the court, as an admission recorded at the commencement of the trial.

The decision in the case of Sivarathnam *et.el*, referred to above has no relevance to the issues in this case as the issue before this court is whether the procedure adopted by the plaintiff in producing the impugned statement is obnoxious to the provisions relating to mode of proof of documentary evidence.

At this point I wish to refer to the provisions in the Code of Civil Procedure relating to reception of documents in civil cases.

For ease of reference the relevant parts of the Section 154 of the Code are reproduced below-

> 154. (1) **Every document** or writing, which a party intends to use as evidence against his opponent ***must be formally tendered by him in the course of proving his case at the time when its contents of purport are first immediately spoken to by a witness.*** (Emphasis added), If it is an original document already filed in the record of some action, or the deposition of a witness made therein, it must previously be procured from that record by means of, and under an order from, the court. If it is a portion of the pleadings, or a decree or order of court made in another action, it shall not generally be removed therefrom, but a certified copy thereof shall be used in evidence instead,

Explanation to Section 154 lays down the procedure that should be adopted by courts when a document is tendered in evidence and the explanation reads thus:-

Explanation

> If the opposing party does not, on the document being tendered in *evidence,* object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it,
>
> *If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court:-*
>
> *Firstly, whether the document is authentic- in other words, is what the party tendering it represents it to be; and*
>
> *Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.*
>
> The latter question in general is a matter of argument only, but the first must be supported by such testimony as the party can adduce. If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination. makes out a prima facie case of authenticity and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.
>
> *If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document*
>
> Whether the document is admitted or not it should be marked as soon as any witness makes a statement

> with regard to it: and if not earlier marked on this account, at least, be marked when the court decides upon admitting it.

Section 154 (1) clearly requires that if a party intends to use any document as evidence, it must be formally tendered, when its contents or purport is first immediately spoken to by a witness. Neither the District Court nor the High Court adverted to this provision. The said Section also stipulates that, whether the document is admitted or not, it should be marked as soon as any witness makes a statement with regard to it. As the Respondents have objected to the admission of the impugned statement, the court is then required to address the issue of authenticity and whether the contents would constitute legally admissible evidence as I have referred to earlier in this judgment. It must be noted that none of the courts have given its mind to this requirement either. Furthermore the Appellant has testified to the effect that he has knowledge of the impugned statement as he was present when the 1st Respondent made the statement at the Gampaha police station and the Appellant has cited the Officer -in-Charge of the said police station as a witness.

Having considered the foregoing, I hold that the High Court had erred on the questions set out in sub - paragraph (a), (b) and (c) of Paragraph 9 of the Petition.

Accordingly, I make order setting aside both orders, the order of the High Court dated 31-January -2012 and the order of the learned District Judge dated 13-09-2011. This court is not in a position to make a determination with regard to the admissibility of the impugned statement as the full facts are not before us. Thus, I direct the District Court to consider afresh the application made in respect of the document that

was sought to be marked in evidence by the Appellant and the objection raised on behalf of the Respondent and decide the issue applying the criteria laid down in Section 154 of the Civil Procedure Code. Both parties are free to present their respective positions afresh, before the court.

The appeal is allowed with costs.

JUDGE OF THE SUPREME COURT.

Eva Wanasundera P.C J.

I agree.

JUDGE OF THE SUPREME COURT.

K.T Chitrasiri J.

1 agree.

JUDGE OF TI 1E SUPREME COURT.

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

S.C. Appeal 149/2013
SC/HC/CALA No. 571/2012
WP/HCCA/Mt. 66/09/F
D.C. Mt. Lavinia Case No. 1959/04/L

In the matter of an application for Leave to Appeal in terms of Section 5(C) (1) of the High Court of the Province (Special Provisions) Amendment Act No. 54 of 2006

1. Sanvara De Ruberu
   Samaraweera Gunasekera

2. Suranga Madhawa De Ruberu
   Samaraweera Gunasekera

3. Gerald Mervin De Ruberu
   Samaraweera Gunasekera

   All of No. 25/12, De Alwis Road,
   Mt. Lavinia.

   Manna Marakkalage Lakshmi Malkanthi
   Cooray

   No. 25/12, De Alwis Road,
   Mt. Lavinia.

   (By Attorney of the 1st and 2nd Plaintiff)

PLAINTIFF

Vs.

Fathima Thasneem Yusuff nee Nizar
No. 174/2 – 12A, Kesbewa Road,
Boralesgamuwa

DEFENDANT

AND BETWEEN

1. Sanvara De Ruberu
   Samaraweera Gunasekera

2. Suranga Madhawa De Ruberu
   Samaraweera Gunasekera

3. Gerald Mervin De Ruberu
   Samaraweera Gunasekera

   All of No. 25/12, De Alwis Road,
   Mt. Lavinia.

   Manna Marakkalage Lakshmi Malkanthi
   Cooray

   No. 25/12, De Alwis Road,
   Mt. Lavinia.

   (By Attorney of the 1st and 2nd Plaintiff)

   PLAINTIFF-APPELLANTS

   Vs.

   Fathima Thasneem Yusuff nee Nizar
   No. 174/2 – 12A, Kesbewa Road,
   Boralesgamuwa

   DEFENDANT-RESPONDENT

   AND

1. Sanvara De Ruberu
   Samaraweera Gunasekera

2. Suranga Madhawa De Ruberu
   Samaraweera Gunasekera

3. Gerald Mervin De Ruberu
   Samaraweera Gunasekera

All of No. 25/12, De Alwis Road,
Mt. Lavinia.

Manna Marakkalage Lakshmi Malkanthi
Cooray

No. 25/12, De Alwis Road,
Mt. Lavinia.

(By Attorney of the 1st and 2nd Plaintiff)

PLAINTIFF-APPELLANT-PETITIONERS

Vs.

Fathima Thasneem Yusuff nee Nizar
No. 174/2 – 12A, Kesbewa Road,
Boralesgamuwa

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.
Sisira J. de Abrew J. &
Anil Gooneratne J.

COUNSEL: C. Sooriarachchi with E.A Liyanagama for
Plaintiff-Appellant-Petitioners

Manohara de Silva P.C. with Hirosha Munasinghe for
Defendant-Respondent-Respondent

ARGUED ON: 02.10.2015

DECIDED ON: 28.01.2016

GOONERATNE J.

This was an action filed for a declaration of title to the land described in the first schedule to the plaint and eviction of Defendant-Respondent from a portion encroached from the eastern boundary of Plaintiff-Appellant-Petitioner's land and also for demolition of the building/wall standing thereon. Plaintiff-Appellant-Petitioners by this appeal seeks to set aside the Judgment dated 21.11.2012 of the Western Provincial High Court of Civil Appeals

The only short point involved in this appeal, which in fact was urged and issues raised in the District Court, was whether a transfer of title of the lands described in the 2nd schedule to the plaint by Plaintiff party and when title to the property in question was transferred to the Defendant-Respondent-Respondent, a portion or strip of land had been encroached by the Defendant-Respondent-Respondent. Issue Nos. (1) to (4) raised on behalf of Plaintiff in the District Court attempts to demonstrate such a position, but the learned District Judge answered those issues in the negative which Judgment was affirmed by the Civil Appellate High Court. However this court on 24.10.2013 granted leave in terms of paragraph 24 of the petition.

To state very briefly, the Plaintiff-Appellant-Petitioners by deed No. 818 dated 03.11.2000 sold and transferred to Defendant-Respondent-Respondent the land and premises shown as lot 2 in plan 1535 dated 25.08.2000 by Surveyor Alahakoone. The extent of the said lot was 6.60 perches. In the said lot 2, premises No. 174/2 is situated and occupied by the Defendant. Issue Nos 1 and 2 raised by the Plaintiffs in the original court indicates that at the time the land in dispute was transferred and possession handed over to Defendant, there was an agreement on part of the Defendant to demolish the alleged encroached portion of land. However the Defendant failed and neglected to do so or hand over possession of the strip of land on which a common wall stood. It is the position of the Defendant-Respondent that there was no such agreement to demolish any wall at any stage and if it was to happen in the manner suggested by the Plaintiff, that would be a reduction of the extent of land purchased by the Defendant (Lot 2 in plan 1535 which is 6.60 perches).

Both courts have dealt with the question of an alleged agreement as described above. Defendant-Respondent-Respondent denies any kind of agreement to demolish. Both courts have considered this position in relation to the provisions of Section 2 of the Prevention Frauds Ordinance. Defendant-Respondent has raised issue Nos 05-10 and issue No 06 refer to the position contemplated under Section 2 of the Preventions of Frauds Ordinance. It is on

this footing that parties proceeded to trial. Any agreement pertaining to land should be a written agreement. There is no legal or any other valid basis to interfere with the Judgement of the learned District Judge and that of the Provincial High Court.

The learned trial Judge has considered the evidence led at the trial and dismissed Plaintiff's case. This court being the Apex Court does not wish to interfere with several factual positions dealt with by the Original Court. Unless perverse orders are made by the lower courts it would not be in order for a Superior Court to interfere with factual matters. Plaintiff party sold the entirety of lot 2 in pan No. 1535, as evidenced by deed No. 818. Plaintiff party has not placed reliable evidence to prove their case, especially the question of encroachment and that Defendant agreed to demolish a wall. In fact the trial Judge disbelieves the version of the Plaintiff that there was any kind of arrangement to the effect that Defendant had agreed to demolish the wall, at the time of execution of title deed in favour of the Defendant-Respondent. Original Court has the advantage of hearing testimony of a witness and observe the demeanour of a witness. Unless substantive material is placed before court, to hold otherwise, I do not wish to interfere with the views expressed by the

trial Judge. An Appellate Court will not interfere with findings of a trial Judge on question of fact. Fradd V. Brown & Co. Ltd., 20 NLR 282.

> Where the controversy is about veracity of witnesses, immense importance attaches, not only to the demeanour of the witnesses, but also to the course of the trial, and the general impression left on the mind of the Judge of first instance, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge of first instance upon a point of fact purely is over-ruled by a Court of Appeal.

The High Court in its Judgment has considered the un-contradictory evidence of the Defendant. It is stated in the said Judgment that Plaintiff is seeking to demolish the western wall of the Defendant within premises bearing assessment No. 174/02 which is also Plaintiff's eastern wall. If the western boundary is demolished the structure of the entire building would collapse as the roof and the entire building rests with western boundary.

The questions of law referred to in paragraph 24 of the petition cannot be answered in favour of the Plaintiff-Appellants. In fact the question referred to in the said paragraph seems to assume certain facts in the absence of suggested admissions recorded at the trial. I answer the question as follows;

24:-

(i) No. It is misleading to state that paragraph 12 of plaint was admitted. Only paragraphs 1 – 4 of plaint and paragraph 7 (correspondence) had been admitted.

(ii) No. As stated above, the land described in the 2nd schedule to the plaint, by deed 818 of 03.11.2000 had been transferred to Defendant-Respondent.

(iii) No. Land purchased in the extent referred to in the above deed. Evidence reveal that there was no arrangement to demolish a wall. As such based on evidence no encroachment proved.

(iv) No

(v) No, no issue suggested on prescription

(vi) No. Defendant-Respondent purchased the extent of land as per above deed.

(vii) There is no 3rd schedule to the plaint but the Judgment of the High Court explains that land was purchased by Defendant-Respondent, along with the right of way.

(viii) No. Does not arise.

In all the above circumstances we affirm both judgments of the District Court and the High Court. This appeal stands dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

P. B. Aluwihare 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 No. 153/2014
S.C/Spl./LA/122/2014
C.A. No. 1194/00(F)
D.C. Gampaha No. 24537/L

In the matter of an application made for Special Leave to Appeal against the Judgment of the Court of Appeal dated 11.06.2014 under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Mohammed Ali Abdul Wadood of
Ovitigama,
Pugoda.

PLAINTIFF (DECEASED)

1A. Mohammed Ashraff Mohammed Aswer
2A. Mohamemed Ashraff Mohammed Shapar

Both of Ovitigama, Pugoda.

SUBSTITUTED-PLAINTIFFS

Vs.

A.L. A. Ahamed Lebbe of
Ovitigama,
Pugoda.

DEFENDANT (DECEASED)

1A. Ahamed Lebbe Abuhaneefa
2B. Ahamed Lebbe Sithithi Thamna
3C. Ahamed Lebbe Farida
4D. Mohammed Ali Puwuda Umma

SUBSTITUTED –DEFENDANTS

AND

A.L.A. Ahamed Lebbe of
Ovitigama, Pugoda.

DEFENDANT-DECEASED

1A. Ahamed Lebbe Abuhaneefa of
Ovitigama, Pugoda.

SUBSTITUTED 1A DEFENDANT-PETITIONER

Vs.

Mohammed Ali Abdul Wadood of
Ovitigama, Pugoda.

PLAINTIFF (DECEASED)

1A. Mohammed Ashraff Mohammed Aswer
2A. Mohamemed Ashraff Mohammed Shapar

Both of Ovitigama, Pugoda.

SUBSTITUTED-PLAINTIFFS-RESPONDENTS

A.L. A. Ahamed Lebbe of
Ovitigama,
Pugoda.

DEFENDANT (DECEASED)

2B. Ahamed Lebbe Sithithi Thamna
3C. Ahamed Lebbe Farida
4D. Mohammed Ali Puwuda Umma

All of Ovitigama, Pugoda.

SUBSTITUTED–DEFENDANTS-RESPONDENTS

AND NOW

A.L. A. Ahamed Lebbe of
Ovitigama,
Pugoda.

DEFENDANT (DECEASED)

1A. Ahamed Lebbe Abuhaneefa of
Ovitigama, Pugoda.

SUBSTITUTED 1A DEFENDANT-PETITIONER-APPELLANT

Vs.

Mohammed Ali Abdul Wadood of
Ovitigama, Pugoda.

PLAINTIFF (DECEASED)

1A. Mohammed Ashraff Mohammed Aswer
2A. Mohamemed Ashraff Mohammed Shapar

Both of Ovitigama, Pugoda.

SUBSTITUTED-PLAINTIFFS-RESPONDENTS-RESPONDENTS

A.L. A. Ahamed Lebbe of
Ovitigama,
Pugoda.

DEFENDANT (DECEASED)

2B. Ahamed Lebbe Sithithi Thamna
3C. Ahamed Lebbe Farida
4D. Mohammed Ali Puwuda Umma

All of Ovitigama, Pugoda.

SUBSTITUTED–DEFENDANTS-RESPONDENTS-RESPONDENTS

AND NOW BETWEEN

1A. Ahamed Lebbe Abuhaneefa of
Ovitigama, Pugoda.

SUBSTITUTED 1A DEFENDANT-PETITIONER-APPELLANT-PETITIONER

1A. Mohammed Ashraff Mohammed Aswer
2A. Mohamemed Ashraff Mohammed Shapar

Both of Ovitigama, Pugoda.

SUBSTITUTED-PLAINTIFFS-RESPONDENTS-RESPONDENTS-RESPONDENTS

2B. Ahamed Lebbe Sithithi Thamna
3C. Ahamed Lebbe Farida
4D. Mohammed Ali Puwuda Umma

All of Ovitigama, Pugoda.

SUBSTITUTED–DEFENDANTS-RESPONDENTS-RESPONDENTS-RESPONDENTS

BEFORE: K. Sripavan C.J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: Ikram Mohamed P.C. with M.S.A. Wadood, Nadeeka Galhena and Charitha Jayawickrema for the Substituted 1A Defendant-Petitioner-Appellant-Petitioner

Rasika Dissanayake for Substituted Plaintiff-Respondent-Respondent-Respondents

ARGUED ON: 16.12.2015

DECIDED ON: 10.06.2016

GOONERATNE J.

This is an appeal to this court by the Substituted 1A Defendant-Petitioner-Appellant-Petitioner (hereinafter referred to as Defendant-Petitioner) to set aside the Judgment of the Court of Appeal delivered on 11.06.2014 ('Y') dismissing an application to purge default on the basis that the application to purge default was outside the time limit permitted by law. (after a lapse of 14 days) Supreme Court granted Special Leave to Appeal on the following questions of law, as per paragraph 20 of the petition.

(i) Has the Court of Appeal erred in Law in dismissing the said appeal of the Defendant Petitioner on the ground that the application to purge default had been made out of time in the absence of a finding of fact made by the learned Trial Judge that the said application had been made after 14 days of the service of ex parte decree?

(ii) Has the Court of Appeal erred in law, in dismissing the said appeal on the ground that the application to purge the default had been made out of time in breach of the Principles of Audi Alteram Partem?

(iii) Has the Court of Appeal erred in law in dismissing the said appeal on the ground that the application to purge the default had been made out of time, when the said matter was not a matter for the determination in the said appeal in the absence of a cross appeal being made by the Plaintiff Respondent?

(iv) Has the Court of Appeal erred in law in dismissing the said appeal of the Defendant Petitioner in view of its finding that the evidence adduced at the inquiry established reasonable grounds for default within the meaning of Section 86(2) of the Civil Procedure Code?

In the District Court of Gampaha the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action for a declaration of title as prayed for in his plaint. The original Defendant filed answer and also amended answer and sought a dismissal of the action. Trial commenced on 05.08.1986 (pg. 67 of 'x') by recording admissions and issues. Plaintiff-Respondent led evidence on 20.01.1986, 13.03.1987 and on 29.08.1990. On 21.06.1994 Plaintiff-Respondent closed his case leading in evidence P1 to P4. Trial was re-fixed for 03.01.1995 for the Defendant's case but record indicates that both the original Plaintiff and Defendants died and steps were taken in the Original Court to substitute the legal heirs, of both parties. Thereafter the case was fixed for further trial on 04.06.1998 (Pg. 96 of 'X'). On the said day the Defendant party was absent and unrepresented. As such case had been fixed ex-parte and ex-parte evidence was led afresh, although the Plaintiffs had given evidence earlier and closed his case.

It is also noted that on the day the case was put off for the Defence case the Defendants were absent and unrepresented. (04.06.1948) No doubt it indicates the position of the registered Attorney. As long as a valid proxy is filed

of record and not revoked, it is no excuse for the registered Attorney or Proctor to keep away from Court merely because his client was absent. The registered Attorney is duty bound to be present in court and is required to at least make an application on behalf of his clients. However registered Attorney's absence along with the Defendants would be a ground to fix the case ex-parte.

In a gist, before I conclude this Judgment, I prefer to note the salient points in the Court of Appeal Judgment.

(a) Learned District Judge's order which was to be set aside is dated 21.11.2000

(b) Process servers report P1 accepted, as the date of serving the decree on the Defendants as 31.08.1998. Defendant's version of non-receipt of decree rejected by the Court of Appeal. Court of Appeal observes that the Defendant has failed to state of non-receipt of decree in their petition filed in the Court of Appeal

(c) No objection on P1.

(d) 14 days stipulated under Section 86(2) of the Civil Procedure Code is mandatory, vide a Ceylon Brewery Ltd. Vs. Jax Fernando 2001(1) SLR 270. Appellant failed to comply with the above mandatory requirement.

(e) The term 'reasonable grounds' in the said Section 86(2) should be interpreted liberally and court need to be more flexible. Defendant's explanation of reasonable grounds are sufficient.

It is interesting to note the position taken up by the Defendant-Petitioner to overcome the jurisdictional objection resulting from time bar. Learned President's Counsel argues inter alia, as in his oral and written submissions as follows:

(1) Respondent at the inquiry to purge default did not contest the application on the basis of time bar, either orally or in their objections/written submissions.
(2) Objections filed for the purposes of the inquiry by the Respondent do not aver the question of a time bar.
(3) Respondent's objections filed on 17.09.1999 indicate that decree was served on 16.09.1998. (one day before the application was made to vacate ex parte decree)
(4) As such in the above circumstances the question of time bar never became a matter for the learned District Judge to decide. In the trial Judge's order it is stated

කෙසේ වෙතත් පෙන්සම ප්‍රමාදවී ඉදිරිපත් කිරීම පිළිබඳව පැමිණිල්ලෙන් ප්‍රශ්නයක් මතුකලේ නැත. එසේ හෙයින් මෙම ප්‍රමාදය පිලිබඳව මෙ අවස්ථාවේදී සලකා නොබලමි.

The several points urged by both learned counsel on either side raise several interesting points that need to be carefully considered, especially where the Court of Appeal Rules on the questions of reasonable grounds in favour of the substituted 1A Defendant-Petitioner-Appellant, but holds that the

time limit requirement specified under Section 86(2) of the Civil Procedure Code is mandatory and not directory. The Court of Appeal rely inter alia in the reported case of Ceylon Brewery Ltd. Vs. Jax Fernando 2001 (1) SLR 270 and also observe that it is trite law that a pure question of law can always be taken up in appeal. Notwithstanding above learned President's Counsel stress that there was no adjudication by the learned District Judge as regards the stipulated time limit in terms of the above stated section of the Civil Procedure Code and state that date of service of decree, whether served or not is not a pure question of law which can be raised in appeal for the first time. It is his view that the 14 day requirement is a procedural requirement, and though affects the jurisdiction of court, it does not affect the total want of jurisdiction. He cites an important case dealing with latent or contingent want of jurisdiction which could be waived by acquiescence or inaction, and the patent want of jurisdiction which cannot be waived by non-objection. Vide, Perera Vs. Commissioner of National Housing 77 NLR 361.

One has to be mindful of the language used by the legislature as referred to in Section 86 of the Civil Procedure Code. Is it mandatory or directory? A Court of Law need not transgress upon the domain of the legislature and rule otherwise, if the intention of the legislature was to apply the law and procedure strictly and stringently. As such the guidelines suggested by his

Lordship Justice Victor Tennekoon in the above decided case as regards patent and latent jurisdiction would no doubt assist this court. On the other hand to conclude on the question of mandatory or directory on the relevant piece of legislation would be of immense importance to arrive at a decision as regards the case in hand.

It is in a way, unfortunate for the Court of Appeal not to have granted relief for the Substituted 1A Defendant-Appellant, as the said Court, having ruled on the reasonable grounds of default in favour of the said party. The Court of Appeal was not in a position to grant any relief according to law as the time frame within which an application to purge default was made beyond the period stipulated by law. Section 86(2) of the Civil Procedure Code confers jurisdiction on the District Court to set aside a default decree. That jurisdiction depends on two conditions being satisfied. One condition is that the application should be made within fourteen days of service of default decree on the Defendant, vide, The Ceylon Brewery Ltd. Vs. Jax Fernando Proprietor, Maradana Wine Stores 2001 (1) SLR at 271.

It is settled law that provisions which go to jurisdiction must be strictly complied with. Sri Lanka General Workers Union Vs. Samaranayake 1992 (2) SLR 265 at 273-274. As such Section 86(2) of the Code is mandatory and not directory. It is the intention of the legislature to stipulate strictly time limits to

enable the District Court to be conferred with jurisdiction. A Court of law need to get at the real intention of the legislature by attending to the whole scope of the statute to be construed. Enactments which regulates procedure of courts are usually construed as imperative. As such I cannot conclude that the lapse on the part of the 1A Defendant-Appellant is a mere irregularity, as the law is settled that provisions which go to jurisdiction must be strictly complied with. On the contrary to take a different view to above would leave room for abuses in the Administration of Justice. A liberal approach is possible where a court has to decide on the reasonableness of default, but not as regards stringent procedure pertaining to a jurisdictional issue which could be described as a patent want of jurisdiction which is not curable for non-objection/acquiescence or waiver.

It is apparent from the proceedings in the lower court that the question of time bar was not a matter raised before the learned District Judge. On that basis learned President's Counsel argued that it is a mix question of fact and law and that such a position cannot be urged for the first time in appeal and as such the learned Judge of the Court of Appeal erred in this regard. I am unable to accept the argument of the learned President's Counsel. I have held, having considered the case of the 'Ceylon Brewery' as stated above and having considered the provisions contained in Section 86(2) of the Civil Procedure Code

that Section 86(2) is mandatory and must be strictly complied with. Construction of a statute is a pure question of law, and it can be raised in appeal for the first time (76 NLR 427). My views are also supported in *Talagala Vs. Gangodawila Corporative Store Society Ltd. 48 NLR 472.*

Held:

> Where a question which is raised for the first time in appeal is a pure question of law and is not a mixed question of law and facts, it can be dealt with. The construction of an Ordinance is a pure question of law.

The Fiscal's report and Appellant's application to purge default is part of the record and proceedings. The Court of Appeal is within its authority to consider same, and rule on the time frame.

I also note that the absence of the Proctor or registered Attorney has never been explained in the proceedings/submissions made to this court or made available on behalf of the substituted 1A Defendant-Petitioner-Appellant-Petitioner. There is no excuse for the registered Attorney to be absent on the day in question, as long as a valid proxy is filed of record and not revoked. The registered Attorney along with the party concerned has to take the blame for the default. Negligence of the registered Attorney is much more serious as he has failed in his professional obligations towards his client.

I would answer the questions of law in terms of paragraph 20 of the petition as follows:

(i) No. The absence of a finding by the learned District Judge is no bar for the Appellate Court to rule as a pure question of law.

(ii) No. Opportunity was available to the party concerned in terms of the law, to purge default, and he had been cross-examined and Fiscal's report marked P1 was put to the witness which refer to date of service by Fiscal of the decree.

(iii) No, and in view of the answer given in (i) above, it does not arise

(iv) No. Section 86(2) requires two conditions to be satisfied i.e application to purge default to be filed within 14 days which is mandatory and to establish the grounds of reasonable requirement. Both conditions need to be satisfied, and the first being mandatory would be the intention of the legislature.

In all the facts and circumstances of this case I am not inclined to disturb the findings of the learned Judge of the Court of Appeal and the conclusions of the learned District Judge. The time limits specified in Section 86(2) of the Civil Procedure Code to set aside a default decree is mandatory.

As stated above, it is settled law, and only reasonable grounds could be explained to take a liberal approach, but both conditions in Section 86(2) need to be satisfied. Construction of a Statute is a pure question of law which could be raised for the first time in appeal. In a case where the default

occurred in a partly heard case court may proceed to dispose of the action in one of the modes directed by chapter 12 of the Civil Procedure Code or make such other order as the court thinks fit. That is a matter for the trial court. As such I proceed to affirm the Judgment of the Court of Appeal and dismiss this case without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

K. Sripavan C.J.

I agree.

CHIEF JUSTICE

Priyantha Jayawardena

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal under Article 128 of the Constitution read with Section 5 (c) of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006.

AMERASINGHE ARACHCHIGE DON DHARMARATNE
No. 274, Makola North,
Makola.

PLAINTIFF-RESPONDENT-APPELLANT

SC APPEAL No. 158/2013
S.C. H.C. C.A.L.A. No.100/2013
WP/HCCA/GPH/29/2007(F)
D.C. Gampaha Case No.40570/L

VS.

1. DODANGODAGE PREMADASA
2A. DODANGODAGE PREMADASA
2B. DODANGODAGE PREMALATHA
2C. DODANGODAGE DAYAWATHI
2D. DODANGODAGE AMARASEELI MALLIKA
2E. DODANGODAGE HARINDRANATHA
All of No. 274/4, Makola North,
Makola.

DEFENDANTS-APPELLANTS-RESPONDENTS

Priyasath Dep,PC J
K.T.Chitrasiri J
Prasanna Jayawardena, PC. J

COUNSEL: W. Dayaratne,PC with Ms.R.Jayawardena for the Plaintiff-Respondent-Appellant
Gamini Marapana, PC with Navin Marapana the Defendants-Appellants -Respondents.

ARGUED ON: 04th July 2016

DECIDED ON: 12th October 2016

Prasanna Jayawardena, PC, J

The Plaintiff-Respondent-Appellant ["the Plaintiff"] instituted this Action in the District Court of Gampaha against the 1st and 2nd Defendants ["Defendants"], praying for a Declaration of Title to an allotment of land in the Gampaha District and the ejectment of the Defendants from this property.

The Plaint avers that, one Jayaratne was the original owner of this allotment and that: Jayaratne transferred the land to Somalatha by Deed of Transfer No. 6348 dated 16th June 1987; Somalatha then transferred the land to Aida Jayaratne (the widow of Jayaratne) and her six children by Deed of Transfer No. 99 dated 19th August 1993; and that, these seven persons transferred the land to the Plaintiff by Deed of Transfer No. 4061 dated 28th December 1995.

The Plaint goes on to aver that, the Defendants were occupying the land at the time the Plaintiff obtained title and that, from then on, the Defendants continued in occupation with the leave and license of the Plaintiff. The Plaintiff does not claim that he had possession of the land at any stage. The Plaint averred that, the Defendants remained in wrongful occupation despite the Plaintiff having terminated the leave and license.

In their Answer, the 1st and 2nd Defendants admitted that, the original owner – namely, Jayaratne – had title to the land but denied the aforesaid three Deeds of Transfer. The Defendants also denied that Deed No. 6348 and Deed No. 99 were the acts and deeds of the Transferors named therein and put the Plaintiff to proof of these Deeds. The Defendants admitted that they were in possession but denied being licensees of the Plaintiff. The Defendants prayed that, the Plaintiff's Action be dismissed. No counter claim was made.

When the Trial commenced, it was admitted that, Jayaratne was the original owner of the land. Issue No. 1 framed by the Plaintiff was as to whether he held title to the land in the manner averred in the Plaint – *ie:* upon the chain of title set out in the aforesaid three Deeds of Transfer No.s 6348, 99 and 4061. The other issues framed by the Plaintiff are not relevant for the purposes of this Appeal. The Defendants did not frame any issues.

The Plaintiff gave evidence at the Trial and also led the evidence of several other witnesses. The Defendants did not give evidence and did not lead the evidence of any witnesses. During the pendency of the Trial, the 2nd Defendant died and her husband and children, namely the 2A to 2E Defendants-Respondents-Respondents, were substituted in her place.

When the Plaintiff gave evidence, he produced the aforesaid three Deeds. Deed No. 6348 was marked **"P3"**, Deed No. 99 was marked **"P4"** and Deed No. 4061 was marked **"P5"**. All three Deeds of Transfer were produced 'Subject to Proof'. As I mentioned earlier, the Defendants had denied these Deeds in their Answer and had also denied that, the Deeds marked **"P3"** and **"P4"** were the acts and deeds of the Transferors named therein and had specifically put the Plaintiff to proof of these Deeds.

In these circumstances, if the Plaintiff was to succeed in this Action, he had to discharge the burden of duly proving the three Deeds marked **"P3"**, **"P4"** and **"P5"** since he relied on these three Deeds to establish his title to the land. – *vide:* Sections 101 and 102 of the Evidence Ordinance.

The learned District Judge entered Judgment for the Plaintiff, holding that, the Defendants' failure to raise issues disputing the notarially attested Deeds of Transfer produced by the Plaintiff and the Defendants' failure to lead evidence to challenge these Deeds, resulted in the District Court having to accept these Deeds as being proved.

The Defendants appealed to the High Court of Civil Appeal (holden in Gampaha). In appeal, the learned High Court Judges set aside the Judgment of the District Court and dismissed the Plaintiff's Action holding that, this was a *rei vindicatio* Action in which the burden was

cast on the Plaintiff to prove his title, but that, the Plaintiff had failed to discharge this burden by duly proving the Deeds marked **"P3"**, **"P4"** and **"P5"** in the manner required by Law. The learned High Court Judges held that, the Plaintiff had failed to prove any one of the Deeds marked **"P3"**, **"P4"** and **"P5"**.

The Plaintiff sought Leave to Appeal from this Court and obtained Leave to Appeal on the following two questions of Law:

(i) *Did the Civil Appellate High Court misdirect itself in holding that execution of **"P5"** had not been duly proved ?*

(ii) *Did the Civil Appellate High Court misdirect itself in holding that the termination of the license had not been established by evidence ?*

It is clear that, the second question of Law set out above will need to be considered only if this Court answers the first question of Law in the affirmative and holds that, the Plaintiff had established title.

We have heard learned President's Counsel for the Plaintiff and learned President's Counsel for the Defendants. I will now proceed to consider whether the Plaintiff can succeed in this Appeal.

It is not in dispute that, this is a *rei vindicatio* Action. The Plaintiff has expressly stated so in his Written Submissions in the District Court which state (reproduced *verbatim*) *"This is a rei vindicatio action filed by the Plaintiff against the Defendants who disputed his title, denied that they were not in possession under his leave and license which were terminated by Defendants and, therefore, the Plaintiff's burden of proof is that he is the lawful owner of the land and the Defendants are in unlawful possession.".*

As recognised by the Plaintiff in his Written Submissions quoted above, it is well established law that, in a *rei vindicatio* Action, the burden of proof is cast firmly upon the Plaintiff to prove his title to the land, if he is to succeed in the Action.

Thus, in DE SILVA vs. GOONETILLEKE [32 NLR 217 at p.219], a Full Bench stated that, in a *rei vindicatio* Action, *"The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie."*. More recently, in HARIETTE v. PATHMASIRI [1996 1 SLR 358 at p. 361], S.N.Silva J (as he then was) stated, *" ….. the action being one for declaration of title and possession, the burden was on the Plaintiff to establish his title to the land which was in dispute. ……. The Plaintiff's action as presently constituted should therefore be dismissed if she fails to establish title and the right to possess the corpus pursuant to such ownership."*. In the subsequent Case of DHARMADASA vs. JAYASENA [1997 3 SLR 327], G.P.S.de Silva CJ stated (at p. 330) *"But the point is that this is a rei vindicatio action and the burden is clearly on the plaintiff to establish the title pleaded and relied on by him."*. In LATHIEF vs. MANSOOR [2010 2 SLR 333 at p.352], Marsoof J pointed out that, *"An important feature of the actio rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title."*.

It is also established law that, in a *rei vindicatio* Action, the Defendants need not establish any Defence or prove their right or title to the land unless and until the Plaintiff discharges the burden of proving his title. This principle is, perhaps, best illustrated by the Judgment of the Supreme Court in the often quoted Case of JUWANIS APPUHAMY vs. WANIGARATNE [65 NLR 1657] which held that, "*It has been laid down now by this Court that in an action rei vindicatio the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the defendant in the action. The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title."*

As set out above, the Plaintiff's Case is that he obtained title by the Deed of Transfer marked **"P5"**. Therefore, the Plaintiff had to duly prove **"P5"** in order to prove his title.

However, proving **"P5"** alone would not suffice since whatever title the Plaintiff may have obtained by **"P5"** is dependent on the Transferors named in **"P5"** - namely Aida Jayaratne (the widow of Jayaratne) and her six children - having held valid title at the time they are said to have executed **"P5"** in favour of the Plaintiff.

Therefore, in order to duly prove his title, the Plaintiff *also* had to prove that Aida Jayaratne (the widow of Jayaratne) and her six children obtained title by the Deed of Transfer marked **"P4"** executed by Somalatha and also that, prior to **"P4"**, Somalatha obtained title by the Deed of Transfer marked **"P3"** executed by the undisputed original Owner, namely Jayaratne. This is the very basis of the Plaintiff's Case.

In other words, in order to establish his title and succeed in the Action, the Plaintiff had to prove all three links in his alleged chain of title - namely, the Deeds marked **"P3"**, **"P4"** and **"P5"**, all of which have been expressly denied by the Defendants. If the Plaintiff failed to do so, his *rei vindicatio* Action had to fail.

Chronologically, the Deeds marked **"P3"** and **"P4"** precede the Deed marked **"P5"**. Therefore, simple logic requires that, this Court has to be satisfied that, the Plaintiff had duly proved the two Deeds marked **"P3"** and **"P4"** (*ie:* the first two links in the alleged chain of title) before a need arises to consider whether the Deed marked **"P5"** (*ie:* the last links in the alleged chain of title) has been proved.

As well known, the manner of proving Deeds is specified in Section 68 of the Evidence Ordinance which states *"If a document is required by law to be attested, it shall not be used in evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence."*.

Sir James Fitzjames Stephen who was the author of the Indian Evidence Act, 1872 which is the blueprint for our Evidence Ordinance described the rule contained in Section 68 as an ancient rule which is inflexible in its operation – *vide:* Sir James Fitzjames Stephen's

Committee Report to the Council,1872. Coomaraswamy's The Law of Evidence [Book 1 at p. 108] cites the Indian Cases of KARIMULLAH vs. KOERI [AIR 1925 All. 56] and BENARSI DAS vs. COLLECTOR OF SAHARANPUR [AIR 1936 All. 712] and states, *"The section insists on strict compliance where the defendant denies the execution of the document…. The omission to call such a witness, where the execution is denied or not admitted, is fatal to the admissibility of the document"*.

Our Courts have consistently taken the view that, other than in instances where a notarially attested Deed is admitted by the opposing party or is produced in evidence without objection or requirement of proof, the requirements of Section 68 of the Evidence Ordinance are imperative and that Deed will not be considered in evidence unless the testimony of, at least, one attesting witness has been led. Thus, in BANDIYA vs.UNGU [15 NLR 263]. Lascelles CJ described the requirements of Section 68 of the Evidence Ordinance as a *"wholesome rule"* and held that, a notarially attested Deed shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, capable of giving evidence and subject to the process of the Court.

Next, the general rule that is evident from the decisions of this Court is that, the Notary Public who attested the Deed can be regarded as an attesting witness for the purposes of Section 68 of the Evidence Ordinance.

Thus, Cases such as KIRIBANDA VS. UKKUWA [1892 1SCR 216], SOMANATHA vs. SINNETAMBY [1899 1 Tambiah 38] and SENEVIRATNE vs. MENDIS [6 CWR 211] have held that, the Notary Public who attested the Deed may be regarded as being an attesting witness for the purposes of Section 68 of the Evidence Ordinance. In WIJEGOONETILLEKE vs. WIJEGOONETILLEKE [60 NLR 560] Basnayake CJ stated, *"In our opinion a Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance."*.

However, it must be noted that, this general rule that, a Notary Public who attests a Deed will be regarded as an attesting witness for the purpose of proving the Deed, is subject to

the restriction that, the Notary Public should have been personally acquainted with the executant or executants of the Deed, if he is to be regarded as an attesting witness for the purposes of Section 68.

This is simply because the purpose of leading the evidence of an attesting witness is to place before the Court, the evidence of a person who knew the alleged executant of the Deed and, therefore, can properly testify that: (i) the alleged executant did, in fact, execute the Deed in his presence; and (ii) the formalities specified by Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 were complied with at the time of the execution of the Deed.

Thus, T.S.Fernando J explained in SOLICITOR GENERAL vs. AVA UMMA [71 NLR 512 at 516-516] *"The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in section 2 of No. 7 of 1840 means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution.".*

Therefore, if the Notary Public was not personally acquainted with the executant or executants of the Deed, he will not qualify to be regarded as an attesting witness for the purposes of satisfying the requirements of Section 68 of the Evidence Ordinance.

Thus, T.S.Fernando J stated in SOLICITOR GENERAL vs. AVA UMMA (at p. 516), *"If the notary knew the person signing as maker he is competent equally with either of the attesting witnesses to prove all that the law requires in section 68 - if he did not know that person then he is not capable of proving the identity as pointed out in Ramen Chetty v. Assen Naina (supra), and in such a case it would be necessary to call one of the other attesting witnesses for proving the identity of the person."* In the same vein, Sinnetamby J previously stated in MARIAN vs JESUTHASAN [59 NLR 348 at p.349] *"To become an attesting witness a notary must personally know the executant and be in a position to bear witness to the fact that the signature on the deed executed before him is the signature of the*

executant.". See also RAMEN CHETTY vs. ASSEN NAINA [1909 1 Current Law Reports 256] and SENEVIRATNE vs. MENDIS (*supra*).

This rule was recognised by Tambiah J, with Ranasinghe J agreeing, in the original decision of the Court of Appeal in JAYASINGHE vs. SAMARAWICKREMA [1982 1 SLR 349 at p. 358-359] who reiterated that, a Notary Public is competent to prove a Deed under Section 68 only if he knew the maker of the Deed. In terms of this Judgment of the Court of Appeal, this Case was sent back to the District Court for Trial *de novo.* When the Judgment of the District Court in the fresh Trial later came up to the Supreme Court in Appeal in SAMARAWICKREMA vs. JAYASINGHE [2009 1 SLR 293], Marsoof J cited with approval and applied Tambiah J's recognition of the rule that, that a Notary Public is competent to prove a Deed under Section 68 only if he knew the maker of the Deed. See also Marsoof J's later Judgment in LATHIEF vs. MANSOOR (*supra* at p. 358) which reiterates this rule.

It should also be mentioned that, Section 68 of the Evidence Ordinance only spells out the *mode* of proof or what I might call the minimum required to make the Deed admissible in evidence, which is that, as stated in Section 68, *"at least"* one attesting witness must give evidence to enable the Deed to be *"used as evidence"*. In other words, the testimony of *"at least"* one attesting witness is the threshold stipulated by Section 68 which must be passed for the Court to take the Deed into consideration.

However, Section 68 does not state that, leading the evidence of only one attesting witness shall fully discharge the burden of proving due execution of the Deed. In other words, Section 68 does not refer to the *quantum* of proof required to prove the Deed in a manner which will satisfy the Court that the Deed was the act and deed of the executant and was executed in compliance with the requirements of Section 2 of the Prevention of Frauds Ordinance.

As Tambiah J explained in JAYASINGHE vs. SAMARAWICKREMA [1982 1 SLR 349 at p.359] citing Sarkar's Law of Evidence, *"S. 68 of the Evidence Ordinance lays down that documents required by law to be attested shall not be used as evidence unless at least one*

attesting witness is called to prove its execution, if he is alive and subject to the process of the Court. 'This is not the same thing as saying that a document required to be attested by more than one witness shall be proved by the evidence of only one witness. S. 68 only lays down the mode of proof and not the quantum of evidence required. More than one attesting witness may be necessary to prove a document according to the circumstances of a case' (Sarkar's Law of Evidence, 10th Edn. p. 591).".

Therefore, if there are doubts regarding the circumstances in which the Deed was executed or the role played by the Notary Public, the party producing that Deed may be well advised to lead the evidence of more than one attesting witness since the evidence of the Notary Public alone or the evidence of only one witness may not suffice to duly prove a Deed which is challenged. As Bonser CJ succinctly observed in ARNOLIS vs. MUTU MENIKA [2 NLR 199], *"A deed can be proved by the evidence of one witness, though as a matter of precaution it may be advisable in many cases to call all the witnesses."*. See also BARONCHY APPU vs. PODOHAMY [2 Browne's Reports 221], JAYASINGHE vs. SAMARAWICKREMA, SAMARAWICKREMA vs. JAYASINGHE and LATHIEF vs. MANSOOR (*supra*).

No rule of thumb can be laid down. The quantum of proof required – *ie:* the witnesses who should be called and other evidence required - will vary according to the circumstances of the Case.

I have recounted, at some length, the principles which are evident from the decisions of our Courts with regard to the manner of duly proving a Deed in terms of the requirements of Section 68 of the Evidence Ordinance, because these principles determine the fate of this Appeal.

To move to the facts of the present Appeal, as I stated earlier, this Court should *first* consider whether the Deeds marked **"P3"** or **"P4"** were proved, since these two Deeds are the first and second links in the chain of title which the Plaintiff was required to prove in order to succeed in the Action.

The evidence establishes that, the Plaintiff was not an attesting witness to either of the Deeds marked **"P3"** or **"P4"**, though he claimed to have been present when **"P3"** was executed. The Plaintiff did not lead the evidence of an attesting witness to either of the Deeds marked **"P3"** or **"P4"**. The Plaintiff also did not lead the evidence of the Notaries Public who attested the Deeds of Transfer marked **"P3"** and **"P4"**.

The Plaintiff did not seek to invoke the exception provided in the last two lines of Section 68 of the Evidence Ordinance and lead evidence to suggest that the attesting witnesses or the Notaries Public had died or were incapable of giving evidence or that it was impossible to procure their attendance.

The Deeds marked **"P3"** and **"P4"** which are dated 16th June 1987 and 19th August 1993 were produced in evidence on 02nd December 2012 – *ie:* less than thirty years after the execution of these Deeds - and, therefore, no question arises for consideration whether the Plaintiff could have invoked the benefit of Section 90 of the Evidence Ordinance which vests the Court with a discretion to draw certain presumptions in the case of Deeds which are over 30 years of age at the time they are produced in Court and are produced from proper custody.

It should also be mentioned that, the Plaintiff led the evidence of an Officer from the Gampaha Land Registry and produced the folios at the Land Registry which established that, the Deeds marked **"P3"**, **"P4"** and **"P5"** had been registered. However, quite obviously, the production of the folios did not prove the due execution of the Deeds.

In the aforesaid circumstances, the result of the Plaintiff not having led the evidence of an attesting witness or Notary Public to either of the Deeds marked **"P3"** or **"P4"** is that, the Plaintiff failed to pass these two Deeds through the threshold stipulated in Section 68 of the Evidence Ordinance.

Thus, the Plaintiff has failed to prove the Deeds marked **"P3"** and **"P4"**, which, as stated earlier, are the first two of the three links in his alleged chain of title.

I will now proceed to consider the first question of law framed by this Court. That is, the question: *"Did the Civil Appellate High Court misdirect itself in holding that execution of* ***"P5"*** *had not been duly proved ?*

The Plaintiff did not call either of the attesting witnesses to the Deed of Transfer marked **"P5"**. The Plaintiff only led the evidence of the Notary Public who attested this Deed.

As stated above, it is settled law that, Notary Public who attested this Deed can be regarded as an attesting witness for the purposes of Section 68 of the Evidence Ordinance only if he knew the executant or executants of the Deed.

The learned High Court Judges held that, the evidence before the Court established that, the Notary Public did not know the executants of the Deed marked **"P5**.

In this regard, I note that, the Notary Public stated in his Evidence-in-Chief that he knew one of the executants of the Deed marked **"P5"**. But, his evidence in Cross Examination suggests that he was unsure whether he knew the executants and that he was only able to say, with certainty, that he knew the attesting witnesses to the Deed. Thus, the testimony of the Notary Public did not clearly establish that he knew the executants of the Deed marked **"P5"**.

Further, in his Attestation on the Deed marked **"P5"**, the Notary Public does not state that, he knows the executants and only states that he knew the attesting witnesses. It seems to me that, the only conclusion that can be properly reached from the wording of the Attestation is that, the Notary Public did not know the executants (transferors) who are said to have executed the Deed marked **"P5"**.

If the Notary Public did know the executants of the Deed, he would have had no reason not to state so, in his Attestation. In fact, if the Notary Public did know the executants of the Deed, the provisions of Section 30 (20) (*b*) of the Notaries Ordinance No. 1 of 1907, as

amended, placed a duty upon him to state so in the Attestation. Therefore, the fact that, the Notary Public did not state in his Attestation that he knew the executants, leads compellingly to the conclusion that, he did not know the executants. Further, it seems to be that, the general principles set out in Sections 91 and 92 of the Evidence Ordinance will apply and result in the statement in the Attestation prevailing over any oral evidence that the Notary Public may have given.

Thus, I agree with the finding by the learned High Court Judges that, the evidence placed before the Court at the Trial did not establish that, the Notary Public who attested the Deed marked **"P5"** and who gave evidence at the Trial, knew the alleged executants of that Deed.

Therefore, upon an application of the aforesaid settled law that, a Notary Public who does not know the executant of a Deed, cannot be regarded as an attesting witness for the purposes of Section 68 of the Evidence Ordinance, the evidence of the Notary Public who gave evidence at the Trial did not satisfy the requirements of Section 68 and did not prove the Deed marked **"P5"**.

The learned High Court Judges correctly applied the aforesaid established principle of law and held that, the Deed marked **"P5"** had not been proved.

I agree with the determination of the learned High Court Judges and, accordingly, answer the aforesaid first question of law in the negative. I would also add that, not only was the Deed marked **"P5"** not proved, as I observed earlier, the Deeds marked **"P3"** and **"P4"** were also not proved.

Accordingly, I hold that, this Appeal should be dismissed since the Plaintiff has failed to prove the Deeds of Transfer marked **"P3"**, **"P4"** and **"P5"** in the manner required by the law.

In view of the above, the second question of law regarding whether the Plaintiff has proved the termination of the leave and license does not need to considered. In this connection, I should also state that, the Plaintiff identifies this as a *rei vindicatio* Action and does not suggest that this is a possessory Action where a question of a contractual nexus may have to be considered. In any event, it is an undisputed fact that, the Plaintiff never had possession of the land.

The Appeal is dismissed with costs in a sum of Rs.20,000/- payable by the Plaintiff-Respondent-Appellant to the Defendants-Appellants- Respondents.

Judge of the Supreme Court

Priyasath Dep, PC J.
I agree

Judge of the Supreme Court

K.T.Chitrasiri J.
I agree

Judge of the Supreme Court

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

In the matter of an Appeal from the

Judgment of the Civil Appellate

High Court of the Western Province

Holden at Gampaha

SC Appeal No. 160 / 2013
SP/HCCA/ Gph / 316 / 2011
WP/HCCA/GPH 95/01
D.C.Negombo Case No. 4858/L

Bharatha Wijesundera,
No. 116,Negombo Road,
Sayakkaramulla,
Marandagahamula

Plaintiff

Vs.

1.Nanedirige Sarath Thilakasiri,
"Srimali Rice Mill",
Weyangoda Road, Wegouva,
Minuwangoda.
2. Nanedirige Ananda Tilakaratne,
No. 427, Dematagolla,
Horampella.

Defendants

AND THEN

1.Nanedirige Sarath Thilakasiri,
"Srimali Rice Mill"
Weyangoda Road,
Wegouwa,
Minuwangoda.

2.Nanedirige Ananda Tilakaratne,
No. 427, Dematagolla,
Horampella.

Defendant Appellants

Vs.

Bharatha Wijesundera,
No. 116, Negombo Road,
Sayakkaramulla,
Marandagahamula.

Plaintiff Respondent

AND NOW

1. Nanedirige Sarath Thilakasiri,
   "Shrimali Rice Mill",
   Weyangoda Road,
   Wegouva,
   Minuwangoda.
2. Nanedirige Ananda
   Tilakaratne,

2a. Gamage Piyawathi.

2b. Nanedirige Wasantha Lakmali
Tilakaratne.

2c. Nanedirige Thilina Lakmal
Tilakaratne.

2d. Nanedirige Tharindu Lakmal
Tilakaratne.

All of No. 427, Dematagolla,
Horampella.

Defendants Appellants
Appellants

Vs.

Bharatha Wijesundera,

No. 116, Negombo Road,
Sayakkaramulla, Minuwangoda.

Plaintiff Respondent
Respondent

BEFORE : **S.EVA WANASUNDERA PC J.**
B.P. ALUVIHARE PC J. &
K.T.CHITRASIRI J.

COUNSEL : S.N.Vijithsingh for the Defendant Appellant Petitioners
Sudarshani Cooray for the Plaintiff Respondent Respondent

ARGUED ON : 03. 02. 2016.

DECIDED ON: 21.03. 2016.

S.EVA WANASUNDERA PC J.

This is an appeal to be decided on one question of law contained in paragraph 13(d) of the Petition dated 12.08.2011., i.e. " whether the High Court erred in law by not considering the fact that the parole evidence of the Respondents is sufficient to establish a constructive trust in the circumstances of this case".

The land which is the subject matter of this case is of an extent of 34.5 Perchs. It is a part of Lot 2A2 in Plan No. 603 dated 18.06.1990. surveyed by licensed surveyor Fonseka. Lot 2A2 is of an extent of 3 Roods. The 1st Defendant Appellant Appellant (hereinafter referred to as the 1st Defendant), N.Sarath Thilakasiri got

title to this land by way of Amicable Partition Deed No. 70089 dated 2.1.1991. attested by Jaysekera Abeyruwan, Notary Public. This Deed was marked in evidence at the District Court trial.

The land of an extent of 34.5 Perches was marked on the document, the Plan No. 603 mentioning as " an allotment marked and allotted as Lot 2A2 -1 ", on 25.04.1992, prior to executing **the Deed No. 8764** dated 19.07.1992 by which deed the 1st Defendant transferred the said **Lot 2A2 -1** to the Plaintiff. This is the deed that the Defendants are claiming to be a constructive trust and not intended to be a transfer of title of **Lot 2A2-1**.

It is evident that Lot 2A2-1 had not been physically demarcated on the ground at the time of the transfer. The Defendants are two brothers. They claim that the Plaintiff Respondent Respondent (hereinafter referred to as the Plaintiff) gave a loan of Rs.22500/- to the 1st Defendant in June, 1992 on 5% interest per month for which the security given was only a cheque for that amount. The 1st Defendant had been paying interest but had failed to pay the principal amount for some months. Then the Plaintiff had insisted that as security the 1st Defendant should transfer a piece of land since a cheque is not good enough security any more.

The 1st Defendant had then transferred Lot 2A2-1 by Deed 8764 to the Plaintiff who had promised that he will retransfer the land to the 2nd Defendant, the elder brother of the 1st Defendant. This promise was given in his handwriting by way of another document which was signed on a stamp. The Defendants claim that this document was written and given when the transfer deed was done in the Notary's office. This was marked in evidence as V1. By V1, the amount of the loan is given as Rs. 35000/- . The Plaintiff had promised to retransfer the property to the 2nd Defendant if the said Rs. 35000/- is repaid within 2 years from that date, i.e. from 15.7.1992 with interest at 5% per month. Yet he had not waited for 2 years but tried to fence the Lot 2A2-1 in Oct. 1993. It is then that the troubles had started when the 2nd Defendant had complained to the Police about the Plaintiff's attempt to fence the property. There had been a Primary Court Case under No. P 22177 filed under Sec. 66(1)B of the Primary Courts Procedure Act No. 44 of 1979 on the complaints made to the Police by the Defendants and the Primary Court by order dated 4.4.1994 had given possession to the Defendants who were in

possession of the land at that time and ordered the Plaintiff not to disturb them untill the matter is resolved in the District Court in a civil action.

The Plaintiff has made both the 1st and 2nd Defendants as parties to the District Court action because the Primary Court had placed both of them in possession as they were the complainants in that case.

The Plaintiff's evidence before the District Court was that even though the amount mentioned in the Deed as purchase price is Rs. 35000/- , the actual amount paid by him to the 1st Defendant is Rs. 135000/-. The Plaintiff denied V1, the letter of promise to retransfer at the trial but later on, in cross examination said that it looks like his handwriting. Even in that letter the amount he had

mentioned is Rs. 35000/- and interest at 5% per month and not Rs.135000/-. He had mentioned in his statement to the Police that if Rs. 135000/- is paid to him, he is ready to retransfer the land then and there. Furthermore he had mentioned in his evidence that he wanted a land by the Negombo Road from the 1st Defendant but the 1st Defendant had transferred a piece of land in the 'jungle'. In my view, no proper buyer of a block of land would buy the same for good consideration without seeing and identifying the land prior to buying the same. Taking the answer of the Plaintiff, it is obvious that he had physically not seen the land prior to the execution of the Deed 8074. This affirms that it was taken only as security for the loan. When he was cross examined as to why he stated in his statement to the Police, that he would retransfer the land if Rs. 135000/- is given in the Police, he had answered that the Police had suggested that he could buy a land by the main road if Rs. 135000/- is given and that is the reason for his statement. I find it hard to believe that the Police would get involved in such discussion with the complainants and respondents before them. This satement of the Plaintiff suggests that at that time, the market value could have been somewhere around Rs.135000/- for a land of 34.5 perches, which he had got by way of a transfer deed for Rs. 35000/- only.

The statements to the Police reveals that there is a cadjan thatched small house on Lot 2A2-1 in which the 2nd Defendant had placed one Premasinghe and his family. This Premasinghe had refused to sign on a paper which he was asked to sign by the Plaintiff and further he is the person who had chased out the Plaintiff

from the land when he had come with four other people to fence the same in 1993. The troubles had arisen at that time.

I observe that the land belonging to the 1st Defendant was transferred to the Plaintiff on trust on the understanding that when Rs. 35000/- was paid back with interest at 5% per month within two years to the Plaintiff by the 1st Defendant, the land would be retransferred back to the 1st Defendant. Furthermore I observe that it was a promise that the land will be retransferred to the 1st Defendant on repayment as agreed.

In ***Dayawathie and others Vs Gunasekera and another, 1991, 1 SLR 115***, it was held that, " The Prevention of Frauds Ordinance and Sec. 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in the property. Extrinsic evidence to prove attendant circumstances can be properly received in evidence to prove a resulting trust." In ***Premawathie Vs Gnanawathie, 1994, 2 SLR 171,***Hon. Chief Justice, G.P.S. de Silva held that " An undertaking to reconvey the property sold was by way of a non-notarial document which is of no force or avail in law under Sec. 2 of the Prevention of Frauds Ordinance. However the attendant circumstances must be looked into as the plaintiff had been willing to transfer the property on receipt of Rs. 6000/- within 6 months but could not do so despite the tender of Rs.6000/- within the six months as she was in hospital, and the possession of the land had remained with the 1st Defendant and the land itself was worth Rs 15000/- , the attendant circumstances point to a constructive trust within the meaning of Section 83 of the Trusts Ordinance. The 'attendant circumstances' show that the 1st Defendant did not intend to dispose of the beneficial interest. "

According to the case law on the subject, such as *Dayawathie Vs. Gunasekera 91 1 SLR 115, and Premawathie Vs. Gunawathie 94 2 SLR 171,* the grounds on which a trust can be adjudged is as follows:

(a) on the oral promise and/or written informal promise to reconvey,

(b) the transferee having remained in possession and the transferor not having taken possession of the land, right after the transfer and

(c) the disparity between the proper value and the value placed in the Deed.

All these grounds are present in this case in hand which have come out in the evidence of the Plaintiff and the Defendants before the District Court and also in the statements made to the Police by them.

Both the District Judge and the High Court Judge have failed to analyze the evidence placed before them with a view to see whether there was parole evidence to support a constructive trust behind the transfer of land by Deed 8074. They have only analyzed the story of the Defendants narrating how they agreed to give a piece of land as security for the accumulated loan of Rs. 35000/- to the Plaintiff and the descrepancies in their evidence explaining title to the land. In fact, the owner of the land 2A2-1 was the 1st Defendant. This fact was proven with the Amicable Partition Deed No. 70089 and the covenants included in the Deed of Transfer No. 8074 and they were accepted facts.

The contest in the case is that, with the deed of transfer, the title did not pass because it was only security given for a loan on trust and that it will be retransferred if the loan was repaid with interest within two years. However the Plaintiff did not wait for two years and tried to demarcate the boundaries of the land on the ground without informing the 1st Defendant, at which time trouble started and a case was filed before the Primary Court to keep peace and the Defendants were given possession till the matter is settled in a case filed in the Disstrict Court. On a balance of probabilities of evidence placed before the District Court, to my mind , it is clear that it was security given for a loan of Rs. 22500/- with accumulated interest got collected upto a loan of Rs. 35000/- when the Plaintiff demanded a property be transferred to secure the loan.

I answer the question of law to be decided as aforementioned in the affirmative in favour of the Defendants Appellants Appellants. The learned Judges of the High Court and the District Court have not given sufficient consideration to the parole evidence in the case proving the constructive trust placed with the Plaintiff by

the 1st Defendant when Deed 8074 was executed. The learned judges have erred in their decisions.

I do hereby set aside both Judgements of the Civil Appellate High Court of Gampaha dated 05.07.2011 and the District Court of Negombo dated 30.01.2001. In view of the decision of this court, issues bearing Nos. 10 and 11 raised in the District Court are answered in favour of the Defendants. Accordingly decree should be entered as prayed for in the answer dated 14. 10. 1994. The Registrar of this Court is directed to return the District Court Record to the relevant District Court forthwith to enable parties to comply with this judgment.

The Appeal is allowed. However I order no costs.

Judge of the Supreme Court

B.P. ALUVIHARE PC J,
I agree.

Judge of the Supreme Court

K.T.CHITRASIRI J,
I agree.

Judge of the Supreme Court

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

In the matter of an appeal having granted Special Leave under and in terms of the provisions of the Constitution.

SC Application No. SC/SPL/LA 230/2012

CA Writ Application No.1097/2006

SC Appeal 161/2013

Hassen Lebbe Mohamed Nizam

89/2, Lady Gordon's Road, Kandy.

Petitioner

-Vs-

1. Dr. M.S. Jaideen

2, R. W. M.S.B. Rajapakse

3. Dilshan Jayasooriya

All members of the Ceiling on Housing Property Board of Review

No. G-10, Vipulasena Mawatha Housing Scheme Sri Vipulasena Mawatha, Colombo10.

4. The Commissioner for National Housing

Department of National Housing, Sethsiripaya, Battaramulla.

5. Gnoi Bintan Moomin

No. 504/6 Peradeniya Road, Kandy.

6. K. Engonona Wickramasinghe

504/1, Peradeniya Road, Kandy.

7. Mulin Medawatte Gedara,

   504/1, Peradeniya Road, Kandy.

8. M.C. De La Motte,

   No. 36, Windsor Place, Dehiwala.

9. W.M.H.L. Mohamed Farrok

   504, Peradeniya Road, Kandy.

Respondents

AND NOW BETWEEN

Hassen Lebbe Mohamed Nizam

89/2, Lady Gordon's Road, Kandy.

Petitioner-Petitioner

-Vs-

1. Dr. M.S. Jaldeen.
2. R. W. M.S.B. Rajapakse
3. Dilshan Jayasooriya

   All members of the Ceiling on Housing Property Board of Review

   No. G 10, Vipulasena Mawatha Housing Scheme, Sri Vipulasena Mawatha, Colombo 10.

4. The Commissioner for National Housing Department of National Housing, Sethsiripaya, Battaramulla,
5. Gnoi Bintan Moomin

   No. 504/6 Peradeniya Road, Kandy.

6. K. Engonona Wickramasinghe

   504/1, Peradeniya Road,

   Kandy.

7. Mulin Medawatte -Gedara,
504/1, Peradeniya Road, Kandy.

8. M.C. De LaMotte,
No. 36, Windsor Place, .Dehiwala

9. W.M.H.L. Mohamed Farrok
504, Peradeniya Road, Kandy.

Respondents- Respondents

BEFORE: Eva Wanasundera P.C.J
Buwaneka Aluwihare P.C.J
Sisira J De Abrew J

COUNSEL : M U..M Ali Sabri PC with Lasantha Thiranagama for the Petitioner- Petitioner-Appellant

Vikum De Abrew Deputy Solicitor General for the 4th Respondent- Respondent

J.C Boange for the 5th and 7th Respodent Respondent

Argued on: 26- 05-2014

Decided on : 15-02-2016

Aluwihare P.C.J

The Petitioner-Petitioner-Appellant, and the 9th Rrespondent became joint owners of the premises bearing assessment numbers 504/1, 504/2, 504/3, 504/5, and 504/6, Peradeniya Road Kandy, originally owned by one George E De La Motte, by virtue of George De Lamotte's last will. His son Hans Cecil De La Motte became the owner of the premises in issue as at 1973, the year in which the Ceiling on Housing Property Law came into operation. Hans Cecil De La Motte died intestate in 1979. Prior to the death of Hans Cecil De La Motte, the Petitioner-Petitioner-Appellant (hereinafter the Appellant) and his brother, the 9th Respondent had entered into an agreement with Hans Cecil De La Motte to purchase tenements bearing assessment numbers 504/1 to 504/6 and premises bearing assessment numbers 504, 504/1A. The Appellant and the 9th Respondent subsequently purchased the premises 504/1 to 504/6 with the permission of the court from the administratrix of the estate of said Hans Cecil De La Motte, appointed by the District Court of Kandy case number 2820/T. Deed Nos. 8707 and 8708 dated 15 September 1981 had been executed for this purpose.

Subsequent to the transactions referred to above, Applications were made by some of the tenants of the premises referred to above to the 4th Respondent, the Commissioner of Housing to have the tenements transferred to them on the basis that the De La Motte family had houses in excess of the permitted number. After an inquiry, the 4th Respondent, held that Hans Cecil De La Motte was an excess house owner. Aggrieved by this decision of the 4th Respondent, the Appellant and the 9th Respondent appealed against the said order of the Housing Commissioner to the Board of Review established in terms of section 17 of the Ceiling of Housing Property Law (hereinafter the Law). The Board of Review affirmed the findings of the Commissioner of Housing by its order dated 3rd May 2006.

As a sequel to this order, the Appellant sought a writ of certiorari from the Court of Appeal to quash the order dated 3 May 2006 made by the Board of Review.

The gravamen of the Appellant's complaint before the Court of Appeal was that the Board of Review failed to consider the contents of three highly relevant documents (X1, X 2 and X3) which the Appelleant asserted, provided vital evidence to arrive at the determination as to whether George De La Motte was or was not an excess house owner for the purpose of the Law. The three documents were;

(a) Last Will of George De La Motte -X1

(b) Inventory- X2

(c) Probate in respect of the estate of said George De La Motte -X3

The above documents, X1 to X3 were marked and produced before the Court of Appeal as P 15, P 16 and P17, in that order.

Although it does not seem necessary to delve into the facts in relation to this matter in detail, I wish to refer to them to the extent necessary to bring some clarity to the issues before this court.

The documents X1 to X3 aforesaid were produced as annexures to the Petition before the Board of Review.On behalf of the Appellant and the 9th Respondent it was pleaded that the said documents had not been available to them at the time and hence they could not be produced at the inquiry before the 4th Respondent. The Appellant and the 9th Respondent had taken up the position that the heirs of De La Motte were neither made parties nor noticed at the said inquiry and the particulars relating to several premises owned by Hans Cecil De La Motte were matters within the knowledge of his heirs and that the Appellant and the 9th Respondent had to embark on a voyage of discovery to trace the documents X1 toX3, the contents of which would have shed light on the issue before the Board of Review.

The Respondents, however had objected to the production of the said document on the grounds that they were new documents produced for the first time and there was no provision to admit new evidence before the Board of Review. It was urged on behalf of the Appellant, that Section 32 of the Ceiling on Housing Property law confers power on the Board of Review to record additional evidence and compel production of documents.

It was the contention of the Appellant that such powers are conferred on the Board of Review to enable it , to come to the correct findings, in this instance as to the propriety rights of the parties before it. The document X1, which is the last Will of the father of Hans Cecil De La Motte appears to be a significant document in determining as to whether Hans Cecil De La Motte was an excess house owner or not.

It was urged before the Board of Review by the Appellant that the 4th Respondent, Commissioner, was made to believe that Hans Cecil De La Motte is the only heir of George De La Motte, and the Commissioner made an order on the premise that all the properties of George De La Motte devolved on Hans Cecil De La Motte. The Board of Review had neither considered the documents X1 to X3 nor had adduced any reasons for rejecting the said documents. The Board of Review in upholding the decision of the 4th Respondent, Commissioner, had gone on to state that the Commissioner is justified in arriving at the determination on the basis of the evidence both oral and documentary, produced by the Respondents.

The Court of Appeal dismissed the application of the Appellant based on the (now has become known as) "Ladd principles" which have laid down the basis for reception of fresh evidence. The Court of Appeal relied on the following passage of Lord Denning in the case of Ladd vs. Marshall (1954 3 AER 745)

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled; first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second,

the evidence must be such that, if given,it would probably have an important influence on the result of the case, although it need not be decisive:third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

As far as the three requisites referred to in the case of Ladd vs. Marshall are concerned, the documents sought to be produced not only have significant influence on the result of the issue that had to be decided but also appear to be credible in that they consist of a last Will which has been proved , an inventory filed in a testamentary case and the probate in respect of the estate of George De La Motte.

The only issue that has to be considered is whether Appellants could have obtained the documents when the matter came up for inquiry before the 4th Respondent Commissioner, if reasonable diligence had been exercised. Although the Court of Appeal had been of that view, with all due deference, the Court of Appeal had not given any reasons for such a conclusion. The test as to the application of the requisites was considered by the Court of Appeal of England in the case of R vs. Seaga UK Ltd (2015) EWCAC Civil 113. It was held the standard required is reasonable diligence and not higher.

By enacting Section 32 of the Law, the legislature in its wisdom would have been mindful of the significance of safeguarding propriety rights of the citizenry and had thought it fit to vest power with the Board of review, to consider fresh material that had not been placed before the Commissioner.

Section 32 (1) of the Law reads thus.-

"The Chairman or the Vice-Chairman of the Board and, if the Chairman or the Vice-Chairman is not presiding at any meeting of the Board, the Chairman of that meeting shall, for the purpose of the consideration and determination of any reference, have all the powers of a District Court-

(a) to summon and compel the attendance of witness;
(b) to compel the production of documents;
(c) to administer any oath or affirmation to witness.

The main issue that came up in the Court of Appeal was whether the 5th Respondent had uttered a deliberate falsehood at the inquiry before the 4th Respondent (Commissioner of Housing) to the effect that George the La Motte had only one child, namely Hans Cecil De La Motte on whom the ownership of 22 houses had devolved. The assertion on the part of the 5th Respondent in this respect, in all probability would have influenced 4th Respondent, to come to the findings that were challenged before the Board of Review. It was, to establish that the position taken up by the 5th Respondent was incorrect; that the Appellant sought to produce the documents X1to X3 referred to earlier, before the Board of Review, invoking Section 32 of the Ceiling on Housing Property law.

The gravamen of the complaint is that the Board of Review did not admit or consider the contents of the documents, X1 to X3 which were very material to determine the issues before the Board of Review. It was the contention of the Appellant that, had these documents been considered, the Board of Review would have arrived at a different determination. By virtue of section 39 (2) of the Law, section 32 is applicable to the hearing and determination of any appeal before the Board of Review. Thus, section 32 vests the power with the Board of Review to summon and compel attendance of witnesses and to compel the production of documents.

Hence there is no ambiguity that fresh material that may not have been produced at an inquiry before the Commissioner of Housing by a party, could be placed before the Board of Review.

The Court of Appeal went on to state that "it is an admitted fact that by the docments X1, X2 and X3 the Petitioner attempted to establish the fact that George De La Motte had six children and therefore is not an excess house owner" The Court of Appeal observed that X1,X2 and X3 could have been obtained by the Petitioner if he had exercised reasonable diligence. The Court of Appeal however had not attributed any reason to form sch a view.

Upon analysis of Lord Denning's decision in Ladd Vs. Marshall, I wish to focus on the second and third principles laid down in the case with regard to admission of fresh evidence vis a vis the facts of this case: I am of the view that the document sought to be marked would satisfy the second and third of the Ladd principles. What is left to be decided is whether the Appellant has execised reasonable diligence to trace the impugned documents.

At this point I wish to refer to the reasoning of Lord Denning (in deciding the issue of permitting fresh evidence to be led) At page 748 of the judgment wherein his Lordship expressed the view *" if it were proved that the witness had been bribed or coerced into telling a lie at the trial and was now anxious to tell the truth, that would I think be a ground to for a new trial, again if it were proved that the witness made a mistake on a most important matter and wished to correct it and the circumstances were so well explained, that his fresh evidence was presmbly to be believed, then again there would be ground for a new trial"*.

In the present case, it is apparent that either the 5th Respondent had uttered a falsehood or made a mistake on a most important matter, when he testified before the 4th Respondent to the effect that Hans Cecil De La Motte was the only child of George De La Motte, whereas documents X1, X2, and X3 amply demonstrate that was not the case.

When an application is made to have fresh evidence adduced before any forum which is empowered to receive such evidence, such an application must be determined by applying the priciples referred to. In the instant case the Board of Review failed in its duty to do so. The Court of Appeal does not appear to have applied them either.

In this context I am of the view that the decision of Court of Appeal cannot stand and accordingly I set aside the order of the Court of Appeal dated 13-09-2012 for the reasons aforesaid. I also make order quashing the order of the Board of Review dated 03-05-2006 and direct the Board of Review to hold a fresh inqiry.

In the event an application is made to have documents X1 X2and X3 admitted as evidence in terms of Section 32 (1) of the Law, the Board of review is further directed to reconsider the application applying the principles referred to, in this judgement.

The appeal is allowed. I make no order as to costs

JUDGE OF THE SPREME COURT

Eva Wanasundera P.C J.

I agree

JUDGE OF THE SPREME COURT

Sisira J De Abrew J.

I agree

JUDGE OF THE SPREME 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 Kurunegala dated 26.07.2013. In case No. NWP/HCA/KUR/32/2012 LT.

A.K. Mohammed Illyas ,
No. 114, Nikagolla,
Yatawatte.

APPLICANT

SC APPEAL No. 165/2013
SC Leave to Appeal No. 228/13

H. C. Kurunegala Case No.HCA/LT/ 32/2012
Civil Appeal High Court Case No.
NWP/ HCCA/ KUR/ 25/2010 /LT

Vs

Agricultural and Agriarian Insurance Board, No. 27, Vauxhall Street, Colombo 02.

RESPONDENT

L T KURUNEGALA Case No.
25/Ku/63333/1998

AND BETWEEN

A.K. Mohammed Illyas.
No. 114, Nikagolla,
Yatawatte

APPLICANT – APPELLANT

Vs

1. Agricultural Insurance Board,
   267, Union Place,
   Colombo 02.

1A. Agricultural and Agrarian Insurance Board, Subadrarama Road,
Nugegoda.

RESPONDENT – RESPONDENT

AND NOW BETWEEN

A. K. Mohammed Illyas,
No. 114, Nikagolla,
Yatawatte.

APPLICANT – APPELLANT – APPELLANT

Vs

1. Agricultural Insurance Board,
   267, Union Place,
   Colombo 02.

1A. Agricultural Insurance and Agrarian
Insurance Board, Subadrarama Road,
Nugegoda.

RESPONDENT- RESPONDENT-RESPONDENT

……..

In the matter of an Appeal from the
Judgment of the Civil Appellate High
Court of Kurunegala dated 26.07.2013.
In case No. NWP/HCA/KUR/32/2012 LT.

A.K. Mohammed Illyas ,
No. 114, Nikagolla,
Yatawatte.

Vs

Agricultural and Agriarian Insurance
Board, No. 27, Vauxhall Street,
Colombo 02.

RESPONDENT

SC APPEAL 164/13
SC LEAVE TO APPEAL No. 364/13

HC KURUNEGALA Case No.
HCA/LT/32/2012.

AND BETWEEN

A.K. Mohammed Illyas.
No. 114, Nikagolla,
Yatawatte

APPLICANT – APPELLANT

Vs

1. Agricultural Insurance Board,
267, Union Place,
Colombo 02.

1A. Agricultural and Agrarian Insurance Board, Subadrarama Road,
Nugegoda.

RESPONDENT - RESPONDENT

CIVIL APPELLATE HIGH COURT Case No.
NWP/HCCA/KUR/25/2010/LT

AND NOW BETWEEN

L T KURUNEGALA Case No.
25/Ku/63333/1998

1. Agricultural and Agrarian Insurance Board, No. 27, Vauxhall Street,
Colombo 02.

1A. Agricultural and Agrarian Insurance Board,No. 117, Subadrarama Road,
Nugegoda.

RESPONDENT-RESPONDENT-APPELLANT

Vs

A.K. Illyas,
No. 114, Nikagolla,
Yatawatte.

APPLICANT-APPELLANT-RESPONDENT

……

BEFORE : PRIYASATH DEP PCJ
S. EVA WANASUNDERA PCJ &
K. T. CHITRASIRI J.

COUNSEL : D. K. Dhanapala for the Applicant Appellant Appellant
In SC Appeal No. 165/13 and for the Applicant Appellant
Respondent in SC Appeal No. 164/13
Sobitha Rajakaruna DSG for the Respondent Respondent Respondent
In SC Appeal No. 165/13 and for the Respondent Respondent Appellant
In SC Appeal No.l 164/13.

ARGUED ON : 27. 01. 2016

DECIDED ON : 28. 03. 2016

S. EVA WANASUNDERA PCJ

This is an Appeal in which leave to appeal was granted on 28.11.2013. on the questions of law enumerated in paragraph 16 of the Petition dated 05.09.2013.

It has arisen from the Civil Appellate High Court judgment dated 26.07.2013. In this Appeal,the Appellant has appealed from that judgment. The Respondent in this case also had appealed from the same judgment and leave was granted in that case as well and the number of that case is SC Appeal No. 164/2013. **Since both cases have arisen from the same judgment f the Civil Appellate High Court, the parties agreed that they be consolidated and heard together by one bench of judges and that they will abide by one judgment of this court**. Therefore, I will consider the judgment of the High Court dated 26.07.2013 on submissions made by parties alleging different grounds for appeal.

The employee complains that the learned High Court Judge has erred in law by failing to appreciate the evidence in the correct perspective and by having calculated the compensation on the basis of last drawn salary disregarding the document marked as R 39 and also by having unreasonably limiting the amount of compensation ordered for a period of 10 years. The employer complains that the High Court Judge erred in law by considering extraneous factors and by disregarding the conclusions made by the LT President ,and by allowing the appeal of the employee concluding that the employee did not have the mental element of intention to vacate and therefore he cannot be held to be deemed to have vacated the post , amongst many other reasons. Both parties have submitted that the High Court judgment is unsatisfactory.

The facts pertinent to this case is as follows; The employee Illyas was employed by the employer Agricultural and Insurance Board as a Development officer on or about 15th September, 1986. He served in different offices of the employer till 23rd November, 1997.The employer by its letter dated 16th January, 1998, informed the employee that he is deemed to have vacated his office w.e.f 23.11.1997. The employee claimed that his services have been terminated unjustly and unreasonably and filed an application in the Labour Tribunal against the employer. The employer filed answer and stated that on 25.11.1997 the employee had sent a telegramme submitting that he is ill and thereafter he had not requested for leave.He had not written any letters to the employer. No notification was made to his employer about his absence from work from 25.11.1997 to 01.01.1998 and as such he was informed by his employer that he is deemed to have vacated his post. On 16.02.1998 the employee had written a letter as an appeal , submitting seven medical certificates indicating different sicknesses for different periods. The employer had rejected the said appeal. Aggreived by that, Illyas, the employee, had come before the Labour Tribunal.

I observe that the Labour Tribunal, has analyzed the evidence giving its mind to the seven medical certificates which were brought to the attention of the employer by the employee after the letter of vacation of post was sent to him**. It was dated 16.01.1998. and it was marked R30.** The medical certificates were dated, 15.11.1997, 22.11.1997, 24.11.1997, 15.12.1997, 17.12.1997, 02.01.1998 and 09.01.1998. which covered the period when he was absent from work, i.e. from 15.11.1997 to 23.01.1998.

It can be understood, in the background of **taking all of them to be true,** that these medical certificates would have been in the possession of the employee, Illyas by the time he received the letter **of vacation of post dated 19.01.1998 which he had stated in his appeal to have received by him on 21.01.1998**. I observe **that none of these medical certificates were produced by him to the employer till after 37 days *(last medical certificate was dated 09.01.1998 and his letter to the employer was dated 16.02.1998.),* i.e. after one month and 7 days,** by way of a letter as an appeal , **dated 16.02.1998.**

Three questions arise in my mind. Why did he not send the medical certificates as and when he got them from the doctor into his hand? Why did he not send a letter to the employee asking

for leave on medical grounds? Then, even after getting the medical certificates, why did he wait for another 37 days to write to the employer?

He had waited from 21.01.1998 until 16.02.1998 to write to the employer. He received the letter of vacation of post marked as R30 dated 19.01.1998 by post delivered to him on 21.02.1998. By R30, he was informed that he is deemed to have vacated his post w.e.f. 23.11.1997. He submitted the medical certificates with an appeal written after 26 days of coming to know that he has lost his occupation. Under these circumstances I hold that he had no intention of staying in his post at work. I fail to see that he had any intention to remain as a worker with this employer. On the contrary, I observe that he was not interested about his occupation; he did not care whether he could get back to work or not and he was not bothered about going back to work even after getting out of all the different sicknesses he had got during the time period of 15.11.1997 to 23.01.1998. Instead of being conscious of his duty to report to work, he did not even try to contact the employer and secure his place with the employer. He finally got the letter of vacation of post and even thereafter he had not responded to that letter for the next 37 days which I consider to be quite abnormal for someone who would have wanted to get back to work under the same employer.
It is incredible that someone who had the mental element of intention to stay at work with the same employer, could ever have taken that long to write to the employer. In the circumstances I hold that he had hardly any intention to get back to work.

In the case of ***Nelson de Silva Vs State Engineering Corporation 1996 2 SLR 342,*** the concept of vacation of post has been determined to include two elements. Vacation of post or desertion or abandonment of service consists of;

a. Failure to report to work (absence without leave) and
b. An intention to desert and abandon employment.

In the case of ***Building Materials Corporation Vs Jathika Seveka Sangamaya 1993 2 SLR 316***, the Supreme Court held that long absence without obtaining leave or authority is evidence of desertion or abandonment of service. In that case also, the Applicant, employee had been absent for a long period from work. The Court held that the workman had failed to satisfy the employer that he was in fact ill and that he was not fit to report for work. The Supreme Court held that it was clear that the employee by his conduct had severed the contract of service.

The employee, Illyas, by his own inaction and by his own documents have displayed that he had no intention to report to work. He failed to inform the employer by any letter or any message which could have been sent through a messenger why he could not report to work which he had failed to do. It is obvious that he had not reported to work without obtaining leave or without giving any reasonable grounds for his absence from work

I am of the opinion that no employer could indefinitely keep a post vacant without receiving any information from the worker of his inability to come to work. The employer did not send

the vacation of post letter to the employee right after the first date of him not reporting to work. The employer waited without sending the employee any letter, thus giving him enough and more time to tender any explanation for his absence or any information to be sent to the employer about his inability to report to work, from 23.11.1997 to 16.01.1998, i.e. one month and three weeks prior to sending him the letter of vacation of post. Yet, the employee did not make use of that opportunity given to him by the employer.

In the circumstances discussed above, I hold that the employee had vacated his post on his own accord having acted in the way he did. It is amply evident that Illyas , the employee had failed to report to work thus absenting himself without leave and also had no intention to return to work and thus deserted and abandoned his employment. I hold that the learned Civil Appellate High Court judges had considered all extraneous matters and come to a wrong finding in this matter. I set aside the High Court judgment dated 26.07.2013 and affirm the order of the learned President of the Labour Tribunal dated 10.07.2010.

I dismiss the Appeal in case No. SC Appeal 165/2013 and I allow the Appeal in case No. SC Appeal 164/2013. I order no costs in either case.

Judge of the Supreme Court

I agree.
PRIYASATH DEP PC J,

Judge of the Supreme Court

I agree.
K. T. CHITRASIRI J

Judge of the Supreme Court

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

S.C. Appeal 166/2011
SC/HC/CALA 289/2011
WP HCCA/COL 45/2010/LA

In the matter of an Application for Leave to Appeal against Judgment dated 23rd June 2011 Pronounced in Case No. WP HCCA/COL/45/2010/LA under and in terms of Section 5(c) (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

ISPAT Corporation (Pvt) Ltd.,
No. 111-1/C/2, New Parliament Road,
Battaramulla.

PLAINTIFF

Vs.

Hiat Steel (Pvt) Limited,
Pelahela,
Dekatana.

DEFENDANT

AND

People's Bank,
No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 2.

1ST CLAIMANT-PETITIONER

Ismail Abdul Gaffar,
No. 20B, Sujatha Mawatha,
Kalubowila,
Dehiwela.

2ND CLAIMANT-PETITIONER

Vs.

ISPAT Corporation (Pvt) Ltd.,
No. 111-1/C/2, New Parliament Road,
Battaramulla.

PLAINTIFF-RESPONDENT

Hiat Steel (Pvt) Limited,
Pelahela,
Dekatana.

DEFENDANT-RESPONDENT

AND BETWEEN

ISPAT Corporation (Pvt) Ltd.,
No. 111-1/C/2, New Parliament Road,
Battaramulla.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Hiat Steel (Pvt) Limited,
Pelahela,
Dekatana.

DEFENDANT-RESPONDENT-RESPONDENT

People's Bank
No. 75, Sir Chittampalam A. Gardiner
Mawatha, Colombo 2.

1ST CLAIMANT-PETITIONER-RESPONDENT

Ismail Abdul Gaffar,
No. 20B, Sujatha Mawatha,
Kalubowila,
Dehiwela.

2ND CLAIMANT-PETITIONER-RESPONDENT

AND NOW BETWEEN

People's Bank
No. 75, Sir Chittampalam A. Gardiner
Mawatha, Colombo 2.

1ST CLAIMANT-PETITIONER-RESPONDENT-PETITIONER

Vs.

ISPAT Corporation (Pvt) Ltd.,
No. 111-1/C/2, New Parliament Road,
Battaramulla.

PLAINTIFF-RESPONDENT-PETITIONER-RESPONDENT

Hiat Steel (Pvt) Limited,
Pelahela,
Dekatana.

DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENT

Ismail Abdul Gaffar,
No. 20B, Sujatha Mawatha,
Kalubowila,
Dehiwela.

2ND CLAIMANT-PETITIONER-RESPONDENT-RESPONDENT

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

COUNSEL: Kushan D'Alwis P.C. with Hiran Jayasooriya &
Rajiv Wijesinghe for the 1st Claimant-Petitioner-Respondent-Appellant

M.U.M. Ali Sabry P.C. with Shamith Fernando
Instructed by K.P. Law Association for the
Plaintiff-Respondent-Petitioner-Respondent

WRITTEN SUBMISSIONS OF THE 1ST CLAIMANT-PETITIONER-RESPONDENT-PETITIONER FILED ON: 30.11.2011 & 01.02.2016

WRITTEN SUBMISSIONS OF THE PLAINTIFF-RESPONDENT-PETITIONER-RESPONDENT FILED ON: 13.12.2011 & 25.07.2011

ARGUED ON: 17.12.2015

DECIDED ON: 29.04.2016

GOONERATNE J.

This matter arises from claims to property seized, which provision has been made in terms of Section 241 of the Civil Procedure Code. Supreme Court granted leave on 19.10.2011 against the Judgment of the Civil Appellate High Court dated 23.6.2011 on questions of law set out in paragraph 11(a), (b) & (c) of the petition filed of record. In brief the questions of law indicate that this court need to decide as to whether the jurisdiction of the court which made order for execution of decree is ousted in case where a claim or as objection is preferred, where the property seized is outside the jurisdiction of court. The said section seems to contemplate different positions where property seized is not within the jurisdiction of court which made order for execution of decree. The relevant section as stated above is Section 241, which reads thus:

> In the event of any claim being preferred to, or objection offered against the seizure or sale of, any immovable or movable property which may have been seized in execution of a decree or under any order passed before decree, as not liable to be sold, the Fiscal or Deputy Fiscal shall, as soon as the same is preferred or offered, as the case may be, report the same to the Court which passed such decree or order, and the Court shall thereupon proceed in a summary manner to investigate such claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he were a party to the action:
>
> Provided always that when any such claim or objection is preferred or offered in the case of any property so seized outside the local limits of the jurisdiction of the Court

> which passed the decree or order under which such seizure is made, such report shall be made to, and such investigation shall thereupon be held by, the Court of the district or division within the local limits of which such seizure was made, and the proceedings on such report and investigation with the order thereon shall, at the expiry of the appealable time, if no appeal has been within that time taken therefrom, but if an appeal has been taken, immediately upon the receipt by such Court of the judgment or order in appeal, be forwarded by such Court to the Court which passed the decree or order, and shall be and become part of the record in the action;
>
> Provided, further, that in every such case the Court to which such report is made shall be nearer to the place of seizure than, and of co-ordinate jurisdiction with, the Court which passed the decree or order.

I have checked the present Civil Procedure Code Section 241 with the earlier Civil Procedure Code. (contained in Chapter 86 – Legislative Enactment of Ceylon – 1938 revision) Both sections in either code contains identical provisions. The printed wording is the same, except in the way the Section is arranged or printed. The present Code gives more charity by separately arranging the provisos of the section but in the earlier code the entire section has been put together or clubbed together.

It is desirable to ascertain the meaning of this section before I proceed to consider the facts of the case in hand. I am inclined to accept the explanation and views of Dr. K.D.P. Wickremesinghe in his text, on Civil Procedure in Ceylon, as regards Section 241 of the Civil Procedure Code.

At pg. 257 Dr. Wickremesinghe states as follows:

> Where a claim is preferred to, or objection offered against the seizure or sale of, any property seized, as not liable to be sold, the Fiscal must report the same to the court which passed the decree or order of seizure. The court must thereupon investigate the claim or objection summarily. Where the property seized is within the jurisdiction of a court other than that which passed the decree or order, the report has to be made, and investigation must be held, by the court which has jurisdiction over such property. The proceedings with the order thereon must be forwarded by such court to the court which passed the decree or order, and the two courts should have co-ordinate jurisdiction.

The material made available to this court indicates that Plaintiff-Respondent-Petitioner filed action against the Defendant-Respondent-Respondent seeking relief in a sum of Rs. 1,000,000/- in the manner pleaded in the plaint dated 02.12.2005. The Plaintiff was successful in the above case and decree nisi was entered in favour of the Plaintiff which was thereafter made absolute. Plaintiff moved court to execute a writ in the said case and certain movable properties belonging to the Defendant was seized by the Deputy Registrar/Fiscal of the District Court of Pugoda in the Defendant's premises situated at Pelahela-Dekatana. (within the jurisdiction of the District Court of Pugoda). It is pleaded that against the above seizure the People's Bank (1st Claimant-Petitioner-Respondent) and the 2nd Claimant-Petitioner-Respondent took up the position that the properties seized are not liable to be sold in execution of the decree and made their respective claims to the District Court

of Colombo. The Plaintiff-Respondent-Petitioner filed objections to the claims made by the aforesaid Claimant-Petitioners-Respondents and pleaded that the claim should have been made to the District Court of Pugoda as the District Court of Colombo has no jurisdiction and moved for dismissal of the above applications. At the inquiry in the District Court of Colombo Plaintiff raised a preliminary objection based on above.

The learned District Judge of Colombo however overruled the said preliminary objections by his order of 27.04.2010, being aggrieved by the said order of 27.04.2010 the Plaintiff-Respondent-Petitioner sought leave to appeal from the said order from the relevant High Court, and leave was granted by the High Court. The High Court after hearing, set aside the order of the learned District Judge and allowed the appeal with costs.

In the original court the learned District Judge in arriving at his decision placed much emphasis in the reported case, *David Kannangara Vs. Central Finance Ltd. 2004 (2) SLR 311*. However the learned High Court Judge in his Judgment distinguish David Kannangara's case and state that it is not applicable to the case in hand. I fully agree with the views of the learned High Court Judge that the case reported above was not about the jurisdiction of court but dealt with the issues of whether a party is permitted to make a claim directly to the court or fiscal. The instant case deals with the jurisdiction of court in a

particular given situation for which specific procedure has been provided in the procedural law and leaves no room for interpretation.

In the case in hand the fiscal of the District Court of Pugoda seized the properties which were found or kept in the Defendant's premises situated at Pelahela-Dekatana (within the jurisdiction of the District Court of Pugoda). The first proviso to section 241 is more than clear and plain, there is no ambiguity at all and what the fiscal is expected to do is explained clearly, where the property liable to seizure is found and seized outside the local limits of the jurisdiction of the court which passed the decree. If a claimant objects or offer a claim that the property is not liable to seizure the fiscal need to report to the court within the jurisdiction of court of the District or division within the local limits of which such seizure of property effected by the fiscal.

Maxwell on The Interpretation of Statutes 12th Ed –
General Principles of Interpretation.

Pg. 28/29.

> If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.

> The rule of construction is "to intend the Legislature to have meant what they have actually expressed." The object of all interpretation is to discover the intention of Parliament, "but the intention of Parliament must be deduced from the language used," for "it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law."
>
> Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise.

David Kannangara's case the facts are entirely different to the case in hand. In the said case even before a writ of execution was issued an application was made to claim the property. By that time the fiscal had not seized the property. The learned District Judge in the said case refused the application and remarked that the claimant must make its application at the proper stage. In these circumstances Justice Amaratunge's views expressed in David Kannangara's case would apply to that case and that case only, since steps taken to claim was prior to seizure. In the case in hand the fiscal had seized the properties, within the jurisdiction of the District Court of Pugoda.

I will refer to the relevant Paragraph in *'David Kannangara's case pg. 312,* of the said Judgment to explain the position that the case in hand differ on certain material facts in comparison to David's case.

At pgs. 312-2004 (2) SLR 312.

> Before Writ of execution was issued, the present respondent finance company made an application to Court claiming that it was the absolute owner of the said vehicle and

> therefore the said vehicle should be released to the respondent company. By that time the fiscal has not seized the vehicle in execution of the decree entered by Court. The learned Judge having observed that that was not the stage in which such application could be made, refused the application and remarked that the finance company should make its application at the proper stage.

I have no hesitation to affirm the Judgment of the learned High Court Judge. When a statute in very clear terms lays down the procedure, all concerned need to follow same and apply the procedure contemplated by the statute. That would be the intention of parliament. I had the benefit of perusing the written submission of either party, no doubt assisted court to arrive at this decision in the best interest of justice.

Dr. Amarasinghe J. in Fernando vs. Sybil Fernando And Others 1997 (3) SLR pg. 1 had made the following remarks in an important Judgment in this regard.

> There is substantive law and there is the procedural law. Procedural law is not secondary: The maxim *ubi ius ibi* remedium reflects the complementary character of civil procedure law. The two branches are also interdependent. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives it remedy and effectiveness and brings it into action".
>
> "The concept of the laws of civil procedure being a mere vehicle in which parties should be safely conveyed on the road to justice is misleading, for it leads to the incorrect notion that the laws of civil procedure are of relatively minor importance, and may therefore be disobeyed or disregarded with impunity."

In all the above facts and circumstances of this case the Judgment of the High Court dated 23.06.2011 is affirmed. As such, 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

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 against
the Judgment of the High Court of
Civil Appeal of Western Province
Holden in Mt. Lavinia

Brenda Hilda Violet Perera,
No. 21, " Mount Rose ",
JambugasmullaMawatha,
Nugegoda.

Plaintiff

SC Appeal No. 170/ 14
Leave to Appeal No. SC(HC) CALA/320/12
WP/HCCA/MT/05/2010(F)Vs
D.C.Nugegoda No.Spl/062/08

IndramalaNelumDhanaratne,
No. 17, Rochester Drive,
Pinner, Middlesex,
United Kingdom

Defendant

AND BETWEEN

IndramalaNelumDhanaratne,
No. 17, Rochester Drive,
Pinner, Middlesex,
United Kingdom

Defendant Appellant

Vs

Brenda Hilda Violet Perera,
No. 21, " Mount Rose ",
JambugasmullaMawatha,
Nugegoda.

Plaintiff Respondent

AND NOW BETWEEN

IndramalaNelumDhanaratne,
No. 17, Rochester Drive,
Pinner, Middlesex,
United Kingdom

Defendant Appellant Appellant

Vs

Brenda Hilda Violet Perera,
No. 21, " Mount Rose ",
JambugasmullaMawatha,
Nugegoda.

Plaintiff Respondent Respondent

BEFORE: **S. EVA WANASUNDERA PCJ.**
UPALY ABEYRATHNE J.
NALIN PERERA J.

COUNSEL: Manohara de Silva PC with PubudiniWickremaratne for the Defendant Appellant Appellant.
RanjanSuwandaratne with SunariTennekoon for Plaintiff Respondent Respondent.

ARGUED ON: 06.05.2016.

DECIDED ON: 22.06.2016.

S. EVA WANASUNDERA PCJ.

In this matter, leave to appeal was granted on one question of law. It reads as follows:-

"Have the judges of both the District Court and the High Court erred ***in law and in fact*** in coming to the conclusion that the Plaintiff has set out a cause of action based on Gross Ingratitude in the circumstances of this case?"

The Plaintiff Respondent Respondent(hereinafter referred to as the Plaintiff) had gifted a house and property at JambugasmullaMawatha, Nugegoda situated on a block of land of an extent of 17 Perches to the Defendant Appellant Appellant (hereinafter referred to as the Defendant) by Deed No. 1586 dated 11.11.1992. reserving the right to live therein as life interest holder.

At the time of this gift, the Defendant had been living in England and her father had accepted this gift as her Power of Attorney holder. The Plaintiff Donor and the Defendant's father were brother and sister. There had been four more siblings in the family. The Plaintiff was the youngest female in the family and she did not get married. The brothers and sisters got together and transferred their shares of this property to this spinster in the year 1976 when their parents had passed away. The Plaintiff made icing cakes, wedding cakes etc. as an occupation. The Defendant's father who accepted the gift of the land given to his daughter had passed away some years after receiving the gift on behalf of his daughter. He had done so as the Power of Attorney holder of the daughter, who is the Defendant in this case.

The Plaintiff had carried on the occupation of cake making for a long time. The Defendant has been living in England for over 35 years with her husband and children but has been in the habit of coming to Sri Lanka at least once a year. The Plaintiff Aunt and the Defendant Neice had been liking each other for quite some time until the Plaintiff fell ill with some problem in her eyes which happened in the year 2005. Until then the Plaintiff Aunt had been managing her own expenses etc. without a problem. Thereafter, it is alleged that the Plaintiff asked for money at different times from the Defendant which she failed to give. It is alleged that it is only then that the Plaintiff had decided to file this action to revoke the gift on gross ingratitude.

Action was filed after one year and five months from the time she fell sick i.e. in March, 2005, in the District Court of Mount Lavinia on 18th August, 2006.The Plaintiff had pleaded that the house and property which is the subject matter of the action had been her home from birth. She was given all the other shares of the property in question, belonging to the other siblings in 1976 by a deed of gift and she became the sole owner of the property. She is a spinster. She had looked after the Defendant who is the neice when she was in Sri Lanka as well as the Defendant's parents as the Defendant's father was the Plaintiff's elder brother. There had been a close connection between themselves as the Defendant was the only child of the Plaintiff's elder brother.

As the Plaintiff was doing well with her home industry of making cakes, she had advanced one hundred thousand rupees as a loan to the elder brother when he was living and taken care of the brother when he was ill and hospitalized until his death. In 1992, the Plaintiff had gifted the property to the Defendant keeping for herself the life interest thereof. At the time of filing action the Plaintiff was 70 years of age and was living with a trusted servant in the house on the property. She had gifted the property to the Defendant due to the love and affection she had for her as well as repeated promises that she will look after the Plaintiff Aunt in her old age just like the Plaintiff Aunt looked after the Defendant and the Defendant's parents. The Plaintiff had asked for financial help many times over the phone when she fell ill with problems in both her eyes. She had become incapacitated in making icing cakes and her income had fallen down due to her being unable to do the icing decorations which needed the help of the eyes, the use of which was not recommended by the eye specialists. When no assistance

was given financially by the Defendant, and when the Defendant asked the Plaintiff to send a request for money in writing she had got a friend to write the letter on her behalf on 24.03.2005, which was marked as P3 with the Plaint and pleaded that a monthly payment of 15000/- be made as well as to send the loan of Rs. 100,000/- given to the Defendant's father be paid back. The Plaintiff had written that letter in good courteous language in English stressing the point of having been sick for the last two months. She had also suggested that the Defendant could open a Fixed Deposit and give a standing order to transfer Rs. 15000/- every month. She had also added that the Defendant can take the interest and all what is left after her demise. She had added that she will be obliged if Rs. 15000/- be sent to her 'as long as she is around' meaning that she needs help to live on till she dies.

The Defendant filed answer on 05th November, 2007, i.e. after one year and three months from the date of filing action by the Plaintiff, stating that the gift of property was irrevocable ; it was gifted not for affection but as an appreciation of the acts done by the Defendant's father who was the elder brother of the Plaintiff; the Defendant had not acted in breach of any conditions of the deed; the action had been filed at the instigation of others who had ulterior motives and that the action is frivolous and vexatious.

The Plaintiff had given evidence on 08.07.2008 at the age of 72 and stressed the point that even though the property was gifted to the Defendant in 1992, she did not ask for any financial assistance until the year 2005 when she seriously fell ill with her eyes going bad and her home industry was affected due to the sickness. She had pleaded with the Defendant to send her some money monthly as she had found it very difficult to live with what she earned. In evidence she had stated that the Defendant had told her to make wedding cakes and earn money if she is unable to make icing cakes. Anyway she said that with difficulty she still makes wedding cakes. She further said that once she asked her to get her a new oven which the Defendant failed to do. Then again she had wanted a new refrigerator and asked the Defendant to help her to get one. The Defendant's response had been to be satisfied with the old fridge. It is an accepted fact that the Defendant had never assisted her financially except once, and that was by sending her Rs. 17000/- (100 sterling pounds) by post, after she filed this action. It is also accepted that the Defendant who usually comes to Sri Lanka once a year or more had never visited her when she came to Sri Lanka after the Plaintiff fell ill. This

had caused great mental pain to the Plaintiff. When cross examined, the Defendant said that she did not visit the Plaintiff Aunt on legal advise. The Plaintiff was cross examined at length on two dates , i.e. on 18.08.2008 and on 05.11.2008. The doctor, eye specialist from the Kalubowila national hospital had given evidence on behalf of the Plaintiff. Two others, one relation and one friend also had given evidence in support of the Plaintiff.

The Defendant had given evidence on 01.09.2009. In cross examination she had admitted that the Plaintiff had never asked for assistance until she fell ill. She also admitted in evidence that she ignored her requests. She had admitted that she did not visit her after her sickness. She had further admitted that she asked the Plaintiff to make a request for financial assistance in writing. She stated in her evidence that she was a citizen of U.K and Sri Lanka. Having lived in U.K. from the year 1972 up to date she had stated in her evidence that she does not have money and she had to get it from her Engineer husband and therefor she had told the Plaintiff Aunt to send a request in writing.

She has three grown up children who are well educated and living and earning in U.K. Even though the Defendant had pleaded that it was a gift given in consideration of and in appreciation of the Defendant's father's good actions to the Plaintiff, the Defendant had not even stated anything to that effect in her evidence. It was only the Defendant who had given evidence and no other evidence was called for the defence.

The argument of the Defendant was that since it is an irrevocable gift and it is not subject to any condition. The failure to fulfill a condition in the deed may render it revocable but as the said deed of gift had no such conditions to be fulfilled by the donee, it cannot be revoked. The deed of gift can be revoked only if gross ingratitude by the Donee towards the Donor is proved. The Defendant contends that the Plaintiff has failed to prove gross ingratitude.

The case ***of Dona Podi Nona RanaweeraMenikeVsRohiniSenanayaka 1992, 2 SLR 180*** was very much discussed in the submissions made by the Defendant. This is a lengthy judgment of Amarasinghe J with Fernando J and Kulatunga J agreeing which was decided on 5th June, 1992. This judgment has dealt with mostly deeds of gift granted to the sons in law as dowry, at the time of the daughters getting married according to our Sri Lankan culture , whether such deeds can be revoked

or not and on what grounds such deeds can be revoked. Yet, the said learned judges have considered about what can be interpreted as " gross ingratitude " to the Donor.

As pointed out by the Defendant's counsel, in the case in hand, a summary of causes to revoke a donation on account of ingratitude, according to the aforementioned decision of the Supreme Court can be categorized as follows:

1. If the **donee** lays impious hands on **the donor**
2. If he does him an atrocious injury
3. If he willfully causes him great loss of property
4. If he makes an attempt on his life
5. If he does not fulfill the conditions attached to the gift and
6. If he does other equally grave causes.

It was submitted by the Defendant's counsel that none of the causes enumerated above under categories 1 to 5 were ever committed by the Defendant donee to the Plaintiff donor. The evidence did not show that anything of that sort was done.

I am inclined to consider whether the acts done or omitted to have done by the donee in this instance amounts to " other equally grave causes " which would amount to gross ingratitude towards the donor by the donee.

I observe from the evidence placed before the District Court that the Plaintiff donor had placed material before court to show that she had a lot of love and affection towards the donee Defendant at the time of executing the deed of gift as she was the only child of the donor's elder brother. The donor had got full title in 1976 and executed the deed of gift to the Defendant 16 long years later in the year 1992. Nothing quite terrible happened till the year 2005 when the donor fell ill with terrible eye problems which brought down her level of income, even though when she wanted help to get a new oven once and then a new fridge, the donee had not obliged in the previous years.

The evidence shows that the donor never pressurized the donee to give her anything until the time she fell ill and as a result when her home industry could

not function well. The letter from the donor to the donee , namely P3 speaks well for her needs.

That letter was sent by post as requested by the Defendant donee demanding a written request from the Plaintiff if she needed financial assistance. In that letter, the Plaintiff reminds of the debt of Rs. 100000/-which was owing and due to her by the Defendant's father as well as begs for Rs. 15000/- as monthly assistance from the donee. It was hand written with the help of a friend and the letter begins with that confession of a friend writing it as she is unwell and suggests even ways of how to deposit money so that she can receive Rs.15000/- a month. She further says that she needs it only ' till she is around' and states that she can get all what is left after her demise.

I find it very surprising and schocking to see that the donee Defendant who had received such a property of very high value in Nugegoda from the donor who gifted the same 13 years ago, had not cared to send her any money or made any arrangements to assist her in any way as requested. It is also incredible to see the evidence given by the Defendant to the effect that she wanted a written request for financial assistance needed by her Aunt because the Defendant did not have any money and to get the money from the husband she wanted a written request.

How can someone living in U.K. for over 40 years with an Engineer husband and three working adult children in U.K. and who has the money to come to Sri Lanka more than once a year, state that she has no money.

I am of the opinion that the District Juge who has analysed her evidence had come to the correct decision that the Defendant had acted ungratefully in this instance. Furthermore the Defendant had admittedly not visited her after she complained of her sickness even when she came to Sri Lanka.This attitude of the Defendant had given great mental pain to the Plaintiff donor. Even without visiting there are many more things that one could have done, if the Defendant had an iota of gratitude.

The Plaintiff , in this year of 2016 , must be over 80 years. She is old enough to be given assistance of whatever kind even if she does not have any sickness. This is not the way a donee who has got millions worth of property from the donor

should act towards the donor. The love and affection which caused the donor to give the property when she was healthy and young should be returned when she is unhealthy and old. The donee Defendant has failed to do so. She could not have acted any worse than turning a blind eye to someone who did not ask for any assistance monthly from 1992 to 2005, when asked for financial assistance of a small amount compared to the earning capacity of someone living in U.K. There are numerous ways she could have helped if she really cared to do so but she never did. The pain of mind of the old donor cannot be even imagined specially when she is an unmarried person. On the other hand, when the Plaintiff had gifted her house and property to the neice in U.K., while having many other nieces in Sri Lanka , there is no way she could have asked for money from anyone else. Knowing this situation very well the donee had failed and neglected the donor. I would categorise this situation as one of cruelty which is worse than ingratitude.

I am of the view that the attitude of the Defendant comes under " other equally grave causes " as pointed out in the case of the authority mentioned above.

In the case of ***KrishnaswamyVsThillaiyampalam 1957, 59 NLR 265 at 269*****,** Basnayake CJ said thus;

"The ways in which a donee may show that he is ungrateful being legion, it is not possible to state what is 'slight ingratitude' and what is not, except in regard to the facts of a given case. There is nothing in the books which lays down the rule that a revocation may not be granted on the commission of a single act of ingratitude. Ingratitude is a form of mind which has to be inferred from the donee's conduct. Such an attitude of mind will be indicated either by a single act or by a series of acts."

In the case in hand, ingratitude has been continuous. The donee had never wanted to give the donor any help at any time.That is the reason for not helping her to get a new oven or a new fridge when she was doing her home industry earning some income. She had not even suggested to chip in if the donor wanted to really buy new instruments to help her industry of making cakes. Then she had not responded well to the donor's request for financial help over the telephone conversations when she fell sick but demanded that the request be done in writing. Even thereafter no money was sent or made any arrangement for her to

get any money when the donor was in dire need of it and mentally down as she was sick. Thirdly she had not visited her when she came to Sri Lanka knowing very well that she was sick. By doing so she had caused great mental pain to her. The donor was an aunt who loved and comforted her when she needed that before leaving the country in 1972 and finally gifted her only house and property to the Defendant. The Plaintiff donor was a spinster who had no others from whom she could ask for any help financially. Fully well knowing all these circumstances, the donee had failed to care for her. I consider this attitude of the Defendant as continuous ingratitude. I conclude that gross ingratitude has been proven.

I conclude that the trial judge of the District Court and the Civil Appellate judge of the High Court have correctly adjudicated that there are grounds to allow the deed of gift to be revoked. I affirm the Judgement of the District Judge and the Judgement of the Civil Appellate High Court.

Appeal is dismissed with costs.The Registrar is directed to send the District Court record forthwith to the District Court of Mount Lavinia for necessary action to be followed.

Judge of the Supreme Court

Justice Upaly Abeyrathne
I agree.

Judge of the Supreme Court

Justice Nalin Perera
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.

SC.APPEAL NO.173/2012
SC.HC.CALA.NO.52/2012
CP/HC/CA/84/10
DC(Nuwara-Eliya)993/MISC

MohedeenPichche Peer Mohomed
No.16, Mohomed Building,
Holbrook Bazaar,
Agarapathana.
Plaintiff-Respondent-Petitioner-Appellant

Vs.

HameedMohomedMusamil
No.16/08, Bandaranayake Square,
Talawakelle.
Defendant-Appellant-Respondent-Respondent

BEFORE : SISIRA J. DE ABREW, J.
K.T. CHITRASIRI, J. &
PRASANNA S. JAYAWARDENA, PC, J.

COUNSEL : M. NizamKariapper with M.C.M. Nawas, M.I.M. Iynullah and M.S.S. Sanfara for the Plaintiff-Respondent-Appellant.
Dr. S.F.A. Cooray with SudarshaniCooray for the Defendant-Appellant-Respondent.

WRITTEN SUBMISIONS
TENDERED ON : 02.06.2014 by the Defendant-Appellant-Respondent.
28.7.2016 and13.7.2016 by the Plaintiff-Respondent-Appellant

ARGUED ON : 13.07.2016.

DECIDED ON : 23.11.2016

SISIRA J. DE ABREW, J.

The Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff-Appellant) filed a case in the District Court of NuwaraEliya asking for a declaration that he is the lawful possessor of the land described in the plaint. He also sought a permanent injunction preventing the Defendant-Appellant-Respondent (hereinafter referred to as the Defendant-Respondent) entering into

the premises described in the plaint. The learned District Judge, by his order dated 17.6.2004, refused to grant an injunction. There is no appeal against the said order.The learned District Judge by his judgment dated 25.5.2010, decided that the Plaintiff-Appellant was the lawful possessor of the premises described in the plaint. Being aggrieved by the said judgment, the Defendant-Respondent appealed to the Civil Appellate High Court. The Civil Appellate High Court, by its order dated 14.12.2011 set aside the said judgment. Being aggrieved by the said judgment, the Plaintiff-Appellant has appealed to this court. This court by its order dated 28.9.2012, granted leave to appeal on the questions of law set out in paragraph 9 of the petition of appeal dated 25.1.2012 which are reproduced below.

1. Did the Civil Appellate High Court judges err when they came into the conclusion that the action of the Petitioner is not based on lease and licence?
2. Did the Civil Appellate High Court judges misdirect themselves when they came into the conclusion that that the authority cited in the judgment is not applicable?
3. Did the Civil Appellate High Court judges misdirected themselves when they came into a finding that the District Court is not entitled to enter judgment based on the admitted evidence at the trial to the effect that the Defendant-Appellant-Respondent had obtained possession of the premises from the Plaintiff-Respondent-Petitioner and had been in possession without any payments and as such the Plaintiff-Respondent-Petitioner is entitled to have the possession back?
4. Did the Civil Appellate High Court judges err in coming to the conclusionthat there is a burden on thePlaintiff-Respondent-Petitioner

to prove what rights he had to be in possession?

The plaintiff-Appellant in his evidence states that he got the beef stall in the year 2001 from PradeshiyaSabhaNuwaraEliya on an agreement marked P1 and in 2011 he gave the beef stall to the Defendant-Respondent. The Plaintiff-Appellant takes up the position thatthe Defendant-Respondent is his licensee. When he requested the Defendant-Respondent to hand over beef stall to him, he (the Defendant-Respondent) refused to do so. The Defendant-Respondent challenges the above position of the Plaintiff-Appellant. He states that thebeef stall was given to him by the Plaintiff-Appellant as he (the Plaintiff-Appellant) could not repay the money taken from him (the Defendant-Respondent).

The Plaintiff-Appellant takes up the position in his evidence that he got the beef stall fromPradeshiya Sabha Nuwara Eliya on an agreement marked P1 in 2001. The period of the said agreement is only two years. Thus the agreement has come to an end in 2003. The case was filed on 5.1.2004. It is therefore seen that when the Plaintiff-Appellant filed the case, the agreement P1 was not in existence. Then on what basis does the Plaintiff-Appellant claim a declaration that he is the lawful possessor of the beef stall? It appears from the above facts that he has no legal right to claim the possession of the beef stall. Further he, in his evidence, admits that he has not been in possession of the beef stall from the year 2001.

When I consider all the above matters, I hold that the Plaintiff-Appellant is not entitled to thedeclaration that he sought in his plaint. In view of the conclusion reached above, I answer the 1st,3rd and 4thquestions of law raised by the Plaintiff-Appellant in the negative. The 2nd question of law raised by the

Plaintiff-Appellant does not arise for consideration.

For the above reasons, I affirm the judgment ofthe Civil Appellate High Court and dismiss the appeal of the Plaintiff-Appellant. However in all the circumstances of the case, I do not make an order for costs.

Judge of the Supreme Court.

K.T.CHITRASIRI J

I agree.

Judge of the Supreme Court.

PRASANNA JAYAWARDENA PC J

I agree.

Judge of the Supreme Court.

INTHE SUPREME COURTOF THE DEMOCRATIC SOCIALIST REPUPLIC OF SRILANKA

In the matter of an Appeal from the judgment of Civil Appellate High Court of Kalutara in case No.WP/HCCA/KAL/8/2001(F) dated 30.07.2009.

SC APPEAL 174 /10
SC /HC/CA/LA/ 231/2009
WP/HCCA/KAL/ 8/ 2001 (F)
DC KALUTARA /5556 /P

Maddumaralalage Dona Mary Nona of Galhena, Beruwala.

Plaintiff

Vs

1.Maddumaralalage Don Justin
2.Maddumaralalage Don Piyadasa
3.BudagodaArachchigeJayasenaWijewarden
4.BudagodaArachchigeSirisenaWijewardena
4a.Gammampila Imiyage DonaKarunawathi
5.Maddumaralalage Susil
6.Maddumaralalage Don Leelarathne
7.Maddumaralalage Don Hemachandra
8.Maddumaralalage Don Asilin
9.Maddumaralalage Don Thilakarathne
10.Maddumaralalage Don Chandrasena
11.Payagala Mudiyanselage alias Payagala Mudalige Nandawathi
All of Galhena, Beruwala.
12. Kamburawala Kankanamge Panis Singho Of No. 5, Wickremasinghe Place, Kaluth--ara South.
13. Hubert Danapala Ranasinghe of Kurun--duwatta, Indajothi Mawatha, Hirana, Panadura.
14. Dodangoda Liyanage Podinona of Wata--raka, Gintota.
15. Pitawala Kankanamage Don Poliyar Jayathilaka of Galhena, Beruwala.

Defendants

And

5, 9A. Maddumaralalage Sucil
9. Maddumaralalage Don Thilakarathne (dead)
11. Payagala Mudiyanselage alias Payagala Mudalige Dona Nandawathi.
All of Galhena, Beruwala.
5th, 9th and 11th Defendants Appellants

Vs

Maddumaralalage Dona Marynona of Galhena, Beruwala.

Plaintiff-Respondent and 1a Defendant Respondent

1.Maddumaralalage Don Justin (Dead)
2.Maddumaralalage Don Piyadasa
3.Budagoda Arachchige Jayasena Wijewa--rdena (Dead)
3A.B.A.D. Kanthi Wijewardena
3B.B.A.D. Dharmasena Wijewardena
4. Budagoda Arachchige Sirisena Wijeward--ena
4a. Gammampila Imiyage Dona Karunawathi
6.Maddumaralalage Don Leelarathne
7.Maddumaralalage Don Hemachandra
8.Maddumaralalage Dona Asilin
10.Maddumaralalage Don Chandrasena
12.Kamburawala Kankanamge Panis Singho Of No. 51/2, Wickremasinghe Place, Kal--uthara South
13.Hubert Danapala Ranasinghe of Kurund--uwatta, Indajothi Mawatha, Hirana, Panadura.
14.Dodangoda Liyanage Podinona of Wata--raka, Gintota West.
15.Pitawala Kankanamge Don Poliyar Jayat--hilake of Galhena, Beruwala (Dead)

Defendants Respondents

And Now Between

5, 9A - MaddumaralalageSucil

11 - PayagalaMudiyanselage alias PayagalaMudalige Dona Nandawathie ,

All of Galhena, Beruwala.

5th 9A and 11th Defendant Appellants Appellants

Vs

Maddumaralalage Dona Marynona of Galhena, Beruwala.

Plaintiff-Respondent-Respondent and 1A Defendant-Respondent-Respondent

2.Maddumaralalage Don Piyadasa
3.Budagoda Arachchige Jayasena Wijewa-
-rdena (Dead)
3A. B.A.D. Kanthi Wijewardena

3B. B.A.D. Dharmasena Wijewardena

4A. Gammampila Imiyage Dona Karunawathi

6. Maddumaralalage Don Leelarathne

7. Maddumaralalage Don Hemachandra (dead)

8. Maddumaralalage Dona Asilin (Dead)

10.Maddumaralalage Don Chandrasena

12.Kamburawala Kankanamage Panis Singho of No. 5, Wickremasinghe Place, Kalutara South.

13. Hubert Danapala Ranasinghe of Kurunduwatta, Indrajothi Mawatha, Hirana, Panadura.

14. Dodangoda Liyanage Podinona of Wataraka, Gintota West.
15. Pitawala Kankanamage Don Poliyar Jayathilake of Galhena, Beruwala (Dead)

Defendants Respondents Respondents

BEFORE : S. EVA WANASUNDERA PCJ,
SISIRA J DE ABREW J &
UPALY ABEYRATHNE J.

COUNSEL : Rohan Sahabandu, PC with S.O. Withanage for 5th 9A and 11th Defendants Appellants Appellants.
H. Withanachchi for Plaintiff Respondent and 1A Defendant Respondent Respondent.

ARGUED ON : 15.02.2016.

DECIDED ON : 08.06.2016.

S. EVA WANASUNDERA PCJ

Leave to appeal was granted on 30. 08. 2010. on the questions of law contained in paragraph 19 (a) to (h) of the Petition dated10th September, 2009.

The main grievances against the judgment of the District Court and the judgment of the High Court can be identified from the questions of law, to be that **all the issues raised were not answered by the trial judge** and by doing so **the court has not investigated the title of parties** concerned and that **the land was not identified as per the extent of the same** and thereby there is a miscarriage of justice.

In the Civil Procedure Code, the requisites of a judgment is laid down in Sec. 187 , which reads as follows:
" The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively."

It is procedure known and accepted in the District Court trials that the 'points for determination' are set down at the conception of the trial, naming the same

as "issues". Even though the issues are raised by the plaintiff and each and every defendant or parties to the case, the trial Judge has to frame them and conduct the trial at his discretion. The Judge can accept the issues, re-frame the issues, reject the issues suggested by parties and somehow get the path straight to conduct the trial on the said points for determination because it is his onus to write the judgment on those issues. It is also trite law that when the issues are framed, the pleadings of the case recede to the back ground because it is only the issues which will be attended to by the Judge at the time of writing the judgment. Of course, he has to place at the beginning of the judgment , a 'concise statement of the case', which means a summary of the pleadings of the plaintiff and the pleadings of other parties and what they are contesting about etc. as it is presented to the Court. It would be a narration of facts and the focus would be the reason why they are before court.

In a Partition action, the procedure is laid down by the Partition Act as to how to file a partition action, what should be done first and how court can issue a commission to survey the land etc. but at the end of the case, writing of the judgment has to be done in compliance with Sec. 187 of the Civil Procedure Code. In a partition action, the judge has to decide what share of the land should be allotted to which party. It is different from answering issues in a money recovery case, a divorce case, a rent and ejectment case, a land dispute case, a debt recovery case, a case based on contract or a case based on delict etc. In those cases, the answers could be in the affirmative or in the negative, may be with some comment or a remark which would show the inclination to the final decision. But in a partition action, each party claims different portions of one big land and the Judge is expected to sort out what share of the land should be granted to which plaintiff and or defendant. For this reason, I find that the onus of the Judge in a partition case is somewhat more difficult than in any other kind of case, since the Judge has to specifically calculate the share of entitlement. If all the parties were friends with each other living on one land, they can come to a settlement in how to partition the land and how many perches or what extent of land each one would get, then get it surveyed by a surveyor and enter into an amicable partition. Then they need not file a partition action. They can write an amicable partition deed, if they wish to do so.

Those who come before court in a partition action are those who cannot share the land and use the same peacefully. They have to plead that the reason for

filing the action is that peaceful possession and enjoyment of the land as co-owners is difficult as a pre condition to requesting court to decide on each one's share at the end of the case. The parties normally contest that the share which they have been in possession and have been enjoying be granted to them. In the case in hand I observe that most of the parties in their statements of claim have claimed rights over the cultivation of permanent crops such as coconut trees, jak trees etc. Some have made claims on prescription.

At the trial in this case, 32 issues were raised by all the parties. The plaintiff had raised 8 issues; the 5th 9th and 11th Defendants filing a joint statement of claims had raised 6 issues; the 2nd Defendants had raised 6 issues; the 4th Defendant had raised 3 issues ; the 3rd Defendant had raised 3 issues; and the 10th, 12th, 13th, and 14th Defendants had raised 6 issues on 08. 03. 1993.

The whole land was a consolidation of 9 lands with different names. All the parties had agreed that the corpus to be partitioned was according to Plan No. 1050 done by the Court Commissioner W.L.Fonseka dated 18th October, 1989. The Commissioner's report is attached to it with the same date. Lots 1 and 3 of the said Plan No. 1050 was accepted as the land to be partitioned excluding Lot 2 of about 30 perches for the ' heen ela ' meaning the narrow waterway. I observe that there was no dispute regarding the extent of the land being of an extent of 13 Acres 2 Roods and 22Perches. I see no merit in the third contention of the Appellants that the land was not identified specifically with regard to the extent of the land because it was accepted by all parties that it is the land to be partitioned.

The District Judge, having recorded the 32 issues and having gone through a lengthy trial with almost all the defendants having given evidence with regard to their permanent plantations etc. had answered only issues 1 to 7. He had added that " in view of the answers given to issues Nos. 1 to 7, answering the other issues does not arise ". The Appellants appealed to the High Court and it was held that the District Judge had written the judgment in accordance with Sec. 187 of the Civil Procedure Code and the Appeal was dismissed.

I observe that 25 issues have not been answered by the District Judge. Going through the evidence, it is apparent that some plantations were highly contested and some of the land was claimed on prescription as well as on paper title.

In the case of Dona Lucihamy Vs Ciciliyanahamy 59 NLR 214, it was held by the Supreme Court that **Court *must answer the points of contest***. This was a Partition Action and Sec. 187 of the Civil Procedure Code was discussed. The District Judge had mentioned that, " All the issues that have been raised can be crystalised in this one contest and that it whether the land in suit is Dewatagahawatta or Hedawakagahawatta " , and gone ahead with only deciding that. The answers to the issues had been only addressed as "yes", "no" and "does not arise" and the Supreme Court had held that " Bare answers to issues or points of contest, whatever may be the name given to them, are insufficient unless all matters which arise for decision under each head are examined". Since the trial judge had failed to examine title of each party it was held that it had prejudiced the substantial rights of the parties and therefore the Supreme Court had ordered a new trial.

In an even earlier case, in ***Mohamedaly Adamjee and others Vs Hadaad Sadeen, 58 NLR 217,*** it was laid down by the Privy Council that " if it appears to the Apex Court when hearing an appeal in a partition case, **the investigation of title has been inadequate it should** ,even though no party before had raised that point, **set aside the decree**." In ***Chandrasena Vs Piyasena 1999***, ***3 SLR 201,*** the same principle was adopted. It was held that ' If it appears to the Supreme Court when hearing an appeal, in a partition case, **that investigation of title has been inadequate** it should, even though no party before it has raised the point, **set aside the decree** acting under the powers of revision'.

The Appellant further contested that the land to be partitioned was not identified as to the extent of the same. In almost all the land and partition cases which come before this Court, I find that this is one of the questions of law. According to the Partition Law, a commission to survey the land is taken out at the initial stages and at that stage, the parties to the action resolve the matter about the identification of the land. Thereafter it should be taken as an admitted fact. But more often than not, the parties who are not satisfied with their share or not getting a share, complain in appeal that the land was not identified, the extent is not the same as in the plaint or that it bears a different name as the name of the land in the deeds are different. The main purpose of the Partition Law fails at the end of the case. The main purpose is to get their block of land neatly demarcated as being co-owners of one land had become troublesome and possession of their blocks of land peacefully had become impossible. In the case ***of Sopaya Silva and another Vs Magilin Silva 1989***

2SLR 105, Justice Sarath N. Silva (as he then was) dealt with the case where the plaint in the partition action said that it is of an extent of 8A 3R 29P and when the Commission was taken out the surveyor surveyed an extent of 11A 1R 33P. When the case is such, the Supreme Court held that ;

"On receipt of the surveyor's return which disclosed that a substantially larger land was surveyed the District Judge should have **decided on one of the following courses after hearing the parties:**

i. To reissue the Commission with instructions to survey the land described in the plaint. The surveyor could have been examined as provided as provided in section 18(2) of the Partition Law to consider the feasibility of this course of action.
ii. To permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh lis pendens.
iii. To permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2) of the Partition Law.
iv. The **Surveyor** under section 18(1) (a)(iii) of the Partition Law **must** in his report state whether or not the land surveyed by him is **substantially the same as the land sought to be partitioned as described in the schedule to the plaint.** Considering the finality and conclusiveness that attach in terms of Section 48(1) of the Partition Law to the decree in a partition action, the **Court should insist upon due compliance with this requirement by the Surveyor.**

In this case also a fresh trial was ordered according to the guidelines given above. I am of the view that in all the partition cases, the aforementioned guidelines should be adhered to.

In the case in hand , I hold that the District Judge has not investigated the title of the parties to the action. He has only answered issues Nos. 1 to 8 only out of the 32 issues raised by all the parties. Evidence in this case was very long. The District Judge had not analyzed the evidence at all. He has just held that the

shares should be allocated according to the plaintiff has mentioned in the plaint. He has not given reasons for having done so either. According to the way he has written the judgment, if it is decided that the Plaintiff is correct, it is not necessary to look into other issues raised and/or other claims placed before court by others even though they all led evidence at the trial.

The High Court Judges have affirmed the judgment of the District Court , by not having any concern with regard to the Appellants' arguments but going on the basis that some of the issues overlap each other and therefore the District Judge has decided to answer only the issues which are a summary of all the issues etc. I hold that the High Court also had come to a wrong finding.

In the circumstances, even though another trial would take time, there is no other option but to order a fresh trial since the title of all the parties have to be gone into in the interest of justice. I set aside the Judgment of the High Court and the judgment of the District Court. I make order that a trial de novo to be held before the District Court. The Appeal of the Appellants is allowed. I order no costs.

Judge of the Supreme Court

Justice Sisira J De Abrew
I agree.

Judge of the Supreme Court

Justice Upaly Abeyratne
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 High Court of Civil Appeal holden in Avissawella dated 29.12.2008.

Pattinige Abayadasa,
95/9, Godagamawatte,
Godagama.

Plaintiff

Vs

SC APPEAL No. 176/ 2010

SC.HC.(CA) LA No. 21/2008

WP/HCCA/AV/13/2008 (LA)

D.C. HOMAGAMA No. 6342/ D

Welisarage Chandrawathie Perera,
No. 476/4/A, Arawwala,
Pannipitiya.

Defendant

AND BETWEEN

Welisarage Chandrawathie Perera,
No. 476/4/A, Arawwala,
Pannipitiya

Defendant Petitioner

Vs

Pattinige Abayadasa,
95/9, Godagamawatte,
Godagama.

Plaintiff Respondent

AND BETWEEN

Pattinige Abayadasa,
95/9, Godagamawatte,
Godagama.

Plaintiff Respondent Appellant

Vs

Welisarage Chandrawathie Perera,
No. 476/4/A, Arawwala,
Pannipitiya

Defendant Petitioner Respondent

AND NOW BETWEEN

Welisarage Chandrawathie Perera,
No. 476/4/A, Arawwala,
Pannipitiya

Defendant Petitioner Respondent
Petitioner

Vs

Pattinige Abayadasa,
95/9, Godagamawatte,
Godagama.

Plaintiff Respondent Appellant
Respondent

BEFORE : **S.EVA WANASUNDERA PCJ.**
SISIRA J. DE ABREW J.
UPALY ABEYRATHNE J.

COUNSEL : Manohara de Silva, PC with Rajitha Hettiarachchi for the Defendant Petitioner Respondent Petitioner
Ranjan Suwandaratne for the Plaintiff Respondent Appellant Respondent

ARGUED ON : 15. 02. 2016.

DECIDED ON : 30. 03 .2016.

S. EVA WANASUNDERA PCJ.

In this matter this court had granted leave to appeal on the 13th of December, 2010, on the questions of law set out in paragraph 13 of the amended Petition dated 12th February, 2010. The questions of law are nine in number, running from sub paragraphs (a) to (i) but I find that all the questions have been framed in such a manner that all of them challenge the quantum of alimony pendente lite granted by the Civil Appellate High Court Judge when he reduced the amount of Rs 7500/- given by the District Judge to Rs. 2600/- per month.

The facts in summary are as follows: The Plaintiff Respondent Appellant Respondent (hereinafter referred to as Plaintiff) filed action to get a divorce from his wife , the Defendant Petitioner Respondent Petitioner (hereinafter referred to as the Defendant) by plaint dated 18.06.2002. They had two children by this marriage, born on 06.07.1980 and 27.05.1986. Both of them were daughters. After the case was filed the elder daughter went to live with the father and the younger daughter lived separately with the mother. At the maintenance case the Plaintiff was ordered to pay Rs. 2500/- for this younger child who lived with the Defendant. In the divorce case, the Defendant asked for alimony pendent lite and an inquiry was held. Both the Plaintiff and the Defendant as well as one friend of theirs also had given evidence at the inquiry. Having heard the evidence , having seen the demeanour of the witnesses and having considered the documents produced in evidence, the District Judge ordered that the Plaintiff should pay Rs. 7500/- per month as alimony pendente lite to the Defendant. The Plaintiff appealed against that order to the Civil Appellate High Court and the High Court reduced the amount to Rs. 2600/- taking the basis as Rs. 13000/- to be the monthly income of the Plaintiff.

I observe that the evidence before the District Court was lengthy. The Defendant, wife had produced documents to prove that the Plaintiff was the owner of the house they were living in and that he had sold that house to a known female and he is also living there which he had admitted. He was a mathematics teacher and had retired from government service and was getting a pension. He was the owner of a 'communication center'. He ran a business of taking people on pilgrimages to India. The advertisements regarding that business was also produced at the inquiry. He also had a shop which was given on rent. None of these was denied by the

Plaintiff before court but he had continued to state that the business was run at a loss, which I feel had no basis. He did not place before court the accounts to show that it is run at a loss. Even the communication center, he said , was run at a loss. He did not place any evidence as to how it was run at a loss. The District Judge had considered all these matters and fixed the alimony pendente lite at Rs. 7500/- per month even though the Defendant had asked for much more i. e. double the amount granted by courts , in her affidavit which was placed before court at the inception of the pleadings before court. The District Judge has given this amount on 05.02.2008 in a well analyzed order. She had not even taken the money earned through pilgrimage trips to India organized by the Plaintiff due to the reason that the income from that was not proved. I am of the opinion that the order of the District Judge was correct.

Going through the order given by the High Court, I find that the reasoning behind the reduction has no basis. The analysis is wrong. In this instance I hold that the District Court which heard the evidence and saw the cross examination etc. has judged the situation, properly and the High Court having changed the amount without giving good reasons for the same has acted wrongly.

I set aside the order of the High Court dated 29.12.2008 and direct the Plaintiff Respondent Appelllant Respondent to pay a sum of Rs. 7500/- per month as originally ordered by the learned District Judge of Homagama by his order dated 05.02.2008.

The Appeal is allowed. I order no costs.

Judge of the Supreme Court

SISIRA J. DE ABREW 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 Leave to Appeal.

S.A. Amitha Ranjani
Lakmini Agro Centre,
Blackpool, Nuwara Eliya

Plaintiff-Respondent-Appellant

SC Appeal No. 176/12
SC.HC CALA 267/12
CP/HCCA/KAN/72/2010 [F]
DC Nuwara Eliya Case No. MR 86

Vs.

Sunil Ratnayake Labuthala
No. 185, New Settlement
Ruwan Eliya.

Defendant-Appellant-Respondent

Before	:	Priyasath Dep, PC. J B.P. Aluwihare, PC. J.& Sisira J. de Abrew, J.
Counsel	:	Dulani Warawewa for the Plaintiff-Respondent-Appellant Himali Kularathne for the Defendant-Appellant-Respondent
Written Submissions filed by the Appellant on	:	14.11.2012
Argued on	:	14.12.2015
Decided on	:	10.11.2016

Priyasath Dep, PC. J

The Plaintiff- Respondent- Appellant hereinafter referred to as 'Plaintiff' instituted action in District Court of Nuwara Eliya in case No.MR/86 to recover a sum of Rs 297,000 from the Defendant-Appellant-Respondent hereinafter referred to as 'Defendant'. In the Plaint , the Plaintiff averred that the Plaintiff supplied 45 crates of potato seeds to the Defendant. The Defendant agreed to tender a cheque for the amount due. As the defendant failed and neglected to pay the amount due, the Plaintiff sent a letter dated 08. 08. 2006 marked P1.Thereafter the Plaintiff sent a letter of demand which was marked as P2.

The Defendant in his answer whilst denying the Plaintiff's claim admitted only the jurisdiction of the Court. The Defendant denied that he had a transaction as alleged by the Plaintiff and thereby denied the liability.

The parties proceeded to trial on 12 issues of which 7 issues were raised by the Plaintiff and 5 issues were raised by the Defendant. Apart from denying the liability to pay, the Defendans raised three issues pertaining to the maintainability of the action They are:

Issue No 8

Is the business of the Lakmini Trade Centre carried on by the plaintiff and her husband is a lawful business?

Issue No. 9

Could the Plaintiff maintain the action against the Defendant without joining the husband as a party as he is a partner of the business?

Issue No. 10

Did the Defendant had a transaction with the Plaintiff as alleged in the Plaint?

It is appropriate at this stage to briefly refer to evidence led at the trial.

The Plaintiff Amitha Ranjane Shanthi Aratchi stated that her husband and herself were running a business named Lakmini Agro Center for 10 years and she supplied 45 crates of potatoes to the Defendant. Though the Defendant had alleged that business was a partnership, the Plaintiff has maintained the position that she was helping her husband in the business due to the fact that he was disabled and could not attend to business and that she was not a partner. It was revealed that the Lakmini Agro Centre is an agent of the Hayleys Agro Company.

It was the position of the Plaintiff that the Defendant did not make any payments for the goods he had obtained. The Defendant at the time he accepted delivery of goods, had stated that he forgot to bring the cheque book and had assured the Plaintiff that he will hand over a cheque to the plaintiff on the following day morning. The Defendant took delivery of the goods but failed and neglected to make the payment even when the Plaintiff on several occasions demanded that he settles the money due to the Plaintiff. According to the evidence of the Plaintiff the said transaction was entered into between the her and the Defendant, and not with the Plaintiff's husband and the Defendant. It was also the position of the Plaintiff that these goods were given to the defendant purely on trust and reliance they placed on him due to the good relationship the Defendant has had with the Plaintiff.

At the trial Plaintiff and her husband gave evidence and marked documents P1 which was the reminder letter dated 08.08.2006 sent by the Plaintiff to the Defendant requiring him to make payments for the goods that he has already obtained. P2 is the letter of demand dated 18.08.2006 which was sent by the Plaintiff's Attorney at Law to the Defendant and P3 is the letter dated 19.05.2006 sent by the Defendant to Hayleys Agro Company with a copy to the Plaintiff stating that he had purchased 45 crates of potato seeds from Lakmini Agro Center and that a cheque given by him to the said shop has been dishonored by the bank. The Defendant did not testify nor did he summon any witnesses.

The District judge had referred to the case of *Sri Lanka Port Authority vs Jugolinija Bold East* 1981 (1) SLR 18 where it was stated that**: '** when a document is marked on condition to prove and then if it is not been proven and no objection were raised of its validity at the end of the trial, that document will be treated as proved.'

Furthermore in the judgment it was stated that Defendant had not denied the signature on the document marked as P3 and did not call any witness to contradict the position taken up by the Plaintiff or to prove his position.

The learned District Judge on 26.03.2010 delivered the Judgment in favour of the Plaintiffs and granted the relief prayed for in the plaint.

The learned District Judge answered the Plaintiff's issues in the affirmative. In respect of the issue no 8 the court held that the business is a lawful business.

The issue no 9 relates to the question as to whether or not the Plaintiff could file action without joining her husband as a party. It is the position of the Defendant that Lakmini Agro Center is a partnership and without joining the husband as a plaintiff, the Plaintiff cannot proceed with the case .The position taken up by the Defendant was that there was a non joinder. The Learned District judge held that the Plaintiff could file the action without joining the husband as a plaintiff.

As regards to the objection raised by the Defendant regarding non joinder, the Plaintiff relied on sections 17 and 22 of the Civil Procedure Code. Section 17 reads thus:

> "No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deals with the matters in controversy so far as regards the rights and interests of the parties actually before it"

The issue of non joinder was taken up in the answer. According to section 22 the objection should be taken up at the earliest possible opportunity. The section 22 reads thus:

> "All objections for want of parties, or for joinder of parties who have no interest in the action, or for misjoinder as co-plaintiffs or co-defendants, shall be taken up at the earliest possible opportunity, and in all cases before the hearing. And any such objection not so taken shall be deemed to have been waived by the defendant".

In the judgment the learned District Judge referred to several authorities regarding the issue of non joinder.

In *Abdul Cader vs Ahamudu Lebbe* 37 NLR 257**,** it was held that :

> 'Court would not uphold a belated objection on this ground if injustice would result from giving effect to it. Furthermore submits that case law also establishes that the Court will not dismiss a case for want of parties'

In *Dingiri Appuhamy* and others *vs Thalakolawewe Pangananda Thero* 67 NLR 89 where is was held that:

> "there is no provision in the Civil Procedure Code or any other law requiring an action to be dismissed where there is a misjoinder of causes of action. It is therefore, improper for the Court to dismiss an action on the ground of misjoinder of defendant and the causes of action without giving an opportunity to the Plaintiff to amend the plaint".

The learned Counsel for the Plaintiff submitted that had the Defendant raised this objection at the very beginning, the Plaintiff would have had a chance to amend her pleadings.

The District Judge has also considered the case of *Ponnamma vs Kasipathi Pille* 4 NLR 261**,** where it was held that:

> "An objection under S 17 of the code has to be taken at the earliest possible opportunity. It has been held that an objection of this premise cannot be raised in an answer but that it has to be raised at an earlier stage by way of a motion. It has been held that if the objection is one of non joinder, the defendant has to name the party to be joined".

The learned District Judge found that, the Defendant has failed to raise an objection to the non-joinder of the Plaintiff's husband at the earliest possible opportunity. Therefore the learned District Judge had correctly rejected the objection raised by the defendant regarding non joinder of the Plaintiffs's husband as a plaintiff to the action.

The defendant been aggrieved by the judgment of the Learned District Judge appealed to the High Court of Civil Appeal of the Central Province on six grounds.

(a) That the said order and Judgment is contrary to law and misconceived in law and not supported by the evidence.

(b) That the learned District Judge has misdirected herself on the question of 'burden of proof'

(c) That the finding that the Respondent is entitled to relief is wrong and contrary to law and in any event there is no cause of action established by the Respondent to proceed against the Appellant.

(d) That the evidence does not disclose that there had been a sale of the relevant potato seed boxes and therefore the Respondent is not entitled to relief.

(e) That the finding on document marked 'P3' is not supported by the evidence led in the case.

(f) That the finding that 'Luckmini Argo Center' is a legal person is contrary to law and wrong.

The High Court of Civil Appeal had allowed the appeal and found that the Plaintiff Respondent has no Locus Standi and in the Judgment dated 29th May 2012 stated as follows:

"the question then arises for the consideration whether the plaintiff had the locus standi to bring this action against the defendant. Issue No 10 suggested by the defendant is to the effect that the transaction referred to in the plaint was not between him and the plaintiff. The finding of the learned District Judge on the above issue is that the defendant has transacted with Lakmini Agro Centre. Admittedly the plaintiff is not the owner of Lakmini Agro Centre. Lakmini Agro Centre is not a legal entity that can sue and be sued. There is no evidence that the plaintiff had any share of the business except for being the wife of the owner. Her position is that what belongs to my husband belongs to me. That may be the understanding between the husband and the wife but it is not sufficient to confer a right on the plaintiff to sue the defendant upon a transaction entered into between the defendant and her husband."

The Learned High Court Judges allowed the appeal and set aside the judgment of the Learned District Judge on the basis that the Plaintiff is not the owner of Lakmini Agro Centre and it is not

a legal entity that can sue or be sued and therefore for Plaintiff had no Locus Standi to institute action.

Being aggrieved by the judgment of the High Court, the Plaintiff filed a leave to appeal application in the Supreme Court and obtained leave on the following questions of law:

a) Did the High Court err in holding that the Plaintiff does not have locus standi when the parties were not at issue on the question of locus

b) Could the Defendant make out a new case in appeal where the issues in the trial court were different

c) Did the High Court set aside the judgment of the District Court based on grounds that were not argued and matters that were not contentious in the trial court between the parties

d) In the circumstances of the instant case is the question of locus standi a question of fact as the evidence categorically show that it was the Plaintiff who took the initiative and conducted the business called and referred to as Lakmini Agro Center

The District Judge in her Judgment had come to a finding that the Plaintiff Respondent Appellant is not the owner or a Partner to the business named Lakmini Agro Center. But due to her husband's handicapped conditions she was helping her husband to run the business.

It is also submitted by the learned Counsel for the Plaintiff- Respondent- Appellant that the finding of the learned High Court Judges that the Plaintiff has no Locus Standi is erroneous as the Defendant never denied that the plaintiff has a right to institute this action but merely insisted that her husband whom he considered to be a partner of the business ought to have been made a party to this action. The defendant only complained of non-joinder of a party and never denied the right of the Plaintiff to institute this action. In addition to that, in the written submissions filed on 05.01.2010 by the Defendant, the Defendant even went to the extent to state that if at all the Plaintiff is entitled to recover only half of the price. This amounts to once again admitting that the Plaintiff has a right to sue him.

The learned Counsel for the Plaintiff Respondent Appellant also submitted that as borne out by the evidence, it was the plaintiff who had been at the shop at the time of the transaction and it was the Plaintiff who had issued the goods to the Defendant. The transaction had taken place between the Plaintiff and the Defendant. Therefore the husband of the Plaintiff who was not conducting the business due to his disability as he had lost both hands and was also not at the place of business is therefore not privy to this transaction.

The question that arises in this case is whether or not the plaintiff could maintain the action even though she was not the owner or a partner of the business. The husband of the Plaintiff who is the owner had testified to the effect that he has no objection to the plaintiff maintaining this action on behalf the business. There is clear evidence that though the owner of the business is the husband of the plaintiff, she was the one who did all the day to day work of the business. Furthermore the said transaction alleged in the plaint was between the plaintiff and the defendant.

The learned High Court judges held that the Plaintiff has no locus standi to institute and maintain the action. The learned Counsel for the Plaintiff-Respondent-Appellant submitted this question was raised for the first time in the appeal . This Court has to decide whether the issue of locus standi is a question of law or mixed question of law and fact. If it is a question of law it could be raised for the first time in appeal. On the other hand if it is a mixed question of law and fact it could not be raised for the first time in appeal.

The learned Judges of the High Court has used the word locus standi which is generally used in actions based on Public law such as in writ applications and fundamental right applications. In the Civil Procedure the equivalent is the right to sue or capacity to sue. In the District Court the main issues were non joinder of the parties and whether there was a transaction between the Plaintiff and the Defendant as alleged in the plaint. The Learned District Judge dealt with these two issues and held with the Plaintiff.

When considering the facts and circumstances of this case it is clear that the question of locus standi or right to sue is a mixed question of law and fact. The issue of right to sue cannot be considered in isolation. The Court has to consider the nature of business, whether it is a large ,medium or small scale business, nature of relationship between the parties and persons who are in control of the business. In this case Lakmini Agro Center is not formally registered as a sole proprietorship nor as partnership. It is a small business run by husband and wife although the husband claims to be the owner. Due to husband's disability as he had lost both his hands, wife was running the business. She is not an employee, agent or servant of the husband. Both of them are not only partners in life but also partners in business and income from the business is their livelihood. In view of the facts and circumstances of this case I hold that the question of locus standi or right to sue is a mixed question of law and fact and cannot be raised for the first time in appeal

In Talagala Vs. Gangodawila Cooperative Stores Society Limited, NLR 48 page 472 it was held that

' where a question which is raised for the first time in appeal is a pure question of law and not a mixed question of law and fact, it can be dealt with'

In Jayawickrema Vs. Silva N.L.R. 427 it was held that ' A pure question of law can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done.'

Ranaweera Vs. Bank of Ceylon, 79(2) N.L.R. 482 followed the judgments *in Talagala Vs. Gangodawila Cooperative Stores Society Limited(supra) and Jayawickrema Vs. Silva (Supra)*

For the reasons stated above, I set aside the judgment of the High Court and affirmed the judgment of the District Court. The appeal allowed.

The Defendant to pay Rs. 50,000/= to the plaintiff as cost of this appeal.

Judge of the Supreme Court

B.P.Aluvihare, 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

SC. Appeal No. 177/2010

SC.HC.CA.LA. Application No.

125/2010

CP/HCCA/738/2005

D.C. Kandy Case No. **X11946**

In the matter of an application for Leave to Appealunder Section 5 C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006.

Yatawatte DhammanandaThero

Sri Maha Bodhi MahaVihara,

Bahirawakanda,

Kandy.

Plaintiff-Respondent-Petitioner-Appellant

Vs.

Bahirawakande Dhammawansa Thero,

Sri Maha Bodhi Vihara,

Bahirawakanda,

Kandy.

Defendant-Appellant-Respondent-Respondent

BEFORE : SISIRA J. DE ABREW, J.

K.T. CHITRASIRI, J. &,

PRASANNA S. JAYAWARDENA, PC J.

COUNSEL : Manohara de Silva, PC for
the Plaintiff-Respondent-Petitioner-Appellant

Kumar Arulanantham PC with Ms. Devika Panagoda for the Defendant-Appellant-Respondent-Respondent

ARGUED ON : 22.07.2016

WRITTEN SUBMISSION

TENDERED ON : 31.1.2011 by the Appellant
25.7.2011, 23.1.2012, 1.8.2016 and 16.8.2016
by the Respondent

DECIDED ON : 23.11.2016

SISIRA J. DE ABREW J.

This is an appeal by the Plaintiff-Respondent-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) against the judgment of the Civil Appellate High Court dated 24.3.2010 wherein it set aside the judgment of the learned District Judge who held in favour of the Plaintiff-Appellant.

The Plaintiff-Appellant, by his plaint, inter alia, prayed for a declaration that he is the lawful Viharadhipathi of the temple described in the plaint. The learned District Judge held in favour of the Plaintiff-Appellant. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) appealed to the

Civil Appellate High Court (hereinafter referred to as the High Court). The said High Court set aside the judgment of the learned District Judge. Being aggrieved by the said the judgment of the High Court, the Plaintiff-Appellant has appealed to this court. This court, by its order dated 10.12.2010, granted leave to appeal on the questions of law set out in paragraphs 11A to 11J of the petition of the Plaintiff-Appellant dated 4.5.2010 which are set out below.

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

b) The learned Judges of the High Court failed to consider that an appointment as the Viharadhipathiship of the aforesaid Vihara is governed by the rules of pupillary succession and that the Plaintiff, being the senior most pupil of the original Viharadhipathi, was entitled to be appointed as Viharadhipathi of the said Vihara;

c) The High Court erred in law in holding that the appointment of Jinawansa Thero who was not a pupil of the deceased original Viharadhipathi, was legal. Where rules of pupillary succession applies, only a pupil can be appointed and not any other Bhikku who is not a pupil;

d) The High Court failed to consider that in any event, the pupillary succession of the original Viharadhipathi did not fail and therefore the purported appointment of Jinawansa Thero was bad in law;

e) The High Court erred in holding that another Bhikku could have been appointed notwithstanding the existence of a senior pupil. This conclusion was erroneous for the reason that even in the Kathikawatha and Chapter of

the Amarapura Maha Nikaya, if the senior pupil is overlooked, only another pupil of the Viharadhipathi can be considered and not any other Bhikku;

f) The High Court erred in holding that the deviation from the rules of pupillary succession and the appointment of Jinawansa Thero under clause (d) of Schedule 2 of P7 is legal;

g) The High Court failed to consider the overwhelming evidence in support of the fact that the Plaintiff is the senior most pupil of the original Viharadhipathi and is senior to the Defendant in being ordained and receiving Upasampada and that upon the death of the original Viharadhipathi, the Plaintiff has duly been appointed as Viharadhipathi of the said Vihara and administration of the said Vihara has been handed over to the Plaintiff by documents marked P1 and P2;

h) The High Court failed to consider that as at the date of instituting this action, the Plaintiff has been lawfully and rightfully appointed as Viharadhipathi of the said Vihara that Jinawansa Thero and/or the Defendant's appointment as the Viharadhipathi are dated subsequent to the filing of this action;

i) The High Court erred in failing to consider the admission by Kandegedara Sri Sumanawansa Thero who is the Mahanayake of Udarata Amarapura Chapter that the reason to cancel the Plaintiff's appointment as Viharadhipathi and to appoint Jinawansa Thero was due to the fact that Jinawansa Thero was sick and did not have a place to reside and expressed willingness to hold the Viharadhipathiship of the said temple and that

subsequently the Defendant was appointed as Viharadhipathi by Jinawansa Thero (vide pages 153 and 160);

j) The High Court erred in holding that the relief prayed for in the prayer to the plaint cannot be granted;

The Defendant-Respondent was robed in 1977 and the Plaintiff-Appellant was robed in 1979. The position of the Plaintiff-Appellant was that the Defendant-Respondent lost his seniority due to disrobing in 1981. Learned President's Counsel (PC) for the Plaintiff-Appellant submitted that both the Plaintiff-Appellant and the Defendant-Respondent are pupils of Ampitige Dhammarama Thero who was the Viharadhipathi of the temple described in the plaint and that the said Rev. Thero died on 26.11.1993. He further submitted that although the Defendant-Respondent was robed in 1977, he lost his seniority as he disrobed himself in 1981. He therefore submitted that the Plaintiff-Appellant is entitled to the Viharadhipathiship of the temple. The Plaintiff-Appellant himself, in his evidence, admits that the Defendant-Respondent was robed again in four days time. When I consider the above facts, the most important question that must be decided is whether or not the Defendant-Respondent has disrobed himself in 1981.

Rev.Sumanawansha who was the Mahanayaka Thero of Udarata Amarapura Chapter stated, in his evidence, that the Defendant-Respondent lost his seniority as he disrobed himself. The Plaintiff-Appellant mainly relied on the evidence of Sugathadasa who was a taxi driver to prove the fact that the Defendant-Respondent disrobed himself. According to his evidence, he with the Chief Priest of the Defendant-Respondent went in his taxi near the Kandy Lake; spotted the Defendant-Respondent who was wearing a T shirt and a trouser; on the invitation of the Chief Priest, he (the Defendant-Respondent) went to the temple

with the Chief Priest; and robed himself. According to the evidence of the Plaintiff-Appellant, the Defendant-Respondent was without robes only for four days. The Defendant-Respondent, in his evidence vehemently denied the fact that he disrobed himself and stated that that he is a Buddhist Priest from the day that he was robed. Under these circumstances the most important matter that must be decided is whether evidence of Sugathadasa, the taxi driver, could be accepted against the evidence of the Defendant-Respondent. I now advert to this question. Sugathadasa, in his evidence, admitted that he with the Plaintiff-Appellant came to court to give evidence without summons and he was closely associating with the Plaintiff-Appellant than the Defendant-Respondent. He also, in his evidence, admits that he used to take $1/4^{th}$ of a bottle of liquor in the evening. The Defendant-Respondent, in his evidence, says that he as a Buddhist Priest speaks the truth and that he never disrobed himself. When I consider the above evidence, I prefer to place more reliance on the evidence of the Defendant-Respondent than the evidence of Sugathadasa. Assuming without conceding that what Sugathadasa says is correct, the next question that must be considered is whether the Defendant-Respondent intentionally disrobed himself? Was there an intention on the part of the Defendant-Respondent to renounce the priesthood? If the Defendant-Respondent had had an intention to renounce the priesthood, why did he go to the temple with the Chief Priest when he was invited to come to the temple near the Kandy Lake and robed himself at the temple? If he had an intention to renounce the priesthood, he would have refused the invitation of the Chief Priest. Further according to the evidence of Sugathadasa, when Defendant-Respondent went to the temple, he wore the robes again at the temple. These facts demonstrate that he had not had an intention of renouncing the priesthood. It appears from the above facts that the act of disrobing was only a temporary one. If the Defendant-Respondent

did not have an intention to renounce the priesthood, can it be said that he renounced the priesthood when he disrobed himself for a period of four days? In this connection it is relevant to consider the judicial decision in the case of Somaratne Vs Jinaratne 42 NLR 361. In the said case the defendant, a Buddhist Priest, disrobed himself in order to obtain medical treatment and nursing treatment. The question was whether the defendant lost his seniority when he disrobed himself for the above purpose. Court held thus: "Temporary disrobing in an emergency of a grave illness does not involve the forfeiture of rights." According to the judicial decision in the above case the defendant did not lose his seniority. It is relevant to state the following passage of the judgment of Soertsz J in the above case at page 363. His Lordship observed thus:

> *"It is conceded that on recovering from his illness, the defendant resumed his robes, but it is urged that this resumption had no retrospective force and must be postponed to the plaintiff's ordination. I cannot accept that submission. Not only does it seem wrong, but it is also contrary to the view taken by Bonser C.J. and Withers J. in the case of Gooneratne Terunanse v. Ratnapala Terunanse. [Matara Cases 227.] In that case it was held that for disrobing to produce such a result as is here claimed, it must be voluntary and with a clear intention to renounce the priesthood."*

Applying the principles laid down in the above legal literature and considering the facts of this case, I hold that the Defendant-Respondent had not renounced the priesthood when he disrobed himself for a period of four days and that therefore he had not lost his seniority. I have stated the above contention assuming without conceding that the evidence of Sugathadasa, the taxi driver, is true. After considering the facts of this case, I hold that among the Plaintiff-

Appellant and the Defendant-Respondent, the senior pupil is the Defendant-Respondent and that the Defendant-Respondent, after the death of Ampitiya Dhammarama Thero, is entitled to the Viharadhapathiship of the temple described in the pliant.

In view of the above conclusion reached by me, I answer the questions of law set out in paragraphs 11(a),(b),(g) and (j) in the negative. The questions of law set out in paragraphs 11(c), (d),(e),(f),(h) and (i) do not arise for consideration.

For the aforementioned reasons, I dismiss the appeal. In all the circumstances of the case, I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court.

KT Chitrasiri J

I agree.

Judge of the Supreme Court.

Prasanna 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 from a judgment of the Civil Appellate High Court of Kegalle.

PathirennehelageSwarnasiriNimal,
Of Batuwatta, Helamada.(Deceased)

Plaintiff

GangodaMudiyanselageWijewathi
Podimenike of Mahawelegedara,
Batuwatta, Helamada.

Substituted Plaintiff

SC APPEAL No. 178/2013
SC/HCCA/LA 31/ 2013
SP/HCCA/Kegalle/ 856/2011
D. C. Kegalle No. 26682/P

Vs

1. PathirennehelageLeelawathie,
   Of Mahawelegedara,
   Batuwatta, Helamada.
2. VidanarallageGunarathMenike,
   Of Mahawelegedara,
   Batuwatta, Helamada.

Defendants

AND BETWEEN

GangodaMudiyanselageWijewathi
Podimenike of Mahawelegedara,
Batuwatta, Helamada.

SubstitutedPlaintiff Appellant

Vs

1. PathirennehelageLeelawathie,
   Of Mahawelegedara,
   Batuwatta, Helamada.
2. VidanarallageGunarathMenike,
   Of Mahawelegedara,
   Batuwatta, Helamada.

Defendants Respondents

AND NOW BETWEEN

GangodaMudiyanselageWijewathi
Podimenike of Mahawelegedara,
Batuwatta, Helamada.

Substituted Plaintiff Appellant Appellant

Vs

PathirennehelageLeelawathie
Of Mahawelgedera, Batuwatta,
Helamada.

Defendant Respondent Respondent

BEFORE : S. EVA WANASUNDERA PCJ.
UPALY ABEYRATHNE J. &
PRASANNA S. JAYAWARDENA PCJ.

COUNSEL: B. O. P. Jayawardena instructed by Gaithri de Silva for
The Substituted Plaintiff Appellant Appellant.
Dr. Sunil Coorey with A.W.D.S. Rodrigo for the Defendant
Respondent Respondent.

ARGUED ON: 17. 11. 2016.

DECIDED ON: 14. 12. 2016.

S. EVA WANASUNDERA PCJ.

In this Appeal, the questions of law to be decided are as follows:-

1.Have the learned High Court Judges erred in law when they affirmed the Judgment of the learned District Judge dated 19.05.2011?

2.Have the learned High Court Judges erred in law when they failed to give due consideration to the admissions recorded in this case, particularly taking into consideration of the fact that the said admissions were recorded between the only two parties to the case?

3.Have the learned High Court Judges erred in law when they failed to consider that the Respondent while being present at the trial fully endorsed and accepted the Appellant's evidence?

4.Have the learned High Court Judges erred in law when they failed to evaluate the evidence adduced by the Appellant properly, regarding the earlier cases decided on the same pedigree as in the present case?

5.Have the learned High Court Judges erred in law when they came to the conclusion that the Appellant had failed to establish title to the lands in this case?

The facts pertinent to the case are as follows:
P. SwarnasiriNimal was the original Plaintiff. He filed this action seeking to partition the lands described in five schedules to his plaint dated 16.07.1996. He sought to partition the said allotments of land between himself and the 1st Defendant . The 2nd Defendant was holding the life interest of the portions which belonged to the 1st Defendant. The 1st Defendant was the daughter of the 2nd Defendant. The Plaintiff and the 1st and 2nd Defendants were close relations. The pedigree set up by the Plaintiff was common to all the allotments of land in the five schedules. **The claim of the Plaintiff was ½ share of all the lands and he submitted in his Plaint that the other ½ share was to be given to the 1st Defendant.**

The Plaintiff had passed away and the Substituted Plaintiff Appellant (hereinafter referred to as the Plaintiff Appellant) continued with the case to get an order of partition as prayed for in the Plaint. During the proceedings in

the District Court , the **2nd Defendant** also had passed away and no substitution had taken place because she **had only the life interest**. The land sought to be partitioned was to be divided between only the **Plaintiff and the 1stDefendant**

A commission to survey was taken out as a matter of procedure. The said five allotments of land in the schedules to the Plaint were surveyed separately and the Surveyor, A.C.P. Gunasena made five new plans and submitted the same to court with a report common to all the plans. The Plans were bearing numbers as 1007P, 1008P, 1009P, 1010P and 1011P. In the joint Statement of Claim filed by the 1st and 2nd Defendants, it was averred that the land described in the Second Schedule had not been properly depicted in the said Plan number 1011 P and only a portion of the land called " NikathenneKumbura" had been depicted in the said plan.Then, the 1st and 2nd Defendants, at that time had caused the said land to be surveyed and the plan bearing number 720 made by S.S.P. Kulatunga licensed surveyor had been tendered to the District Court.

Thereafter **several persons** who made claims to the said land called NikathenneKumbura described in the 2nd Schedule to the Plaint(which was depicted in the aforementioned Plan No. 1011P), **were added as 3rd to the 25th Defendants.** The said Defendants had **filed different statements of claim with different pedegrees.**

At this juncture, **the Plaintiff Appellant, made an application to withdraw the case in respect of the land called NikathenneKumbura** described in the Second Schedule. Then, the District Court made order allowing the application and accordingly **excluded the said land and permitted the Plaintiff Appellant to proceed with the case against only the 1st Defendant Respondent Respondent** (hereinafter referred to as the **Defendant Respondent**) to partition the land in the 1st , 3rd, 4th and 5th Schedules to the Plaint. As a result of the said withdrawal, all the other Defendants who intervened and filed statements of claim to the land **called NikethenneKumbura were released from the case.**

Thereafter on **09.07.2009**, the Plaintiff Appellant and the Defendant Respondent had informed court that they were **negotiating a settlement** and sought a further date for the same. On the next date of the case, i.e. **on 09.03.2010 again**, the Defendant Respondent had requested for a further date for settlement. The Plaintiff Appellant had agreed for the same and the case got postponed **to 31.05.2010**. The learned District Judge on record on both the

said dates was Hon. Mr. Sapuvida. By the next date the former District Judge had gone on transfer and the matter came up before the next District Judge, Hon. Mr. Morawaka. Finally, on **31.05.2010 both parties agreed to settle the case and on the same day six admissions were recorded.**

Then on the same day, as usual, right after recording the admissions, in the same run, the **Plaintiff Appellant** gave evidence. **Her testimony was uncontested.**She was **not cross examined**. The evidence led through the Plaintiff Appellant on that day was marked and produced as P12. The **admissions** are recorded as follows:

1.Parties agree that the lands proposed to be partitioned are five in number.

2.Parties agree that the said lands are contained in the five Schedules to the Plaint.

3.The said lands are surveyed and shown in Plans Nos. 1007P to 1011P

4.The Parties agree that the land depicted in Plan 1011P was excluded from the corpus to be partitioned.

5.Accordingly**, the pedigree** pertaining to the property as well as the manner in which it should be apportioned is **accepted**.

6.Both parties agree that the **Plaintiff should be granted an undivided ½ share and the Defendant should be granted the other undivided ½ share** thus being given equal shares of the property to be partitioned.

It is mentioned that with permission of court, evidence of the Plaintiff Appellant is being led in the case. The next line in the proceedings state that " Accordingly, **in pursuance of the settlement** ,depending on the evidence of the Plaintiff**, if necessary, the evidence of the Defendant can be called. Firstly, the evidence of the Plaintiff is taken**."

It is obvious that due to the fact that this is a case to partition the property, the evidence of the Plaintiff was led, to impress upon the trial court of the contents of the Plaint and the pedigree and the other factors relevant to **implement the settlement as agreed. It is clear that evidence was called to place facts before court.**

No issues had been raised. No cross examination was done. It seems to me that **the Judge did not want to hear any evidence from the Defendant** and the evidence had not been necessary because it is Court which has recorded that if the evidence of the Plaintiff does not bring forth enough evidence that the Defendant's evidence will be called, according to what was recorded right before the Plaintiff gave evidence.

The case was closed on that day praying that the lands which were the subject matter be divided in equal shares between the Plaintiff and the Defendant.Documents marked were ten in number and marked as Pe1 to Pe 10. Out of these documents, Pe4 ,Pe 8, Pe 10 and Pe 6 were respectively, a decree in DC Case No. 27331P , judgment in DC Case No. 26768P, judgment in DC Case No. 27328P and proceedings in DC Case No. 27328P. **The said cases had been other partition cases between the same two parties with regard to other lands.** Some cases out of those had been filed by the Defendant in this case in hand and others had been filed by the Plaintiff in this case, against each other**. They had been settled accepting the same pedigree as in this case.**

The case in hand, had come up next, in open court on 30.08.2010 before yet another District Judge, Hon. Sahabdeen. The lawyers had informed that the **judgment was due by the former District Judge, Hon. Morawaka** and that the documents also had been already sent to the said Judge. Finally on 19.05.2011, judgment by Hon. Morawaka had been delivered **dismissing the Plaint**. The Judgment is marked as P 21 and produced before this Court.

The said Judgment has analysed the evidence to reach a **conclusion** that the evidence of the Plaintiff Appellant **does not prove the pedigree well enough** and **the Defendant Respondent's entitlement is not proven** by the Plaintiff's evidence set down by the documents and the oral evidence before Court. The **District Court dismissed the Plaint** on that account thus not making any order for partitioning the land in the Schedules to the Plaint.

The Plaintiff Appellant appealed from that Judgment to the Civil Appellate High Court. On 13.12.2012 , the High Court affirmed the judgement of the District Court. The Plaintiff Appellant has now appealed from the High Court Judgement to this Court.

The law on Partition is contained in the Partition Law which was enacted in 1977 by Law No. 21 of 1977. The said Law commenced with effect from 15.12.1977 and thereafter four amendments to the said Law was enacted. The

four Amendments are Acts Nos. 5 of 1981, 6 of 1987, 32 of 1987 and 17 of 1997. The Partition Law provides for the partition and sale **of land held in common.** Whoever who comes before court as the Plaintiff should plead that the land which is held in common be partitioned. Section 2 provides that where any land belongs in common **to two or moreowners**, any one or more of them, may institute an action for partition.

Section 25(1) which deals with the trial of a Partition action reads as follows:

"On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court **shall examine the title of each party** and shall hear and receive evidence in support thereof and shall try and determine all questions of law an fact arising in that action in regard to the right, share or interest of each party to, of or in the land to which the action relates, and shall consider and decide which of the orders mentioned in Sec. 26 should be made."

According **to Sec. 26 (2)(a) and (g) ,** court can order for a partition of the land and can order any share be unallotted if title and pedegree is not proved . In other words, if the land cannot be partitioned due to the reason that the title has not been proved to a particular portion with evidence to the satisfaction of court, any portion can be left unallotted.

It is trite law that the duty imposed on the judge in a partition case is a sacred one.The burden of seeking and getting evidence before court, in the course of investigation of title to the land sought to be partitioned by parties before Court, prior to deciding what share should go to which party is **more the duty of the judge than the contesting parties**. The authorities proclaim that it is the duty of the trial judge in a partition action to investigate title of the parties before he decides what share should be allocated to which party of the case before him.

In the case of **Cynthia De Alwis Vs. Marjorie De Alwis and two others, 1997, 3 SLR 113**, it was held that, " A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. In the exercise of this sacred duty to investigate title, a trial judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases."

In**Faleel Vs. Argeen and Others 2004 , 1 SLR 48**, it was held that " It is possible for the parties to a partition action to compromise their disputes provided that the Court has investigated the title of each party and satisfied itself as to their respective rights."

In **Sopinona Vs Cornelis and Others 2010 BLR 109,** it was held that " It is necessary to conduct a thorough investigation in a partition action as it is instituted to determine the questions of title and investigation devolves on the Court. In a partition suit which is considered to be proceeding taken for prevention or redress of a wrong, it would be the prime duty of the judge to carefully examine and investigate the actual rights to the land sought to be partitioned."

In the case in hand, there were two parties, namely the Plaintiff Appellant and the Defendant Respondent**. All the provisions with regard to the matter before reaching the trial stage had been complied with**. Parties had accepted and admitted the title to either party for ½ share of each parcel of land in the Schedules to the Plaint. There had not been any other party who came before court to contest the Plaintiff's case, claiming any portion of the lands which are the subject matter of this action. The High Court Judge and the District Court Judge had tried to examine the title of the Plaintiff and the Defendant since it is the onus of the judge to examine the title.

The pedigree of the Plaintiff is drawn out in page 104 of the brief before this Court. It commences with Deed No. 7160 dated 05.09.1990 granted in favour of the original Plaintiff, Swarnasiri Nimal. In the said deed, which is marked as Pe 1 at the trial and also marked for convenience of this Court by the Plaintiff Appellant as P20 in this brief, in the very first sentence in the Schedule to the deed**, it is mentioned that the Vendor had got titlein the year 1939 by Deed No. 5825 dated 18.05.1939 attested by A.I.De S. Abeywickrema, Notary Public.PathirennehelagePunchibanda had got title** to all **the twelve parcels of land** of different names by this Deed and it is also added that he had been possessed of the said land without any interference from others from 1939 up to the date of transfer as mentioned in the Deed No. 7160. By this Deed, the ownership of the Plaintiff to the lands in the Schedules to the Plaint **stands proved.**

The pedigree and the averments in the Plaint dated 16.07.1996 however submit that the lands mentioned in the five Schedules to the Plaint were owned by PathirennehelagePunchi Banda and PathirennehelagePunchiNilame

at one time and an undivided ½ share owned by Punchi Banda was transferred to the Plaintiff SwarnasiriNimal by Deed 7160. Even though the Plaint does not specifically explain as to how the Defendant Respondent (= the 1st Defendant in the District Court) is entitled to the other ½ share, the pedigree shows the 1st Defendant as the owner of ½ share. **The title Deed No. 5825 referred to in Deed 7160 had not been produced** in the evidence before the District Court in this trial but in the judgements of other cases produced in evidence by the Plaintiff in cases Nos. 27331/P, 27338/P, 26768/P and 27369/P which were the **cases between the same parties** and which cases were settled in Court ,**the title Deed No. 5825 had been taken as good evidence as the base of title of ½ share for either party of the cases.**

In all the said judgments the said Deed No. 5825 has been mentioned as the title deed of the Plaintiff Appellant's predecessor in title and the Defendant Respondent's predecessor in title. When analysed, I can see that the Deed No. 5825 had been the source of title of Puchi Banda and PunchiNilame. Even though the said deed is not before us today, it had been taken into account by the Judges who accepted the settlements between the same parties and allowed the partitioning of the other lands in the Schedule to Deed No. 7160 **which are seven more in number. Only five lands** out of the twelve lands described in the Schedule to the said Deed 7160 make up the subject matter of this case in hand before this court.

I understand that the reasoning behind the evidence produced before the District Court by way of judgments in the other cases, is the fact that the **devolution of title contained in Deed No. 5825** proves the ownership of the Plaintiff Appellant and the Defendant Respondent. They both get title from one source. **Punchirala who granted title to Punchi Banda and PunchiNilame , to receive ½ share of all the lands had been done by Deed No. 5825**.

Therefore I am of the opinion that the decision of the parties to this action at the trial to divide the four lands amicably by way of a settlement with ½ sharefor either party should be finalised by allowing the partition as prayed for in that way by the Plaintiff.

Both Courts which has dismissed the Plaint have **failed to understand** the evidence before them. The High Court Judge specifically states in the penultimate paragraph of his judgment as follows: " I have carefully considered the judgments marked Pe 8, Pe 10 and Pe 6. It has clearly convinced my mind that the **Appellant failed to explain** how these judgments are related to the

present action. The facts stated above clearly demonstrate that there is no sufficient evidence to prove how Punchirala's rights devolved on PodiNilame and Punchi Banda. Therefore I am of the view that the learned District Judge has correctly arrived at the conclusion that the mode of devolution of title from Punchirala to Punchi Banda and PunchiNilame is not explained."

I hold that the reasoning given in the High Court judgement is wrong. It is the duty of the trial Judge to examine the title according to Partition Law which both Judges have failed to do. They have failed to understand that by Deed No. 5825 dated 18.05.1939, Punchirala had given 12 parcels of land in equal shares to his sons, PunchiNilame and Punchi Banda. This Deed had been produced in the other partition cases and those cases were settled. The learned District Judges had acted upon the said Deed and allowed partition of seven parcels of land contained in the said Deed in four other cases between the same parties. That deed had been recognized as the source of title of the Plaintiff Appellant and the Defendant Respondent in those cases. The five out of twelve parcels of land remaining unpartitioned were the subject matter of this case. Even though the said Deed 5825 was not produced to Court in this particular case to partition the remaining five parcels of land, Court has to take judicial notice of the judgments passed by the same court which were not appealed from by either party. The Deed before Court in the present case is Deed 7160 which specifically mentions that the Vendor got title by Deed 5825. No Court can ignore the material placed by the Plaintiff with regard to other judgments between the same parties which were before the same Court prior to this case.

The learned High Court Judges erred when they affirmed the judgment of the District Court which failed to call for the evidence of the Defendant, if it was of the opinion that the evidence of the Plaintiff was not sufficient to prove the entitlement of the Defendant, specially so, because right before the evidence of the Plaintiff commenced, the Court had recorded that depending on the Plaintiff's evidence, it will decide whether it should make order for the Defendant to give evidence. After stating so in the record, how could the same judge dismiss the Plaint on the basis that the Plaintiff has failed to prove the share to be given to the Defendant? Both the High Court and the District Court had failed to evaluate the evidence adduced by the Plaintiff properly regarding the earlier cases which were between the same parties on the same pedigree as in the present case. The basis of entitlements was decided on one Deed 5825 by which Punchirala had given the lands to his two sons PunchiNilame and Punchi Banda in equal undivided shares. The Judges have failed to identify this fact which was proven and accepted by both parties.

I answer all the questions of law set down at the beginning of this judgment in the affirmative in favour of the Plaintiff Appellant .

I hold that the High Court Judges have erred in law. I answer the questions of law in the affirmative in favour of the Plaintiff Appellant. I set aside the Judgment of the Civil Appellate High Court dated 13.12.2012 and the Judgment of the District Court dated 19.05.2011. I make order allowing the partitioning of the lands described in the Schedules 1,3,4 and 5 of the Plaint in accordance with the provisions of the Partition Law , on the basis of an undivided half share each to the Appellant and the Respondent from each of the said lands.

Appeal is allowed with costs.

Judge of the Supreme Court

UpalyAbeyrathne J.
I agree.

Judge of the Supreme Court

Prasanna S. Jayawardane PCJ
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 a Judgement Of the Provincial High Court of Kegalle.

T.Somaweera of Yatagama,
Walgama, Rambukkana.

Plaintiff

S. C. Appeal 180/2010
SC (HC CALA)No. 288/09
PHC Kegalle No. SP/HCCA/KEG/569/2008(F)
D. C. Kegalle No. 25901/P

Vs

1. G. Laisa
2. T. Jamis
3. K. P. Samarakoon

All of Yatagama, Walgama,
Rambukkana.

Defendants

AND

T. Jamis of Yatagama,Walgama,
Rambukkana.

2nd Defendant Appellant

Vs

1.G. Laisa and

3.K.P. Samarakoon

Both of Yatagama,Walgama,
Rambukkana.

Defendants Respondents

AND NOW BETWEEN

T. Jamis of Yatagama,Walgama,
Rambukkana

2nd Defendant Appellant
Petitioner

Vs

T. Somaweera of Yatagama,
Walgama, Rambukkana.

Plaintiff Respondent

1. G. Laisa and
3.K. P. Samarakoon

Both of Yatagama, Walgama,
Rambukkana

1st and 3rd Defendants
Respondents Respondents

BEFORE : S. EVA WANASUNDERA PCJ.
PRIYANTHA JAYAWARDENA PCJ. &
K. T. CHITRASIRI J.

COUNSEL : Sunil Abeyratne for the 2nd Defendant Appellant Appellant
MahindaNanayakkara for the Plaintiff Respondent Respondent
D.M.G. Dissanayake with Ms. L.M.C.D. Bandara for the 3rd Defendant Respondent Respondent

ARGUED ON: 08. 07.2016.

DECIDED ON: 09.09. 2016.

S. EVA WANASUNDERA PCJ.

This Court hasgranted leave to appeal on the questions of law set out in paragraphs 17 (a), (b) and (c) of the Petition dated 8.11.2010 . They are as follows:-
(a)Whether the learned judges of the High Court of Provinces (Civil Appellate), Kegalle have failed to identify the corpus for partition properly?
(b)Whether the said judges have failed to decide the case on a balance of probability of evidence in this case?
(c)Whether the said judges and the District Court Judge of Kegalle have partitioned Bilinchagahamula watta including a portion of Hitinawatte, the land of the 2nd Defendant Appellant Petitioner and the 1st Defendant Appellant Petitioner?

I find that the 1st Defendant Appellant Petitioner even though referred to, in the aforementioned questions of law have not been represented before this Court. Further more the 1st Defendant Respondent Respondent is also not represented in this Court.

The questions of law in summary points to the land called Bilinchagahamulawatta having got partitioned, allegedly including a portion of Hitinawatta. The contention of the Appellant is that it was decided wrongly.

On the 29th January, 1993, the Plaintiff filed action to partition a land named Bilinchagahamula watta of an extent of 12 lahas of paddy sowing.The boundaries were, to the North Gammaddewatte Galweta, to the East Galketiye Hena and watta, to the South Pahala Arambe Agala, Galweta and Endaru weta and to the West, Bulugahalande watta. It was in the village of Walgama.

On the 10th of May, 1994, the Plaintiff made an application to the same court in the same action begging court to grant an interim injunction and an enjoining order to stop the the 1st and 2ndDefendants from felling the trees on the land sought to be partitioned in this case , alleging that they had cut down two coconut trees and some arecanut trees on the land which was the subject matter of the partition action. Court made order on the 28th of July to auction the trees which were felled by the Defendants and deposit the money into the case in court and got the parties to agree not to fell any trees until the case is concluded.

The District Court issued a commission on the surveyor, D.Ratnayake and he came up with the Plan No. 1696 where the boundaries are explained and demarcated as in the Schedule to the Plaint and had measured the land to be of an extent of A0 R3 P14. The Defendants were dissatisfied with this Court Commissioner's Plan and requested Court to direct another surveyor to survey the land again and superimpose the Plan done by surveyor D.Ratnayake.

Court directed Surveyor G.A.R.Perera to do the same and he came up with the Plan No. 1530. He had measured the land to be of an extent of A0 R3 P 2.7. He had demarcated in the plan, on paper, Lots 1,2,3,and 4 as shown by the Defendants but accepted in court while giving evidence when cross examined, that those markings were never on the ground. There were no demarcations on the ground.

The 2nd Defendant Jamis is a person who had taken on lease, the land which belonged to one Kiri who owned 3/4th portion of Bilinchagahamulawatta a long time ago. That lease had ended and because Jamis had been reluctant to hand over the land back to Kiri, there had been a court case between Kiri and Jamis. At the time that the said court case was going on, Kiri had sold the land to the Plaintiff, Somaweera. That is how Somaweera had become the owner of 3/4th portion of Bilinchagahamulawatta.

The 3rd Defendant is the son of Laisa, the 1st Defendant, and while he is occupying the 1/4th portion of the land named Bilinchagahamulawatta along with his mother, he claims for himself, more from the land named Bilinchagahamulawatta.

The 2nd Court Commissioner, surveyor G.A.R.Perera had demarcated the lines dividing specific lots on the land, on paper, on the plan, on instructions of the Defendants as they claimed to be possessing. He had done so with **no evidence** as to **any physical boundaries** on the land to any of those lots he had demarcated on the plan on paper**, but he had done so just because the Defendants wanted it demarcated in that way on the plan** which was produced to Court. He admitted this fact when he was cross examined by the lawyer of the Plaintiff at the trial.

There had been a partition case to partition a land called Hitinawatta in or around the year 1946. The partition plan in that case ,was produced in this case as P5. That plan had been marked as A/16 in D.C.Kegalle case No. 4628. It is clearly shown in that Plan, A/16, that the land called Hitinawatta was partitioned at that time and the land to the **North of Hitinawatta was Bilinchagahamulawatta.** The document marked P4 which was produced was the decree in that partition case No. 4628. P4 is evidence of the names of the parties to that action. The Plaintiff of that partition case was Kotambullalage Rankira. The ten defendants were Kotambullalage Pina, Jaya, Pincha, Balinda, Lapaya, Tikiri, Sella, Kirihonda, Sepia and Sethura. The decree is dated 07.06.1988.

P5 proves the fact that the land which is the subject matter of this present case in hand , is not Hitinawatta but it is the land on the North of Hitinawatta , named and presented in that plan as Bilinchagahamulawatta. Furthermore, the 2nd Defendant Appellant Appellant, K. Jamis claims his rights to **1/4th of Hitinawatta** from his predecessor in title, Kotambullalage Dingira by Deed No. 10163 dated 25.03.1991 which was registered in Volume /Folio**, B 364/134** at the Land Registry of Kegalle.The lispendens for the corpus to be partitioned in the case in hand was registered in Volume / Folio, **B 350/33** which was named Bilinchagahamulawatta. It is clear, that they are therefore two different lands with two different names and registered in two different folios in the land registry.

The 2nd and 3rd Defendants claim under the Deeds relating to Hitinawatta and not Bilinchagahamulawatta. The land after two commissions were identified to be the land which all parties claim and which should be partitioned for peaceful occupation by the owners. The District Judge had identified the corpus to be partitioned to be of an extent of approximately 3 Roods and 14 Perches. After considering the boundaries mentioned in the title deeds of the Defendants and the boundaries mentioned in the title deeds of the Plaintiff seperately along with the boundaries of the corpus to be partitioned according to the two surveys done by order of court, **the District judge had identified the land**.

The District Judge explains well as to how she came to the finding that the corpus to be partitioned is not Hitinawatta but it is Bilinchagahamulawatta in pages 6 and 7 of the judgment. She states thus:

" It is apparent that according to documents P4 and P5 which were produced in Kegalle District Court Case No. 4628 / Partition, Hitinawatta is on the south of the corpus to be partitioned in this case. The Plaint does not propose to partition a land of which the Nothern boundary is Hitinawatta. In Plan No. 1530 of surveyor G.A.R.Perera, there is a land called Hitinawatta on the South as well as a land called Hitinawatta on the North. The Plaint discloses that the land to be partitioned has , as the Nothern boundary, a land called Gammaddewatta of which the boundary demarcation is a 'Galweta'. In Plan 1530 marked Y, the Nothern boundary is Hitinawatta. The Defendants have claimed that the Nothern boundary of the land to be partitioned is 'Galweta' according to 2V1 and 3V1. The Eastern boundary is Galenda, Southern boundary is Galweta and the Western boundary is Kosgaswetiya. Plan Y shows a Galweta in Lots 1 and 2 and the Eastern boundary of Lot 3 is Galenda. Accordingly, 2V1 and 3V1 produced by the Defendants, do not show that the Western boundary and the Southern boundary are Kosgaswetiya and Mala Ela. Therefore it is abundantly clear that the Plan 1530 marked Y does not demonstrate the land described as the corpus in 2V1 and 3V1. There is no Mala Ela in Plan 1530 as any boundary but the Plan shows to the West the main Road and Bulugahalande, to the South Hitinawatta and Pahala Aramba. Mala Ela is nowhere to be seen at all as a boundary. In the circumstances, I decide that the land to be partitioned is not what is in the Deeds 2V1 and 3V1. I take as the corpus to be partitioned to be what is in the Schedule to the Plaint. It is named as Bilinchagahamulawatta from around the year 1939 according to P1 and P2.**"**

The Defendants had not filed their statements of claim until after the second commission and the report was filed in court. The 1st, 2nd and 3rd Defendants had filed **a joint statement of cla**im. It is surprising to see that **only the 2nd Defendant has appealed from the District Court to the Civil Appellate High Court and from there to the Supreme Court.** The 1st and the 3rd Defendants , being mother and son had not appealed. The 1st Defendant had received 1/4th share of the whole land according to the judgment of the District Judge. It can be concluded therefore **that the 1st and 3rd Defendants were satisfied with 1/4th of Bilinchagahamula watta being granted to the 1st Defendant**.

The 2nd Defendant has got **no share** of Bilinchagahamulawatta according to the District Court judgment. He had moved for dismissal of the Plaint and/or for a granting of 1/4th share of the corpus. He is before this court as he did not get what he had prayed for.

In the case ***of Jayasuriya Vs Ubeid, 61 NLR 352***, it was held that there is a duty cast on the trial judge **to satisfy himself as to the identity of the land sought to be partitioned .** In the case in hand I find that the evidence before court was good enough to identify the corpus properly and the trial judge need not have on her own called for any more evidence. The District Judge had good reasons to come to the finding that the land to be partitioned was not Hitinawatta but Bilinchagahamulawatta, specially when the decree and the plan of the earlier partition case of Hitinawatta clearly demonstrated that Hitinawatta was on the South of Bilinchagahamulawatta. The District Judge had also done an analysis as mentioned above which explains more as to why she identified the corpus to be Bilinchagahamula watta and not any part of Hitinawatta.

The parties to the case accepted that the land to be partitioned was **physically one block of land** which they agreed to be claimed by all the parties and it was the land which could not be possessed in peace as co- owners. The only contesting point was that the Plaintiff said it was Bilinchagahamulawatta but the Defendants said it was Hitinawatta. The Plaintiff's deeds were for the ownership of Bilinchagahamulawatta and the Defendants' deeds were for the ownership of Hitinawatta. The trial judge had to go through the evidence before court by way of documents and by way of oral evidence and decide on a balance of probability.

The District Judge had done it very carefully and come to the correct decision that the corpus is Bilinchagahamulawatta and not Hitinawatta.

I am of the view that the learned judges of the Civil Appellate High Court of Kegalle had agreed with the findings of the trial Judge of the District Court and correctly come to the conclusion that the corpus to be partitioned was identified properly by the learned District Judge. The Judges in both courts have taken up the evidence before them and analysed the same and decided the case on a balance of probability of the evidence. The trial judge has partitioned Bilinchagahamulawatta after concluding correctly that it does not include any portion of Hitinawatta.

I hold further that the trial judge has done the duty imposed on the judge by Sections 25 and 26 of the Partition Law No. 21 of 1977 as amended and correctly decided on the shares as well, in this case. The Appellant cannot complain on that aspect either. There is much case law in this regard pertinent to the investigation of title etc. which I do not wish to discuss as the main ground of appeal in this case is only the identity of the corpus to be partitioned.

Therefore I answer the questions of law enumerated above in favour of the Plaintiff Respondent Respondent and against the 2nd Defendant Appellant Appellant.

I affirm the judgment of the Civil Appeallate High Court and the judgment of the District Court. This Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

Justice Priyantha Jayawardena.
I agree.

Judge of the Supreme Court

Justice K.T.Chitrasiri
I agree.

Judge of the Supreme Court

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

S.C. Appeal No. 189/2012
SC(HC)CALA Application No. 151/2012
WP/HCCA/COL/17/2010(RA)
D.C Colombo Case No. DSP/00147/08

In the matter of an Application in terms of Section 16(1) of the Recovery of Loans by Banks (Special Provisions) Act No. 04 of 1990 as amended.

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

PETITIONER

Vs.

Hikkaduwa Gamage Thejasiri Gunethilake
No. 309/55, Gorge E. De Silva Mawatha,
Kandy.

RESPONDENT

AND

In the matter of an Appeal in terms of Section 753 of Civil Procedure Code read with Section 5 of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Hikkaduwa Gamage Thejasiri Gunethilake
No. 309/55, Gorge E. De Silva Mawatha,
Kandy.

RESPONDENT-PETITONER

Vs.

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

PETITIONER-RESPONDENT

AND NOW

In the matter of an Application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) (Amendment Act) No. 54 of 2006 read together with Article 127 of the Constitution.

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

PETITIONER-RESPONDENT-PETITIONER

Vs.

Hikkaduwa Gamage Thejasiri Gunethilake
No. 309/55, Gorge E. De Silva Mawatha,
Kandy.

RESPONDENT-PETITONER-RESPONDENT

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

COUNSEL: Palitha Kumarasinghe P.C., with Priyantha Alagiyawanna
for the Petitioner-Respondent-Petitioner

Sumedha Mahawanniarachchi with Champika Rodrigo
For the Respondent-Petitioner-Respondent

ARGUED ON: 19.10.2016

DECIDED ON: 23.11.2016

GOONERATNE J.

This was an action filed in the District Court of Colombo by the Petitioner-Respondent-Petitioner (hereinafter referred to as Petitioner) against the Respondent-Petitioner-Respondent (hereinafter referred to as the Respondent) in terms of Section 16(1) of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 as amended, praying for the delivery of possession of the property referred to in the schedule to the petition and eviction of the Respondent, his agents, employees and all those holding under the Respondent. The said Section 16(1) reads thus:

Order for delivery of possession.

(1) The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where that property is situate. And upon production of the certificate of sale issued in respect of that property under section 15, be, entitled to obtain an order for delivery of possession of the that property.

The above section has a significant bearing on a 'Certificate of Sale'. As Such, I would also refer to Section 15(1) & (2) of the said Act. Section (1) & (2) reads thus:

(1) If the mortgage property is sold, the Board shall issue a certificate of sale and thereupon all the right, title and interest of the borrower to, and in, the property shall vest in the purchaser, and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to, and in, the property made or registered subsequent to the date of the mortgage of the property to the Bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser.

(2) A certificate signed by the Board under subsection (1) shall be conclusive proof with respect to the sale of any property that all the provisions of this Act relating to the sale of that property have been complied with.

It is important to consider the background facts at this point as presented by learned President's Counsel on behalf of the Petitioner Bank, and very many of such facts are not disputed by the opposing party.

The Respondent was a customer of the Petitioner Bank of the Katugastota branch and he maintained account bearing No. 30101. On the request of Respondent the Petitioner Bank granted the Respondent a term loan facility and an overdraft. In the usual way Respondent provided security for the said facilities by a mortgage and hypothecated the property described in the schedule to the petition (Mortgage Bonds No 2294 and 2655). The Respondent

defaulted repayments due on the above facilities. As such the Board of Directors as provided by the above Act under Section 4, passed a resolution to sell the property by public auction in order to recover monies due on the above Mortgage Bonds. Material furnished to this court indicates that the resolution was published in the Government Gazette (A-P 3 (a) to A-P 3(d)).

It is also urged that the Petitioner Banks resolution was duly communicated to the Respondent by letter of 14.08.2003. It is also pleaded that the Petitioner Bank fixed the auction on 03.10.2002 and published the date and place of auction by Gazette dated 12.09.2003. At the auction there were no bidders and the Petitioner Bank purchased the property and thereafter the Board of Directors of the Bank issued a certificate of sale (A-P4)

The Petitioner Bank as stated above instituted proceedings in the District Court of Colombo by petition dated 23.09.2008 (A) for delivery of possession of the property. Respondent filed objections on 17.07.2009 (B) to above and moved for dismissal of the petition of the Petitioner Bank. At the inquiry before the learned District Judge both parties agreed to dispose the matter by way of written submissions. Learned District Judge delivered the Order on 23.04.2010 (‘E’) and rejected the objections of the Respondent and District Judge by his Order, made Order ‘nisi’ absolute and issued the writ. However the Respondent filed a Notice of Appeal. Petitioner Bank moved the

District Court to issue the Writ of Execution. On 01.06.2010 District Court issued the Writ of Execution against the Respondent. Prior to issuing the Writ the Respondent filed a Revision Application (G) in the High Court on 31.05.2010 against the Order of the learned District Judge dated 23.04.2010 ('E').

The High Court of Colombo having initially issued a Stay Order, ('H') finally acting in revision set aside the Order of the learned District Judge dated 23.04.2010 ('E') by Judgment dated 16.03.2012 and directed the learned District Judge to re-issue notice of application for Writ, on the Respondent.

The Petitioner Bank being aggrieved and dissatisfied with the Judgment of the High Court dated 16.03.2012 filed a Leave to Appeal Application in the Supreme Court. This court granted Leave to Appeal on the following substantial questions of law.

1. Has the Provincial High Court of the Western Province erred in law setting aside the Order dated 23.04.2010 of the District Court of Colombo issuing writ and ordering the District Court to re-issue Notice of Writ of Execution, purporting to act under Section 347 of the Civil Procedure Code?
2. Has the Provincial High Court of the Western Province erred in law when it set aside the order dated 23.04.2010 issuing the writ of the District Court as the High Court acting in revision as the High Court has not given any valid reason to act in revision or to set aside the said Order?
3. Has the Provincial High Court of the Western Province erred in law in exercising revisionary jurisdiction in the circumstance of this case?

4. Can documents be tendered in an application filed in terms of the summary procedure of the Civil Procedure Code without a supporting affidavit or oral evidence?

At the very outset, prior to expressing my views as regards the case in hand, it would be convenient to very briefly and by a simple observation to discuss, “what is parate execution”? It is simply a right of the mortgagee to sell the mortgaged property without the intervention of courts. It is a sale by the creditor of the debtors property (whether movable or immovable) without intervention of courts. Today it is ‘perhaps’ described as an extra judicial sale arising from an extra Judicial Order. Statutory recognition for this type of sale seems to have been a gradual process and in earlier times courts have gone to the extent to observe it to be harsh and deplorable. However the legislature thought it fit to enact laws to facilitate and expedite debt recovery, as large sums of money due to Banks on loan facilities, remained unsettled. Eventually significant changes occurred in the 1990 era and several statutes were enacted to facilitate debt recovery. Just to mention a few i.e Debt Recovery (Special Provisions) Act No. 2 of 1990, Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, Mortgage Amendment) Act No. 3 of 1990, Consumer Credit Act No. 7 of 1990. Trust Receipts (amendments) Act No. 13 of 1990 etc. Very many such statutes of this category empowered Banks and other institutions as

described in statutes to resort to parate execution and gives the power to non-judicial persons (Board of Directors of a Bank as the case may be)to take the decision to sell the mortgaged property to recover unsettled loans, having complied with the requirements of the statute.

The learned counsel for the Respondent however argued before us, that an auction sale did not take place and that there was no valid auction sale as contemplated by law. He also urged inter alia that notice of auction sale was sent only three days prior to the auction sale and contrary to the required provisions in law. It was also evident to this court that learned counsel for the Respondent did not wish to make any comments in support of the order of the High Court.

The learned President's Counsel for the Petitioner however demonstrated to this court the requirements laid down in Section 16(1) and Section 15 of the above law and maintained throughout the hearing and by his submissions supported the Order of the learned District Judge and also submitted that the High Court had misdirected itself in law and fact and made order contrary to law. Learned President's Counsel placed much emphasis inter alia in his submission to the conclusive nature of the certificate of sale as contemplated by Section 15 of the said Act. He also submitted to court that Section 15 of the said Act would not permit the borrower or any other person

claiming through the borrower to invalidate the sale for any cause whatsoever or maintain any right or interest to the property as against the purchaser.

Having perused the Judgment of the learned High Court Judge, I find that good part of the Judgment consists of a narration of the case of each other as referred to in their written submissions. The only point considered by the High Court was that Petitioner Bank had not given reasonable notice or due notice as required by Section 347 of the Civil Procedure Code, regarding notice of the application for writ (not contested by Respondent). High Court also observes that as submitted and stated by the Petitioner Bank, the Respondent has not challenged the order of the District Court on the question of Order issuing the writ. High Court rejects that position of the Petitioner Bank as above, and holds that due notice of application for writ of execution had not been given by the Petitioner Bank. Accordingly the High Court had set aside the Order of the learned District Judge dated 23.04.2010 which seems to have been confused as an Order issuing writ and directed the learned District Judge to re-issue notice of the application for writ to the Respondent.

There is no doubt that the learned District Judge made his Order, making the order nisi absolute on 23.04.2010. In the Revision Application before the High Court no relief was prayed for against execution of the writ. Material furnished to this court, Petitioner sought to execute the writ of execution on

17.05.2010 ('Y' F1). As such one year has not lapsed from the date of decree to the application of writ.

I do agree with the submissions of learned President's Counsel that in the absence of a right of appeal against the Order made under Section 16 of Act No. 4 of 1990, the Judgment creditor is entitled to execute the writ on the basis there is no appeal. It seems to me that the High Court erred in holding that the Petitioner made an application for writ of execution on 17.10.2010 whereas the application was in fact made on 17.05.2010. I also agree with the submissions of learned President's Counsel that the High Court failed to consider that Respondent challenged Order of the learned District Judge dated 23.04.2010 on the basis that the certificate of sale is invalid and Petitioner has not adduced evidence to show that an auction sale was held on 03.10.2003. High Court had erroneously misdirected itself on basic facts, that transpired in the District Court.

The learned District Judge has concentrated on the evidence led and referred to in his order (E) that the Respondent has defaulted in the repayment process of the loan granted to him. Order further states that the Petitioner Bank sold the property in dispute under a duly passed resolution by the Petitioner Bank and that the Bank becomes in terms of the certificate of sale (P4) the owner. It is concluded by the learned District Judge that the Respondent

failed to provide material as to why the said decree nisi should not be made 'absolute'.

In this Judgement I have discussed very briefly parate execution. Judicial authority described legislation enacted to expedite debt recovery as special legislation which conferred special jurisdiction. G.P.S de Silva J. (a former Chief Justice) in Bakmeewewa, Authorised Officer of People's Bank Vs. Konarage Raja 1989(1) SLR 231 held in a case under the Finance Act that the jurisdiction exercised by the District Court is a special jurisdiction. Case discussed therein is very similar to the case in hand and held further that Section 72(7) and 72(8) of the said law provide for a speedy mode of obtaining possession of premises, which have already vested in the Bank by virtue of the vesting order. He further held that an application made to the District Court and the provisions of Chapter 24 of the Civil Procedure Code are invoked solely for the purpose of executing an extra judicial order. To make it very clear a distinction has been made by G.P.S. de Silva J. and he observes that Section 23 of the Judicature Act provides for a right of appeal in respect of Judgment of the District Court made in the exercise of its ordinary, general, civil jurisdiction and has no application to the special jurisdiction conferred on the District Court.

In the above circumstances the Petitioner Bank is entitled to execute the writ notwithstanding the notice of appeal. Act No. 4 of 1990 has not provided for a right of appeal against an order made by the District Court in terms of Section 16 of the said Act. Martin Vs. Wijewardena 1982 (2) SLR 409 at 420 Jameel J. held "an appeal is a statutory right and must be expressly created and granted by statute. It cannot be implied. The law is clear and I would say it is trite law on the point as in Section 16(1) of the said Act. The method followed by the Petitioner Bank to regain possession of the land in dispute cannot be faulted in any respect.

Section 16(1) of the Act no doubt provides, upon production of the certificate of sale issued in respect of that property under Section 15, entitle the Petitioner Bank to obtain an order for delivery of possession of that property. Wording in Section 16(1) is almost similar to Section 72(7) of the Finance Act No. 16 of 1973. Both statutes require the production of the vesting order or the certificate of sale as the case may be. Both statutes in this way provides for delivery of possession of property and so enacted by the legislature to expedite such delivery of possession. Certificate of sale is conclusive proof in respect of that property and as regards its sale being duly complied with in terms of the Act. As such the certificate of sale cannot be challenged, if and when it is issued in terms of the said Act.

The law as contemplated in Act No. 4 of 1990, and as amended, need to be strictly interpreted. The words employed by the said statute cannot be given any extended meaning other than to achieve the purpose of the statute. As such as observed in this Judgment the intention of the legislature was to expediate debt recovery under a special jurisdiction exercised by the District Court.

As such the questions of law are answered as follows.

Question No. (1) & (2) yes.

(3) High Court erred in law in exercising revisionary jurisdiction in the absence of exceptional circumstances, which should have been established by Respondent. In any event High Court was in a serious error.

(4) It is elementary that where both Petitioner and Respondent are present. Proceedings commence in summary procedure by Respondent stating his objections to the petition. Further, Respondent is entitled to read his affidavit or other documentary evidence or with leave of court lead oral evidence. I note that no documentary evidence can be so read without express leave of court unless a copy of document is served on the Petitioner at least 48 hours before hearing (Section 384). Documents may not be introduced with written submissions. However the evidentiary value conferred on the certificate of sale as per Section 15 of Act No. 4 of 1990 cannot be contested as the certificate is conclusive. As such upon the production of the certificate of sale the Petitioner Bank is entitled for delivery of possession of the property in dispute.

This appeal is allowed. The Judgment of the High Court is set aside. We affirm the Order of the District Court.

Appeal allowed, without costs.

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

V.A.K.Cisilin Nona alias
Pesonahamy
Moratota
Pelmadulla
Plaintiff-Respondent-Appellant

S.C.Appeal No.190/2012
S.C.(SPL) LA No.44/2012
Court of Appeal Case No.249/99[F]
D.C.Ratnapura Case No.11254/D Vs.

Gunasena Jayawardana
Moratota
Pelmadulla
Defendant-Appellant-Respondent

BEFORE : PRIYASATH DEP, PC, J.
PRIYANTHA JAYAWARDENA, PC, J.
K.T.CHITRASIRI,J.

COUNSEL : Chathura Galhena with Ms.Manoja Gunawardana
for the Plaintiff-Respondent-Appellant
S.N.Vijithsingh
for the Defendant-Appellant-Respondent

ARGUED ON : 02.02.2016

WRITTEN : 16.11.2012 by the Defendant-Appellant-Respondent
SUBMISSIONS ON : 21.07.2015 by the Plaintiff-Respondent-Appellant

DECIDED ON : 05.05.2016

CHITRASIRI, J.

Plaintiff-Respondent-Appellant (hereinafter referred to as the Appellant) instituted this action in the District Court of Ratnapura claiming *inter alia* 1/10th share of the land described in the schedule to the plaint and to have the defendant-appellant respondent (hereinafter referred to as the respondent) evicted therefrom. Respondent filed his answer praying for dismissal of the action. The case was then taken up for trial on 10.07.1995. On that date, the appellant was not ready for the trial. On her application the trial was fixed for 12.12.1995. On that date too, the trial was once again re-fixed anticipating a settlement. The case was again re-fixed on the third date of trial, stating that there was no settlement and it was re-fixed for 22.10.1996. On that date also, the case was again postponed since the learned trial judge was on a transfer order to another station. Then the case was taken up for trial on 27.05.1997.

On this particular day, learned Counsel for the respondent informed Court that he had not received instructions from the respondent to appear for her. Immediately thereafter, learned trial judge took the matter up for hearing in the absence of the respondent considering it as an *ex parte* trial. It is evident by the journal entry made on 27.05.1997. Accordingly, the judgment was delivered on that date itself. The journal entry made on the aforesaid date reads thus:

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නැවත විභාගය (5)
පැ/නි වෝල්ටර් සිල්වා මයා
වි/නි ඒ.එල්.එම්. ජුනයිදීන් මයා
පැමි සිටි.
වි නැත.

විත්තියෙන් උපදෙස් නැති බව නිතීඥ ජුනයිදීන් දන්වා සිටි.
සටහන් බලන්න.

ඒක පාක්ෂික තීන්දු ප්‍රකාශය ඇතුලත් කළ පසු විත්තියට භාර කරවා අඩ
3/10/97
අත් කලේ/

[At page 12 in the appeal brief]

Accordingly, *ex parte* decree was entered and it had been served on the respondent. Thereafter, respondent made an application under Section 86(2) of the Civil Procedure Code to have the *ex parte* decree set aside. Learned District Judge refused the said application. As a result, the *ex-parte* judgment remained valid. Being aggrieved by that order, appellant filed an appeal to the Court of Appeal. Court of Appeal made order setting aside the order of the learned District Judge and directed the original court to have a *trial de novo*. The matter before this Court now, is to determine the correctness of the judgment of the Court of Appeal. The issue that was argued in the Court of Appeal was whether the trial held in the District Court should have been a trial *ex parte* or was it a trial *inter partes*. In other words, had the trial judge followed the proper procedure when he decided to take up the matter *ex parte*

consequent to the submissions made by the counsel for the respondent as to his appearance?

The order made by the learned District Judge on 27.05.1997 shows that he has taken up the matter, considering it as an *ex parte* trial. The judgment and the decree entered in that case also was on that basis. Thereafter, learned trial judge made order to serve a copy of the decree as required by Section 85(4) of the Civil Procedure Code. Consequently, an application also had been made under Section 86(2) of the Civil Procedure Code by the respondent upon receiving the decree to have the decree vacated. Accordingly, it is clear that the appeal made to the Court of Appeal was to set aside the order made in the application filed under Section 86(2) of the Civil Procedure Code.

As referred to earlier, the Court of Appeal was basically on the question that the trial in the original court was an *ex parte* or it was a trial *inter-partes*. Having considered the authorities, Court of appeal held that it should have been a trial *inter-partes*. Hence, I will now look at the issue to determine whether the Court of Appeal was misdirected when coming to such a decision.

In Andappa Chettiar vs. Sanmugam Chettiar, [33 NLR at 217] it was held that;

> *" When a case is called when the proctor on the record is present in Court constitutes an appearance for the party from whom the proctor holds proxy, unless the proctor expressly informs the Court that he does not,*

on that occasion appear, for the party. Accordingly, it was held that the matter cannot be re-opened due to the absence of the party when the proctor has marked his appearance before the judge".

In that case **Macdonell, C.J.**held thus:

"The Commissioner quite rightly refused to do so, since the proceedings whereon that judgment was pronounced were inter partes". (at page 221)

Lyall Grant J, in that case held as follows:

"For the reasons given in answering the first terms of reference, I think that there was an appearance by the defendant and that the judgment therefore was not ex parte.

It purported to be inter partes but was not properly entered, inasmuch as the plaintiff was not called upon to give evidence in support of a claim to which a specific defence had been entered".[at page 226].

Identical issue was dealt with by Jayasinghe J. in **Isek Fernando Vs. Rita Fernando and others. [1999(3) SLR 29]** In that decision it was held thus:

"Appearance may be by the party in person or by his counsel or his registered Attorney, and where the defendant is absent but is represented by counsel or by Attorney-at-Law and the Court is satisfied on the evidence adduced by the plaintiff, Court must enter a final judgment and not an Order Nisi. Judgment must be considered as being pronounced inter-partes and not ex parte."

Having referred to the law applicable in this connection, I will now advert to the facts of this case in order to determine whether the trial in the original court was *inter-partes* or was it a trial *ex-parte*. Both in the journal entry and in the proceedings recorded on 27.05.1997 show that Mr.Junaideen Attorney-at-law, on that date, he being the proxy holder had marked his appearance on behalf of the respondent. Even the answer of the respondent had been filed under his name. Having marked his appearance for the respondent, he has merely submitted that the respondent had not given him instructions to appear on that particular date.

Authorities referred to above show that the trial judge, under those circumstances should have taken up the matter considering it as an *inter-parte*s trial and allowed the counsel to cross examine the witness. Accordingly, it is clear that the Court of Appeal has correctly decided the issue in this case having adopted the law relevant thereto. In the circumstances, I am not inclined to interfere with the decision of the Court of Appeal.

At this stage, it is also necessary to refer to the contents that are required to be mentioned in a judgment irrespective of the fact that it was a judgment delivered upon holding an *ex-parte* trial or trial *inter-partes*. Those matters that should contain in a judgment are mentioned in Section 187 of the Civil Procedure Code and it reads thus:

187. *The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively.*

In this instance, the impugned judgment contains only one line and it reads as follows:

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ඒක පාක්ෂික තීන්දු ප්‍රකාශය ඇතුලත් කල පසු විත්තියට භාර කරවා අඩ ගසන්න. 97.10.03

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දිසා විනිසුරු - රත්නපුර
97.05.27

I will now refer to the authorities relevant to this particular issue. In the case of **Sirimavo Bandaranaike Vs. Times of Ceylon, [1995 (1) SLR 22]** it was held thus:

"Even in an ex parte trial, the judge must act according to law and ensure that the relief claimed is due in fact and in law, and must dismiss the plaintiff's claim if he is not entitled to it. An ex parte judgment cannot be entered without a hearing and adjudication."

Clearly, the impugned judgment does not contain the matters referred to in Section 187 of the Civil Procedure Code. The authorities referred to hereinbefore show the importance of having those matters in a judgment of a court. In view of the above, it is clear that the *ex parte* judgment delivered in this case is contrary to law particularly because no proper evaluation of evidence had been made by the learned District Judge in this instance. Therefore, such a judgment cannot be allowed to stand before the eyes of the law.

Learned Counsel for the appellant also submitted that the Court of Appeal should not have considered the question as to the manner in which the case was taken up for trial in the District Court since no such a matter had been mentioned in the petition of appeal. However, merely because an issue of that nature had not been referred to in the petition of appeal, the Court of appeal is not prevented from looking at such a question since it amounts to a question of law.

Section 758 (2) of the Civil Procedure Code stipulates that the court deciding any appeal shall not be confined to the grounds set forth by the appellant. The said Section 758(2) stipulates thus:

> 758(2) *The Court in deciding any appeal shall not be confined to the grounds set forth by the appellant, but it shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of being heard on that ground.*

In view of the above provision in law, I am not inclined to agree with the contention of the learned Counsel for the appellant. Accordingly, I am of the opinion that the appellate courts are empowered to consider an issue concerning a question of law despite the fact that such a question is not being mentioned or agitated in the petition of appeal.

For the aforesaid reasons, I affirm the judgment dated 27.01.2012 of the Court of Appeal. Accordingly, the decisions of the Court of Appeal are to remain intact. Registrar is directed to take steps accordingly,

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, 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 Leave to Appeal under Section 5(2) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 read with Section 754(2) of the Civil Procedure Code.

Sarangi Charika Kuruppu of No 3/14,
Canbera Avenue, Dandenong , Australia and appearing by her power of attorney holder Gulawattage Don Dayaratana of Ovitigala Road, Munagama, Horana.

PLANTIFF

SC Appeal NO 194/2011
S.C (H.C) L.A No.46/2011
C.H.C NO. 295/2010/MR

Vs.
DFCC Bank PLC of No 73/5, Galle Road,
Colombo 03.

DEFENDANT

And Now
Sarangi Charika Kuruppu of No 3/14, Canbera Avenue, Dandenong , Australia and appearing by her power of attorney holder Gulawattage Don Dayaratana of Ovitigala Road, Munagama, Horana

PLANTIFF-PETITIONER

Vs.

DFCC Bank PLC of No 73/5, Galle Road,

Colombo 03.

DEFENDANT-RESPONDENT

Before

Chandra Ekanayake, J.
Priyasath Dep, PC J
Buwaneka Aluwihare, PC J

Counsel	S.A Parathalingam,PC with Varuna Senadeera for the Plaintiff Appellant Kushan D'Alwis, PC with Kaushalya Nawaratne for the Defendant-Respondent.
Argued on	15.12.2015.
Written Submissions tendered on	23.11.2011 (by the Plaintiff-Appellant) 16.02.2012 (by the Defendant Respondent)
Decided on	28. 03. 2016.

Chandra Ekanayake, J

The plaintiff- appellant (hereafter referred to as the appellant) by petition dated 01/06/2011 filed in this Court (together with an affidavit of her power of attorney holder) had sought inter-alia leave to appeal against the order of the Learned Judge of the Commercial High Court dated 13/05/2011, to set aside the same and to issue an interim injunction as prayed for in sub-paragraph (f) of the prayer to the plaint filed in case No.CHC/295/2010/ MR in the Commercial High Court of Colombo. An order staying all proceedings in the aforesaid case No: CHC/295/2010/MR and also for an order suspending the operation of the said order dated13.05.2011 until final conclusion and determination of this case were also sought by the appellant (as per sub-paragraphs (d) and (e) of the the prayer to the petition)

When the above application was supported on 27/11/2011 this Court had granted leave to appeal on the following questions of law :-

(1) has the Learned Judge of the Commercial High Court erred in holding that the purported cause of action of the petitioner is based on the conduct of a recipient of rights from a co-owner of a land in respect of which the petitioner has co-owned rights and not a cause of action based on a "commercial transaction" between the respondent bank and the other co- owner?

(2) has the the Commercial High Court Judge erred in proceeding to make order after coming to the categorical finding that the transaction pleaded in the plaint is not a "commercial transaction"?

(3) has the Learned judge of the Commercial High Court in his said order erred and/or misdirected himself in applying the judgment in Abeywardana Vs Abeywardana (1993) 1 S.L.R 272 to the facts of this case and thereby erroneously holding that the contents of the affidavit tendered with the plaint may be based on hearsay and cannot

be accepted for the purpose of confirming a cause of action?

(4) has the Learned Judge of the Commercial High Court in his said order erred in holding that the affirmant of the said affidavit should adduce his grounds of belief, has totally disregarded the provisions of Section 181 of the Civil Procedure Code

5. The appellant had instituted action against the defendant - respondent bank(hereinafter referred to as the respondent) praying for the following main reliefs, namely :-

- that the aforesaid mortgage bond bearing No 552 dated 29/03/2006(X11) and that the notice of resolution passed by the board of directors of the respondent bank (X13) are wrongful, unlawful , ab-initio null and void and of no force or avail in law,

- that the respondent is not entitled to sell by public auction the land and premises morefully described in the schedule to the plaint in terms of the said resolution (X13) and to sell by public auction the said property based on the aforesaid mortgage bond (X11),

- a permanent injunction preventing the respondent and its servants, agents and all those holding under it from taking further steps in terms of the said resolution and/or selling, and/or alienating and/or in any other manner disposing the said property - vide sub prayer (e) of the prayer to the plaint.

The basis of the plaint is as follows :-

The appellant had become aware of notice of a resolution (X13)passed by the board of directors of the respondent bank under Section 8 of the Recoveries of Loans by Banks (Special Provisions) Act No 4 of 1990 published in the newspapers. The appellant had made repeated representations not to take any further steps with regard to the said resolution. Notwithstanding the aforesaid requests the respondent bank had proceeded to take further steps in respect of the said resolution. It is the stance of the appellant that Attanayake

Mudiyanselage Ariyadasa (the step father of the appellant) who being a person said to be entitled only to an undivided 2/6 share of the said property is not entitled to execute a mortgage bond in respect of the entirety of the property. The appellant contends that on or about 29.03.2006 the said A.M.Ariyadasa has purported to have mortgaged the entirety of the said land and premises which is morefully described in the schedule to the plaint by mortgage bond bearing No.552 of 29.03.2006 attested by S.D.N.Kannangara N P - (X11). It has been further contended by the appellant that she was not a signatory to the said mortgage bond and A.M.Ariyadasa by executing the said mortgage bond in the above manner has acted in derogation of the the rights of appellant in respect of the said property. As per the title averred in the plaint the appellant is entitled to an undivided 1/6 share of the property. On the above basis the appellant claims that the said mortgage bond is wrongful, unlawful, ab-initio null and void and of no force or avail in law and thus the respondent is not entitled to sell by public auction the property described in the schedule to the plaint.

When the application in the plaint was supported before the Commercial High Court on 19/05/2010 Learned Judge had issued an enjoining order as pleaded in sub prayer (g) of the plaint together with a notice of interim injunction. On receipt of the same the respondent had filed its statement of objections (together with an affidavit and documents). The inquiry into the application for interim injunction had been disposed of by way of written submissions. The Learned Judge had pronounced the impugned order dated 13/05/2011. By the above order the appellant's application for interim injunction was dismissed.

At the hearing before this Court Learned Counsel who appeared for the appellant heavily laid stress on the fact that aforesaid A.M Ariyadasa who is entitled only to an undivided 2/6th share of the said property is not entitled to execute the aforesaid mortgage bond bearing No 552 dated 29.03.2006 in respect of the entirety of the said land and premises, which being a co-owned property.

Perusal of the impugned order reveals that the Learned Judge had observed the following:-

(a) that the defendant had not raised any objection with regard to jurisdiction of the Court in the Commercial High Court,

(b) for the Court to be clothed with jurisdiction to hear and conclude a case of this nature the cause of action has to be one which has arisen on a commercial transaction. The alleged cause of action submitted by plaintiff is against the defendant bank and a careful consideration of the averments in the plaint disclose that the alleged cause of action has not arisen from a commercial transaction between the two parties,

(c) if at all any commercial transaction could arise between the defendant bank and the 2nd husband of the plaintiff's mother who is a co-owner of the mortgaged property,

(d) for the above reasons this cause of action has not arisen on a commercial transaction between the appellant and the respondent.

Further at page 6 of the impugned order he had concluded that in terms of Section 4 of the above mentioned Act No. 4 of 1990, a resolution can be passed by the bank in respect of any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover unpaid portion of such loan and interest thereon subject to the terms stipulated in section 13 of the Act. The said Section 4 thus reads as follows:-

> "Subject to the provisions of Section 7 the Board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan , and the interest thereon upon the date of the sale , together with the moneys and costs recoverable under Section 13."

By sub prayers (a) and (b) to the petition the mortgage bond (X11) and the board resolution (X13) are sought to be declared null and void. As per sub prayers (d) and (e) to the plaint, a declaration to the effect that the respondent is not entitled to sell the mortgaged property by public auction and a permanent injunction preventing the respondent from taking any steps in relation to the resolution (X13) have been sought respectively. By sub prayers (f) and (g) to the plaint an interim injunction and an enjoining order also had been sought.

A party who seeks an interim injunction must as a rule, should satisfy Court on three requirements viz;

(i) has the plaintiff made out a *prima facie* case?

(ii) does the balance of convenience lie in favour of the plaintiff?

(iii) do the conduct and dealings of the parties justify the grant of the same. In other words do equitable considerations favour the grant of an interim injunction.

The first and foremost thing that should be satisfied by an applicant seeking an interim injunction is: "has the applicant made out a *prima-facie* case"? in other words, it must appear from the plaint that the probabilities are such that the party who is seeking the interim injunction is entitled to a judgment in his favour. That is the plaintiff must show that a legal right of his is being infringed and that he will probably succeed in establishing his rights. A prima facie case - does not mean a case which is proved to the hilt, but a case which can be said to be established if the evidence which is led in support of the same were believed and accepted. In the case of Martin Burn Ltd., v. R.N.Banerjee, (AIR) 1958 SC 79 at 85: the Supreme Court of India (Bhagwati, J) had opted to outline the ambit and scope of connotation "*prima-facie*" case as follows:-

"A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. *While determining whether a prima facie case had been*

made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence."

When deciding whether a *prima facie* case has been established by an applicant for an interim injunction, the court has to first satisfy itself that there is a serious question to be tried at the hearing and that on the facts and circumstances of each case whether there is a probability that the plaintiff is entitled to the relief claimed. In this regard pronouncement by Dalton J, (at page 34) in the case of Jinadasa vs. Weerasinghe (31 NLR 33) would lend assistance. Per Dalton, J., whilst adopting the language of Cotton L.J. in Preston Vs. Luck (Supra) (1884) 24 CH.497:-

" In such a matter court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff are entitled to relief."

When considering whether an applicant for an interim injunction has passed the test of establishing a *prima facie* case, the Court should not embark upon a detailed and full investigation of the merits of the parties at this stage. But, it would suffice if the applicant could establish that probabilities are that he will win. In this regard assistance could also be derived from the decision in Dissanayake vs Agricultural and Industrial Corporation 1962 - 64NLR 283. Per H.N.G. Fernando J., (as he then was) in the above case at page 285:-

"The proper question for decision upon an application for an interim injunction is 'whether there is a serious matter to be tried at the hearing' (Jinadasa vs.Weerasinghe[1]). If it appears from the pleadings already filed that such a matter does exist, the further question is whether the

circumstances are such that a decree which may ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction is not issued."

The following principles of law were enunciated in F.D.Bandaranaike vs. State Film Corporation (1981 2 SLR 287) with regard to the sequential tests that should be applied in deciding whether or not to grant an interim injunction. Those are :-

- 'has the plaintiff made out a strong *prima facie* case of infringement or imminent infringement of a legal right to which he has title, that is, that there is a question to be tried in relation to his legal rights and that the probabilities are that he will win,
- in whose favour is the balance of convenience,
- as the injunction is an equitable relief granted in the discretion of the Court do the conduct and dealings of the parties justify grant of the injunction.'

With regard to a *prima facie* case the conclusion in the impugned judgment appears to be that the appellant has no claims for a *prima facie* cause of action. Further it is stated that under section 4 of the above Act No.4 of 1990 read with provisions of section 7 the board of directors of the bank may by a written resolution authorize a sale by public auction of any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the money stated therein. The appellant's main complaint is that entire property has been mortgaged inclusive of her undivided share also. This alone would suffice to arrive at the conclusion that there is a serious question to be tried pertaining to the appellant's legal rights. When the entire transaction is considered it has arisen from a commercial transaction. It is not necessary that the appellant should be certain to win the main case. For the above reasons I am inclined to the view that the appellant has succeeded in establishing a *prima facie* case.

If a *prima facie* case is established then we go on and see where the balance of convenience lie and whether equitble considerations favour the grant of the injunction.

In the aforecited case of F.D.Bandaranaike vs. State Film Corporation (1981 2 SLR 287), Justice Zosa has summarized the matters in granting an interim injunction at page 302. He has proceeded to state as follows :-

> "In Sri Lanka we start off with a *prima facie* case that is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning. It is not necessary that the Plaintiff should be certain to win. It is sufficient if the possibilities are he will win."

When all the facts and circumstances of this case are considered it becomes amply clear that the damage the appellant would suffer in the event the injunction is refused would be greater than the damage if any, that would be caused to the other party. Therefore, the balance of convenience too favours the granting of the injunction. In my view equitable considerations also favour the issuance of the injunction.

Now I shall advert to consider the 3rd and 4th questions of law on which leave to appeal was granted by this Court. This leads me to examine whether the Learned Judge has misdirected himself in applying the decision in Abeywardena V Abeywardena – 1993 - 1SLR, 272 to the facts of this case and erroneously held that the contents of the affidavit may be based on hearsay and as such cannot be accepted to support the cause of action. The affidavit filed in the commercial High Court is filed by the power of attorney holder of the appellant. On a perusal of the affidavit I am unable to conclude that the affidavit is based on hearsay evidence.

With regard to the above affidavit the Learned Judge has observed that the facts averred in the affidavit do not appear to be within his personal knowledge and based on his personal

observations. All what is required is that an affidavit should satisfy the requirements stipulated in section 181 of the Civil Procedure Code.

It is well settled that an affidavit has to be filed along with the plaint when an interim injunction is sought by the plaint. However, the affidavit has to be in terms of section 181 of the Civil Procedure Code. In this case the conclusions arrived upon by the Learned Judge at page 7 of the impugned order does not appear to be correct for the reason that the affidavit in question is one in compliance with provisions of the above section 181. In view of the above analysis the 3rd and 4th questions of law also have to be answered in the affirmative.

For the aforesaid reasons I am inclined to the view that the conclusions arrived upon in the impugned judgment by the Learned Judge are found to be incorrect . Viewed in the above context I proceed to answer all questions of law on which leave to appeal was granted in the affirmative. This appeal is allowed with taxed costs. The interim injunction sought by sub prayer (f) to the plaint is granted operative till final determination of this action.

Registrar of this Court is directed to transmit a copy of this judgement together with the original record in Case No.CHC/295/2010/MR to the Registrar of the Commercial High Court, Colombo forthwith.

Judge of the Supreme Court

Priyasath Dep, 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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 197/2011

SC/ HCCA/LA/ 349/2011

CP/HCCA/Kandy/186/2008(F)

DC Kandy No/32786/MR

Keva Fragrances (Private) Limited,
Devakaran Mansion,
No. 36, Mangaldas Road,
Mumbai 400 002.

Plaintiff

Vs.

1. Bobby Industries (Private) Limited,
   No. 14, 1st Lane,
   Mawilmada,
   Kandy.
2. A. Razaak,
   Managing Director,
   Bobby Industries (Private) Limited,
   No. 14, 1st Lane,
   Mawilmada,
   Kandy.

Defendants

AND

Keva Fragrances (Private) Limited,
Devakaran Mansion,
No. 36, Mangaldas Road,
Mumbai 400 002.

Plaintiff Appellant

Vs.

1. Bobby Industries (Private) Limited,
   No. 14, 1st Lane,
   Mawilmada,
   Kandy.
2. A. Razaak,
   Managing Director,
   Bobby Industries (Private) Limited,
   No. 14, 1st Lane,
   Mawilmada,

   Kandy.

Defendant Respondents

AND NOW BETWEEN

Keva Fragrances (Private) Limited,
Devakaran Mansion,
No. 36, Mangaldas Road,
Mumbai 400 002.

Plaintiff Appellant-Appellant

Vs.

1. Bobby Industries (Private) Limited,
   No. 14, 1st Lane,
   Mawilmada,
   Kandy.
2. A. Razaak,
   Managing Director,
   Bobby Industries (Private) Limited,
   No. 14, 1st Lane,
   Mawilmada,
   Kandy.

Defendant Respondent-Respondents

BEFORE	:	PRIYASATH DEP, PC, J. SISIRA J DE ABREW, J. UPALY ABEYRATHNE, J.
COUNSEL	:	M.U.M. Ali Sabri, PC, with Ruwantha Cooray for the Plaintiff Appellant-Appellant Faiz Musthapha, PC, with Ashiz Hassin for the Defendant Respondent- Respondents
WRITTEN SUBMISSION ON:		24.11.2015 (Plaintiff Appellant-Appellant) 16.03.2016 (Defendant Respondent -Respondents)
ARGUED ON	:	29.10.2015
DECIDED ON	:	11.08.2016

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of the Central Province holden at Kandy dated 27.07.2011. By the said judgment the Civil Appellate High Court has set aside the judgment of the learned District Judge of Kandy dated 22.04.2008 and sent the case back to the District Court of Kandy for a trial *De novo* on the same pleadings. By the said judgment the learned District Judge has dismissed the action of the Plaintiff Appellant - Appellant (hereinafter referred to as the Appellant) instituted against the Defendant Respondent Respondents (hereinafter referred to as the Respondents) on the basis

that the Appellant has failed to prove the case. The Appellant sought leave to appeal from the said judgment of the Civil Appellate High Court and this Court granted leave to appeal on the questions of law set out in paragraph 13 (e) (f) (h) and (i) of the Petition of Appeal dated 06.09.2011. Said questions of law are as follows;

(e) Did the High Court err in law in deciding to order a trial *Denovo* after clearly coming to a conclusion that the Respondents have failed to discharge the burden of proof thrust upon them by the court based on admissions so recorded?

(f) Is the judgment of the High Court contrary to the principles of burden of proof wherein the Respondents have failed to establish payments for goods admittedly received and the Appellant has establish its case by proving supply of goods?

(h) Did the High Court err in law in failing to arrive at the correct conclusion and to carry out with the right decision based on the materials and evidence surfaced and/or transpired during the trial as depicted by the case record in remitting the case back to trial *De novo* when the judges could have clearly entered judgment in favour of the Appellant?

(i) Is the said order totally contradictory to the legal precedent created by the superior courts in similar circumstances?

The Appellant instituted the said action against the Respondent to recover a sum of US $ 68,505/- together with the legal interest. The Appellant averred that he was carrying on a business of manufacturing and exporting perfume and fragrance essence based in Mumbai, India, and the 1st Respondent

was engaged in the business of the appellant in buying perfume and fragrance essence for about 20 years until the year 1998. At the beginning of the business with the Respondents, for several years, goods were supplied after the letters of credit opened at relevant banks and since the Respondent was able to demonstrate his trustworthiness, the goods were therefore supplied on sight draft issued by banks. After 1998 the Appellant noticed that the Respondents were in the habit of delaying payments for the goods supplied and certain consignments of goods had been left unpaid. Having noticed that the payments for 09 invoices had not been settled by the Respondent, in July/August 2002, the Appellant stopped supply of goods ordered by the Respondents. In paragraph 11 of the plaint the Appellant averred that the Respondent has failed to settle the monies due on following invoices.

Proforma Invoice No.	Date	Amount US$
1. KF-233-1999	24.01.2000	4,500/-
2. KF-333-2000	14.03.2001	3,175/-
3. KF-17-2001	17.04.2001	8,050/-
4. KF-58-2001	23.05.2001	3,000/-
5. KF-116-2001	20.07.2001	11,275/-
6. KF-189-2001	13.10.2001	5,430/-
7. KF-287-2001	29.01.2002	5,250/-
8. KF-352-2001	30.03.2002	12,475/-
9. KF02-03/0090	10.07.2002	15,350/-
Total		68,505/-

Said invoices have been produced with the plaint marked P 1 to P 9. At the trial the Appellant has marked the said invoices as P 13 to P 21 and the Respondent has marked the same invoices as D 15 to D 23.

In paragraph 10 of their answer, the Respondents whilst denying the averments contained in paragraph 11 of the plaint, have averred that they have settled all the payments which were due to the Appellant from the Respondents. In proof of that the Respondents produced certain documents with the answer marked D 1 to D 9. The aforesaid position taken up by the Respondent crystallized the fact that the Respondent had received the goods in question. Hence the whole case revolves around the alleged payments made by the Respondents.

At the trial the Appellant raised the issues No 01 and 02 on the averments contained in paragraph 11 of the plaint as follows;

1. Was a sum of US$ 68.505/- due from the Defendant to the Plaintiff upon the supplying of essential oil as mentioned in paragraph 11 of the plaint?
2. Did the Defendant default the payment of US$ 68.505/- as reflected in the invoices mentioned in paragraph 11 of the plaint on demand to the plaintiff?

The Respondent raised issue No 06 on the averments contained in paragraph 10 of the answer as follows;

06. Did the Defendant settle all the payments to be made to the Plaintiff as reflected in documents averred in paragraph 10 of the answer?

In view of the issue No 06 the burden of proof shifted on the Respondent to prove his case and he was requested to begin the case. Accordingly the Respondent has called several witnesses from several banks to prove certain payments made by the said banks to the Appellant which were set out in paragraph 10 of the answer. I now deal with the evidence of the said witnesses since the

Appellant's grievance was that both courts have failed to evaluate the evidence of the witnesses correctly who testified for the case of the Respondent, and failed to consider the defence set out by the Respondent in the light of the evidence so led.

Witness Janaka Kurukulasuriya who represented the Union Bank testified to the effect that the letter dated 06th October 2004 marked V 4 was issued on the request of the Respondent to certify the fact that the transactions revealed therein had been made in favour of Keva Fragrance Limited, Mansion 36, Mangaladas Road, Mumbai, India, on behalf of the Respondent. Said transactions are as follows;

Transaction Date	Transaction Ref. No	Amount US$	Proforma Invoice No	Date
11.05.2001	UBC/KDY/TT/01/01	3,000/-	73-S	10.04.2001
09.07.2001	UBC/KDY/TT/01/04	5,625/-	55-SE-01.02	18.06.2001
19.03.2002	UBC/KDY/TT/02/12	6,300/-	189-A-0102	05.02.2002
28.06.2002	UBC/KDY/TT/02/14	5,350/-	No number	20.06.2002

Witness produced the said invoices marked V 5, V 6, V 7 and V 8 respectively. It is clearly seen from the above details of the said documents that the Appellant's case was not based on the invoices marked V 5 to V 8. A comparison of V 5 to V 8 with P 13 to P 21clearly exhibits that none of the said payments made by the Union Bank had been made to settle any of the amounts mentioned in the invoices P 13 to P 21. Witness Kurukulasuriya too in his evidence has admitted that the details contained in V 5 to V 8 do not tally with the details in P 13 to P 21.

Witness Darshan De Silva, who was called by the Respondent to prove the payments made by the Hatton National Bank, in his evidence producing a letter, dated 26.01.2005, marked V 1 said that the Hatton National Bank had transferred a sum of US$ 7250/- in favour of Keva Fragrance Limited on

10.04.2001. The witness produced a hand written proforma invoice No 1/2001(S) dated 23.03.2001, which was relevant to the said transaction, marked V 2. It is clearly seen from V 2 that the proforma invoice number, date and amount indicated therein or the amount mentioned in V 1do not tally with the proforma invoices marked P 13 to P 21.

The next witness called for the Respondent's case was Sashik Abdul Kadar, the Manager, International Branch, Peoples Bank. In his evidence he testified to the effect that on 09th of July 2001 the Peoples Bank International Branch had remitted a sum of US$ 5650/- in favour of Keva Fragrance Limited. In proof of that he produced a letter dated 22.09.2004 marked V 9. Even though he could not produce a proforma invoice relevant to the said transfer of US$ 5,650/-. The witness admitted that in the absence of such proforma invoice he was not in a position to substantiate the said payment US$ 5,650/- was in respect of any of the invoices referred to in the plaint marked P 13 to P 21.

Witness Harsha Chaminda Walpola who represented the Hongkong and Shanghai Banking Corporation Limited, has produced a letter dated 01st September, 2004 marked V 11. In his evidence the witness said that the said letter was dispatched by the Bank to confirm the telegraphic transfer of a sum of US$ 10,000/- on 20th June 2002 under reference TT KAN200030MNY favouring Keva Fragrance Pvt. Limited. It is clearly seen that said reference number and date, and the amount mentioned therein has no bearing on any of the invoices referred to in the plaint marked P 13 to P 21.

The next witness Mahinda Wijesundera Ranasinghe, an officer from the Bank of Ceylon, who gave evidence on behalf of the Respondent, produced a letter dated 6th September 2004 marked V 12 and testified that V 12 was sent to the Respondent in reference to his letter dated 19.07.2004 in confirmation of Swift

Transfer of a sum of US$ 6,175/- on 19.03.2002. But the witness had not produced an invoice pertaining to the said payment of US$ 6, 175/-. Hence the said payment of US$ 6,175/- too does not demonstrate that it was made in settlement of money due upon the invoices marked P 13 to P 21.

Thus it is crystal clear that all the aforesaid payments revealed by the said witnesses had not formed a part of the payments due on the invoices produced at the trial marked P 13 to P 21.

When the evidence led at the trial on behalf of the Respondent was as such, it is clearly seen that the learned District Judge has erred in evaluating the said evidence in a correct perspective. He has failed to examine the alleged payments made on behalf of the Respondent by the aforesaid financial institutions upon a due comparison with the payments due on the invoices produced at the trial marked P 13 to P 21. The learned District Judge has failed to give adequate reasons for the conclusions reached upon the invoices marked P 13 to P 21 and the alleged payments which the Respondent prayed court to believe those were made in settling the amounts indicated in the said invoices.

The learned High Court Judges having reached the conclusion that there was absolutely no evidence to support the view that the payments that were made by the Defendant Respondent in fact were made in respect of 09 invoices annexed to the plaint, have concluded that the case to be sent back to the District Court of Kandy for a trial *Denovo* on the same pleadings. But unfortunately before arriving at such conclusion the learned High Court Judges also have failed to adhere to the requirements to be considered by a court of law whether the facts and circumstances that were revealed at the trial on evidence warrant the case to be remitted back to the trial court for a trial *Denovo*.

The relevant provisions in section 773 of the Civil Procedure Code empower the Court of Appeal, **where think fit, or, if need be,** to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit. (Emphasis is mine)

In Lada vs. Marshall [1954] 3 All ER 745 at 748, Denning, L.J. said, "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

These conditions were taken into account and applied in *Ratwatte vs. Bandara 70 NLR 231 (SC)* where the question of the admission of fresh evidence at the hearing of the appeal was referred to; It was held that "Reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz., (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, (3) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible."

According to the said evidence led at the trial the Respondents' contention that they have settled all dues on the said 09 invoices is untenable. On the other hand said evidence crystallize the fact that the Appellant has proved on a balance of probability that the amount the Appellant is claiming from the

Respondents is due to the Appellant. I have no hesitation in concluding that overwhelming evidence adduced by the Appellant at the trial suffices to decide the matter without sending back for trial *Denovo.* The learned High Court Judges have failed to address their mind to the said requirements in law prior to reaching to the conclusion of a trial *Denovo.* Hence I answer the said questions of law in the affirmative.

In the circumstances I set aside the Judgment of the learned District Judge of Kandy dated 22.04.2008 and the judgment of the High Court of Civil Appeal of the Central Province holden at Kandy dated 27.07.2011. I hold that the Appellant is entitled to a judgment as prayed for in the plaint with cost in all courts. The learned District Judge is directed to enter a decree accordingly. Appeal of the Appellant is allowed with costs.

Appeal allowed.

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 application for Leave to appeal 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.

SC. Appeal No. 198/15

SC(HC) CALA/Application No. 594/14

NWP/HCCA/KUR/89/2011(F)

D.C Kuliyapitiya Case No. M/15408/06

ElectroRef Engineers (Pvt) Ltd.,
No. 74, Lesley Ranagala Mawatha
(Serpentine Road), Borella,
Colombo 8.

Defendant-Petitioner-Appellant-Petitioner-Appellant

-Vs-

Sandalankawa Coconut Production & Industrial Co-operative Society Ltd.,
Wetakeyyawa, Gonawila.

Plaintiff-Respondent-Respondent-Respondent-Respondent

BEFORE : Sisira J. de Abrew, J.
K. T. Chitrasiri, J. &
Prasanna S. Jayawardena, PC, J.

COUNSEL : I. S. de Silva with Sarath Walgamage for the Defendant-Petitioner-Appellant-Petitioner-Appellant.

Pulasthi Rupasingha for the Plaintiff-Respondent-Respondent-Respondent-Respondent.

ARGUED &
DECIDED ON : 25.07.2016

Sisira J. de Abrew, J.

Heard both Counsel in support of their respective cases.

The main point urged by learned Counsel for the Defendant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) is that, the Plaintiff – Respondent – Respondent (hereinafter referred to as Plaintiff – Respondent) has failed to prove the payment made by him to the Defendant - Appellant. He further submits that the judgment of the District Court is not in accordance with Section 187 of the Civil Procedure Code.

We have perused the documents and heard submissions of the learned Counsel. Learned Counsel for the Plaintiff-Respondent is unable to point out to Court as to how the payment of 43,000 $ was made to the Defendant-Appellant. He submits that he relies on the documents marked P7 and P8. We have perused the documents marked P7 and P8 but the said documents do not prove the fact that the payment had been made to the Defendant-Appellant. Prayer in the Plaint was to recover the full amount alleged to have been paid to the Defendant.

When we consider the totality of evidence led at the trial, we are unable to conclude that the Plaintiff-Respondent has paid the amount stated in the Plaint to the Defendant-Appellant.

In these circumstances, we hold that we are unable to

allow the judgment of the District Judge dated 27/03/2009 to stand. We therefore set aside the judgment of the learned District Judge and the judgment of the Civil Appellate High Court which affirmed the judgment of the District Judge.

We allow the appeal.

Case is sent back to the District Court for retrial.

Learned District Judge is directed to give priority and to conclude this case without delay.

In all the circumstances of this case, we do not make an order to pay costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

K.T. Chitrasiri, J.
I agree.

JUDGE OF THE SUPREME COURT

Prasanna S. Jayawardena, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

Ahm

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

In the matter of an Appeal from the Civil Appellate High Court of Ratnapura.

BogahawattaDurageChandana Pushpakumara, No. 36/14, Ratnapura Road, Pelmadulla.

Plaintiff

SC APPEAL No .202 / 2012
SC (HCCA) LA No. 160/2012
SP/HCCA/RAT/40/2010 LA
D. C. PELMADULLA , No. 125/ P

Vs

1.KottewattaArachchilageYasawathie Nanda Gunawardena,No. 98/5 DharmapalaMawathaPannipitiya.

2.NalinGankanda, UdahaWalawwa, Gallpoththawala, Pelmadulla.

3.Dinesh Rajiv Gankanda, UdahaWalawwa, Galpottawala, Pelmadulla.

4.VijithaGunatileka, No. 105, DharmapalaMawatha, Pelmadulla.

5. IduranPitiyaKankanamalage Ratnaseeli,DharmapalaMawatha, Pelmadulla.

6.
IduranPitiyaKankanamalageMangalasiri, DharmapalaMawatha, Pelmadulla.

7.
IduranPitiyaKankanamalageThusithananda,DharmapalaMawatha, Pelmadulla.

8.
KottawattaArachchilageGunawardena,DharmapalaMawathaPedesa,Pelmadulla.

9.
BeligaswattaAkkaranKuruppuMudiyanselageSirinilame, Mudduwa ,Ratnapura.

10.BeligaswattaAkkaranKuruppuMudiyanselageSugathapala, Mudduwa , Ratnapura.

11.LindawatteNandawathie, VidyalayaMawatha, Pelmadulla.

12. G. L. Jinadasa, PahalaBempitiya, Medawatta, Pelmadulla.

13. A.M.M. Kularatne, No. 13, Medawatta,Bopitiya, Pelmadulla.

14. A. M. Dharmawardena, Kutwapitiya, Pelmadulla.
15. G. G. Dharmadasa, VidyalaMawatha, Pelmadulla.
16. S. A. Keerthithilaka, 1/101, Ratnapura Road, Pelmadulla.
17. W. A. AnandaWickremasinghe, 99, Ratnapura Road, Pelmadulla.
18. B. A. M. Abeyratne, 171/3, Pahalawatta,Mudduwa, Ratnapura.

19. W. M. AsithaWijesundera, Ratnapura Road, Pelmadulla.

20.WelwitaLiyanaArachchilageSunderawathieMenike, c/o AnandaHewawasam, Bulugahapitiya, Ehaliyagoda.

21. BeligaswattaAkkaranKuruppu MudiyanselageGaminiKamalaratne Sirinilame, 171/3, Pahalawatta, Mudduwa, Ratnapura.

22.BeligaswattaAkkaranKuruppuMudiyanselageDushmanthaDharmakeerthiSirinilame, Dadadeniya, Ehaliyagoda.

23.BeligaswattaAkkaranKuruppuMudiyanselageDhammikaSirikumariSirinilame, c/o AnandaHewawasam, Bulugahapitiya, Ehaliyagoda.

24.BeligaswattaAkkaranKuruppuMudiyanselageGnanathilakaThamarakumariSirinilame,

25.BeligaswattaAkkaranKuruppuMudiyanselageGnanathilakaNavaratneSirinilame,

26.BeligaswattaAkkaranKuruppuMudiyanselageGnanathilakaUpulAnuradhaSirinilame,

The 24th, 25th, and 26th Defendants above are all of 171/3, PahalaWatta, Mudduwa, Ratnapura.

Defendants

AND

BogahawattaDurageChandana
Pushpakumara, No. 36/14,
Ratnapura Road, Pelmadulla.

Plaintiff Petitioner

Vs

G. G. Dharmadasa, No. 1,
VidyalaMawatha, Pelmadulla.

15th Defendant Respondent

AND BETWEEN

G. G. Dharmadasa, No. 1,
VidyalaMawatha, Pelmadulla.

15th Defendant Respondent Petitioner

Vs

BogahawattaDurageChandana
Pushpakumara, No. 36/14,
Ratnapura Road, Pelmadulla.

Plaintiff Petitioner Respondent

AND NOW BETWEEN

BogahawattaDurageChandana
Pushpakumara, No. 36/14,
Ratnapura Road, Pelmadulla.

Plaintiff Petitioner Respondent Appellant

Vs

G. G. Dharmadasa, No. 1,
VidyalaMawatha, Pelmadulla.

15th Defendant Respondent Petitioner Respondent

BEFORE: S. EVA WANASUNDERA PCJ.
UPALY ABEYRATNE J.
NALIN PERERA J.

COUNSEL: HarshaSoza PC with AnuruddhaDharmaratne for the Plaintiff Petitioner Respondent Appellant.
Ms. SudarshaniCooray for the 15th Defendant Respondent Petitioner Respondent.

ARGUED ON: 13. 06. 2016.

DECIDED ON: 21.07.2016.

S. EVA WANASUNDERA PCJ.

In this matter leave to appeal was granted on 19.11.2012 on the questions of law set out in paragraph 17 (a) to (f) of the Petition dated 27.04.2012. At the same time this Court had also granted an interim order as prayed for in prayer (e) of the Petition, restraining the 15th Defendant Respondent Petitioner Respondent from carrying out any construction work on the corpus described in the schedule to the Petition, until the disposal of this Appeal.
The said questions of law are as follows:-

17(a) Have the learned judges of the Civil Appellate High Court erred in law in holding that the learned Trial Judge has reached an erroneous finding that the Petitioner (15th Defendant) has built on Lot 4 in Plan No. 843?
(b) Have the learned judges of the Civil Appellate High Court erred in law and prematurely decided the boundaries of the corpus?
(c) Have the learned Judges of the Civil Appellate High Court erred in law in holding that the Petitioner (15th Defendant) has failed to make out a prima facie case ?
(d) Have the learned judges of the Civil Appellate High Court erred in law in setting aside the interim injunction issued by the learned District Judge?
(e) Before deciding to set aside the said interim injunction were the High Court Judges obliged in law to specifically consider the nature of the construction and the location of the construction and whether in the circumstances the said construction would place the co-owners of the subject matter of this action at a disadvantage?
(f) Have the learned Judges of the Civil Appellate High Court erred in law that evenwhere the boundaries of the corpus sought to be partitioned are in dispute, construction ought not to be permitted , if such construction would prevent an equitable division of the corpus?

The facts pertinent to this matter can be summarized as follows. The Plaintiff Petitioner Respondent Appellant (hereinafter referred to as the Plaintiff) filed action to partition the land called PelmadulleKumbura in the District Court of Pelmadulla on 20.09.2007. He filed amended Plaint on 08.01.2008. adding some more defendants making the number of defendants as 26 and sought to give shares to only the 1st to 11th and from 20th to 26th Defendants. A

preliminary Plan was drawn by Licensed Surveyor, P.S.G. Karunathileke on 20.06.2008 namely, Plan No. 843.

This Preliminary Plan No. 843 has described 17 lots of land which the surveyor had to survey, some of which are very small in extent, namely Lots 1,2,3,5,6,7,8,9,10,11,12,13 and 14 all of which are less than 4.5 perches each. They are the small boutiques and business premises which have some building or other on them. Only Lots 4, 15, 16 and 17 are the bigger portions which are empty blocks of land. All these Lots were claimed by the Defendants and the Plaintiff in the District Court case.

I observe that the report of the surveyor, has 8 pages describing who claims and what buildings are on each lot etc. He further mentions the names of persons who are occupying and claiming the small lots as well as the big lots but it is noted by me that the Plaintiff is not occupying any building. No block is occupied by the Plaintiff either even though he claims all the Lots , according to the surveyor.The Surveyor further states that the Plaintiff had shown the boundaries and the survey was done accordingly. The 3rd Defendant had mentioned that Lots 1,2,3 and 4 are from and out of a land called Mahakumbura, and that the 6th to 14th Lots are said to be from and out of a land called Kottayadiwela. He further says that according to the commission, the area is named as Pelmadulla but he finds that according to a final village plan the place where the land is situated is named as Bopitiya village. The Plaintiff had however claimed that all this land is PelmadullaKumbura. The whole area of the big land to be partitioned is of an extent of one Acre and 38.43 Perches.

Before any statement of claim could be filed by any of the Respondents, the Plaintiff Petitioner filed a Petition and Affidavit on 21.09.2011 and prayed for an ***interim injunction preventing the 15th Defendant Respondent (hereinafter referred to as the 15th Defendant***) from constructing and altering the status quo of the subject matter of this partition action, among other reliefs such **as to grant the Plaintiff ½ share** of the whole land consisting of paddy land and the high land **with road frontage**.

The 15th Defendant filed a statement of objections with an affidavit stating that he and one GeeganageUpali, (his son) were the lawful owners of Lots 1

and 2 of Plan No. 843 (which lots of land together is of an extent of 6.96 perches) and that possession of the said lots had been handed over to them in the District Court of Balangoda case No. 1051/L . He further mentioned that his lots are from the land called as " MahaKumbura and PelmadulleKumbura" and not the land which the Plaintiff has sought to partition in the present District Court case, namely " PelmadulleKumbura".Further it was alleged by the 15th Defendant that the LisPendance was not registered by the Plaintifffproperly in the relevant folio where hisland , namely Lots 1 and 2 are registered.

The 15th Defendant sought an exclusion of his lots from the corpus of the partition action and alleges that the Plaintiff has not made GeeganageUpali a party to the present action, even though the Plaintiff knows that in the District Court case No. 1051/L , the 15th Defendant and GeeganageUpali were decreed to be the lawful owners of the said lands. *It is to be noted that the Plaintiff never sought to intervene in that action and claim* that the said lots of land were co-owned or that the Plaintiff has a claim on the said lots of land.

The DistrictJudge delivered order granting interim relief preventing the 15th Defendant from constructing any building on Lot 4 which is one of the lots of land among other lots which comprise the corpus of the land sought to be partitioned. The 15th Defendant filed an appeal to the Provincial High Court challenging the District Court order. The High Court made order dissolving the interim injunction which was operative against him. Thereafter, when leave was granted by this court, once again a stay order was issued against the 15th Defendant till the final disposal of this matter.

I observe that Lots 1 and 2 have buildings on it, namely dwelling houses according to the surveyor's report. The 'red line' as it is referred to by the High Court which the surveyor has demarcated on the preliminary plan, cuts across the buildings in Lots 1 and 2. The surveyor states that the boundaries were shown by the Plaintiff. Looking at the preliminary plan 843, it surprises me to see that the boundaries are not marked physically on the ground but on paper, on one side, cutting across the buildings on lots 1 and 2and also partly protruding on to the main PelmadullaRatnapura road and on the other side, cutting across lots 6,7,8,9,10,11,12,13, and 14 where there are buildings

occupied by other claimants but not bordering the road frontage. I also observe that , the way that the surveyor has demarcated the boundaries the corpus to be partitioned includes the road frontage of almost all the lots marked on the land. It is a peculiar relief , I observe, that the Plaintiff has prayed for ½ share of the whole land with road frontage**.**

The demarcation of boundaries near the main road, seems to be quite awkward on paper. One cannot even imagine why and how that kind of surveying could have been done physically and for what purpose it was done so. It is rather obvious that the Plaintiff had got the surveyor to demarcate the lots leaving some road frontage right along the whole big land as he had in his plaint claimed ½ share of the land *with road frontage*.

I am of the opinion that this preliminary plan No. 843 has created trouble in this partition action. It may be due to this reason that a commission had been issued by the District Court to the Surveyor General after the said preliminary plan was filed of record. The Surveyor General's plan is marked and filed of record dated December 2010. This Surveyor General's plan is numbered as R/PLM/2009/175. It was not made use of by the District Court as parties had disagreed to go by that plan, the reason for which I fail to understand. This plan shows the buildings as "permanent buildings" and specifically shows the boundary line that *the Plaintiff claims to be the boundries of the big land.*

However, I observe that Lots 1 and 2 are clearly the subject matter of a decided District Court ofBalangoda action No. 1051/L. The title is clear in Deed No. 3816 dated 11.12.1997. The Plaintiff has failed to file LisPendance in the volume / folio in which this deed is registered.The northern boundary of both these lots are mentioned in the deed as the main road. The 15th Defendant has denied that he had tried to build on any other part of the land than in his own land which is Lots 1 and 2 which is owned by him and his sonUpaliGeeganage who is not made a party to this case by the Plaintiff. The District Judge had come to a wrong finding that the 15th Defendant had tried to build on Lot 4 in plan 843 without any evidence to that effect before court. The High Court judges have correctly remedied the situation by dissolving the interim injunction.

I am of the opinion that the Plaintiff had obtained an interim injunction from the District Court, against the 15th Defendant to stop construction of business premises at the road frontage, without any lawful reason to do so. For any court to issue an interim injunction , it should use its discretion conferred upon the court by law in terms of Sec. 662 of the Civil Procedure Code which requires that the Plaint should reflect that the party seeking an injunction is entitled to judgment in his favour. If there is no prima facie case in favour of the party seeking the interim injunction, it should not be granted.

In ***Felix Dias BandaranayakeVs State Film Corporation*****(1981) 2 SLR 287**, it was held that a party applying for an interim injunction has to satisfy three sequential questions, i.e.

1. Has the party seeking an interim injunction established a strong prima facie case?
2. In whose favour is the balance of convenience?
3. Does the dealings of the parties justify the grant of an interim injunction or in other words do equitable considerations warrant the granting of an interim injunction?

In the case of ***GulamHussainVs Cohen*****(1995) 2 SLR 365** , it was held that " a party seeking an injunction shall establish a prima facie case in which it is seen that there is a serious matter in relation to their legal rights to be tried at the hearing of the action and that they have a good chance of winning ".

I am of the view that before the trial judge granted an interim injunction, he should have verified the place on which the 15th Defendant was allegedly trying to construct a building to clearly find out whether it is adjacent to the house which he is occupying or whether he is trying to build on a totally different area of the land which is to be partitioned. The District Judge had failed to identify the area or whereabout on the land to be partitioned , had the 15th Defendant tried to build. It was alleged and complained by the Plaintiff that the 15th Defendant had a religious ceremony as the first step in commencing the construction but was there any evidence to show that it was done on Lot 4?

There is no oral evidence or documentary evidence to be seen on record to show that the construction alleged was to get done on Lot 4. The inquiry regarding this interim injunction had been done only by way of written submissions. Somehow the District Judge has written on the order that the construction alleged was on Lot 4 in the preliminary plan No. 843. When going through the documentary evidence placed before the District Judge, I observe that document P5 which is the complaint by the Plaintiff, Pushpakumara to the Police on 12.09.2010 speaks of ' a construction which is going to be done is right behind the boutique building of G.G.Dharmadasa', (the 15th Defendant), which he is occupying. The 15th Defendant liveson Lots 1 and 2 of P.P.843 which is of a small extent such as 6.96 Perches with his son UpaliGeeganage. He apparently had tried to draw the lines with rope on the ground for a small foundation as an extension of his boutique behind his already existing boutique after performing the usual religious chantings according to Sri Lankan culture. The Plaintiff has got an interim injunction submitting to court that the 15th Defendant was trying to build on Lot 4 which is a bigger portion of land of an extent of 20.88 Perches.

There seems to be some misunderstanding by the District Judge and/or misrepresentation made before him by the Plaintiff who had complained to the Police that another construction is about to get done right behind the 15th Defendant's boutique. The whole land the Plaintiff has filed action to be partitioned is of an extent of one Acre and 38.43 Perches. By getting an interim injunction to stop the 15th Defendant who was trying to improve his business , by building at the back space left on his own small piece of land, the Plaintiff seems to have already caused losses to the 15th Defendant. Anyway the District Judge had no evidence whatsoever before Court to establish that the proposed construction was on Lot 4.

I also observe that the Preliminary Plan 843 describes many boundaries as 'uncertain' and an interim injunction should not have been issued on land which is 'uncertain' admittedly marked as uncertain by the surveyor when the surveyor had done the survey.

By having done what the District Judge had done, he had gone against the principles laid down in the very old case of ***Jinadasa Vs. Weerasinghe (1929) 31 NLR 33*** where Dalton J. held that:

" Of course in order to entitle the Plaintiffs to an interlocutory injunction, though the Court is not called upon to decide finally on the rights of parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it, there is a probability that the Plaintiffs are entitled to relief".

In the case in hand the question arises whether there were any facts before court to show that there was a serious question or whether there was a probability that the Plaintiff was entitled to relief prayed for in the interim? The case being one of 'partitioning a big land' , how could the Court have come to even think that the Plaintiff was probably entitled to relief as he had prayed for at the end of the proper trial. There were many other parties who claimed the land and in such a situation how could the Judge decide that the Plaintiff was probably entitled to the relief that he had prayed for. It is obvious that the District Judge was wrong in law when he granted an interim injunction.

I find that the learned District Court Judge had reached an erroneous finding that the 15th Defendant had tried to build on Lot 4 in Plan No. 843. The Plaintiff had failed to make out a prima facie case against the 15th Defendant before the trial judge. The Plaintiff had not shown any evidence to specifically demonstrate the location of the alleged construction or how such a construction would place the co-owners of the land at a disadvantage. Even before any party filed any statement of claim, with a preliminary plan of uncertain boundaries before the District Court, it is quite surprising how the District Judge had acted in granting interim relief as prayed for by the Plaintiff.

I answer all the questions of law enumerated at the beginning in the negative and infavour of the 15th Defendant Respondent Petitioner Respondent. I am of the view that the learned Judges of the Civil Appellate High Court had quite correctly reversed the decision of the District Court and dissolved the interim injunction.

I dismiss the Appeal with costs to be paid to the 15th Defendant by the Plaintiff. I direct that the case record of the High Court be sent back to the High Court of Ratnapura. The Registrar is directed to send forthwith, the District Court case record to the Registrar of the District Court of Pelmadulla for the Partition action to proceed before the District Judge.

Appeal is dismissed with costs.

Judge of the Supreme Court

Justice UpalyAbeyrathne
I agree.

Judge of the Supreme Court

Justice NalinPerera
I agree.

Judge of the Supreme Court

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 207/2014

SC/ HCCA/LA/ 426/2014

NWP/HCCA/KURU/17/2013[Rev]

DC Kurunegala No/7316/T

In the matter of the intestate property of the late J.M. Ukkubanda of Alawwa.

J. M. Appuhamy,

No. 89, Main Street,

Alawwa.

Petitioner

Vs.

1. M. M. Bandaramenike,
   No. 89, Main Street,
   Alawwa.
2. J. M. Yasapala,
   'Yasasiri', Indigaha Dowa,
   Lunuwatta, Bandarawela.
3. J. M. Sudu Menike,
   DIV Rampitiye Gedara, Idamegama,
   Bambarapana, Bandarawela.

4. J. M. Sudu Banda,
   Suduwatura Ara,
   Kumbukkana, Monaragala.
5. J. M. Jayasekera,
   No. 107, Sewwandi Textiles,
   Main Street, Alawwa.
6. J. M. Gunathilake,
   No. 89, Main Street, Alawwa.
7. J. M. Punchi Banda,
   Bandarawela Textiles,
   Main Street, Alawwa.

Respondents

AND BETWEEN

J. M. Gunathilake,
No. 89, Main Street,
Alawwa.

6th Respondent Petitioner

Vs.

J. M. Appuhamy,
No. 89, Main Street,
Alawwa.

Petitioner Respondent

1. M. M. Bandaramenike,
   No. 89, Main Street,
   Alawwa.
2. J. M. Yasapala,
   'Yasasiri', Indigaha Dowa,
   Lunuwatta, Bandarawela.
3. J. M. Sudu Menike,
   DIV Rampitiye Gedara, Idamegama,
   Bambarapana, Bandarawela.
4. J. M. Sudu Banda,
   Suduwatura Ara,
   Kumbukkana, Monaragala.

5. J. M. Jayasekera,
   No. 107, Sewwandi Textiles,
   Main Street, Alawwa.
7. J. M. Punchi Banda,
   Bandarawela Textiles,
   Main Street, Alawwa.

1st to 5th and 7th Respondent-Respondents

AND NOW BETWEEN

2. J. M. Yasapala,
   'Yasasiri', Indigaha Dowa,
   Lunuwatta, Bandarawela.
5. J. M. Jayasekera,
   No. 107, Sewwandi Textiles,
   Main Street, Alawwa.

2nd and 5th Respondent Respondent Appellants

Vs.

J. M. Gunathilake,
No. 89, Main Street,
Alawwa.

6th Respondent Petitioner Respondent

J. M. Appuhamy,
No. 89, Main Street,
Alawwa.

Petitioner Respondent-Respondent

1. M. M. Bandaramenike,
   No. 89, Main Street,
   Alawwa.
3. J. M. Sudu Menike,
   DIV Rampitiye Gedara, Idamegama,
   Bambarapana, Bandarawela.

4. J. M. Sudu Banda,
   Suduwatura Ara,
   Kumbukkana, Monaragala.
7. J. M. Punchi Banda,
   Bandarawela Textiles,

   Main Street, Alawwa.

1st 3rd 4th 7th Respondent
Respondent- Respondents

BEFORE	:	B. P. ALUWIHARE, PC, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Lakshman Perera PC with Upendra Walgampaya for the 2nd and 5th Respondent-Respondent Appellants W. Dayaratne PC with Nadeeshan Kekulawala for the 6th Respondent Petitioner Respondent
WRITTEN SUBMISSION ON:		05.01.2015 (2nd and 5th Respondent Respondent Appellants) 06.02.2015 (6th Respondent Petitioner Respondent)
ARGUED ON	:	18.07.2016
DECIDED ON	:	14.12.2016

UPALY ABEYRATHNE, J.

When this matter was taken up for hearing on 10th September, 2015, both parties intimated to Court that the matter could be disposed of on written submissions. Accordingly this matter was fixed for judgment. Thereafter the Counsel for The 2nd and 5th Respondent-Respondent Appellants (hereinafter referred to as the Appellants) by way of a motion dated 26.10.2015 sought permission of this Court to have the matter fixed for rehearing enabling them to make oral submissions. Accordingly this matter was taken up for hearing on 18.07.2016. After the hearing, both parties were given opportunity to file further written submissions.

The 2nd and 5th Appellants sought leave to appeal from the order of the High Court of Civil Appeal of the North Western Province holden at Kurunegala dated 23.07.2014. The leave was granted on the following questions of law set out in paragraph 19(i), (ii), (vi) and (vii) of the petition dated 26.08.2014.

19(i) Has the High Court of Civil Appeal failed to consider the failure of the 6th Respondent Petitioner Respondent to exercise his right of appeal in terms of Section 722 of the Civil Procedure Code?

(ii) Has the High Court of Civil Appeal failed to consider that the 6th Respondent Petitioner Respondent has failed to give a valid explanation for having not exercised his right of appeal in terms of Section 722 of the Civil Procedure Code?

(vi) Is the 6th Respondent Petitioner Respondent entitled to explain the reasons for the delay in his counter affidavit after the Appellant has raised preliminary objections?

(vii) Has the High Court of Civil Appeal erred in law in accepting the explanation given for the delay in filing the Revision Application?

Upon an application made by J. M. Appuhamy, the Petitioner Respondent-Respondent the learned District Judge of Kurunegala granted Letters of Administration to the said Petitioner to administer the estate of the deceased Jayasundara Mudiyanselage Ukkubanda. Thereafter, disputing the inventory of the deceased's estate, the 6th Respondent Petitioner Respondent (hereinafter referred to as the 6th Respondent) made an application to exclude "Dharshana Textiles" from the inventory of the deceased estate claiming him to be the sole owner of the said business. The Appellants and the 7th Respondent-Respondent-Respondent raised objections against the said claim on the basis that the deceased was the owner of half a share of the said business. Thereafter an inquiry was held upon raising the points of contests by the parties and the learned District Judge by his judgment dated 28.04.2005 concluded that the deceased was the owner of ½ shares of the said "Dharshana Textiles" and the profits of the said business should be brought in to the case. Also the learned District Judge answered the issues 3 to 7 which were raised by the 2nd and 5th Appellants and the 7th Respondent-Respondent-Respondent against their interests and refused the claim made by them. Neither the 6th Respondent nor the Appellants canvased the said judgment by way of an appeal.

Afterwards upon a request made by the Administrator J. M. Appuhamy, the Petitioner Respondent-Respondent due to his old age and ill health, the learned District Judge, by order dated 23.08.2007, had recalled the grant of Administration and revoked the grant and subsequently, by order dated 26.08.2008, with consent of the parties had granted fresh Letters of administration of the said estate to the 6th Respondent.

According to the journal entry No. 82 the 5th Appellant had filed a motion supported with an affidavit seeking to support the same on 15.05.2009. According to journal entry No. 83 on 15.05.2009 the 5th Appellant had supported the said application and the trial judge had made an order to issue notice on the Respondents to the said application under Section 724A of the Civil Procedure Code directing to show cause.

Upon the receipt of the notice of the said application under Section 724A the 6th Respondent administrator had filed a statement of objection and after an inquiry the learned District Judge had made the order dated 10.10.2011 requiring the 6th Respondent that the assets mentioned therein namely the sums of money mentioned in item 1, 2, 3, and 4 under movable property of the final account dated 16.01.2005 to be brought to the credit of the case before 18.11.2011 and the final account as is prescribed by Section 551 to be filed and in default thereof cause to be shown as to why he should not be attached. In the said order the learned trial judge has concluded that the 6th Respondent being the administrator of the deceased's estate had not credited a sum of Rs. 174,984/- as described under item 4 of the said final account dated 16.01.2009. Accordingly the court made order requiring the 6th Respondent to file a final account in terms of Section 551 of the Code before 18.11.2011 after taking steps to recover the sums of money described under the heading of movable property of the said final account. Also the

learned District Judge has concluded that an order under Section 724A(2) of the Code to be served on the 6th Respondent administrator requiring him to file a final account and in default thereof to show cause why he should not be attached.

It is important to note that as reflected from the said order dated 10.10.2011 moneys to be recovered from the 5th Appellant had been set out under items 1 and 2 and moneys to be recovered from the 2nd Appellant had been set out under item 3 of the said final account.

Neither the 6th Respondent nor the Appellants canvased the said findings of the learned District Judge in an appropriate forum.

Upon the receipt of the said notice and the order under Section 724A(2), the 6th Respondent had appeared before the District Court on 31.10.2012. The 5th Respondent Appellant also had happened to appear before court on the same date since he had been cited to attend an inquiry under Section 712 of the Civil Procedure Code. At the inquiry in to the said matters the 5th Appellant had taken up the position that the said sums of money described in the said final account was not a part of the estate of the deceased as the income has generated after the death of the deceased. The learned District Judge after hearing the submissions of both parties made the impugned order dated 08 01 2013.

It is important to note that by the said order dated 08.01.2013 the learned Additional District judge has dealt with the claim of the Appellants which had already been dealt with and refused by the said judgment dated 28.04.2005.

It is also an admitted fact that none of the said parties had exercised their right of appeal against the said order dated 08.01.2013. Section 722 of the Civil Procedure Code stipulates that every order or decree made under the

provisions of chapter LIV, in which Section 712 to 722 contained, shall be subject to an appeal to the Court of Appeal.

However the 6th Respondent about 06 months and 18 days after the said order dated 08.01.2013, by way of a petition dated 26th July 2013 supported with an affidavit made an application in revision in the Provincial High Court of Civil Appeal of the North Western Province holden at Kurunegala seeking to:

- Revise and set aside the order of the learned Additional District Judge of Kurunegala dated 08.01.2013, and
- Affirm the judgment of the learned District Judge of Kurunegala dated 28.04.2005 and also the subsequent order of the learned Additional District Judge of Kurunegala dated 10.10.2011.

As transpired from the Journal Entry dated 21.03.2014 and also from the order of the High Court of Civil Appeal dated 23.07.2014, when the said Revision Application was taken up for argument on 21.03.2014 the Appellants raised the following preliminary objections;

- The Appellants had not exercised right of appeal under Section 722 of the Civil Procedure Code,
- There are no exceptional circumstances,
- Approximately delay of 07 months in making the Revision Application.

The High Court of Civil Appeal by order dated 23.07.2014 has refused the said preliminary objections and has fixed the matter for argument. The present appeal before this court is from the said order of the High Court of Civil Appeal.

It must be noted that in paragraph 15 of the written submission of the Appellants dated 15th of December 2014, they have stated that the Appellants filed a statement of objection in the High Court of Civil Appeal. But a copy of the said written submission has not been tendered to this court. Also the Appellants have not tendered a copy of the final account dated 16.01.2009. Needles to state that said documents are material to the instant appeal.

In paragraph 15 of the said written submission the Appellants have stated that the following preliminary objections had been raised by them.

- The Respondent has failed to exercise the right of appeal and has failed to give any explanation as to why the Respondent has failed to follow the mandatory provisions of Section 722 of the Civil Procedure Code,
- The Respondent has failed to exercise the mandatory provisions of Chapter LX of the Civil Procedure Code for appeal notwithstanding laps of time,
- The Respondent has failed to explain the delay in filing the revision application.

It is clear from the said order that the High Court of Civil Appeal was of the view that irrespective of the said preliminary objections the Respondent's application in revision should be entertained due to the contradictory nature of the order made in the case and as a result by order dated 08.01.2013 the Petitioner has been placed in a dilemma whether he should act in accordance with the judgment dated 28.04.2005 or subsequent order dated 08.01.2013.

It is clear from the page 3 of the said order of the learned Additional District Judge that the order dated 08.01.2013 has been made without holding a

proper inquiry. It is also clear that the 6th Respondent has made the said application seeking the Appellants to be cited to attend an inquiry and to examine about the income derived from the said final account dated 16.01.2009.

It is well settled law that upon the attendance of a person in obedience to such citation the trial judge should follow the procedure laid down in Section 714 of the Code in order to reach the correct conclusion upon the matter before him. Section 714 reads thus;

> 714.(1) Upon the attendance of a person in obedience to such citation and order, he shall be examine fully and at large on oath or affirmation, respecting any money or other property of the testator or intestate, or of which the testator or intestate was in possession at the time of or within two years preceding his death.
>
> (2) A refusal to be sworn or to answer any question allowed by the court is punishable in the same manner as a like refusal by a witness in a civil case.
>
> (3) In case the person cited put in an affidavit that he is the owner of any of the said property, or is entitled to the possession thereof by virtue of any lien thereon, or special property therein, the proceedings as to such property so claimed shall be dismissed.

In the present case before us the learned Additional District Judge has failed to follow the mandatory provisions contained in Section 714 of the Code prior to making the order dated 08.01.2013. I am of the view that these are exceptional circumstances irrespective of the delay in making the application in revision for an appropriate appellate court to exercise discretion and to grant relief by way of revision. In such instances Section 722 of the Civil Procedure Code does

not place a limitation on the powers of the appropriate appellate court to deal with an application in revision in a manner although the matter had not been brought up by way of appeal.

The long line of authorities relating to this issue clearly indicates that the revisionary powers of the Appellate Courts will be exercised only if exceptional circumstances are urged before courts notwithstanding the availability of alternative remedy. The Appellate Courts will not exercise its powers in revision, if exceptional circumstances cannot be placed before courts.

I shall now deal with some of the cases which deal with this aspect of the matter. In the case of *Atukorale Vs Samynathan 41 NLR 165* Soertsz J. stated. "The powers by way of revision conferred on the Supreme Court of Ceylon ..... are very wide indeed, and clearly this Court has the right to revise any order made by an original Court whether an appeal has been taken against that order or not. Doubtless that right will be exercised in a case in which an appeal is already pending only in exceptional circumstances. For instance this jurisdiction will be exercised in order to ensure that the decision given on appeal is not rendered nugatory."

The judgment of Soertsz J. was considered by Wijewardene J. in the case of *Silva v. Silva 44 NLR 494* and the reasoning of Soertsz J. was adopted by him with approval and he stated, "I am in respectful and full agreement with the view expressed in that case. It must take some time for the appeal to be heard. Even after the appeal is perfected and sent to this Court, it has to remain on the list of pending appeals for, at least, fourteen days before it is heard and ..... I think, therefore, that this is a matter in which our revisionary powers should be exercised."'

In *Sinnathangam Vs. Meera Mohideen 60 NLR 393* T. S. Fernando J. stated, "The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security."

Similarly in *Abdul Cader Vs. Sittinisa, 52 NLR 536* the facts were, an objection had been taken in appeal under Rule 4(a) of the Civil Appellate Rules that the appeal abated in consequence of the failure by the appellant to tender the proper sum of Rs. 25/- which was the appropriate sum according to the Schedule under Rule 2 of the Civil Appellate Rules of 1938 in respect of typed-written copies. Pulle J. in the course of his judgment held, "The respondents have not been in any manner prejudiced by the fact that the appellant in applying for the typed-written copy paid only Rs. 20/- instead of Rs. 25/-. Nonetheless we have in mind that the hearing was, as a matter of indulgence, by way of revision. In the ultimate result we have the satisfaction of knowing that we have interfered with the judgment of the Learned District Judge substantially on a point of law only."

In the case of Rustom Vs Hapangama [1978/79] 1 SLR 352 (SC) Ismail J observed that “It is therefore clear from the authorities that the general rule is that while the power of revision available to the Supreme Court is a discretionary power the courts have consistently refused to exercise this power when an alternative remedy which was available to the applicant was not availed of before the applicant sought to avail of a remedy by way of revision. Nevertheless in a series of decided cases the courts have indicated that this was not an invariable rule and in certain instances where exceptional circumstances are shown the Court would exercise this discretionary power even when an alternative remedy which is

available has not been availed of. These instances are few and far between and is often exercised in order not to render a decree of Court nugatory."

In the case of *Gnanapandithan Vs Balanayagam [1998] 1 SLR 286 (SC)* it was held that "The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and exceptional circumstances of the case the appellants were entitled to the exercise of the revisionary powers of the Court of Appeal."

In the case of *Finnegan Vs Galadari Hotels (Lanka) Ltd. [1989] 2 SLR 272 (SC)* Kulatunga J observed that "The facts of this case are different. As discussed above, the plaintiff is impeaching the legality or propriety of the order of the District Judge on fundamental issues including the failure to hold a fair inquiry. Considerations of urgency and the balance of convenience demanded an immediate review of the Judge's order; there were thus exceptional circumstances warranting the exercise of the revisionary jurisdiction of the Court of Appeal."

In the case of *Mariam Beebee Vs. Seyed Mohamed [1965] 68 NLR 36* Sansoni C. J. delivering the majority decision of the Divisional Bench that heard this case said as follows at page 38: "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result."

In view of the forgoing reasons, I hold that it is necessary that the appropriate Appellate court shall intervene with the said order dated 08.01.2013 to

examine whether the said order of the learned Additional District Judge has caused any impact on the previous orders and/or judgment of the present case before me. Hence the Appeal of the Appellant is dismissed with costs. The High Court of Civil Appeal of the North Western Province holden at Kurunegala is directed to hear and conclude the matter expeditiously according to law.

Appeal dismissed.

Judge of the Supreme Court

B. 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

SC/APPEAL/211/2012

SC/HCCA/LA No. 541/2011
WP/HCCA/Gampaha/164/2006 (F)
D.C. Negombo Case No. 2566/Special

In the matter of an application for Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 5C of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 against the Judgment delivered in Appeal No. WP/HCCA/GAM/164/2006(F) on 11.11.2011.

Udagepolage Gunasiri Seneviratne
'Yamuna', Gulawita,
Walallawita.

PLAINTIFF

Vs.

Pattiya Widanage Carmen Premalatha
No. 8, Waagouwwa Cross Road,
Central Watte, Waagouwwa,
Minuwangoda.

DEFENDANT-APPELLANT

Va.

Udagepolage Gunasiri Seneviratne
'Yamuna', Gulawita,
Walallawita.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN
Udagepolage Gunasiri Seneviratne
'Yamuna', Gulawita,
Walallawita.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Pattiya Widanage Carmen Premalatha
No. 8, Waagouwwa Cross Road,
Central Watte, Waagouwwa,
Minuwangoda.

DEFENDANT-APPELLANT-RESPONDENT

BEFORE: Priyasath Dep P.C., J.
Priyantha Jayawardena P.C., J &
Anil Gooneratne J.

COUNSEL: Kaushalya Nawaratne with Mokshini Jayamanne and Yoddhya Thambavita instructed by Sivananthan & Associates for the Plaintiff-Respondent-Appellant.

Malin Rajapaksa for the Defendant-Appellant-Respondent

WRITTEN SUBMISSIONS TENDERED ON:

21.01.2013 (by the Plaintiff-Respondent-Petitioner)
28.02.2013 (by the Defendant-Appellant-Respondent)

ARGUED ON: 08.03.2016

DECIDED ON: 02.05.2016

GOONERATNE J.

This was an action filed in the District Court of Negombo for a declaration that the marriage between the Plaintiff-Respondent-Petitioner and the Defendant-Appellant-Respondent was ab initio null and void. The circumstances under which relief was sought was on the basis that the Defendant-Appellant-Respondent (hereinafter referred to as Respondent) had contracted two marriages which had not been legally dissolved or declared void by a court of competent jurisdiction and as such the purported marriage between Plaintiff-Respondent-Petitioner (hereinafter referred to as the Petitioner) and the Respondent was invalid and thus null and void. Learned District Judge delivered judgment on or about 08.12.2006 in favour of the Petitioner. In the appeal to the High Court, the learned District Judge's judgment was set aside by judgment delivered by the High Court on 06.10.2012 (X6)

Supreme Court on 04.12.2012 granted Leave to Appeal on question of law stated in paragraph 15 (a) and (b) of the petition dated 22.12.2011. The said questions are:

15.(a)(i) In terms of the provisions of Section 18 of the Marriages (General) Ordinance No. 19 of 1907 as amended read together with the provisions of Section 607 of the Civil Procedure Code, is it imperative for any husband or wife to present

a Plaint praying that his/her marriage may be declared null and void on any of the ground recognized by the law applicable to Sri Lanka?

(ii) If the above question is answered in the affirmative, is the Defendant precluded in law from asserting that the marriage between the Petitioner and the Respondent is valid in law?

(b) Are the provisions of Sections Section 18 of the Marriages (General) Ordinance No. 19 of 1907 as amended read together with the provisions of Section 607 of the Civil Procedure Code, applicable only to parties where there is a "valid" marriage?

The position of the Petitioner very briefly was that the Respondent had contracted two previous marriages with one Jeinul Abdeen Mohamed Ishak and one Ratnayake Mudiyaselage Gnanasena. Petitioner argues that both marriages subsisted at the time of the purported marriage between the Petitioner and the Respondent. It is simply the basis of the Petitioner that the purported marriage between the Petitioner and the Respondent is null and void and no force or avail in law. I observe that by law and fact it would not be permissible for any person or citizen of our country, other than those who profess the Islam faith to contract marriages in the manner alleged above by the Petitioner. However the case between parties seems to have gone a long way and finally reached the Apex Court due to the prevailing circumstances of the case for which some members of the society or community may fault the legal fraternity in this country.

There are some primary facts that need to be understood prior to considering the questions of law on which leave was granted. Petitioner and Respondent by Marriage Certificate P1 were married to each other, by October 1992. However the facts placed before this court reveal that the Respondent was earlier married on or about November 1977 to one Jeinul Abdeen Mohomed Ishak (P2 certificate) and on or about August 1985 to Rathnayake Mudiyanselage Gnanasena (P3). It is also stated that by 4th of March 1983 Respondent obtained a divorce from the said Jeinul Abdeen Mohamed Ishak in D.C Gampaha Case No. 23883.

In the District Court four admissions were recorded mainly on aforesaid matters other than the question of divorce referred to above. However the learned District Judge had arrived at a conclusion that the marriage between the Respondent and the abovenamed Jeinul Abdeen Mohamed Ishak was dissolved by a Court of competent jurisdiction. This court has no reason to dispute the trial Judge's findings on that aspect of the dissolution of marriage. As such from the point of view of the Respondent there would not be a bar for her to contract the second marriage between herself and Rathnayake Mudiyanselage Gnanasena. However at the trial before the District Court the second marriage of the Respondent was considered to be invalid in view of the evidence that transpired in the trial

court that the said Gnanasena was also legally married to another person called Leela Gunarasekera. There is some evidence that transpired in the trial court that the said Lela Gunasekera had been separated with Gnanasena for a period of over seven years.

The material placed before this court indicates without a shadow doubt that the Respondent was well aware of the fact that she was already married to a person called Gnanasena at the time and period she thought it fit subsequently to marry the Petitioner. As such the several events that flow from and in between P1 to P3 in which ever chronological order, (before I consider the legal provisions) I observe that the sacred Institution of Marriage was made to suffer due to unacceptable and in a way immoral acts or conduct of persons, involved as litigants or lay witnesses in the District Court.

There is present and can be found an element of illegality in the contracts of marriages referred to above. The repeated marriages within intervals create some confusion. If the argument goes to the extent that the last marriage before the marriage in question was invalid, how should the law consider it? Does the law encourage a wrongdoer to contract an illegal marriage at a certain point of time and permit another marriage to occur subsequently, having taken advantage of an illegal marriage and announce to the world that the former marriage was void.

Contracts are illegal because they are forbidden by Statute or because they are contrary to public policy, which is a common law concept. A contract is contrary to public policy when it is in the public interest that it should not be enforced.

Illegality is a matter of degree, varying according to the granting of the legal prohibition. Two general categories of illegal contracts can be distinguished. Some illegal contracts contain an element of obvious moral turpitude; in others such taint is absent…. The courts treat contracts of the latter category more leniently than contract, of the former class.

Pg. 85 – Charlesworths Mercantile Law 12th Ed. By Clive M. SCHMITTHOFF

This court no doubt has to examine the relevant portions of evidence that was led in the District Court. Plaintiff-Petitioner having produced the relevant Marriage Certificates P1 – P3, stated that after he got married to the Respondent in 1992, there were problems between both of them and as such instituted divorce proceedings on or about 2001/2002. When these proceedings were pending the Petitioner came to know that the Respondent had contracted two previous marriages and thereafter he withdrew the first divorce case. Having obtained information of two prior marriages the Petitioner instituted another divorce case which is the case in question. The above items of evidence remains un contradicted and no doubt suggest the extent to which the Petitioner was misled. The Respondent party led the evidence of two official witnesses and that of Gnanasena, whom the learned

District Judge reported facts and directed the police to conduct investigations regarding witness Gnanasena's acts and conduct of contracting two marriages, with a view of initiating criminal proceedings, against him. I would welcome the step taken by the learned District Jude in this regard to directed the police to take the required steps according to law. This is a step taken by court to protect the society from such evils and a lesson to others behaving in such an awkward manner, irrespective of ones strata in life. The Respondent chose not to give evidence.

I have perused the entirety of the written submissions of both parties in all the courts concerning the divorce case. The position projected on behalf of the Respondent party is that Gnanasena was already married to one Leela Gunasekera and that marriage was not dissolved. As such an attempt made by the Respondent to demonstrate that since the marriage between herself and Gnanasena was void abintio due to the position of witness Gnanasena, the marriage in question remain intact between the Petitioner and Respondent. This position is untenable in law. I reject the entirety of the reasoning and judgment of the learned High Court Judge in this regard. It is scandalous to appreciate such a view. Respondent's position as stated above is an abuse of the process of law.

The substantive law and the procedural law on this subject is contained in Section 18 of the General Marriages Ordinance and Section 607 of the Civil Procedure Code.

Section 18 reads thus:

> "18 - No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void."

It is the submission of the Petitioner that although the provisions of Section 18 of the said Ordinance stipulates provisions as aforesaid, the Defendant-Respondent is duty bound to comply with the provisions of Section 607 of the Civil Procedure Code and thereby to obtain a Judgment and Decree declaring that the said marriage between the Defendant-Appellant and the said R.M. Gunanasena is null and void. In other words, the provisions of Section 18 of the said Ordinance shall be read together with and/or interpreted in conjunction with the provisions of Section 607 of the Civil Procedure Code, which reads thus:

Section 607 reads thus:

> Section 607(1) –
>
> "Any husband or wife may present a Plaint to the District Court within the local limits of the jurisdiction of which he or she (as the case may be) resides, praying that his or her marriage may be declared null and void;
>
> (2) Such Decree may be made on any ground which renders the marriage contract between the parties void by the law applicable to Sri Lanka",

The Petitioner's submissions on this aspect of the above provisions of law connecting with Respondent's acts and conduct is relevant in the context of the case in hand.

I state that Section 18 is not at all ambiguous. It is crystal clear. It simply states that a marriage is valid only if one of the contracting parties or both <u>have not entered into</u> a previous marriage. If either of them have contracted a previous marriage same has to be dissolved by a Court of Competent Jurisdiction prior to the marriage in question or the marriage relied upon by the parties. If not the contract of marriage would be invalid. When a statute is clear and could be easily understood further explanations, interpretations are not necessary. The intention of the legislature must be deduced from the language used. I refer to the General Principles of Interpretation by *Maxwell on The Interpretation of Statutes 12th Ed. Pg. 28 ….*

> If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.

I have in this Judgment observed that the Respondent Party misled the Petitioner. The Respondent either knowingly or unwillingly had not disclosed her marriage to Gnanasena until the Petitioner discovered such marriage which induced him to file a divorce case. Law cannot be so ignorant to recognise the

fact that Gnanasena was already married to another and by that to permit the Respondent to take mean advantage to regularise the marriage between the Petitioner and the Respondent.

I would at this point of the Judgment wish to put the record in its correct perspective having considered the following positions reflected in the *Text Book on Family Law – 6th Ed. Jonathan Herring*.

At pg. 53

> The law relating to marriage draws an important distinction between those marriages which are annulled and those which are ended by divorce. Where the marriage is annulled the law recognises that there has been some flaw in the establishment of the marriage, rendering it ineffective. Where there is a divorce the creation of the marriage is considered proper but subsequent events demonstrate that the marriage should be brought to an end.

At pg. 55

> A void marriage is one that in the eyes of the law has never existed. A voidable marriage exists until it has been annulled by the courts and, if it is never annulled by a court order, it will be treated as valid. This distinction has a number of significant consequences:
>
> 1. Technically, a void marriage is void even if it has never been declared to be so by a court, whereas a voidable marriage is valid from the date of the marriage until the court makes an order. That said, a party who believes his or her marriage to be void would normally seek a court order to confirm this to be so. This avoids any doubts over the validity of the marriage and also permits the parties to apply for court orders relating to their financial affairs.

At pg. 59

> If at the time of the ceremony either party is already married to someone else, the 'marriage' will be void. The marriage will remain void even if the first spouse dies during the second 'marriage'. So, if a person is married and wishes to marry someone else, he or she must obtain a decree of divorce or wait until the death of his or her spouse. If the first marriage is void, it is technically not necessary to obtain a court order to that effect before marrying again, but that is normally sought to avoid any uncertainty. In cases of bigamy, as well as the purported marriage being void, the parties may have committed the crime of bigamy. Chris Barton has argued that there is little justification for making bigamy a crime and instead more could be done at the time of marriage to check whether parties are free to marry.

The above material obtained from the English Law attitudes would have a universal application, and there is no prohibition to draw a parallel to our local conditions, from above. Material placed before this court indicates that the Petitioner was misled to a great extent by the Respondent. The Respondent's record indicates her ability to contract marriages but with no respect to the Institution of Marriage and she entered into such marriage contracts at any cost disregarding good moral conduct. It is no doubt illegal and contrary to public policy as it would not be in the best public interest to contract a marriage whilst another marriage is pending, and not dissolved according to law.

I reject Respondent's contention that it was not necessary to obtain a Decree from court to have the previous marriage dissolved, for the reason that marriage between the Respondent and Gnanasena was in any event null and

void. The said Gnanasena was already married at the time and period when the Respondent entered into a contract of marriage with him. Non-disclosure of the above position by the Respondent to the Petitioner is to take undue advantage and circumvent the law. A man or woman cannot be permitted to take advantage of his own wrong. *Brooms Legal Maxims 10th Ed pg. 191* "no man can take advantage of his own wrong" If the Respondent was genuine in her approach a proper disclosure should be made and should have taken the proper legal steps as per Section 607 of the Civil Procedure Code.

It is relevant in the context of this case to extend the maxim on 'approbate and reprobate'. Where one party is permitted to remove the blind which hides the real transaction the maxim applied that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief and insist upon its apparent character to prejudice his adversary. The maxim is founded not so much on any positive law as the broad and universally applicable Principles of Justice 20 NLR at 124.

I would for more clarity on the issue reproduce the views of the learned District Judge as contained in the following extract from the Judgment of the District Court…

අධිකරණය විසින් මෙහිදී සලකා බැලිය යුතු වන්නේ එකී ඥාණසේන සහ චිත්තිකාරිය විසින් ඇති කර ගන්නා ලද විවාහය අධිකරණයක් මගින් විසුරුවා හැර නොමැති අවස්ථාවකදී එකී චිත්තිකාරියට නැවත විවාහයකට ඇතුලත් විය නොහැකිය යන

කාරණය යි. සාමාන්‍ය විවාහ ආඥා පණත් 18 වන වගන්තියට අනුව පාර්ශවකරුවන් විවාහයකට ඇතුළත් වන අවස්ථාවේදී ඔවුන් ඊට පෙර ඇති කර ගන්නා ලද විවාහයක් නීත්‍යානුකූල ලෙස විසුරුවා හැර හෝ ශූන්‍ය බවට ප්‍රකාශනයට පත් කර නොමැති අවස්ථාවක එකී දෙවන විවාහය වලංගු නොවේ. මෙහිදී ව්‍යවස්ථාදායකය විසින් එකී දෙවන විවාහය ඇති කිරීමට පෙර පල වන විවාහය ශූන්‍ය බවට ප්‍රකාශ කර ගැනීමේ අවශ්‍යතාවක් පෙන්නුම් කර තිබේ. මේ අනුව සැබැවින් ම විත්තිකාරියට සහ ඥාණසේන අතර ඇති වූ විවාහය නීතිය ඉදිරියේ වලංගු විවාහයක් නොවේ. නමුත් එම පදනම මත සිට විත්තිකරියට නැවත විවාහයකට ඇතුලත් විය නොහැකිය. විත්තිකාරිය නැවත විවාහයට ඇතුළත් වීමට නම් එකී විත්තිකාරිය ඥාණසේන සමග වී. 2 ලේකණය අනුව ඇතුලත් වූ විවාහයෙන් ශූන්‍ය බවට ප්‍රකාශ කරවා ගත යුතුව තිබුණි. එසේ ප්‍රකාශ කරවා ගැනීමකින් තොරව විත්තිකාරිය පැ. 1 ලේකණය මත පැමිණිලිකරු සමග නැවත විවාහයකට ඇතුළත් වී ඇත. මේ අනුව සාමාන්‍ය විවාහ ආඥාපණතේ 18 වන වගක්තිය පැ. 1 දරණ විවාහය සහතිකය සම්බන්ධයෙන් ද අදාල වේ. මේ අනුව විත්තිකාරිය පැ 3 විවාහයෙන් ඇතුලත් වූ විවාහය ශූන්‍ය බවට ප්‍රකාශයට පත් කරවා ගෙන නොමැති බැවින් විත්තිකාරිය සහ පපැමිණිලිකරු පැ. 1 දරණ ලේඛණය මත ඇතුලත් වූ විවාහය නීත්‍යානුකූලව වලංගු නොවන ශූන්‍ය විවාහයක් බව තහවුරු වේ.

The question of law raised in this appeal are answered as follows in favour of the Petitioner.

15(a)(i) Yes. In the context and circumstances of the case in hand Respondent should have resorted to the provisions of Section 607 of the Civil

Procedure Code to dissolve her previous marriage with Gnanasena prior to entering into a marriage with the Petitioner. If not it amounts to an abuse of the process of law.

(ii) Yes

15. (b) It is available to both a husband or wife to have the marriage dissolved on any ground which renders the marriage contract between them void by law.

In all the facts and circumstances of the case, I set aside the Judgment of the High Court and affirm the Judgment of the learned District Judge dated 8th December 2006. As such the appeal is allowed with costs, as per the prayer to the Petition of Appeal dated 22.12.2011.

Appeal allowed.

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

SC.APPEAL NO. 221/2014

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

In the matter of an application for Leave to Appeal from the Judgment of the High Court of the Western Province Holden in Colombo, under and in terms of, inter alia, Section 31DD of the Industrial Disputes Act as amended and Act No. 19 of 1990.

SC. APPEAL No.221/2014

SC.HC.LA No.21/2014

HC. Appeal No. HC ALT 139/2012

LT Colombo Case No.LT/2/ad/2790/2005

M. Anura Fernando
No.116, Bodhirajapura,
Werahera,
Boralesgamuwa.
Applicant-Respondent-Petitioner

Vs.

Little Lion Associates (Pvt) Limited
No.11, A.G. Hiiniappuhamy Mawatha,
Colombo 13.
Respondent-Appellant-Respondent

SC.APPEAL NO. 221/2014

BEFORE : **SISIRA J. DE ABREW, J.**

UPALY ABEYRATHNE, J. &

NALIN PERERA, J.

COUNSEL : Shantha Jayawardhana for the Applicant-Respondent-Appellant.

Ranil Prematillake for the Respondent-Appellant-Respondent.

ARGUED &

DECIDED ON: 27.05.2016.

SISIRA J. DE ABREW, J.

Heard both counsel in support of their respective cases. This is an appeal to set aside the judgment of the Learned High Court Judge dated 05.03.2014, wherein he set aside the judgment of the Learned President of the Labour Tribunal. Learned President of the Labour Tribunal ordered re-reinstatement with back wages. Vide order marked P3. This Court, by its order dated 20.11.2014, granted Leave to Appeal on questions of law set out in paragraphs 8a, 8b, 8f & 8g of the Petition dated 11.11.2014. They are as follows:-

8(a) Did the High Court of the Western Province (Holden in Colombo) err in law by failing to appreciate that the Learned President of the Labour Tribunal was correct in holding that

the termination of the Petitioner's services was unfair and unjustified?

8(b) Did the High Court of the Western Province (Holden in Colombo) err in law by failing to appreciate that the Order of the Labour Tribunal was just and equitable?

8(f) Did the High Court of the Western Province (Holden in Colombo) err in law by setting aside the Order for re-instatement of the Petitioner?

8(g) Did the High Court of the Western Province (Holden in Colombo) err in law by setting aside the Order for back wages to the Petitioner?

The main allegation leveled against the Applicant-Respondent-Appellant (hereinafter referred to as the Applicant) in this case is that he, whilst in employment of the Respondent Company, took steps to remove one bag of milk powder from the stores.

Learned Counsel appearing for the Applicant tried to contend that the Applicant was not responsible for the loss of the one bag of Milk Powder (25 Kilos of milk powder). He contended that although document marked R4 states that 50 Kilograms of Milk powder had been issued, the gate pass only indicated that only 25 Kilograms of milk powder had been loaded to the lorry. The Applicant in this case is the driver who drove the relevant lorry. Although, the learned Counsel took up the said argument, this argument is nullified by the evidence of Muniandi and Ajantha Fernando. Muniandi at page 30 of the brief, states that he loaded two bags of milk powder each containing 25 Kilos to the lorry

driven by the Applicant. This is confirmed by the evidence of Ajantha Fernando.

The Respondent has produced a transport chart relating to the relevant lorry driven by the Applicant. According to the said transport chart marked R8, the duration that takes for the lorry to go from Stores to the Factory is only 2 minutes. On the day of the incident, the duty of the Applicant driver was to transport the goods issued by the Stores to the Factory. According to the evidence, the stores is found on one side of the road and the factory is found on the other side of the road. According to the said transport chart normal time that takes for the lorry to go from the Stores to the Factory is only two minutes. But on the day in question when he was transporting the goods from the Stores to the Factory he had taken 12 minutes. The applicant, in his evidence, failed to offer any explanation to the said delay. The applicant, in his evidence, denied that he took 12 minutes. But his evidence is nullified by the said transport chart marked R8. Respondent Company before termination of the services of the Applicant took steps to hold an inquiry by an Inquiring Officer. We note that the Applicant failed to participate in the said domestic inquiry. At the conclusion of the domestic inquiry the Inquiry Officer found the Applicant guilty for the main allegation. When we consider the evidence led at the trial ,we are of the opinion that the allegation leveled against the Applicant has been proved. We therefore hold the view that it is not proper to order re-instatement and back wages. If an employee of an employer steals things of the employer, such an employee cannot be kept in employment because the act of stealing amounts to loss of confidence of the employer.

In such a case ordering re-instatement with back wages cannot be considered as a just and equitable order. For the above reasons, we hold that the High Court Judge was correct in setting aside the order of the Learned Labour Tribunal President.

In view of the above findings we answer the questions of law raised by the Appellant in the negative. For the above reasons, we see no reasons to interfere with the judgment of the Learned High Court Judge dated 05.03.2014 and dismiss this Appeal. The Appeal is dismissed.

JUDGE OF THE SUPREME COURT

UPALY ABEYRATHNE, J.

I agree.

JUDGE OF THE SUPREME COURT

NALIN PERERA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

Horathal Pedige Jayathilake also known as
Hettiarachchige Jayathilake

Plaintiff-Appellant-Petitioner-Appellant

SC Appeal 231/2014

SC/HCCA/LA No.175/2014
WP/HCCA/Gph 123/2008(F)
DC Attanagalla Case No.17/P

Vs

1. Horathal Pedige Jayarathne
2. Wijayalath Pedige Jayawathi Dayawathi
3. Horathal Pedige Upul Priyantha Deepthi
4. Horathal Pedige Jayathissa
5. Yoda Pedige Josi Nona
6. Horathal Pedige Nimalasiri Jayatissa
7. Horathal Pedige Leelaratne Jayatissa
8. Jeevananda Jayatissa
9. HA Keerthi Jayalath

Defendant-Respondent-Respondent- Respondents

Before : Priyasath Dep PC J
Sisira J De Abrew J
Anil Gooneratne J

Counsel : Damitha Karunaratne for the Plaintiff-Appellant-Petitioner-Appellant.
Sudarshani Cooray for the Defendant-Respondent-Respondent-Respondents

Argued on : 13.11.2015

Written Submissions
tendered on : By the Plaintiff-Appellant-Petitioner-Appellant on 23.1.2015
By the Defendant-Respondent-Respondent-Respondents on 25.5.2015

Decided on : 9.3.2016

Sisira J De Abrew J.

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) filed action in the District Court to partition the land described in the schedule to the plaint. The original owners of the land to be partitioned were Horathal Pedige Donchiya and Hewa Pedige Dingira. The said owners gifted 1/5th share of the land to Horathal Pedige Amarasinghe by deed No 13197 dated 30.3.1997. This deed was not challenged in this case. It was alleged by the Plaintiff-Appellant that said Horathal Pedige Amarasinghe gifted 1/5th share of the land to the Plaintiff-Appellant by deed No.1735 dated 13.6.2000 attested by TP Ranjani Ashoka Notary Public. It is noted that other transfer deeds in this case namely deed No.13188 dated 30.3.1997, deed No. 13199 dated 30.3.1997 and deed No.13200 dated 30.3.1997 were not challenged by either party. But the Defendant-Respondent-Respondent-Respondents (hereinafter referred to as Defendants) challenged the deed of gift No.1735 dated 13.6.2000 wherein Horathal Pedige Amarasinghe is alleged to have gifted 1/5th share of the land to the Plaintiff-Appellant.

The defendants took up the position that by deed No.1735 dated 13.6.2000 no rights had passed to the Plaintiff-Appellant as the said deed was not an act of

Horthal Pedige Amarasinghe who died unmarried and issueless and that accordingly rights of Horthal Pedige Amarasinghe should devolve on his brothers and sisters who are the 1st defendant, 4th defendants, Seelawathi, Sirinimal and the Plaintiff-Appellant. After trial the learned District Judge rejected the deed No.1735 dated 13.6.2000. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant appealed to the Civil Appellate High Court. The Civil Appellate High Court, by its judgment dated 4.3.2014, affirming the judgment of the learned District Judge, dismissed the appeal. Being aggrieved by the said judgment, the Plaintiff-Appellant has appealed to this court. This court by its order dated 28.11.2014 granted leave to appeal on the questions of law set out in paragraph 13(a) to (e) of the petition of appeal which are reproduced below.

1. Did the Honourable judges of the Civil Appellate High Court of Gampaha err in law by not considering the fact that the Notary TP Ranjani gave evidence stating that she knew the executant and that the executant signed deed No.1735 in her presence?

2. Did the Honourable judges of the Civil Appellate High Court of Gampaha err in law by refusing to accept the evidence of TP Ranjani Notary Public in relation to the execution of the deed No.1735 in the circumstances of the case?

3. Did the Honourable judges of the Civil Appellate High Court of Gampaha err in law by not considering the fact that the Notary TP Ranjani was an impartial independent witness?

4. Whether the Honourable judges of the Civil Appellate High Court of Gampaha err in law by not considering that the respondents did not call any

independent witnesses to show that the executant Amarasinghe could not sign since he was illiterate?

5. Whether the deed No 1735 executed by the TP Ranjani Notary Public is in conformity with the provisions of the Evidence Ordinance?

The most important question that must be decided in this case is whether the deed of gift No 1735 dated 13.6.2000 was an act by Horthal Pedige Amarasinghe or not. In other words whether the deed of gift No 1735 dated 13.6.2000 was a fraudulent deed. If the deed of gift No 1735 dated 13.6.2000 was not an act by Horthal Pedige Amarasinghe or it was a fraudulent deed, the appeal of the Plaintiff-Appellant should fail. I now advert to these questions. The Defendants challenged the deed of gift No.1735.

It is undisputed that Horthal Pedige Amarasinghe is the brother of the Plaintiff-Appellant and the 1st and the 4th defendants and that said Amarasinghe was a disabled person. The Plaintiff-Appellant in his evidence says that Horthal Pedige Amarasinghe could sign. TP Ranjani Ashoka the Notary Public who attested the deed No.1735 too says, in her evidence, that Horthal Pedige Amarasinghe placed his signature on the deed before her. But the 1st Defendant Horathal Pedige Jayarathne, in his evidence, says that his brother Horthal Pedige Amarasinghe who was a disabled person could not sign and write. He further says, in his evidence, that when his parents gifted 1/5th share of the land in question to Horthal Pedige Amarasinghe by deed No. 13197, he (the 1st Defendant) placed his signature on the deed on behalf of Horthal Pedige Amarasinghe as the said Horthal Pedige Amarasinghe could not sign. He has identified his signature on the deed. He placed his signature to show the acceptance of the gift by Horthal Pedige Amarasinghe. When I examined the above evidence, I am of the opinion that the 1st

Defendant has clearly established that Horthal Pedige Amarasinghe was a person who could not sign. In considering truthfulness of this evidence one must not forget the claim of the defendants. The claim of the Defendants was that the rights of Horthal Pedige Amarasinghe should devolve on all brothers and sisters. In the light of this evidence how can anybody accept Notray's evidence as true evidence when she said that Horthal Pedige Amarasinghe placed his signature on the deed No.1735 before her?

TP Ranjani Ashoka the Notary Public who attested the deed No 1735 says, in her evidence, that two attesting witnesses who signed the deed are Daisy Agnus who is the wife of the Plaintiff-Appellant and Ranthatige Wijethilake. She further says in her evidence that she does not know the said Wijethilake. But she, in her attestation in the said deed, has certified that she knew both witnesses. Thus it appears that her evidence contradicts her own attestation. When the above evidence is considered the question that arises is whether any reliance could be placed on her evidence. In my view no reliance could be placed on the evidence of Ranjani Ashoka the Notary Public who attested the deed No.1735. As I pointed out earlier, the Notary Public who attested the deed says, in her evidence, that one of the attesting witnesses was Daisy Agnus, the wife of the Plaintiff-Appellant. The words 'Daisy Agnus' can be clearly seen on the deed as one of the signatures on the said deed. But surprisingly the Plaintiff-Appellant in his evidence says that he did not take his wife to the office of the Notary Public on the day that the deed No 1735 was executed. It is to be noted here that the Plaintiff-Appellant did not call his wife Daisy Agnus to give evidence that she placed her signature when the deed No.1735 was executed. Why didn't the Plaintiff-Appellant call his own wife to give evidence on his behalf? There is no explanation to this question. Even the other attesting witness was not called as a witness by the Plaintiff-Appellant. There

is no explanation to this failure by the Plaintiff-Appellant. In my view the Plaintiff-Appellant should have, under these circumstances, called one of the attesting witnesses. When I consider all the above evidence the execution of deed No.1735 is a very suspicious act and gives the impression that it is a fraudulent deed. This could be a forged deed. Therefore the Inspector General of Police should be directed to investigate into this matter.

Learned counsel for the Plaintiff-Appellant contended that the Notary Public who attested the deed can be considered as an attesting witness. He therefore contended that the execution of the deed No 1735 had been proved by the evidence of the Notary Public. He relied upon the judgment of Basnayake CJ in Wijegunatilake Vs Wijegunatilake 60 NLR 560. I now advert to this contention. I have already pointed out that no reliance could be placed on the evidence of the Notary Public. Section 68 of the Evidence Ordinance reads as follows.

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

In Samarakoon Vs Gunasekera [2011] 1SLR 149 at 154 and 155 Supreme Court held as follows: "A deed for the sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in Section 68 of the Evidence Ordinance by proof that the maker (the vendor) of that document signed it in the presence of witnesses and notary. If this is not done the document and its contents cannot be used in evidence."

In Hilda Jayasinghe Vs Fransis Samarawickrama [1982] 1 SLR 349 the Court of Appeal observed the following facts: "By Deed No. 4753 dated 12.8.75 the Defendant-Appellants transferred their ancestral home to Ajith minor son of

Mr. Kahatapitige Attorney at Law and Notary Public for a sum of Rs. 3,500/- on condition that the property be transferred back to Defendant-Appellants on the expiry of three years on payment of Rs.3,500/- with 8% interest. By Deed No. 4879 of 24.3.76 Ajith the minor son of the Notary Public re-transferred the property to Defendant-Appellants on payment of Rs.3,500/-. By Deed 4880 of 24.3.76 the Defendant-Appellants sold the same land to Plaintiff Respondent for Rs. 8,000/-. These two deeds too were attested by Mr. Kahatapitige Attorney at Law and Notary Public.

Defendant Appellants alleged that through the machinations of the Attorney at Law and Notary Public both Deeds Nos. 4879 and 4880 of 24.3.76 were fraudulently executed by obtaining the signatures of the Defendant Appellants by misrepresentation of facts and by obtaining their signatures and thumb impression on blank sheets of paper. They also alleged that no consideration passed and that the two attesting witnesses were not present at the time they placed their signature and thumb impression. Mr. Kahatapitige the Notary gave evidence but no attesting witness was called."

After considering the above facts Thambiah J (Ranasinghe J agreeing) held that the circumstances of this case required that one of the two attesting witnesses be called to prove execution of the deed.

In N U Wijegoonatilake Vs B Wijegoonatilake 60 NLR 560 Basnayake CJ (Pulle J agreeing) by judgment dated **6.7.1956** held thus: "A Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance."

In L Marian Vs Jesuthasan 59 NLR 348 Sinnathamby J (Sansoni J agreeing) by judgment dated **20.7.1956** held thus as follows:" Where a deed executed before a notary is sought to be proved, the notary can be regarded as an attesting witness

within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant."

What is the value of the evidence of a Notary Public who has failed to state in his/her attestation that he personally knew the executant but says in his evidence that he knows the executant? If he knew the executant personally at the time of the execution of the deed, what was the difficulty for him to state the same in his attestation? When he certified the attestation the facts were fresh in his mind. Then the preparation of the attestation was the best time for him to state that he knew the executant personally. If he has failed to state in the attestation the fact that he knew the executant personally and later says that he knows the executant personally, no reliance can be placed on such evidence. In the present case the Notary Public who attested the deed No.1735 has failed to state in her attestation that she personally knew the executant but says in her evidence that she knew the executant. It must be borne in mind that when she was giving evidence, she was aware that her own deed was being challenged. Therefore she would naturally defend his deed. When I consider all these matters, I hold the view that no reliance could be placed on her evidence. TP Ranjani Ashoka is an Attorney-at-Law and a Notary Public. When lawyers give evidence, courts expect more accuracy of his/her evidence than lay witnesses because they are aware of the procedure of courts and the relevant legal provisions.

If the executant is known to the Notary Public, he is expected to state it in the attestation. In fact according to Section 31(20) of the Notaries Ordinance, if the executant is known to the Notary Public, he should state it in his attestation. Section 31(20) of the Notaries ordinance reads as follows:

"He shall without delay duly attest every deed or instrument which shall be executed or acknowledged before him, and shall sign and seal such attestation. In such attestation he shall state-

(a) that the said deed or instrument was signed by the party and the witnesses thereto in his presence and in the presence of one another ;

(b) ***whether the person executing or acknowledging the said deed or instrument or the attesting witnesses thereto (and in the latter case he shall specify which of the said witnesses) were known to him ;***

(c) the day, month, and year on which and the place where the said deed or instrument was executed or acknowledged, and the full names of the attesting witnesses and their residences ;

(d) whether the same was read over by the person executing the same, or read and explained by him, the said notary, to the said person in the presence of the attesting witnesses ;

(e) whether any money was paid or not in his presence as the consideration or part of the consideration of the deed or instrument, and if paid, the actual amount in local currency of such payment;

(f) the number and value of the adhesive stamps affixed to or the value of the impressed stamps on such deed or instrument and the duplicate thereof;

(g) specifically the erasures, alterations, and interpolations which have been made in such deed or instrument, and whether they were made before the same was read over as aforesaid, and the erasures, alterations, and interpolations, if

any, made in the signatures thereto, in its serial number, and in the writing on the stamp affixed thereto." (emphasis added).

Thus the Notaries Ordinance requires the Notary Public who attested a deed to state in the attestation that the executant is known to him if he knows the executant. After considering the above legal literature, I hold that when a deed executed before a Notary Public is sought to be proved, the Notary Public can be regarded as an attesting witness within the meaning of Section 68 of the Evidence Ordinance if the following criteria are satisfied.

1. He (the Notary Public) knew the executant personally.
2. He has stated the said fact (the fact that he knows the executant personally) in his attestation.
3. He can testify to the fact that the signature on the deed is the signature of the executant.

In the present case the 2nd criterion above has not been satisfied. In fact TP Ranjani Ashoka the Notary Public has not complied with Section 31(20) of the Notaries Ordinance. For the above reasons, I hold that the deed No1735 has not been proved and that it is not a valid deed in law. I therefore hold that the rejection of deed No.1735 said to have been attested by TP Ranajni Ashoka, the Notary Public by the Learned District Judge is correct. I therefore hold that the deed No.1735 dated 13.6.2000 attested by TP Ranjani Ashoka the Notary Public was not act of Hortahl Pedige Amarasinghe.

Learned counsel for the Plaintiff-Appellant also contended that the Defendant-Appellant should, by calling independent evidence, prove that Horthal Pedige Amarasinghe was a person who could not sign. I now advert to this

contention. When considering this contention I would like to consider Section 101 of the Evidence Ordinance which reads as follows:

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

In the present case it is the Plaintiff-Appellant who says that Horthal Pedige Amarasinghe signed the deed No.1735. Then it becomes his burden to prove it. This position is evident by the illustration (b) given in Section 101 of the Evidence Ordinance which reads as follows:

"A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true. A must prove the existence of those facts."

In view of the aforementioned reasons, I answer the questions of law raised by the Plaintiff-Appellant in the negative. I have earlier observed that the deed No.1735 dated 13.6.2000 attested by TP Ranjani Ashoka could be a forged deed. I therefore direct the Inspector General of Police to investigate into this matter and take steps according to law.

I have gone through the evidence and the judgments of the District Court and the Civil Appellate High Court. I see no reasons to interfere with the said judgments.

For the above reasons, I affirming the judgment of the Civil Appellate High Court, dismiss this appeal with costs. The Registrar of this Court is directed to send

a certified copy of this judgment, a certified copy of the appeal brief and a certified copy of the deed No.1735 dated 13.6.2000 attested by TP Ranjani Ashoka to the Inspector General of Police for necessary action.

Judge of the Supreme Court.

Priyasath Dep 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 appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 235/2014

SC/ HCCA/LA/ 416/2014

UVA/HCCA/Badulla/82/12(F)

DC Badulla No/6419/MB

Seylan Bank PLC
Ceylinco Seylan Towers,
No. 90, Galle Road,
Colombo 03.

Plaintiff

Vs.

1. Mullavidanalage Don Padman Hemachandra,
   No. 7D, South Lane,
   Badulla.
2. Mullavidanalage Don Amarasiri Hemachandra,
   No 35 / 2,
   Bandaranayake Mawatha,
   Badulla.

Defendants

AND BETWEEN

Mullavidanalage Don Amarasiri Hemachandra,
No 35 / 2,
Bandaranayake Mawatha,
Badulla.

2nd Defendant Appellant

Vs.

Seylan Bank PLC
Ceylinco Seylan Towers,
No. 90, Galle Road,
Colombo 03.

Plaintiff Respondent

AND NOW BETWEEN

Seylan Bank PLC
Ceylinco Seylan Towers,
No. 90, Galle Road,
Colombo 03.

Plaintiff Respondent-Appellant

Vs.

Mullavidanalage Don Amarasiri
Hemachandra,
No 35 / 2,
Bandaranayake Mawatha,
Badulla.

2nd Defendant Appellant-Respondent

BEFORE : EVA WANASUNDERA, PC, J.

UPALY ABEYRATHNE, J.

ANIL GOONARATNE, J.

COUNSEL : Anura Ranawaka with Oshada Mahaarachchi for the Plaintiff Respondent Appellant

D.P.L.A. Kashyapa Perera for the 2nd Defendant Appellant Respondent

WRITTEN SUBMISSION ON: 20.01.2015 (Plaintiff Respondent Appellant)

18.03.2015 (2nd Defendant Appellant - Respondent)

ARGUED ON : 03.12.2015

DECIDED ON : 14.10.2016

UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) instituted the said action bearing No 6419/MB against the 1st and 2nd Defendants in the District Court of Badulla seeking inter alia to recover a sum of Rs. 3,141,832.34 and interest accrued thereon from 01.11.2008. The Appellant averred that the 1st Defendant obtained loan facilities and overdraft facilities from the Appellant Bank at several instances and the immovable property described in the schedule to the plaint which was owned by the 2nd Defendant was mortgaged to the Appellant Bank by executing the mortgage bond bearing No 544 dated 19.10.1992 as security for the facilities already obtained and also in respect of the future financial facilities to be obtained by the 1st Defendant. Accordingly the Appellant prayed for a judgment against the 1st and 2nd Defendant to recover the said sum of money and to sell the said mortgaged property at a public auction to recover the said sum of Rs. 3,141,832.34.

The 2nd Defendant filed an answer praying for a dismissal of the Appellant's action. In his answer he took up the position that no cause of action has been disclosed by the plaint and in any event the cause of action disclosed in paragraphs 10 and 11 of the plaint is prescribed in law. He further averred that

since there was no formal demand of money made by the Appellant, he cannot have and maintain the action against the 2nd Defendant.

The case proceeded to trial on 13 issues and the learned District Judge delivered a judgment in favour of the Appellant as prayed for in the plaint. Being aggrieved by the said judgment dated 27.08.2012 the 2nd Defendant Appellant Respondent (hereinafter referred to as the 2nd Respondent) preferred an appeal to the High Court of Civil Appeal of the Uva Province holden at Badulla.

The 2nd Respondent, in his written submission to the High Court of Civil Appeal sought an interpretation of the document produced marked P 12 (the mortgage bond bearing No 544 dated 19.10.1992) since the learned District Judge had delivered the judgment for a sum of amount which exceed the amount agreed for by the parties to the mortgage bond marked P 12 dated 19.10.1992.

The Appellant, countering the said submission of the 2nd Respondent, had submitted before the High Court of Civil Appeal that the said issue was never raised before the District Court.

When the parties were given an opportunity to file further written submissions by the High Court of Civil Appeal, in addition to the said complaint the 2nd Respondent had taken up another new position that the non appearance of the 1st Defendant in the District Court deprived the 2nd Respondent of the opportunity to obtain cogent evidence necessary for his defence.

The learned Judges of the High Court of Civil Appeal, by their judgment dated 17.07.2014 have set-aside the judgment of the learned District Judge dated 27.08.2012 and ordered a trial *Denovo* on the basis that the trial judge had failed to correctly interpret the document P 12 which states that the liability under the document should not exceed Rs. 300,000/-.

The Appellant sought leave to appeal from the said judgment of the High Court of Civil Appeal dated 17.07.2014 and this court granted leave on the following question of law set out in paragraph 20(i), (ii), (iii), (iv), (v), (vi), (vii) and (viii) of the petition dated 26.08.2014.

20(i). Did the Civil Appellate High Court err in law by concluding that the learned District Judge had failed to correctly interpret the document marked P 12?

(ii). Did the Civil Appellate High Court err in law in coming to the conclusion that the sum of money to be recovered in the District Court action was dependant on the interpretation of the document marked P 12 and that it amounts to a pure question of law?

(iii). Did the Civil Appellate High Court err in law by failing to take in to account that the Respondent in the letter marked P 17 and in his evidence had admitted that he was liable to pay the monies claimed by the Petitioner?

(iv) Did the Civil Appellate High Court err in law by taking in to consideration the statement made in the Respondent's further written submissions that the non-appearance of the 1st Defendant in the District Court deprived the Respondent to obtain crucial evidence when there is no material to show that the Respondent had taken any attempt to obtain such evidence?

(v) Did the learned Judges of the High court of Civil Appeal misdirect themselves in law by taking the view that ordering a trial *Denovo* against the Respondent would not make any extra

burden on the Petitioner and such an order would be justified in view of the circumstances of the case and thus falling to appreciate that the evidence against the Respondent would be different to that of evidence against the 1st Defendant?

(vi) Did the Civil Appellate High Court err in law by failing to appreciate the principles of law applicable to allowing new arguments in appeal?

(vii) Did the learned Judges of the Civil Appellate High Court misdirect themselves in law by taking irrelevant matters in to consideration for their decision?

(viii) Are the conclusions of the Civil Appellate High Court based on incorrect and/or irrelevant matters?

The Appellant has contended that by the document marked P 17 the 2nd Respondent had admitted that that he was liable to pay the monies claimed by the Appellant. P 17 was a letter sent by the 2nd Respondent to the Manager, Seylan Bank, Badulla, dated 01.03.2005 requesting for a waiver of the interest and to settle only the loan amount by way of instalments. The total amount contained therein is a sum of Rs. 757,127.79. According to the prayer 'a' of the plaint the Appellant has sought a judgment against the Respondents to recover a sum of Rs 3,141,832.34. It is clear from the said prayer 'a' that by P 17 the 2nd Respondent has not admitted the liability to pay the sums claimed by the Appellant.

On the other hand the Appellant has not instituted the present action against the 2nd Respondent upon the document marked P 17. The Appellant's action is solely based on the Mortgage Bond Marked P 12. Hence the 2nd

Respondent's liability to pay the Appellant has arisen only from the mortgage bond marked P 12.

At the hearing of this appeal the Appellant contended that the mortgage bond marked P 12, although titled as a "mortgage bond", was not intended to be a mortgage, but to bind both the Respondents to a written contract to repay on demand the monies due to the Appellant Bank, as well as a mortgage of the property to secure the said payment. Further the said mortgage bond was also to constitute a continuing obligation and liability to pay on demand for payment.

The Appellant heavily relied on clause 11 of the Mortgage Bond bearing No 544 dated 19.10.1992 which was produced at the trial marked P 12. Clause 11 of the said mortgage bond reads thus;

> " that these presents shall be a continuing security to the bank for all and every the sums and sum of money which now are or is or which shall or may at any time and from time to time and all times hereafter be or become due owing and payable by the obligors to the bank under by virtue or in respect of secured by these presents notwithstanding that the amount of such sums or sum of money from time to time vary or be reduced or fluctuate or be repaid in full and that fresh liabilities shall be incurred after the Obligors ceased to be indebted to the Bank it being intended that the total amount of the monies hereby secured shall not exceed the sum of **RUPEES THREE HUNDRED THOUSAND (Rs. 300.000/-)** of lawful money of Sri Lanka the security hereby created being intended to cover the final balance of account between the Obligors of the **ONE PART** and the Bank of the **OTHER PART** in respect of all transactions and dealings

such final balance not to exceed in the whole the sum of **RUPEES THREE HUNDRED THOUSAND (Rs. 300,000/-)** of lawful money of Sri Lanka plus interest thereon."

On the said clause the Appellant's contention was that by P 12 both Respondents had agreed and undertaken to pay on demand to the Appellant the monies due on the loans given to the 1st Respondent and the mortgage of property by P 12 had been made to secure the monies due on the said loans given to the 1st Respondent.

It is clear and no doubt that according to the said Clause the repayment would only arise when demanded by the Appellant. Even the 2nd Respondent had not challenged the said provisions contained in the said Clause. Even in paragraph 10 of his answer the 2nd Respondent has averred that prior to the institution of the action against him the Appellant had failed to send a formal demand and therefore the Appellant cannot have and maintain the present action against him.

It is clearly apparent from the above questions of law that the words "on demand" contained in clause 11 of P 12 do not arise for consideration in this appeal since the plea of prescription has not been raised before this court.

The 2nd Respondent's contention before the High Court of Civil Appeal was that under any circumstances the liability under the said mortgage bond should not exceed a sum of Rs. 300,000/-. In this regard the 2nd Respondent too heavily relied upon the Clause 11 of the Mortgage Bond. As submitted by the learned Counsel for the 2nd Respondent the relevant provisions contained in Clause 11 of the said Mortgage Bond read thus;

> "that the total amount of the monies hereby secured shall not exceed the sum of **RUPEES THREE HUNDRED THOUSAND (Rs. 300.000/-)** of lawful money of Sri Lanka **the security hereby created being intended to cover the final balance of account** between the Obligors of the ONE PART and the Bank of the OTHER PART in respect of all transactions and dealings **such final balance not to exceed** in the whole the sum of **RUPEES THREE HUNDRED THOUSAND (Rs. 300,000/-)** of lawful money of Sri Lanka plus interest thereon." **(**Emphasis added)

Needless to say that said Clause 11 in clear and unambiguous terms express that the liability under the mortgage bond should not exceed Rs 300,00/-. It specifically stipulates that "in respect of all transactions and dealings the final balance should not exceed in the whole the sum of Rs. 300,000/=."

At the hearing our attention was drawn to Clause (a) at page 2 of the Mortgage Bond marked P 12 by the Appellant, which reads thus;

> "All and every the sums and sum of money which now are or is or which shall or may at any time from time to time and at all times hereafter be or become due owing and payable to the Bank by the principle debtor upon or in respect of loans advances or payments which may at any time and from time to time and at all times hereafter be made by the Bank to or for the use or in respect of any account or accounts transaction or transactions whatsoever between the principle debtor and the Bank."

On the said provisions the Appellant contended that, irrespective of the provisions contained in Clause 11 of P 12 the 2nd Respondent is liable to pay on

demand all monies obtained on loan facilities and on overdraft facilities by the principal debtor which became due to the Appellant Bank. I am not inclined to agree with the contention of the Appellant. Provisions contained in said Clause (a) has no bearing on the limitations set out in Clause 11 of the Mortgage Bond which has been embodied therein to protect the rights of the 2nd Respondent. As I have aforementioned, wordings in Clause 11 of the Mortgage Bond is clear and unambiguous and hence a narrow interpretation cannot be attached to such Clause creating room for said Clause (a) to supersede the limitations set out in Clause 11 of the Mortgage Bond. It is a cardinal principle of interpretation that the words must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless there is something in the object to suggest to the contrary. The words themselves best declare the intention of the makers. Hence the Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by them and not to ignore them.

Therefore I hold that in the Mortgage Bond marked P 12, the 2nd Respondent's liability is limited to a sum of Rs. 300,000/= plus interest and the Appellant's claim against the 2nd Respondent should not exceed in the whole a sum of Rs. 300,000/= plus interest thereon.

The Appellant further contended that the Respondent had taken up new arguments for the first time in appeal before the High Court of Civil Appeal. Learned Counsel for the Appellant submitted that initially in the written submission filed before the hearing of appeal, the 2nd Respondent took up the position that in the Mortgage Bond, the 2nd Respondent's liability was limited to a sum of Rs. 300,000/= plus interest and therefore the 2nd Respondent could not be held liable for a sum of Rs. 400,000/= as set out in P 6 and subsequently at the stage of filing further written submission after the hearing of oral submission the

2nd Respondent took up another position that the non appearance of the 1st Respondent in the District Court deprived him of the opportunity to obtain cogent evidence necessary for his defence.

The raising of new issues for the first time in appeal has been considered in a long line of cases. In this regard the requirement to be adhered by a party who wish to bring such new issues for the consideration of the appellate court is that the matter in question should be one which deals with a pure question of law. I must place on record that the practice of our courts to insist in the exercise of raising new issues of law for the first time in appeal for the exercise of appellate powers has taken deep root in our law and has got hardened in to a rule which should not be disturbed unless the matter in question is tainted with facts of the case.

Dias, J. in *Talagala Vs. Gangodawila Co-operative Stores Society 48 NLR 472* held that "Where a question which is raised for the first time in appeal is a pure question of law and is not a mixed question of law and fact, it can be dealt with. The construction of an Ordinance is a pure question of law".

In the case of *Setha vs. Weerakoon 49 NLR 225 Howard C.J.* stated that "A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it, all the requisite material for deciding the point, or the question is one of law and nothing more."

In the case of *Candappa vs. Ponambalampillai (1993) 1 SLR 184* Supreme Court held that "A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved

which were not in issue at the trial such case not being one which raises a pure question of law."

In the case of *Alwis vs. Piyasena Fernando (1993) 1 SLR 119 G. P. S. de Silva, C.J.* held that "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

In the circumstances I am of the view that the 2nd Respondent's new issue with regard to the interpretation of Clause 11 of the Mortgage Bond marked P 12 is a pure question of law and the learned High Court Judges have correctly gone in to the matter and have reached to a correct conclusion. But on the other hand having reached a correct conclusion and thereafter proceeding to make an order for a trial *Denovo* against the 2nd Respondent cannot be justified in law. Unfortunately before arriving at such conclusion the learned High Court Judges have failed to adhere to the requirements to be considered by a court of law whether the facts and circumstances that were revealed at the trial on evidence warrant the case to be remitted back to the trial court for a trial *Denovo*.

The relevant provisions in section 773 of the Civil Procedure Code empower the Court of Appeal, **where think fit, or, if need be,** to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit. (Emphasis added)

In Lada vs. Marshall [1954] 3 All ER 745 at 748, Denning, L.J. said, "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is

presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

These conditions were taken into account and applied in *Ratwatte vs. Bandara 70 NLR 231 (SC)* where the question of the admission of fresh evidence at the hearing of the appeal was referred to; It was held that "Reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz., (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, (3) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible."

It clearly seems that the 2nd Respondent has not shown any material so required to consider whether the case against him should be remitted back to the trial court for a trial *Denovo*. In the circumstances the 2nd Respondent's second new issue that the non appearance of the 1st Respondent in the District Court deprived him of the opportunity to obtain cogent evidence necessary for his defence should be unsuccessful. Hence I am of the view that the order of the learned High Judges of the High Court of Civil Appeal to send the case against the 2nd Respondent back to trial court for a trial *Denovo* is untenable. Hence I set aside the said portion of the judgment of the High Court of Civil Appeal dated 17.07.2014.

Accordingly I vary the judgment of the learned District Judge dated 27.08.2012 and hold that the 2nd Respondent's liability is limited to a sum of Rs. 300,000/= plus interest and the Appellant is entitled to a judgment against the 2nd

Respondent in the whole a sum of Rs. 300,000/= plus interest thereon. Learned District Judge is directed to enter decree against the 2nd Respondent accordingly with cost. Subject to the aforementioned variations the appeal of the Appellant is dismissed without costs.

Appeal dismissed subject to variations.

Judge of the Supreme Court

EVA WANASUNDERA, 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 in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended

Telephix Technologies (Pvt) Ltd,
185, Peradeniya Road, Kandy
Plaintiff

SC Appeal 239/2014

SC/HCCA/LA No.27/2014
HCCA No: CP/HCCA/KAN/61/2011(LA)
DC Kandy No: DSP 00334/11

Vs

R.M. Jinasena,
No.47, Sri Dhamma Siddhi Mawatha,
Asgiriya, Kandy.
Defendant

AND

Telephix Technologies (Pvt) Ltd,
185, Peradeniya Road, Kandy
Plaintiff-Petitioner

Vs

R.M. Jinasena,
No.47, Sri Dhamma Siddhi Mawatha,
Asgiriya, Kandy.
Defendant-Respondent

NOW BETWEEN

R.M. Jinasena,
No.47, Sri Dhamma Siddhi Mawatha,
Asgiriya, Kandy.
Defendant-Respondent-Appellant

Vs

Telephix Technologies (Pvt) Ltd,
185, Peradeniya Road, Kandy
Plaintiff-Petitioner-Respondent

Before : Eva Wanasundera PC J
Buwaneka Aluwihare PC J
Sisira J De Abrew J

Counsel : Amarasiri Panditharatne for the Defendant-Respondent-Appellant
Nuwan Bopage for the Plaintiff-Petitioner-Respondent

Argued on : 2.2.2016
Written Submissions
tendered on : By the Defendant-Respondent-Appellant on 16.1.2015
By the Plaintiff-Petitioner-Respondent on 16.3.2015

Decided on : 31.3.2016

Sisira J De Abrew J.

Plaintiff-Petitioner-Respondent (hereinafter referred to as the Plaintiff-Respondent) instituted action in the District Court of Kandy against the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant-Appellant) seeking inter alia the following reliefs:

1. For a declaration that the Plaintiff-Respondent is entitled to a right of servitude of light and air for its building.
2. For an interim injunction and permanent injunction preventing him (the Defendant-Appellant) from obstructing servitude of light and air for the building of the Plaintiff-Respondent and from constructing a building on the South-Western boundary of the land in the 1st schedule to the plaint.

The learned District Judge by his order dated 2.11.2011, refused to issue an interim injunction prayed for by the Plaintiff-Respondent. Being aggrieved by the said order of the learned District Judge, the Plaintiff-Respondent appealed to the Civil Appellate High Court and the said High Court by its

order dated 10.12.2013 set aside the order of the learned District Judge and directed the learned District Judge to issue an interim injunction. Being aggrieved by the said judgment of the Civil Appellate High Court the Defendant-Appellant has appealed to this court. This court by its order dated 4.12.2014, granted leave to appeal on the questions of law set out in paragraph 6(i) to (iv) of the petition dated 16.1.2014 which are set out below.

1. Did the Provincial High Court of Civil Appeals err in law in holding that the Respondent (the Plaintiff-Respondent) has set out a prima facie case since it had enjoyed servitude of light and air without any obstacle?
2. Did the Provincial High Court of Civil Appeals err in law in holding that there is a triable issue before the District Court *i.e* whether the enjoyment of light and air by the Plaintiff-Respondent has been obstructed by the Defendant-Appellant?
3. Has the Provincial High Court of Civil Appeals fallen into grave error of law by recognizing a servitude of light and air *i.e. ne luminibus officiator* where such servitude has been derecognized under our law and as such no legally enforceable right has been obstructed by the Defendant-Appellant?
4. Did the Provincial High Court of Civil Appeals err in law in considering the irrelevances namely, whether the permit issued to the Defendant-Appellant to construct on his land has been lapsed or not when it is manifestly clear that the said permit to construct has been renewed or extended?

5. Did the Provincial High Court of Civil Appeals err in law in by not considering the culpability of the Plaintiff-Respondent who has encroached upon the canal and also the land of the Defendant-Appellant and effected illegal constructions over the canal and as such equity does not favour the Plaintiff-Respondent in granting equitable relief?
6. Did the Provincial High Court of Civil Appeals err in law in failing to consider that path of light and air if at all has been obstructed by the Plaintiff-Respondent by its own volition namely by encroaching upon the municipal canal and constructing over it?

I will now consider the facts of this case. The Plaintiff-Respondent and the Defendant-Appellant are owners of the adjoining premises but there is a common canal in between the two premises. Vide paragraph 7 and 8 of the plaint and the statement made to the police by the Managing Director of the Plaintiff-Respondent. Learned counsel for the Plaintiff-Respondent contended that the Defendant-Appellant was not entitled to construct a building on his land and also encroaching on to the common canal because it would deprive (the Plaintiff-Respondent) of the light and air to the building. Learned counsel for the Plaintiff-Respondent further contended that the Defendant-Appellant's building permit issued by the Municipal Council for the construction of the building had lapsed and that therefore the Defendant-Appellant was not entitled to the construction of its building. It is noteworthy to state that the Municipal Council has not instituted any legal proceedings against the Defendant-Appellant in the Magistrate Court for unauthorized constructions. Learned counsel for the Plaintiff-Respondent also contended that the Defendant-Appellant started constructing the

building after the Plaintiff-Respondent completed its building and that therefore the Defendant-Appellant has no right to obstruct light and air that its building has been receiving all this time. He contended that Plaintiff-Respondent had a right of servitude of light and air to its building and that the Defendant-Appellant has no right to obstruct the said right of servitude.

I now advert to the submission made by both parties. The building permit (V7) issued by the Municipal Council on 20.3.2010 to the Plaintiff-Respondent for the construction of the building has been extended by the document dated 1.7.2009 marked V8 for another one year from 20.3.2009. By document marked V9 the period of this permit has again been extended for another one year from 20.3.2010. Thus building permit would be valid till 20.3.2011. Therefore it is seen that when the period stated in the permit is lapsed, the Municipal council has extended it. Further the Defendant-Appellant has subsequently obtained another permit dated 29.6.2011 valid for one year marked V 10 to construct a bridge relating the said building. V10 contains a clause that the validity of the permit could be extended by another two years if the Defendant-Appellant could not complete the construction of the bridge. If the building that the Defendant-Appellant is going to construct is an unauthorized building or the previous permit has not been extended, the Municipal Council would not have issued the permit marked V10. When I consider all the aforementioned matters, I am unable to accept the contention of learned counsel for the Plaintiff-Respondent and I reject it. It is difficult to conclude on the material placed before court that the Defendant-Appellant has started constructing his building on the common canal.

The main question that must be decided in this case is whether the Plaintiff-Respondent is entitled to a right of servitude of light and air to its building over the adjoining land and whether the Defendant-Appellant is entitled to construct his building approved by the Municipal Council on his land obstructing the light and air that the Plaintiff-Respondent's building is receiving. I now advert to this question. In considering this question I would like to consider certain judicial decisions. In Neate Vs de Abrew (1883) 5 SCC 126 it was held that where a plaintiff had for ten years enjoyed an undisturbed flow of light and air through a window, he acquires a servitude *ne luminibus officiator.* This judgment was followed in the cases of Goonewardene Vs Mohideen Koya & Co. (13 NLR 264) and Pillai Vs Fernando (14 NLR 138). But Basanayake CJ and Abeywardene J in W Perera Vs C Ranatunga 66NLR 337 did not follow the above judicial decisions. They in the said case observed the following facts.

> *"The plaintiff and the defendants were owners of adjoining premises. The plaintiff asserted that the defendant was not entitled to erect a multi-storeyed building on his land because it would deprive him of the light and air which his own building had received through certain windows which overlooked the defendant's land. The trial judge held that the plaintiff had by 'prescription obtained the servitude ne luminibus officiator"*. Basnayake CJ (with whom Abeywardene J agreeing) held *"that a right of servitude of light and air cannot be acquired by prescription by mere enjoyment. i.e., by the mere fact that neighbor has not built on his land for any length of time."* The Supreme Court in the said case did not follow the judicial decisions in

Neate Vs de Abrew (supra), Goonewardene Vs Mohideen Koya & Co (supra) and Pillai Vs Fernando (supra).

Later in 1967 a bench of five judges of this court in Musajee Vs Carolis Silva 70 NLR 217 considered this question and held as follows:

"Under the law of Ceylon mere enjoyment, for ten years, of the free access of light and air through a window of a building does not entitle the owner to the servitude ne luminibus officiator, i.e., the right to prohibit a neighbour from obstructing the window light by erecting a higher building on his land. This servitude cannot be acquired by the mere fact that the neighbour has not built on his land for a long period so as to cause such obstruction of light and air."

His Lordship Justice HNG Fernando in the said judgment at page 226 observed thus:

"In our congested cities and towns, adequate work and living space will have to be provided by the erection of tall modern buildings, which may be in quite close proximity to each other. It is unthinkable that such necessary development of available ground-space should be impeded by the mere fact of the existence on a neighbouring land of a building which has hitherto enjoyed the access of light and air in fact only, and not as of right. The civic authorities have by statute sufficient powers to control development in the interest of public health and other similar grounds."

The Supreme Court in the said case did not follow the judicial decisions in Neate Vs de Abrew (supra), Goonewardene Vs Mohideen Koya & Co (supra) and Pillai Vs Fernando (supra).

Considering the above legal literature set out in W Perera Vs C Ranatunga (supra) and Musajee Vs Carolis Silva (supra) I hold that when two persons become owners of adjoining premises one cannot acquire a right of servitude of light and air by prescription over the other's land by mere enjoyment of light and air for a long period and that mere fact that the neighbour has not constructed a building on his land for any length of time does not give a right to the owner of the other land to acquire a right of servitude of light and air. I further hold that the owner of the adjoining premises who has so far not constructed a building on his land has a right to construct a building approved by the Local Authority/Urban Development Authority on his land which may obstruct the light and air that the adjoining building has been receiving.

For the aforementioned reasons, I hold that the Plaintiff-Respondent in this case has not established that he is entitled to a right of servitude of light and air to its building over the Defendant-Appellant's land. Therefore it is seen that there is no serious question to be tried and the claim of the Plaintiff-Respondent is frivolous. What is meant by a prima facie case? In finding an answer to this question, I would like to consider a passage from the book titled 'Law of Injunctions' by G S Gupta 7th edition page 168 wherein it says thus:

> *"Prima facie case really means that there is a serious question to be tried and that the claim of the plaintiff is not frivolous or vexatious."*

Considering the above legal literature and the facts of this case, I hold that the Plaintiff-Respondent has failed to establish a prima facie case to move for an interim injunction.

If a Plaintiff in an application for an interim injunction has not established a prima facie case, he is not entitled to an interim injunction and in such a situation court should refuse to issue interim injunctions. This view is supported by the following judicial decisions. In Felix Dias Bandaranayake Vs The State Film corporation and Another [1981] 2 SLR 287 at page 302 His Lordship Justice Soza remarked thus:

> *"In Sri Lanka we start off with a prima facie case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning."*

In this regard I would like to consider a passage from the book titled 'Law of Injunctions' by G S Gupta 7th edition page 169 wherein it says thus:

> *"Though, the saying is that 'you cannot have the cake and eat it too', a plaintiff who obtains a temporary injunction against the defendant eats the cake even before getting it. Therefore a temporary injunction would be justified only if it was based on a good prima facie case made out by the plaintiff showing that in all probability that he is entitled to get the permanent injunction sought after before going through the evidence depending on the pleadings and documents placed before the Court. Normally, it is in the discretion of the Court to assess whether there is a good prima facie case or not. Granting of an injunction is a very serious matter-it restrains the other party from performing an act or exercising his rights; the Court will not grant an injunction unless it is thoroughly satisfied that there is a prima facie case in favour of the petitioner.*

For the above reasons, I hold that the Plaintiff-Respondent is not entitled to an interim injunction. The learned Judges of the Civil Appellate High Court have failed to consider the above matters.

In view of the above conclusion reached by me, I answer the questions of law Nos. 1to 4 in the affirmative. The questions of law Nos. 5 and 6 do not arise for consideration.

For the aforementioned reasons, I set aside the judgment of the Civil Appellate High Court dated 10.12.2013 and affirm the order of the learned District Judge dated 2.11.2011. I allow the appeal with costs. The Defendant-Appellant is entitled to costs in lower courts as well.

Appeal allowed.

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

The Attorney General
Attorney General's Department
Hulftsdorp, Colombo 12

Defendant-Appellant-Petitioner

S.C.Case No.SC/HCCA/LA/ No.492/14
Civil Appeal High Court Case No.WP/HCCA/COL/134/2006(F)
D.C.Colombo Case No.11619/MR

Vs.

Ulviti Gamage Dhanapala
No.32, Galhena Road
Gangodawila, Nugegoda

Plaintiff-Respondent-Respondent

BEFORE : **SISIRA J.DE.ABREW, J.**
ABEYRATNE, J.
K.T.CHITRASIRI, J.

COUNSEL : Sobitha Rajakaruna, D.S.G.for the Defendant-Appellant-Petitioner

Gamini Premathilake for the Plaintiff-Respondent-Respondent

ARGUED ON : 22.06.2016

ORDER ON : 09.08.2016

CHITRASIRI, J.

When this matter was supported on 24.3.2016 for granting of leave in order to decide whether or not this application could be proceeded with, learned Counsel for the plaintiff-respondent-respondent brought to the notice of Court that he has raised three preliminary objections by way of a motion. Those objections are found in the document dated 05.06.2015 which is filed of record and those are as follows:

1) Petition of appeal was filed outside the time limit permitted by the Supreme Court Rules 1990.
2) The caption in the petition filed in this Court is worded incorrectly by having mentioned it as **"special leave to appeal"** whereas no such **special leave** is required in an appeal filed in terms of the High Court of the Provinces (Special Provisions) [Amendment] Act No.54 of 2006.
3) No affidavit been filed with the petition of appeal that was lodged by the defendant-appellant-petitioner.

Learned Deputy Solicitor General submitted that the impugned judgment had been delivered on 22.8.2014 and the petition of appeal was filed on 02.10.2014. Upon a careful consideration of those dates on which the impugned judgment was pronounced and the petition of appeal was filed, it was found that the petition of appeal had been filed within the time limit referred to in the relevant Supreme Court Rules.

The objection as to the wordings in the caption of the petition of appeal also was considered by this Court. Consequently, Court observed that no prejudice had been caused to the petitioner when the words “special leave” is mentioned in the caption to the petition, instead of the words “leave to appeal”. Accordingly, learned Counsel for the petitioner did not pursue the aforesaid first two preliminary objections that he has taken up at the commencement of the argument. Hence, the learned Counsel for the petitioner restricted his objection as to the non-filing of an affidavit along with the petition of appeal filed on 22.10.2014.

The procedure that should be adopted when filing appeals to the Supreme Court is stipulated in “The Supreme Court Rules 1990” which were published in the Government Gazette [Extraordinary No.665/32 dated 7.6.1971. The Rules relevant to the issue at hand are contained in four different Parts found therein. In Part (1) of those Rules, three types of appeals are being mentioned and once again those are categorized into three parts. Those 3 Parts come under the headings A, B and C. Rules under the heading “A” describes the manner in which “special leave to appeal” applications are to be filed. Rules under the heading “B” refer to “leave to appeal” applications. Matters under the heading “C” stipulates the procedure in relation to “other appeals” than the appeals referred to under the headings “A” and “B”.

Applicability of the aforesaid Rules found in part (1) of the Supreme Court Rules 1990, had been discussed in the case of **I.M.G.Illankoon vs. Anula Kumarihamy [S.C.H.C. C.A.L.A.277/11 S.C.Minutes dated 5.4.2013]** In that decision, Sripavan,J (as he then was) has held that an application for leave to appeal from a judgment of the Civil Appellate High Courts established under the Act No.54 of 2006 would fall within Section C of part 1 of the aforesaid Supreme Court Rules 1990. In coming to the said conclusion His Lordship has relied on the decision in L.A.Sudath Rohana and another Vs. Mohamed Cassim Mohemmed Zeena. [S.C.H.C. C.A.L.A No.111/2010 S.C. Minutes of 14.07.2010] In that case Dr.Shirani A. Bandaranayaka J. [as she was then] has held thus:

> *"Part I of the Supreme Court Rules, 1990 refers to three types of appeals which are dealt with by the Supreme Court, viz., special leave to appeal, leave to appeal and other appeals. Whilst applications for special leave to appeal are from the judgments of the Court of Appeal, the leave to appeal applications referred to in the Supreme Court Rules are instances, where the Court of Appeal had granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal, where the Court had decided that it involves a substantial question of law. The other appeals referred to in Section C of Part I of the Supreme Court Rules are described in Rule 28(1) which is as follows:-*
>
> *"Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal" (emphasis added).*

The High Court of the Provinces (Special Provisions) Act No.19 of 1990 and High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006 do not contain any provisions contrary to Rule 28(1) of the Supreme Court Rules, 1990 thus enabling the fact that Section C of Part I of the Supreme Court Rules, which deals with other appeals to the Supreme Court, should apply to the appeals from the High Courts of the Provinces."

In the circumstances, it is abundantly clear that the Rules applicable when filling appeals under and in terms of the provisions contained in the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006 are the Rules found under the heading "C" in Part (1) of the Supreme Court Rules 1990 published in the Gazette Extraordinary No.665/32 dated 07.06.1971.

Admittedly, this application is neither an application for "special leave to appeal" nor an application for "leave to appeal" referred to under the headings "A" and "B" in Part (1) of the Supreme Court Rules 1990. Therefore, as decided in the two decisions referred to hereinbefore, Rules applicable to this instant appeal are the Rules referred to under the heading "C" in part (1) of the Supreme Court Rules 1990. Hence the applicable Rules in this instance are the Rule 28(1) and Rule 28(3) of the aforesaid Supreme Court Rules 1990.

Rule 28(1) reads thus:

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

Important Rule is the Rule 28(3) and it reads as follows:

> "*The Appellant shall tender with his petition of appeal a notice of appeal in the prescribed form, together with such number of copies of the petition of appeal and the notice of appeal as is required for service on the respondents and himself, and three additional copies, and shall also tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post.*"

Aforesaid Rule 28(3) requires an appellant to file the petition of appeal and the notice of appeal in the prescribed form with sufficient number of copies to be served on the respondents. **The aforesaid Rule 28(3) does not mention of a requirement of filing an affidavit along with the petition of appeal.** In this instance, the petitioner by the motion dated 2.10.2014 has tendered the petition of appeal together with the notice of appeal and the duly made appointment of an Attorney-at-law to act on his behalf.

In the circumstances, it is clear that it is not necessary for an appellant to file an affidavit along with a petition of appeal when leave to appeal is filed against a judgment, decree or order pronounced or entered by a High Court established under Article 154P of the Constitution when exercising its jurisdiction granted in terms of the High Court of the Province [Special Provisions] (Amendment Act) No.54 of 2006.

For the aforesaid reasons preliminary objection raised by the learned Counsel for the respondent is rejected. This matter is to be supported on a future date to consider granting of leave and to take necessary action thereafter.

JUDGE OF THE SUPREME COURT

SISIRA J.DE.ABREW, J.

I agree

JUDGE OF THE SUPREME COURT

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 Appeal in terms of Section 451(3) of the Criminal Procedure Act No.21 of 1988.

1. Mazur Ivegen

2. Iana Bereznah
   No. 130, Tanganrogskay
   Divisu 5, Mariupol
   Ukrain
   (presently at Welikada Remand)

SC Appeal No. TAB/1/2015
High Court Colombo Case No. 6091/2011(TAB)

Accused - Appellants

Vs.

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

Respondent

Before	:	Priyasath Dep, PC. J B.P. Aluwihare, PC. J Sisira J. de Abrew, J Priyantha Jayawardana, PC. J Anil Goonaratne, J
Counsel	:	Amila Palliyage with Madushanka Deeyagaha and Eranda Sinharage for 1st Accused Appellant. Indica Mallawarachchi with Nihara Randeniya and Upul Dissanayake for 2nd Accused Appellant. Thusith Mudalige, DSG for AG.
Argued on		23.07.2015, 24.07.2015, 03.09.2015, 04.09.2015 and 22.01.2016,
Decided on	:	08.12.2016

Priyasath Dep, P.C., J.

The Attorney General exhibited information in the High Court on 24-12-2012 under section 450 (4) of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 21 of 1988 to try the following Accused before the High Court at Bar by three judges without a jury in respect of offences specified below The charge sheet signed by the Registrar of the High Court is given below.

Charge Sheet

Accused 01 Mazur Yevgen alias Mazur Ievgen /Yevgen Mazur

02 Yana Berezhna alias J. Berezhna/Berezhna Yana

1. That on or about 23rd February 2010 at Rajagiriya within the jurisdiction of this Court you did agree to commit or abet or act together with a common purpose for or in committing or abetting an offence to wit, the murder of Victoria Kim and thereby committed the offence of conspiracy, in consequence of which conspiracy the said offence of murder was committed; and that you have thereby committed an offence punishable under Section 113B of the Penal Code read with Section 296 and 102 of the said Code.

2. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 1 you the 1st Accused did commit the murder by causing the death of Jason Kim and that you have thereby committed an offence punishable under Section 296 of the Penal Code.

3. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 2 you the 2nd Accused aforementioned did abet the 1st Accused in the commission of the said offence which offence was committed in consequence of such abetment; that you have thereby committed an offence punishable under Section 296 of the Penal Code read with Section 102 of the Penal Code.

4. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 3, you the 1st Accused did commit murder by causing the death of Daisy Manohar and that you have thereby committed an offence punishable under Section 296 of the Penal Code.

5. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 4, you the 2nd Accused aforementioned did abet the 1st Accused in the commission of the said offence, which offence was committed in

consequence of such abetment; and that you have thereby committed an offence punishable under Section 296 of the Penal Code read with Section 102 of the Penal Code.

6. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 1 you the 1st Accused did stab Victoria Kim with a knife, with such intention or knowledge and under such circumstances that had you by such act caused the death of the said Victoria Kim you would have been guilty of murder, and that you by such act caused hurt to the said Victoria Kim; and that you have thereby committed an offence punishable under section 300 of the Penal Code.

7. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 6, you the 2nd Accused aforementioned did abet the 1st Accused in the commission of the said offence which offence was committed in consequence of such abetment; and that you have thereby committed an offence punishable under Section 300 of the
Penal Code read with Section 102 of the Penal Code.

The charges were read to the Accused at the commencement of the trial and the Accused pleaded not guilty to the charges and thereafter the case proceeded to trial.

Background

Victoria Kim, an Uzbekistan national while living in Thailand in the year 2003 had an intimate relationship with Janak Sri Vithanage, a Sri Lankan national. As a result of this intimacy a child was born to them named Jason. When Jason was three months old, in the year 2004 Victoria came to Srilanka with the child and resided at the premises bearing No. 54/9, Galpotta Road, Nawala. She was staying in the house with son Jason and the servant Daisy Manohar. As Victoria was not employed Janak Sri Vithanage provided support and maintenance. While in Sri Lanka, Victoria came to know the Accused Mazur Ivegen and Yana Berezhna who are Ukrainian nationals. Both of them are married to different persons in Ukraine but were living together in Sri Lanka. According to the 1st Accused Victoria is a friend of his and through her travel agency he used to buy tickets and when he goes abroad he used to leave his belongings at Victoria's place. Sometimes he used to change foreign currency from Victoria

Motive

Victoria knew that the 1st Accused was previously arrested and deported by the immigration authorities for overstaying and he has come to Sri Lanka using a forged passport. She threatened to inform the immigration authorities regarding this fact. Further, she threatened to inform the wife of the 1st Accused that he is living together in Sri Lanka with the 2nd Accused.

Prosecution case

Victoria Kim, the injured in this case is the main witness for the prosecution. She is a national of Uzbekistan and was living in Nawala. 1st and 2nd Accused are well known to her. According to her on 21st February, 2010 the 1st Accused borrowed US $ 500 from her as a loan. On 22nd at about 7.40 pm Victoria called him and asked him to return the money. At this point 1st Accused refused to repay the money back and threatened Victoria and told her that she has to lend him money whenever he asked for. Victoria informed the 1st accused that if he does not return the money or do something to hurt her, she will inform his wife about his girlfriend and also would inform the immigration authorities that he is staying in Sri Lanka illegally with a forged passport. She informed her boyfriend Janak Withanage regarding the threat and gave a call to 119 and informed about the threat and the officer informed her to lodge a complaint with the local police station. But Victoria told Janak that she will handle the matter herself. Neither Janak nor she did not pursue with this matter and made a complaint.

On the 23rd of February, 2010, between 6.00-6.15 am, when Victoria was sleeping in her bedroom with her son, she heard someone knocking at the door. She assumed that it was the servant Daisy who wanted to wake her up. When she opened the door the 1st Accused started beating her. She ran into the bathroom which was inside the room to avoid her son getting up. He demanded money and threatened to kill her son if she refused to give money. She came to the room again and opened the safe and gave him around US $11,100. Her son Jason got up and asked for her phone to give a call. At this time the servant Daisy came to the room. Then she ran downstairs to distract the 1st Accused thinking that servant Daisy and her son will escape from the 1st Accused and run for safety while the 1st accused is in pursuit of her

At this moment her son, servant Daisy and the 1st accused were in the room. But her son stayed in the room and the servant came down following the 1st Accused. The 1st Accused then grabbed the phone from her son and threw it towards Victoria. When she came downstairs, she tried to open the front door which was locked and she could not find the key. She went towards the back door, but the 1st Accused came and started beating her. At this time servant Daisy was there and when she tried to prevent the 1st Accused from beating Victoria he started beating Daisy as well. He stabbed Daisy when she was near the front door with a knife which he took from his back concealed under the shirt. Then he started stabbing Victoria while she was trying to reach the back door. Then Daisy came towards the 1st Accused and asked him to stop attacking them. The Accused started stabbing Daisy again. Victoria tried to reach upstairs but she fell down in the middle part of the staircase. She heard Daisy going to the bathroom downstairs. Then the 1st Accused went inside the bathroom and stabbed Daisy again. Thereafter first accused gave a call to the 2nd Accused and stated "*Yana come soon - to burn her alive -come with petrol. This bitch is going to die*". All this time her son was in a room upstairs. 1st Accused went upstairs and came down again while Victoria was lying in the middle part of the staircase and the Accused went out of the house and came back within a short period of

time and went to the room in the upstairs where her son was. Then she heard her son shouting "don't don't". Victoria then summoned her courage and ran out of the house from the back door. She came out from the front gate and went towards the house on the opposite side of the lane. Victoria was rushed to Kalubowila Hospital and her condition was critical and she underwent surgery. Before the surgery was performed she made a statement to the Police implicating the 1ST Accused.

The learned Counsel for the 1st Accused questioned this witness as to why she did not raise cries when the Accused started to assault her. She replied that she did not do so initially thinking that her son Jason will get frightened. She said that she subsequently raised cries loudly but the 1st Accused threatened her that he will harm the child. She said that she cannot give a definite answer as to whether she mentioned this fact to the police or not. She could not exactly remember as to what she said to the police. The sole purpose of her making a statement to the police even against the advice of the doctors was to give information regarding the person who was involved in this incident.

According to her evidence the knife which was used by the Accused does not belong to the household. She saw the knife for the first time when it was pulled out by the Accused from his backside and stabbed Daisy. This witness was questioned as to why she went towards the kennel of Parakrama Hettiarachchi. Her reply was that due to the penetrative injury on the neck she did not expect to survive long and she went towards the kennel to induce the dogs to bark which will alert the neighbors.

The learned Counsel for the 1st Accused suggested to the witness that the 1st Accused is not responsible for stabbing her, Jason and Daisy but a person who stayed in the house in the night was responsible for this incident. She denied the allegation and reiterated that the 1st Accused is responsible for the stabbing. Further it was suggested to the witness that she stated that the 1st Accused gave a call to the 2nd Accused to falsely implicate her in this incident. She denied the allegation. It was suggested on behalf of the 2nd Accused that she was involved in human trafficking by bringing girls from abroad. She had invited the 2nd accused to join her. But she declined. Due to this reason she was falsely implicated.

Parakrama Hettiarachchi is living at No. 54/10, Galpotta Road opposite the house bearing N0. 54/9 which was occupied by Victoria. He stated that he has known Victoria for about 2 years. He possessed two Doberman dogs which were kept in a kennel within the premises. On 23.02.2010 around 6.15 am he heard the dogs barking and he requested the driver to go to the kennel and see what was happening. The driver went to the kennel and returned and said that Jason's mother was lying fallen with bleeding injuries. He went to that place and saw Victoria lying with bleeding injuries. When this witness inquired from Victoria as to what happened, Victoria with difficulty uttered the words "my son Jason". This witness gave a call to 119 and informed the police emergency unit. Police officer came to the scene and when inquired she

stated “my son Jason” and thereafter uttered the word “Mazur”. Before Victoria was taken to the hospital she gave the telephone number of Janak Sri Withanage, the father of Jason. He informed Janak Sri Withanage.

Janak Sri Vithanage, father of Jason stated that on 21.02. 2010 he visited Victoria’s house and helped Jason to do his homework. At about 7.30 the 1st Accused came to the house and had a conversation with Victoria and thereafter spoke to him and left the house. He was in the house for about fifteen minutes. He came to know from Victoria that the 1st Accused borrowed US $500 Dollars from her. This witness stated that on 22.02.2010 between 5.30-6.00 pm he visited Victoria’s house and left the house at 8.30 pm. That day Victoria received several calls and she refused to answer some calls. In answering the last call, she spoke angrily in Russian language. When questioned by him, Victoria said that the 1st accused is threatening her. Victoria told him that she will inform the immigration that the 1st Accused was previously deported from Sri Lanka. However, neither Victoria nor this witness informed the police of the threat. On 23.02.2010 at about 7.45 am, Parakrama who is staying closer to Victoria’s house gave a call stating that Victoria is in a serious condition and wanted him to come immediately. He rushed to the place and saw Victoria lying fallen with bleeding injuries closer to Parakrama’s house. When he inquired about Jason, Victoria informed him that he is in upstairs. He ran to the house and he found Jason fallen on the stairs midway. Then he ran towards Victoria again. Then Victoria informed him that Shanya killed Daisy. The 1st Accused was referred to as Shanya.

Mohomad Imthiyas Hameed is a person living in a lane closer to the residence of Victoria. In the morning on 23.02.2010 he went in his three wheeler to a Kovil taking items for an offering (Pooja) to be performed on behalf of his daughter. Whilst returning home he found a three wheeler parked partly obstructing the road leading towards his house. With difficulty he was able to enter the lane and he saw a foreign lady staying beside the three wheeler holding it. The foreign lady was wearing a denim trouser and a dark t - shirt. He returned home and between 6.55 to 7.05 he left home again with his daughter to drop her at the school. At that time three wheeler which was parked earlier obstructing the road was not there. When he was returning home after dropping his child in school between 7.05 to 7.15 a foreigner was seen running from the direction of the lane towards Galpotta Road. He thought he was doing his morning exercises. He returned home and after about 10 minutes he heard a resident shouting in an excited manner that there is a problem at Jason baby’s house. So he went towards that house.

According to this witness he had previously seen the foreign male twice in the vicinity. He identified the 1st and 2nd Accused at the identification parade and in Court. It was suggested to the witness that he has falsely implicated the accused at the instance of Victoria and Janak Withanage. He denied the allegation. In cross examination a contradiction was marked and according to the contradiction in his statement to the police the witness had stated that the 2nd Accused was seen standing outside the three wheeler whereas in evidence he had stated that she was seen inside the three wheeler.

Prasad Gooneratne Arthanaayake residing at No. 54/14 gave evidence to the effect that before going for early morning walk he went to his niece's house and plucked some beli fruits and he came back to his house. When getting down the steps to go for the early morning walk at about 6.00 am, he saw a foreign male scaling the wall of Victoria's house. He saw that person and the servant conversing and the girl opened the door. He did not feel suspicious about this matter due to the fact that the servant girl allowed him to enter the house. Then he went for his walk and after about 45 minutes when he returned home he heard the wife of Parakrama Hettiarachchi raising cries and he went towards that direction and saw Victoria Kim lying fallen. Later he came to know that servant girl and the baby Jason had died. When the police arrived he showed the place from where he saw the foreigner scaling the wall. He identified the 1st Accused at the identification parade and in Courts.

Wijesiri, a pumper of the Rajagiriya Petrol Station giving evidence stated that on 23.02. 2010 around 7.10 am the 2nd Accused came to the petrol shed and filled 5 liters of petrol each to two cans she brought with her and paid Rs. 1100/=. She came in a yellow colour three wheeler and she was wearing a denim pant and a black colour t- shirt. He identified the 2nd Accused at the identification parade and in Courts.

Witness Nimalasiri, a three-wheel driver stated that on 23.02.2010 around 6.45 am a white lady got into his three wheeler and wanted him to take her to Galpotta Road. This witness stated that prior to this date this lady had travelled in his three wheeler sometimes alone and at times with a foreign gentleman. The lady was wearing a denim pant and a black colour t-shirt. Thereafter vehicle was driven to Rajagiriya and the lady wanted to go to Galpotta Road. When the three wheeler was turning towards Galpotta road, the lady showed 2 cans and wanted to buy petrol. Then this witness turned the vehicle and went towards Kotte and went to Rajagiriya petrol shed. She got down and filled the two cans with petrol and came back to the vehicle. Thereafter they went to Galpotta Road and stopped near house No. 54/9. The time was around 7.00 to 7.05 am. The lady got down from the three wheeler and gave a call using her mobile phone. He saw a foreign gent leman inside the premises. She came back to the three wheeler and gave two cans to that person. Thereafter, she wanted him to take her to the McDonald's Rajagiriya and he dropped her at Rajagiriya. She paid Rs. 600/- as the hire. He identified the 1st Accused as the person who was seen inside the premises No. 54/9 and the 2nd Accused as the person who travelled in his three wheeler on that day. The Defence suggested to this witness that he identified these two Accused at the instance of the police and before the identification parade he was given photographs of the Accused by the police. The witness denied the allegation made against him. This witness stated that while travelling from Wellawatta to Galapotta road the 2nd Accused had thrice given calls from her mobile phone.

Roshan Sherantha Mallikarachchi said that on 23.02.2010 he dropped his two children in school and between 7.15 to 7.30 am went towards the residence of Victoria to take Jason to school. When he came towards the residence, a white person was seen running towards them.

He saw this person when he was turning the vehicle to the Lane where house No. 54/9 is situated. This person went pass his three wheeler. He had seen this person twice previously. When he went to the Victoria's house he saw Victoria lying fallen with bleeding injuries. Police emergency unit 119 arrived at the scene and he assisted in dispatching Victoria to hospital. When he came back from the hospital he came to know that Jason and the servant girl had died. He identified the 1st Accused at the identification parade and in Court.

Witness Weerakkodige Rukshan Perera is a school mate of Janak Sri Withanage and he is married to an Uzbekistan lady. In the noon he heard over the radio that an Uzbekistan child and a Sri Lankan domestic aid were killed and an Uzbekistan lady was seriously injured and admitted to hospital. He contacted Janak Sri Withnage over the phone and Janak while crying explained to him as to what had happened. He with his wife rushed to Victoria Kim's residence and saw the dead bodies of Jason and the servant. Janka Sri Withanage was seen crying and informed him that Victoria was admitted to Kalubowila hospital. He went to the hospital with his wife at about 2.15 pm and saw Victoria Kim and at that time she was dressed for an operation. He went towards Victoria Kim and touched her head. She opened her eyes and inquired about Jason. He informed her that Jason is with the police. He stated so because doctors informed him that Victoria Kim might die. The police were trying to record her statement. As the police had a difficulty in recording her statement he translated the statement given in English to Sinhala She was in a critical condition and the doctors informed that an emergency surgery has to be performed. Victoria clearly stated that the person who stabbed her is Mazur. She stated that she overheard the conversation of the 1st Accused over the phone asking Yana to bring petrol. Mazur and Yana are not known to this witness. He stated that Victoria gave this statement with much difficulty but she was in a proper state of mind. He identified the dead body of the Jason at the inquest and took charge of the body and the funeral was held on 24.02. 2010.

Investigations

Chief Inspector of Police (retired) Gamini Sarath stated that on 23.02. 2010 he was the Officer in Charge of the Welikada Police and he received a message from 119 regarding a case of causing injuries. At about 7.45 a.m. he proceeded with a police party to the residence No. 54/9 Galpotta Road, Rajagiriya. At that time P.S. Sarath of the police emergency unit 119 was present at the scene. He entered the premises and near the stairway on the floor he found a boy around 7 years old in a pool of blood and the body was facing downwards. In downstairs of the house near the bath room he found a female wearing a night dress lying fallen in a pool of blood. The head was near the door and the feet lying inside the bathroom. Thereafter he proceeded towards the house of Parakrama Hettiarachchi and found a lady fallen with bleeding injuries and screaming**.** He questioned her in Sinhala and the son of Parakrama Hettiarachchi

translated the questions into English. When questioned as to who stabbed her, she replied 'Mazur" who is living at No 22/2, Majestic Apartment, Station Road, Colombo 6. He dispatched Victoria Kim to the hospital. Thereafter, he made further inquiries at the scene. He found two 5-liter plastic cans filled with petrol containing the label 'crystal'. These cans were found on the end of the stairway leading to the upper floor. He took charge of these two cans. He found Nokia 3710 black colour mobile camera phone, Nokia 6830 black colour mobile phone, vodaphone 225. He also produced a sealed glass bottle containing 2 ear studs of square design studded with white coloured stones belonging to the deceased Daisy Manohar. He came to know that the persons who were killed were Jason Kim and the servant Daisy Manohar.

Police Sergeant Sarath Premalal stated that on 23.02.2010 when he was on duty in the emergency unit 119 he received a message from Welikada Police to proceed to the scene. At the scene Parakrama Hettiarachchi showed a foreign female lying fallen with bleeding injuries. When questioned she stated in English (which was translated into Sinhala by Parakrama) the name of Mazur Yevgen and gave his address as 22/2 Majestic Apartment, Station Road, Wellawatta. He dispatched the injured to the hospital in a vehicle belonging to Parakrama Hettiarachchi. Thereafter he assisted in the investigations.

I.P Samarasinghe on receiving information that a foreign male and female were arrested at the airport went to the airport and took charge of the 1st and 2nd Accused at the airport. They were handed over to him by I.P. Ratnayake of State Intelligence Service attached to Katunayake Airport Police. He took charge of 3 documents each from the Accused namely: passport, air ticket and boarding pass. Further he had taken into his custody several items including a black colour t- shirt, ash colour short black and brown colour two slippers, 2 black colour Nokia phones, 3 sim cards, sim card of mobile no. 071-3543012, a silver colour bracelet, 35 US $ 100 dollar notes, 3 Dubai dirham 100 notes and Rs. 15,570. He took charge of the passport, boarding pass and air ticket and a Sony digital camera from the possession of the 2nd Accused. He also recovered several items from the 2nd accused such as perfumes, battery charger, clothes, foreign currency, Sri Lankan Rupees 540. He brought the Accused to Welikada police Station and their statements were recorded at the Police Station. He identified the 1st and 2nd Accused in court as the persons who were arrested and taken into custody by him. He stated that the shirt worn by the 1st accused, pair of slippers and the bracelet were forwarded to the Government Analyst for examination and report.

This witness stated that he took charge of the suspects at about 11.30 am. He observed that the 1st suspect had a contusion on the outer part of the right palm and an abrasion on the right arm, red colour patch on the hair and red dots on the shirt worn by the Accused. According to the air tickets and boarding passes both suspects had booked seats in UL 103 departing to Male at 7.05 pm.

Evidence regarding the use of mobile phones.

Prosecution summoned Premasiri Ratnayake, Asst. Manager (Investigations) of Dialog to give evidence regarding the issuing of mobile phone connections under the names of the Accused. Mobile No. 077-6640691 was issued under the name of Mazur Yevgen on 29.11.2004. This application was marked as X25 and the page containing the photo copy of bio data page of the passport of the applicant was marked as X25A. The date of birth of the applicant was given as 12.12.1975. This mobile phone was in use up to 29.11.2004 under the customer's name. An application was made under the name of the 2nd Accused on 26.11.2008 which was marked as X26 and a mobile phone connection was given under No. 077- 8022936. This was disconnected on 12.01.2012. The date of birth given by the applicant was 12.02.1984.

This witness gave a detailed statement of the calls taken by the users of the above mobile phones on 23.02.2010. This document contained calls taken from 077-6640691 and 077-8022936 and calls taken between the users of these two phones. There were recorded instances of calls taken between these two phones on 23.02.2010. These details give the area from which the calls were made referring to the telecommunication towers and also the place where the recipient was at the time of receiving the calls. The prosecution tried to establish the movements of the Accused with reference to the call data. However, sim cards of these connections were not recovered from the possession of the Accused.

Evidence of the immigration officer

Ranjith Wimalasuriya, Immigration Officer stated that the 1st Accused Yevgen Mazur was deported from Sri Lanka on 03.03.2006 but he has returned under a different passport. When comparing both passports there is a discrepancy in the first name as it was spelt differently in the passports so that it could not be detected by the immigration officers from the system.

Medical Evidence

Doctor Jeewana Chandrin Samaraweera, Asst. Judicial Medical Officer conducted the post mortem examination at the scene on the bodies of Jason Kim and Daisy Manohar. He found the dead body of Jason in the middle of the stairway leading to the upper floor lying fallen in a pool of blood and the body was facing downwards. He found one external injury which is a stab injury on the right side of the neck measuring 3cm x 1cm in size and 03.5 cm in depth. This injury had cut the right ca-rotid artery and this caused his death. According to the doctor this injury is sufficient to cause death in the ordinary course of nature. According to the doctor considerable force was used to inflict this injury.

The post mortem examination on the body of Daisy Manohar was also conducted by the same doctor. There were 27 external injuries found on the body. According to the doctor the cause of death is hemorrhagic shock due to a stab injury to the left lung. According to the medical report she had 14 injuries of which 13 injuries are stab injuries. Injuries 1,3,4, and 13 are grievous injuries and injury No.14 is sufficient to cause death in the ordinary course of nature.

Dr. P.C.L. Sandakan Waduge, Assistant Judicial Medical Officer, Colombo South Teaching Hospital Kalubowila examined Victoria Kim and submitted the medical legal report. According to him though she had received several stab injuries and in a critical condition she was in a good state of mind and was able to speak. She had 13 incised wounds which were sutured after surgery. Injury no. 14 refers to cumulative effect of the other injuries led to excessive hemorrhage which resulted in shock. Her pressure had dropped and blood was transfused several times to save her life. The doctor stated in his evidence that injuries Nos 6,7,9,10 and 11 are defensive injuries received as a result of attempts to ward off the attack. The injuries found on Victoria are consistent with the history given by her.

Dr.R.P. Nadeesha Samerasekera, surgeon who performed surgery on Victoria gave evidence describing the injuries found on Victoria. She was admitted to the surgical theatre on 23-02 2016 at 3.30 pm. She stated that though Victoria had 13 stab injuries she was in a position to make a statement.

Evidence of the Assistant Government Analyst:

Vinitha Jayawardana Bandaranayake, Assistant Government Analyst stated that among other productions submitted to her for examination and report she examined a shirt, short trouser, pair of sandals and a bracelet. She found blood stains on it. She said that there were blood stains below the pocket of the shirt and also on the inner and outer sides of the bracelet.

After the close of the prosecution case the High Court-at-bar called upon the Accused for the defence. The Accused gave evidence under oath and called witnesses. The prosecution led evidence in rebuttal.

Defence Evidence:

The 1st Accused Ievgen Mazur giving evidence stated that he is a Ukrainian national and an engineer by profession. He first visited Sri Lanka either in 2001 or in 2002. He used to come to Sri Lanka between December to January which is a winter season in his country. He had visited Sri Lanka five or more times. His wife is Tatyana and he has a daughter who is 12 years old. He is living together with Yana Berezhna the 2nd Accused. When his wife came to Sri Lanka she stayed with them. His wife knew the relationship he is having with the 2nd Accused and there was no dispute between him and the wife regarding this relationship. He stated that Victoria

procured/supplied women for money. Victoria is a friend of his and through her travel agency he used to buy tickets and when he goes abroad he used to leave his belongings at Victoria's residence. Sometimes he used to change foreign currency from Victoria. Though Victoria is not married in Sri Lanka he is aware that Janak Sri Vithanage is the father of her child. He said that at any given time of the day there are 4 to 5 males at Victoria's residence. (This fact was not suggested to the neighbours who gave evidence)

In 2005 he had to apply for a new passport as all the pages of the passport were used. He stated that the last time he arrived in Sri Lanka by using the passport which was produced as X11 and his date of birth is given as 12.12.1975. He stated that he was never arrested in Sri Lanka and he was not blacklisted by the immigration authorities.

The 1st Accused stated that he used a Mobitel mobile phone but he never used a Dialog Phone No. 0776640691. He denied that the scanned application form marked X25 which was produced by Dialog was submitted by him. He stated that the hand writing and the signature in X25 was neither his handwriting nor his signature. He further stated that the passport produced as X25 does not belong to him though his date of birth is given. His name was misspelt in the passport.

The Accused stated that he last visited Victoria's house was on 22.02.2010 at about 10.00 p.m. He made a request to Victoria about a week ago to reserve two air tickets to go to Male on 23-02-2010 to celebrate the Men's day and also stay till March 8th which is a day of celebration for women in Ukraine. He spent about half an hour in Victoria's house and Victoria had informed him that she had already reserved tickets.

On 23.02.2010 at about 7.00 a.m. they went in a three wheeler to the airport and reached the airport at 9.00 am and went to the ticket counter at about 10.00a.m. At the counter they realized that Victoria has not reserved the tickets though she stated that she had reserved two tickets in the flight leaving at 11.30 am. Thereafter, they purchased two tickets at the counter to fly to Male in the flight leaving after 6.00 p.m. As there was adequate time for the flight they checked in to a room in the airport. When they were in the airport, police came and searched the room and wanted them to accompany them. He stated that brown colour short marked as X, shirt marked X8 and the pair of slippers are items which he was wearing at that time. He denied that there were blood stains at the time the police took charge of those items. He admitted that the bracelet marked X5 is the same that he was wearing but denied that at that time there were blood stains in the bracelet. They were taken to Welikada Police station from the airport. On the following day they were produced before a medical officer for examination but they refused to be examined by the doctor. He stated that he did not have any enmity with Victoria, Jason or Daisy Manohar but he was falsely implicated by Victoria in order to conceal the identity of the perpetrator of the crime.

The 2nd Accused Yana gave evidence and stated that she was born on 12.02.1984 and she was married and has a child aged 7 years. She admitted that from 2008 onwards she was living together with the 1st Accused and the 1st Accused's wife was aware of this relationship. She has two passports and she first visited Sri Lanka by using the old passport. After returning to Ukraine her child tore a page of the passport so that she was compelled to apply for a fresh passport. The 2nd Accused stated that though she had visited Victoria's house on 2 occasions she did not want to associate with her as she was engaged in illegal business. She stated that she had met Rukshan Perera and his wife in a shopping mall and they wanted her to supply women to the business run by Victoria. As she declined the request Rukshan Perera is angry with her. (This was not suggested to Rukshan Perera when he gave evidence). She admitted that on 22.02.2010, the 1st Accused visited Victoria's residence and that was to collect the air tickets. They were expected to leave to Male on 23.02.2010. After the arrival at the Airport they realized that Victoria has failed to book tickets. They purchased tickets at the Airport to take a flight to Male which departs at about 7.00 p.m. As there was sufficient time for the flight they booked a room at the airport and the police arrested them while they were in the room. She denied that she submitted an application to obtain a connection in relation to the mobile No. 077-8022936. She denied that she used a dialog mobile phone. She stated that she had a mobitel connection and used the same sim card in different phones.

Thereafter the defence called Chaminda Prasad Samarakoon, Sales Manager of Ceylon Petroleum Corporation, Tatyana, the wife of the 1st Accused and the third Secretary of the Ukrainian Embassy.

Tatyana the wife of the 1st Accused testified to the effect that she was aware of the relationship between the 1st Accused and 2nd Accused. When she came to Sri Lanka she stayed with them.

Thereafter the defence closed its case.

Evidence in rebuttal

The prosecution led evidence in rebuttal. The witness Ajith Senaratna Perera, Senior Authorized Officer of the Immigration and Emigration Department gave evidence to the effect that on 01.03.2006 he arrested the 1st Accused along with 3 girls and took them to the detention camp and subsequently deported them. He identified the 1st Accused as the person whom he arrested.

The Judgment of the High Court at Bar

The High Court at Bar after recording of evidence, permitted the parties to file written submissions. Thereafter the High Court at Bar entered the following verdict and imposed the following sentences against each accused in respect of the charges framed against them.

Count 1 - both Accused were found guilty and sentenced to death for conspiring to commit the murder of Victoria Kim and consequent to such conspiracy causing the death of Jason Kim and Daisy Manohar, an offence punishable under section 296 read with sections 113B and 102 of the Penal Code.

Count 2 - 1st Accused was found guilty for committing the murder of Jason Kim an offence punishable under section 296 of the Penal Code.

Count 3 - 2nd Accused was acquitted of the charge of abetment under section 296 read with section 102 of the Penal Code.

Count 4 - 1st Accused was found guilty of committing the murder of Daisy Manohar an offence punishable under section 296 of the Penal Code.

Count 5 - 2nd Accused was acquitted of the charge of abetment under section 296 read with section 102 of the Penal Code.

Count 6 - 1st Accused was found guilty of the attempted murder of Victoria Kim an offence punishable under section 300 of the Penal Code and sentenced to 15 years' rigorous imprisonment, a fine of Rs. 25,000/- carrying a default term of 12 months' simple imprisonment and compensation in a sum of Rs. 500,000/- carrying a default term of 12 months' simple imprisonment.

Count 7 - 2nd Accused was found guilty of abetment to commit the attempted murder of Victoria Kim an offence punishable under section 300 read with 102 of the Penal Code and sentenced to 15 years' rigorous imprisonment and a fine of Rs. 25,000/- carrying a default term of 12 months' simple imprisonment and compensation in a sum of Rs. 500,000/- carrying a default term of 12 months' simple imprisonment.

The Accused appealed against the conviction and sentence to the Supreme Court on following grounds.

GROUNDS OF APPEAL

1. The Accused-Appellants have been denied of a fair trial as an application to effectively prepare for their defence on the part of the Counsel was denied by the learned Trial Judges.

2. Prosecution has not explained the presence of a 3rd party at the crime scene at the time of the incident thereby creating a serious doubt in the prosecution case.

3. Presence of an unidentified /unclaimed mobile phone at the crime scene further creates a doubt in the prosecution case.

4. Learned Trial Judges have misdirected themselves on a very critical issue of fact causing serious prejudice to the 1st Accused-Appellant.

5. Learned Trial Judges have failed to address their minds to the serious doubts/infirmities in the evidence relating to telephone conversations.

    - The Dialog Sim cards were not recovered from the possession of the 2nd Accused at the time of arrest;

    - Authenticity with regard to the application forms to obtain the said Dialog sims-scanned photocopies being produced;

    - Serious doubt with regard to the 2nd Accused obtaining the Dialog sim where the date of application being 20/11/2008 and prosecution evidence being that she arrived in Sri Lanka only on the 21/11/2008;

    - Application form of the 1st Accused being dated 29/04/2004 whereas prosecution evidence is that the 1st Accused came to Sri Lanka first on the 06/02/2006;

    - Prosecution has failed to prove the authenticity of X25 and X26 (application forms for the Dialog Sim Cards) in terms of Section 67 of the Evidence Ordinance.

    - Expertise of the prosecution witness namely Premasiri Ratnayake (Dialog Officer) was not proved in terms of the Evidence Ordinance.

6. Serious doubts arise in the prosecution case in the backdrop of the conflicting evidence of the prosecution witnesses which have totally escaped the attention of the learned Trial Judges.

7. Prosecution has not established the link between the blood stained clothes recovered from the 1st Accused at the time of arrest and the crime.

8. Accused-Appellants have been denied of a fair trial as their evidence on oath has been rejected on erroneous premise.

9. Learned Trial Judges erred in law by permitting the prosecution to lead evidence in rebuttal and relying upon same.

10. Learned Trial Judges failed to evaluate in its correct perspective the evidence of Ajith Senarathne Perera (evidence in rebuttal) which evidence negate motive.

11. With regard to the conviction of the 2nd Accused on count 1, the said conviction cannot be supported on the learned Trial Judges own findings.

12. With regard to the conviction against the 2nd Accused on Count 7, the evidence at the trial does not support the said conviction.

The High Court at Bar having considered the evidence came to the conclusion that the case against the Accused was proved beyond reasonable doubt. The Court held that there was a conspiracy to murder Victoria and consequent to the conspiracy Victoria received serious injuries and Jason and Daisy Manohar succumbed to the injuries. The High Court at Bar found the accused guilty of conspiracy to murder and sentenced them to death.

The Appeal

This Court has to consider whether there was sufficient evidence to prove the charge of conspiracy. The prosecution tried to establish the conspiracy charge by using the evidence of Victoria who testified to the effect that the 1st Accused had requested the 2nd Accused to bring petrol to burn her alive and also the data provided by Dialog to establish that the 1st Accused and the 2nd Accused were in contact with each other on 23.02.2010 from 6.30 a.m. onwards. Further the prosecution tried to establish the movements of the Accused using the messages received by transmission towers of Dialog, the service provider of mobile phones used by the Accused. However, the data provided by the service provider is not satisfactory and cannot be relied upon to prove the offence of conspiracy. The defence challenged the expertise of the witness summoned on behalf of Dialog. The relevant sim cards were not recovered from the possession of the Accused. In view of these deficiencies the learned Senior State Counsel indicated to Court that he will not support the conviction against the 2nd Accused.

This Court is required to consider the evidence in respect of each accused and come to a conclusion whether the case against each accused was established beyond reasonable doubt. As

against the 1st Accused the evidence is overwhelming. The evidence of the main witness Victoria was corroborated in material particulars by independent evidence. The evidence is consistent with the medical and other items of circumstantial evidence. She had revealed the name of the 1st Accused at the earliest opportunity. 1st Accused's presence at the scene was established by independent evidence. Therefore, the verdict of the High Court at Bar that the 1st Accused is guilty in respect of murder of Jason and Daisy Manohar and the attempted murder of Victoria is in accordance with the law as the charges were proved beyond reasonable doubt.

The defence marked several contradictions and referred to several omissions in the evidence of the prosecution witnesses and thereby challenged the testimonial trustworthiness of the witnesses. However, these contradictions and omissions are minor contradictions and omissions which did not go to the root of the prosecution case. The High Court at Bar correctly disregarded the contradictions and omissions. At this stage it is appropriate to refer to the Indian case of Bhoginbhai Hirjibhai Vs. State of Gujarat (AIR 1983-SC 753 at pp756-758) very often cited in our courts. It was held:

1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

3) The powers of observation differ from person to person. What one may notice, and other may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

5) In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

The next question is whether there was a conspiracy to commit the murder of Victoria as alleged in Count 1 of the charge sheet. In other words, whether the attempted murder of Victoria and the murder of Jason and Daisy Manohar were committed pursuant to a conspiracy. The evidence available is not sufficient to prove the charge of conspiracy as alleged by the prosecution. In order to establish the charge of conspiracy there should be evidence of prior agreement before the commission of the acts and in this case prior to the acts of stabbing. In other words, the agreement should precede the commission of the acts.

The evidence regarding the conspiracy prior to stabbing is insufficient and unreliable. Though there was insufficient evidence regarding an agreement which preceded the acts of stabbing, there could be a conspiracy formed subsequently. This Court has to examine whether there was an agreement formed between the Accused subsequent to the stabbing of the victims. Witness Victoria stated that she overheard a conversation of the 1st Accused asking Yana to come saying *"Yana come soon- to burn her alive -come with petrol. This bitch is going to die"*. The prosecution had led the evidence to prove that the 2nd Accused Yana came in a three wheeler from Wellawatta to Galpotta Road bringing 2 cans of petrol and handing over to the 1st Accused. Petrol pumper gave evidence stating that the 2nd Accused purchased 10 liters of petrol which were filled into two 5 liter cans brought by the Accused. Police recovered 2 cans of petrol inside the house. As the petrol was not used for the purpose of burning the victim alive and the acts of stabbing were completed the 2nd accused has not contributed towards the commission of the offence. Had the 1st accused used petrol and burnt the injured and if she died 2nd Accused will be guilty of murder.

The question that arises is whether the 1st Accused as well as the 2nd Accused could be convicted under 113A of the Penal Code. It is relevant at this stage to consider the law applicable to conspiracy under the Penal Code. Before the introduction of section 113A to the Penal Code by Ordinance No.5 of 1924, the conspiracy was considered as a manner /mode of committing abetment under section 100 of the Penal Code.

Section 100 of the Penal Code reads thus:

A person abets the doing of a thing who –

Firstly - Instigates any person to do that thing; or
Secondly - Engages in any conspiracy for the doing of that thing; or
Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing.

The Explanation 2 to section 100 refers to conspiracy thus:

'A conspiracy for doing of a thing is when two or more persons agree to do that thing or cause or procure that thing to be done….,'

Prior to the introduction of section 113A to the Penal Code, conspiracy was considered as a species of abetment and was penalized to a limited extend. In *King vs. Silva* 24 NLR 493 an accused was acquitted due to the defect in the law which necessitated the introduction of section 113A which made criminal conspiracy a distinct offence.

Section 113A reads thus:

Sec 113A (1)

If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence whether with or without any previous concert or deliberation, each of them is guilty of an offence of conspiracy to commit or abet that offence, as the case may be.

In a series of cases starting with The *King vs Andree* 42 NLR495 it was held that:

"an agreement is the essence of conspiracy"

In *King vs. M.E.A. Cooray et.al* 51 NLR 433, Gratian J referring to the two limbs in section 113A held that:

'In either set of circumstances conspiracy consists in the agreement or confederacy to a criminal act whether it is done or not'

It was held in several cases that to complete the offence of conspiracy it is not necessary to commit any act pursuant to the agreement or in other words anything should be done beyond the agreement. However, the acts committed pursuant to the agreement could be used to establish the agreement. The offence of conspiracy as like any other offence could be proved either by direct or circumstantial evidence or by combination of both.

In *R vs Mulcahy* L.R.3 H.L.306 cited in The King vs Cooray (supra) it was held that:

"proof of acts committed in pursuance to the agreement is relevant only so far as they furnish evidence from which the prior agreement may be legitimately inferred".

The *Queen vs Liyanage* 69 NLR 193 followed the judgment in *King vs Cooray* (supra) and cited with approval Queen *vs. Aspinall* (1872)2 Q.B.D. 48 and *R vs Mulcahy* (supra) and it held that:

> "The essence of the conspiracy is the agreement to do the unlawful acts alleged; but it is not necessary that any act should take place in pursuance of the agreement. Whether a criminal act is done or not, the agreement and not the act is what is penalized. Proof of acts committed in pursuance of the agreement is relevant only so far as they furnish evidence from which the prior agreement may be legitimately inferred"

In *Queen vs Liyanage* (supra) the conspirators abandoned the plan and did not execute it. However, they were found guilty for conspiring to wage war against the Queen, an offence punishable under section 115 of the Penal Code.

In the case before us we find that the Accused had conspired to burn alive Victoria who had received fatal injuries and was about to die. Punishment for conspiracy is referred to in section 113b. The section 113 states thus:

> "If two or more persons are guilty of the offence of conspiracy for the commission or abetment of any offence, each of them shall be punished in the same manner as if he had abetted such offence."

In this case pursuant to the conspiracy to burn Victoria alive the 1st Accused did not perform any act to burn her though he received two cans of petrol from the 2nd Accused. This may be due to the fact that Victoria was able to leave the house and move towards the house of Parakrema Hettiaratchi and the neighbours gathered near the house.

In the case of The *Queen vs. Aspinall* (1872) 2 Q.B.D.48 referred to in *King vs Cooray* (supra) it was held that:

> "The conspirators will repent and stop; or they may have no opportunity, or may be prevented, or may fail; nevertheless, the crime is complete and was completed when they agreed"

As no offence was committed pursuant to the conspiracy the applicable sentence is given in section 108 of the Penal Code which reads thus:

> "Whoever abets the commission of an offence punishable with death shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extent to seven years, and shall also be liable to a fine"

This court finds that there is no sufficient or credible evidence to establish that the Accused conspired to murder Victoria Kim and pursuant to the conspiracy committed the murder of Jason Kim, Daisy Manohar and attempted Murder of Victoria Kim an offence punishable under section 296 of the Penal Code read with sections 113A and 102 of the Penal Code. The evidence available is insufficient to establish that the conspiracy preceded the alleged acts of stabbing or

in other words acts were committed pursuant to the conspiracy. Therefore, the sentence of death imposed on Count 1 has to be set aside.

The Court finds that there was a conspiracy to burn Victoria Kim alive. However pursuant to the conspiracy no acts were committed to burn Victoria alive. Therefore, the Accused are only liable to be punished under section 296 read with 113 and 108 of the Penal Code for criminal conspiracy based on agreement. The maximum sentence that could be imposed is seven years' imprisonment.

The findings of the Supreme Court

Count 1 - The death sentence imposed on both Accused for conspiring to commit the murder of Victoria Kim and pursuant to that conspiracy committing the attempted murder of Victoria Kim and committing the murder of Jason kim and Daisy Manohar set aside. However, both Accused are guilty of conspiring to commit the murder of Victoria Kim by burning her alive. As no criminal acts were committed by the Accused pursuant to such conspiracy they are guilty only of criminal conspiracy punishable under section 296 read with sections 113B and 102 of the Penal Code. The maximum punishment that could be imposed is seven years' imprisonment of either description and also liable to a fine. As the 1st Accused is found guilty on counts 2, 4 and 6, he is sentenced to 7 years' rigorous imprisonment. The 2nd Accused was acquitted of all other charges level against her. Considering the fact that she was in remand custody since the commission of the offence a sentence of two years' simple imprisonment imposed on her.

Count 2 - 1st Accused was found guilty for committing the murder of Jason Kim, an offence punishable under section 296 of the Penal Code and the Accused was sentenced to death. The conviction and the death sentence is affirmed.

Count 3 - 2nd Accused was acquitted of the charge of abetment under section 296 read with section 102 of the Penal Code.

Count 4 - 1st Accused was found guilty of committing the murder of Daisy Manohar an offence punishable under section 296 of the Penal Code and was sentenced to death. The conviction and death sentence is affirmed.

Count 5 - 2nd Accused was acquitted of the charge of abetment under section 296 read with section 102 of the Penal Code.

Count 6 - 1st Accused was found guilty of attempted murder of Victoria Kim an offence punishable under section 300 of the Penal Code and sentenced to 15 years' rigorous imprisonment and a fine of Rs. 25,000/- carrying a default term of 12 months simple imprisonment and compensation in a sum of Rs. 500,000/- carrying a default term of 12 months simple imprisonment. The conviction and sentence is affirmed.

Count 7 – The conviction and the sentence imposed on the 2nd accused of abetment to commit the attempted murder of Victoria Kim an offence punishable under section 300 read with 102 of the Penal Code is set aside.

Subject to this variation the appeal is dismissed.

Judge of the Supreme Court

Buwaneka Aluvihare P.C., J.
I agree.

Judge of the Supreme Court

Sisira J. de Abrew J.
I agree.

Judge of the Supreme Court

Priyantha Jayawardena P.C., J.
I agree.

Judge of the Supreme Court

Anil Goonerathne J.
I agree.

Judge of the Supreme Court

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

S.C. Appeal 112/2015
S.C (HC)C.A.L.A. No. 398/2014
WP/HCCA/AV/REV: 212/11
D.C. Homagama Case No. 211/Claim

In the matter of an application for Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Sec 5C of High Court of the Provinces (Special Provisions)(Amendment) Act. No.54 of 2006.

Dissanayake Hitihamy Mudiyanselage
Sarath Kumara Dissanayake
455, Belagama Road,
Kelanimulla, Angoda.

CLAIMANT

Vs.

Kanthi Wimala Ratnayake **(DECEASED)**
62, Kothalawala,
Kaduwela.

JUDGMENT CREDITOR

And Between

Dissanayake Hitihamy Mudiyanselage
Sarath Kumara Dissanayake
455, Belagama Road,
Kelanimulla, Angoda.

CLAIMANT-PETITIONER-APPELLANT

Vs.

Kanthi Wimala Ratnayake **(DECEASED)**
62, Kothalawala,
Kaduwela.

JUDGMENT-CREDITOR-RESPONDENT

Malin Nivantha Kumarage
17/C/07, Kothalawala,
Kaduwela

SUBSTITUTED-JUDGMENT-CREDITOR-RESPONDENT

Malin Nivantha Kumarage
No. 174/C/7, Suhada Mawatha,
Kothalawala,
Kaduwela

New address

And now between

Dissanayake Hitihamy Mudiyanselage
Sarath Kumara Dissanayake
455, Belagama Road,
Kelanimulla, Angoda.

CLAIMANT-PETITIONER-PETITIONER-APPELLANT

Vs.

Malin Nivantha Kumarage
No. 174/C/7, Suhada Mawatha,
Kothalawala,
Kaduwela

New address

SUBSTITUTED-JUDGMENT-CREDITOR-RESPONDENT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J
Upaly Abeyrathne J. and
Anil Gooneratne

COUNSEL: Nihal Jayamanne P.C., with Noorani Amarasinghe
For the Claimant-Petitioner-Petitioner-Appellant

Substituted-Judgment-Creditor-Respondent-Respondent
absent and unrepresented

WRITTEN SUBMISSIONS TENDERED ON:
25.01.2016 (by the Appellant – motion dated 20.01.2016)

ARGUED ON: 16.02.2016

DECIDED ON: 29.03.2016

GOONERATNE J.

In a divorce case (D.C Colombo (19129/D) alimony was awarded in favour of the wife who obtained an ex-parte judgment. It is stated that the property alleged to be owned by the Claimant-Petitioner-Petitioner-Appellant was seized in execution of the writ in the above divorce case bearing No. 19129/D, where alimony was awarded to the divorced wife who was the Judgment-Creditor in the case relevant to this appeal, arising from D.C. Homagama Case No. 211/claim. However in the above claim inquiry (211/claim)

the learned District Judge rejected the claim made by the Claimant-Petitioner-Petitioner-Appellant (hereinafter referred to as the Appellant). The order was delivered by the learned District Judge, Homagama on 18.09.2008. The facts presented to this court indicates that the Judgment-Creditor who was the divorced wife was dead prior to delivery of the said order. She died on 08.08.2008.

The Appellant appealed to the Civil Appellate High Court against the order of the learned District Judge. However, the learned District Judge had on receipt of the Petition of Appeal, made a minute that no appeal lies and sent the record to the relevant High Court. In the High Court inter alia various steps had been taken by the Appellant who attempted to prove that the learned District Judge's order was a nullity in view of the demise of the Judgment-Creditor but the High Court had after examining various positions ultimately made order on 28.03.2011 substituting the son of the deceased in the room of the deceased Judgment-Creditor. I will not discuss the pros and cons of the above High Court proceedings and the orders but would concentrate on the question of the record being defective in the circumstances of the case in hand. It is also pleaded that the Appellant had thereafter filed a revision application in the High Court to set aside the learned District Judge's order made on the claim inquiry. However the revision application filed by the Appellant on 07.07.2014 was also dismissed. I

note the following positions as stated by the learned High Court Judge in the above order.

(a) The Petitioner has no right to name a Substituted Respondent in this application.
(b) Creditor Respondent is dead. In the presence of her registered Attorney, order had been pronounced. It is a genuine mistake done by court.
(c) Pronouncement of the order is bad in law where a party is dead. The proceedings which has taken after the death of the Judgment-Creditor-Respondent are null and void.
(d) The only remedy available to the Petitioner is to make an application to the District Court to make order of substitution of the heirs of the deceased and effect substitution. "Thereafter invite court to re-pronounce the Judgment".

The Supreme Court on or about 23.06.2015 granted Leave to Appeal on the following questions of law.

1. Did the High Court Judge err in law holding,

a. that a judgment which they have declared to be void can be re pronounced by any Court even after substitution or with or without substitution.

An order for alimony granted to a divorcee in a divorce suit would not survive after her demise. Ordinarily a heir would succeed by descent to an estate of inheritance. On the death of a person his estate, in the absence of a

will passes at once by operation of law to the heirs. In the case in hand some property was to be seized in execution of a writ to recover the amounts due by way of alimony. The process that was to follow came to a grinding halt on the death of the divorcee. In these circumstances the order for alimony could not be carried out, as such no money was recovered by the divorcee during her life time.

In the instant case the person who had been substituted by the High Court never attempted to take part in the proceedings and kept away from making a claim to his deceased mother's alimony order (rightly or wrongly). There is a total indifference on a factual basis by the legal heir. On the other hand as a matter of law does the cause of action survive in a case of this nature? The alimony order is highly personal to the Judgment-Creditor the divorced wife. The order of the learned District Judge rejecting the claim of the Appellant would be a nullity as at the date order was pronounced the Judgment-Creditor was dead. I read the Judgment in Munasinghe and Another Vs. Mohamed Jabir Navaz Carim 1990(2) SLR 163, on the question of nullity and thus the record becomes defective. Though the above decided case is sound authority where the record becomes defective, in the case in hand from the question of nullity it gets on to the question of survival of the cause of action. Section 5 of the Civil Procedure Code defines cause of action, it is exhaustive in its application. This would

include a denial of a right. The cause of action in an action under Section 247 of the Civil Procedure Code is the seizure which is the violation of a right of ownership and not the disallowance of the claim 12 NLR 196.

In so far as completeness of the record and the case in hand I will also refer to Section 392, 395 of the Civil Procedure Code.

Section 392 reads thus:

> The death of a plaintiff or defendant shall not cause the action to abate if the right to sue on the cause of action survives.

Section 395 of the Code reads thus:

> In case of the death of a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action.

In the case in hand no doubt the right to sue on the cause of action cannot survive the death of the Judgment-Creditor. If there was participation of the legal heir, in the case in hand (subject to the views expressed above) perhaps a question of a collusive action by the Appellant with the husband of the deceased Judgment Creditor, (father of the party sought to be substituted) may have surfaced. However the practical effect is that the death of the Judgment-Creditor would cause the action to abate as the cause of action does not survive. The only question of law suggested to this court is answered in favour of the Claimant-Petitioner-Appellant and the question of re-pronouncing the

Judgment of the lower court would not arise, in law. I set aside the Judgment/Order of the District Court and that of the High Court (as per sub paragraph ‘c’ and ‘d’ of the prayer to the petition dated 18.08.2014).

Appeal allowed, without costs.

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.

In the matter of an application for leave to appeal under Section 5C(i) of the High Court of the Provinces (Special Provisions) Act No, 19 of 1990, as amended by ActNo. 54 of 2006

SC.Appeal No.131/2012

SC(HCLA) LA

No: 192/2012

H.C. (Civil) Appeal

No.WP/HCCA/MT/15/08

DCMoratuwaCase

No:93/99/RE

Shaik Ibrahim Ahamed Kabeer
Of No.97
Wattalpola Road,
Henamulla
Panadura

PLAINTIFF

Vs.

M.I Mohamed Zahir
of No. 56D
Galle Road
Moratuwa

DEFENDANTS

AND

M.I Mohamed Zahir
of No. 56D
Galle Road
Moratuwa

DEFENDANT APPELLANT

Vs.

Shaik Ibrahim Ahamed Kabeer
Of No.97
Wattalpola Road,
Henamulla
Panadura
PLAINTIFF- RESPONDENTS

AND NOW BETWEEN

M.I Mohamed Zahir
of No. 56D
Galle Road
Moratuwa

DEFENDANT –APPELLANT-PETITIONER-APELLANT

Vs.

Shaik Ibrahim Ahamed Kabeer
Of No.97
Wattalpola Road,
Henamulla
Panadura
PLAINTIFF- RESPONDENTS-RESPONDENT_RESPONDENT

BEFORE:- Chandra Ekanayake J

Wanasundera P.C J

Buwaneka Aluwiliare P.C J

COUNSEL: - C.E De Silva with Sarath Walgamage for the Defendant-Appellant-Petitioner-Appellant.

S. Ruthramoorthy instructed by Sajeewa Srinath Tissera for the Plaintiff -Respondent-Respondent- Respondent

ARGUED ON: - 09 -05-2014

DECIDED ON: - 01-04-2016

Aluwihare PC J

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) instituted action in the District Court for the ejectment of the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant) from the premises in suit and for damages. At the conclusion of the trial the learned District Judge by her judgement dated 28-05-2008 answered the issues in favour of the Plaintiff and held that he is entitled to the relief sought. Aggrieved by the said order of the learned District Judge, the Defendant appealed to the High Court of Civil Appeals (hereinafter referred to as the High Court). The learned Judges of the High Court by their order dated 28-05-2012 affirmed the judgement of the learned District Judge and dismissed

the appeal. Aggrieved by the said decision of the High Court, the Defendant moved this court by way of leave to appeal.

The Supreme Court granted leave to appeal on a single question of law which is reproduced below.

> "Did the original court and the Provincial High Court err in holding that the premises in the suit is an Excepted Premises in terms of Regulation 3 of the Schedule to the Rent Act no 7 of 1972"

The facts in relation to this matter can briefly be stated as follows-:

The premises in suit are a business premises and the Defendant became the tenant of the same, in the year 1973. In evidence, it transpired that the original owner of the premises in suit who gave the premises on rent to the Defendant, had placed it as collateral and in 1997, the Peoples Bank had taken over the premises-in-suit in settlement of a debt that was due to the Bank from the original owner. Somewhere around 1998 the plaintiff had purchased the premises in suit from the Peoples Bank and had become the land lord of the defendant. In terms of the law, as far as the impugned property is concerned, the plaintiff stepped into the shoes of the original owner and thereby, not only acquired the same rights but also the liabilities of the previous owner.

The issue before this court revolves around a single issue, that is, whether the premises in suit was an excepted premises or not, for the purposes of the Rent Act.

Before I deal with the evidence led at the trail, it would seem pertinent to refer to four of the issues raised by the plaintiff before the District Court.

1. Was the premises in suit first assessed as a shop by the Moratuwa Urban Council in the year 1973?

2. Was the first assessed value of the shop, Rs. 2051/=

3. Did the first assessed value of the premise in suit exceed Rs.2000/=

4. If the questions 1 to 3 are answered in the affirmative could the premises in suit be considered as an "Excepted Premises"?

Witness Daya Hettige a clerk attached to the Moratuwa Municipal Council stated in his testimony that the property concerned was a bare land up to 1972 and after a shop (premises in suit) was put up in 1973, the same was assessed and valued at Rs. 2051. The witness went on to testify that in 1974 the assessed value of the premises was revised and was fixed at Rs.1179.Then again revisions of the assessed value had taken place in 1986 and 1991 and value had been fixed at Rs.4450 and Rs.8900 respectively. The witness also stated that the Urban Council of Moratuwa was elevated to a Municipal Council in 1987.

What appears to be crucial, in deciding the issue in this matter, is the assessed valuation for the year 1973 for the reason, it was in the said year that the tenancy agreement commenced, between the Defendant and the Plaintiff's predecessor in title. According to the evidence of witness Nirmalee Fernanado Management Assistant of Moratuwa Municipal Council, who testified on behalf of the Defendant, the assessed value of the property in suit was Rs. 2051 as at 21 -08-1973. This witness has stated that prior to that date, the assessed value was Rs.10 and revised to Rs.2051. This change, presumably would have been due to the construction of a building for a shop on the land. This witness too has stated that in the year 1974, the assessed value of the property in suit had again been revised to Rs.1179.

What is significant in this case is, whether the premises in suit was an excepted premise or not, at the point of time the Defendant entered into the tenancy agreement in relation to this premises.

The position of the Defendant appears to be, that he became a tenant of the premises in suit in the year 1973. This was the basis on which the Plaintiff was cross examined at the trial. (Defendant had not testified at the trial). It had transpired in evidence that the premises is a twin shop and the Plaintiff has come in to occupation of the adjacent shop, also as a tenanat. The plaintiff, when under crossexamination, had been asked as to the year in which he came into occupation of the premises. When the plaintiff testified to the effect that he did so in 1973, it was suggested to him that the Defendant had also become a tenant of the premises, at or about the same time. In response to the suggestion so made, the plaintiff had stated that it was quite possible. What can be deduced from the above is that, even the Defendant's position is also, that his tenancy agreement with the original owner of the premises in suit commenced in 1973.

At this point I wish to refer to Regulation 3 of the schedule to the Rent Act No.7 of 1972:

Regulation.3 of the schedule to the Rent Act no 7 of 1972 is as follows:-

Schedule

Regulations as to excepted premises

3. Any business premises (other than premises referred to in regulation 1 or regulation 2) situated in any area specified in column 1 hereunder shall be excepted premises for the purpose of this Act if the annual value thereof as specified in the assessment made as business premises for purposes of any rates levied by any local authority under any written law and in force on the first day of January, 1968, or, where the assessment of the annual value thereof as a business premises is made for the first time after the first day, of

January, 1968, the annual value as specified in such assessment, exceeds the amount specified in the corresponding entry in column II.

I	II
Area	Annual Value Rs.
Municipality of Colombo	6000
Municipality of Kandy, Galle or And other Municipality	4000
Town within the meaning of the Urban Council Ordinance	2000
Town within the meaning of the Town Council Ordinance	1000

From the foregoing, there is no ambiguity that the determining factors, whether a premises is an excepted premises or not, are the assessed value and the area (local government authority) within which the premises are situated.

Considering the above criteria, it's abundantly clear, that when the Defendant entered into a tenancy agreement in 1973 with the original owner of the premises in suit, it was an excepted premises, as its assessed value exceed Rs.2000/= (in that year assessed value was Rs.2051) and was situated within the Urban Council of Moratuwa as per the Regulation.

The argument advanced, however, on behalf of the Defendant was entirely on a different premise. The learned counsel contended that the Moratuwa Urban Council was elevated to a Municipal Council in 1987 and the institution of action before the District Court was in 1999.It was the submission of the

learned counsel for the defendant that, by 1999 the premises in suit was situated within the limits of the Municipal Council of Moratuwa and as the 1st assessed valuation of the premises in suit as a "Business Premises" did not exceed Rs.4000/=, the premises in suit is not an excepted premises. Hence it was further argued in view of the contention aforesaid, provisions of the Rent Act No. 7 of 1972 are applicable to the premises in suit and in particular the Regulation 3 of the schedule to the Rent Act referred to earlier. It was the submission of the Learned Counsel for the Defendant that the learned District Judge erred and misdirected herself both on the law and fact, by not considering the issue from the stand point of the local authority within which the premises in suit was situated, at the time the action was filed.

In support of the contention referred to above, the learned counsel cited the decisions of the Court of Appeal in the cases of Kithsiri vs. Gamalath 2003 (2) S.L.R 123 and Ower Silva vs. Rani Saram 2003 3 S.L R. 223. I am, however, of the view that the decisions in the cases referred to have no bearing on the issue that has to be decided in the instant case.

As referred to earlier, from the evidence led at the trial, it's quite clear that, at the point of time the Defendant entered in to the tenancy agreement with the Plaintiff's predecessor in title, the premises were an "excepted premises" for the purposes of the Rent Act. The provisions of the Rent Act became applicable, if at all, to the premises on a date subsequent to the agreement of tenancy with the elevation of the Moratuwa Urban Council to that of a Municipal Council.

The issue arose, whether the original contract ends once the premises ceases to be an excepted premises.

In the Court of Queen's Bench decision in Baily vs. De Crespigny 1861-73 A.E.R 332, a case relating to covenant of landlord and tenant, Chief Justice Cockburn held that "in the absence of clear words showing contrary intention, parties must always be considered as contracting with the law as existing at the time of the contract….."

A situation similar to the instant case arose in the case of **A.H.M.M. Hadjiar Vs.Marzook and Co Ltd 1979 (2) NLR 253.**

The issue arose, where the provisions of the Rent Restriction Act become applicable to premises which were earlier excepted premises, whether the contract of tenancy, which subsisted prior to the Act becoming applicable, comes to an end.

Delivering the decision of the Supreme Court (at page 256) his Lordship Justice Walpita held " If this argument is accepted it means the earlier contract of tenancy came to an end once the premises became rent controlled and a new contractual relationship unconnected with the original contract arose as a result of the operation of the Rent Restriction Act. The Rent Restriction Act does not have that effect. The original contract can only be terminated by a notice of quit. It therefore continued even after the premises became rent controlled, though by operation of law the landlord could not recover a rent more than the authorised rent."

In the case referred to above, the court further held that the tenant could be ejected from the premises as he was in arrears of rent under the original common law contract of tenancy.

Based on the rationale of the cases referred to above, it is clear that the law applicable is, the law as at the date on which the contract of tenancy was entered into by the parties and not the law applicable at the point, action was instituted, as contended on behalf of the Defendant.

Even if, for sake of argument, the criteria asserted by the Defendant is applied, still he is not bound to succeed. It was contended that, the assessed value of the premises in suit was below Rs.4000/= as at 1999, the year in which action was filed in the District Court, as such the premises cannot be treated as a excepted premises.

The valuation, however of the premises in suit had undergone several revisions and according to the document marked V3, the annual value of the premises

in suit had been revised in the year 1986, and fixed at Rs. 4450. This was the assessed value of the premises when the Urban Council of Moratuwa was elevated to a Municipal Council in 1987. Hence as far as the Municipal Council of Moratuwa was concerned the first assessed value of the premises in suit was Rs. 4450, which is over and above the annual value stipulated in the schedule to Regulation 3 of Rent Act, in relation to a business premises within a Municipal Council.

Considering the foregoing I hold that both the learned District Judge and the learned judges of the High Court of Civil Appeals were correct in holding that the premises in suit is an excepted premises as far as the tenancy agreement between the Plaintiff and the Defendant is concerned. As such, I answer the question of law raised, in the negative.

This Appeal is accordingly dismissed with costs.

JUDGE OF THE SUPREME COURT

Justice Chandra Ekanayake

JUDGE OF THE SUPREME COURT

Justice Eva Wanasundera P.C

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

N. H. J. C. Rangajith Dassanayake
Galliyedde,
Ellawala

18th Defendant-Appellant- Appellant

S.C.Appeal No.183/2014
SC/HC/CALA No.303/2013
GCCA Avissawella
WP/HCCA/AV/522/2008[F]
D.C.Avissawella Case No.599/P

Vs

A. Amaratunga Fernando
64/5, Cross Street
Colombo 8

Plaintiff-Respondent-Respondent

1. A. Rosalin Fernando
2. A.E.Akman (deceased)
3. A. Swarnalatha
4. K.M.John Fernando (deceased)
5. A.R.Yasapala
6. A.R.Punyawathi
7. A.R.Gnanawathi
8. A.R.Siripala
9. A.R.Piyaseeli
   of Ellawela, Eheliyagoda
10. A.R.Luciya Fernando (deceased)

10A.V. H. Gunasoma
37, Sri Sumana Mawatha,
Mudduwa, Ratnapura

11.A.R.Lewis
C/o Ethoya Stores, Ratnapura

12. A.Alensu
    317/F, Naiwala Road, Udugampola

13. A.Pedrik
300,Naiwala Road.Udugampola
14. A.Saimon
300,Naiwala Road.Udugampola
15.A.R.Ensa
Niripola, Hanwella
16.A.Sunil
Ellawela, Eheliyagoda
17.A.Abeywardane
Ellawela, Eheliyagoda
19.Weragodage Kamini Chandralatha
20.A.S. Samanthika Abeywardane
21. Nisansala Lakmali Abeywardane
Ellawela, Eheliyagoda

Defendant-Respondent-Respondents

BEFORE : **S.E.WANASUNDERA, PC, J.**
B.P. ALUWIHARE, PC, J.
K.T.CHITRASIRI, J.

COUNSEL : Thishya Weragoda with Iresh Seneviratne and Chinthaka Sugathapala for the 18th Defendant-Appellant-Appellant

B.O.P.Jayawardane with W.Oshada Rodrigo for the Plaintiff-Respondent-Respondent

ARGUED ON : **03.03.2016**

WRITTEN SUBMISSIONS ON : 24.03.2016 by the 18th Defendant-Appellant-Petitioner
24..05.2016 by the Plaintiff-Respondent-Respondent

DECIDED ON : **30.05.2016**

CHITRASIRI, J.

When this matter was supported on 3rd October 2014, this Court granted leave to proceed on the questions of law referred to in paragraph 21 (b), (c), (d) and (e) of the petition of appeal filed by the 18th defendant-Appellant-Appellant. (hereinafter referred to as the 18th Defendant-Appellant) Those questions of law read thus:

(b) has the learned Provincial High Court Judge erred in law by coming to the conclusion that the plaintiff and other co-owners have prescribed a defined portion of land "Galliyadde Godella alias Radage Godella" marked as Lot 1 in the Plan No.323A marked as "X" at the trial?

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(c) has the learned Provincial High Court Judge erred in law holding that several co-owners of "Radage Kumbura" have prescribed to a portion of land called "Radage Godella".

(d) has the learned Provincial High Court Judge erred in law in holding that –

(i) it is common ground that Lot No.1 of the Plan No.323A marked as "X" at trial is "Radage Godella"?
(ii) that several co-owners of "Radage Kumbura" have prescribed to a portion of land called "Radage Godella"?.
(iii) the owners of "Radage Kumbura" had possessed "Radage Godella" and "Radage Kumbura" as one land?

(e) has the learned Provincial High Court Judge has erred in law by holding that upon coming to a conclusion that that Lot No.1 of the Plan No.323A marked as "X" at the trial is "Radage Godella" a distinct land from "Radage Kumbura" in relation to which *lis pendens* has been registered and the action relates to, can be partitioned in the present action?

By looking at the above questions of law, it is seen that the 18th defendant-appellant is challenging basically, the decision of the learned Civil Appellate High Court Judges. Hence, it seems that the judgment of the learned District judge has not been challenged though all the issues raised in the Trial Court had been answered against the 18th defendant-appellant. Hence, the questions of law raised in this Court may lead to think that the appellant is not keen in canvassing the judgment of the learned District Judge.

Be that as it may, even though the learned High Court Judges in the Civil Appellate high Court have looked at the longstanding possession of the 17th Defendant-Respondent-Respondent to the land subjected to in this appeal upon which the leave was granted by this Court; basically the issue here is to determine whether or not Lot 1 in Preliminary Plan marked as "X" which is the Plan bearing No.323A, forms part of the corpus.

This action was instituted by the plaintiff-respondent-respondent (hereinafter referred to as the plaintiff) by the plaint dated 11th May 1990 having made the 1st to 17th respondents as parties to the action. Subsequently, the 18th defendant-Appellant was added as a party to the action consequent upon his application made by the petition dated 29th January 2002. He is the party who sought to exclude the aforesaid Lot No.1 in Plan 323A, from the corpus. Significantly, neither he nor any other person on his behalf has made any claim before the Surveyor, at the time the

preliminary survey was conducted. Not having made such a claim before the surveyor, the 18th defendant-appellant has thought it fit to claim rights to lot 1 in the preliminary plan X, almost after a period 10 years from the date on which he or his representatives had every opportunity to do so.

In the aforesaid application dated 29.01.2002, 18th defendant-appellant has stated that he became entitled to a land called Galliyadde Godella by deed No.410 dated 17th October 1989 and has claimed that the aforesaid Lot No.1 in Plan 323A forms part of that land called Galliyadde Godella. It is so stated in the Statement of Claim filed by the 18th defendant-appellant as well. Accordingly, he has prayed that lot No. 1 in Plan 323A be excluded from the corpus.

Accordingly, the issue here is to determine whether or not the Lot No.1 in Plan 323A forms part of the land referred to in the Final Village Plan bearing No.252. At the outset it must be noted that this particular issue has been carefully considered by the learned District Judge who heard the witnesses. In that judgment learned District Judge has stated as follows:

"ලොට් අංක 1 ඉල්ලා සිටින 18 වෙනි විත්තිකරු, තම අයිතිය තහවුරු කිරීම සඳහා කේ. විජේරත්න බලයලත් මිනින්දෝරුවරයාගේ අංක 761 දරණ අධිස්ථාපිත පිඹුර 18වී.3 ලෙස ඉදිරිපත් කරමින්, එම පිඹුරේ කැබලි අංක 5 සහ 1 ගල්ලියැද්ද ගොඩැල්ලට අයත් වන බව කියා සිටි. එසේම 18වී.1 දරණ, රත්නපුර මැනුම් අධිකාරි,

අවසාන ගම් පිඹුරු අංක 252 පිළිබඳව සඳහන් කර ඇති ලිපියක් 18 වන්නිය සාක්ෂි මඟින් ඉදිරිපත් කර ඇත.

මෙහි ඉඩම ගල්ලියැද්ද ගොඩැල්ල හෙවත් රදාගේගොඩැල්ල යන නම් දෙකෙන්ම හඳුන්වා ඇති බව පෙනී යන නමුත්, ඉඩම නිරවුල් කල බවට රජයෙන් ලබා දුන් සහතිකයක් ඉදිරිපත් කර නැත.

තවද, රත්නපුර මැනුම් අධිකාරී අංක 345 දරණ බිම් කොටස මැන පෙන්වන ලේඛනයක් 18වි.2 ලෙස ඉදිරිපත් කරන අතර, 18වි.2 කේ. විජේරත්න බලයලත් මිනින්දෝරුවරයා 18වි.3 දරණ ලේඛනයෙහි අධිස්ථාපිත කොට පෙන්වා ඇත.

18 වන වන්නිය විශ්වාසය තබන 18වි.5 වශයෙන් ලකුණු කර ඉදිරිපත් කරන ලද අංක 725 සහ 1946.02.05 දිනැති ඔප්පුවෙහි 18වි.2 වශයෙන් ඉදිරිපත් කල ලේඛනයෙහි ඇති මායිම් කිසිවක් සඳහන් නොවේ.

18වි.5 දරණ ඔප්පුවේ මායිම් මෙලෙස සඳහන් වේ.

උතුරට - මඩවලේ කනත්තෙ අගලද, නැගෙනහිරට- ගල්ලියැද්ද, දකුණට- රදාගොඩැල්ලද, බස්නාහිරට- මත්තාගේලියැද්දද යන මායිම් තුල පිහිටි අක්කර භාගයක පමණ විශාලකම ඇති ඉඩමය.

18වි.5 ඔප්පුවේ එම උපලේඛනයේ සඳහන් ගල්ලියැද්ද ගොඩැල්ල නැමැති ඉඩම පිය උරුමයෙන් අයිති වූ යහපත් හාමි යන අය හේවාගේ ආබ්‍රහම් දාබරේ යන අයට පවරා දී ඇති බව පෙනී යන අතර, 18වි.5 ඔප්පුවෙහි කලින් සඳහන් කල 18වි.1 වශයෙන් ලකුණු කරන්නට යෙදුන ලේඛනයේ ඇති ගල්ලියැද්ද ගොඩැල්ල හෙවත් රදාගේගොඩැල්ල යන ඉඩමක් පිළිබඳව සඳහන් නොවේ.

18වි.5 ලේඛනයේ විෂය වස්තුවේ කොටසක් රදාගේගොඩැල්ල නොවන අතර, එය දකුණට අති මායිමක් වශයෙන් සඳහන් කර ඇති බව නිරීක්ෂණය වේ.

18V.5 ඔප්පුවෙන් අයිතිය ලද ආබ්‍රහම් දාබරේ යන අය 1989.10.17 දිනැති අංක 4110 ඔප්පුවෙන් තම අයිතිවාසිකම් 18 වෙනි විත්තිකරුට පවරා දී ඇති අතර, එම ඔප්පුවේ උපලේඛනයේද ඉඩම හඳුන්වන්නේ ගල්ලියැද්දෙගොඩැල්ල වශයෙන් පමණි.

ඉහත කරුණු අනුව, 18 විත්තිය ඉල්ලා සිටින පරිදි විෂය වස්තුවේ ඇති ලොට් අංක 1 විෂය වස්තුවෙන් පිට කිරීමට හැකියාවක් නැති අතර, එම කොටසින්ද විෂය වස්තුව සමන්විත වන බව නිගමනය කරමි."

The above analysis of the evidence by the learned District Judge shows that he has addressed his mind to the identity of the land referred to in the Final Village Plan with that of the lands referred to in the schedules to the deeds marked by the 18th defendant, having looked at the boundaries of lot 1 in preliminary plan marked X. Moreover, he has stated that there was no settlement of the land in favour of the appellant by the authorities of the Government in respect of the land referred to in the Final Village Plan. Finally, he has concluded that the 18th defendant-Appellant has no right or title to the aforesaid lot 1 in the preliminary plan 323A which he claims to have it excluded from the corpus. This decision as to the title in respect of the land sought to be excluded has not been challenged.

However, as mentioned hereinbefore, the task of this Court is to ascertain whether or not the aforesaid lot 1 forms part of the final village plan marked 18V2 and not on the question of title to the land. Only evidence available to establish this fact is the plan and the oral evidence of the surveyor

Wijerathne who made the plan marked 18V3. He, in his evidence has stated lot 1 in the preliminary plan marked X falls within the boundaries of the Final Village Plan.

However, I do not see any evidence to show the exact basis on which he identified the boundaries of the final village plan when he superimposed that plan with that of the plan marked X. No questions had been asked from the Surveyor Wijeratne as to how he identified Lot 345 in the Final Village Plan for him to perform the superimposition. Even in the Report of the plan marked 18V3, prepared by the Surveyor Wijeratne, he has not stated the manner in which he identified Lot 345 in the Final Village Plan. Answers given by the surveyor as to the way he traced the boundaries of the final villege plan 18V2 show that he was not certain as to those boundaries when he drew the superimposition of the relevant plans. It is evident by his evidence quoted below.

ප්‍ර : මහත්මයා කියන විදිහට 252 ගම් පිඹුරේ කැබලි අංක. 345 දරණ කැබැල්ලේ කොටසක් ?

උ : ඔව්.

ප්‍ර : 345 දරණ සැලැස්ම ඔය ඉඩම තුල තිබෙන පැල ඉනි වැට පෙන්වල නැහැ ?

උ : ඔව්.

(Page 162 in the appeal brief)

Physical boundaries in Lot 345 of the final village plan that existed were not given in his Report marked 18V2 either.

Therefore, it is clear that the surveyor Wijerathne has failed to explain the manner in which he identified the Lots 345 in the Final Village Plan marked 18V2 when he superimposed the final village plan on to the preliminary plan X. Therefore, merely because the Surveyor Wijeratne has stated that Lot No.1 in Plan "X" is a part of the land referred to in the Plan 18V2, it is impossible to decide so for the reasons setout above particularly when no evidence is forthcoming as to the manner in which he determined the boundaries of the final village plan at the time he surveyed the land.

Such a position becomes more relevant when the Surveyor has failed to mention the date on which the Final Village Plan was prepared. His evidence to this effect is found at page 165 in the appeal brief. It reads thus:

ප්‍ර : කොයි කාලයේද අවසාන ගම් සැලැස්ම?

උ : ඒ ගැන මගේ සටහනක් නැහැ.

(Page 165 in the appeal brief)

Hence, it may have been prepared even before a century. The age of the Final Village Plan also matters when identifying the boundaries of such a plan. Hence, I am unable to agree with the surveyor's findings as to the identity of

the Final Village plan upon which the case of the 18th defendant-appellant rests.

I will now advert to the names of the respective lands in order to determine whether those names do have any relevance in determining the issue at hand. In the schedule to the plaint, land sought to be partitioned is identified as Radage Watta. No other name is found in that schedule to identify the corpus. In the plan marked as "X" which is the plan prepared by the Commissioner of the Court, land called Radage Kumbura is shown and it comprises 4 lots. Report of the Surveyor is marked as "X1" at the trial. However, the 18th defendant-appellant's claim is on the basis that it is a land called Galliyadde Godella. Such a name is not referred to in the schedule to the plaint. In that schedule to the plaint it is named as Radage Watta and not even Radage Godella.

Lot 345 in the Final Village Plan bearing No.252 is shown in the plan marked 18V2. In the document marked 18V1, the said Lot 345 is identified as part of the land called Galliyadde Godella alias Radage Godella Garden. However, the deeds marked 18V4 and 18V5 by which the 18th defendant has claimed title, shows that he is entitled to a land called Galliyadde Godella and not to a land called Radage Godella.

Accordingly, it is seen that the land referred to in the Final village plan upon which the 18th defendant has sought to have lot 1 in plan X excluded does not bear the exact name of the land referred to in the schedule to the plaint or the name referred to in the preliminary plan X which is the subject

matter of this action. Therefore, the difference in the names of the lands as described above also creates a doubt as to the identity of the land to be excluded.

Learned Counsel for the appellant contended that it is wrong to have considered the longstanding possession of the 17th defendant as it was done by the learned High Court Judges. It must be noted that such longstanding possession by the 17th defendant-appellant having lived thereon may also become material since the accuracy of the plan marked 18V3 that was made use of, to support the claim of the 18th defendant-appellant was in doubt.

In this instance, clear evidence is found to establish that the 17th defendant having built a dwelling house on that land had been in possession thereon for a long period of time. 18th defendant-Appellant had neither title no possession to that block of land. Learned Counsel for the plaintiff submitted that the aforesaid Lot No.1 had been the Kamatha of the remaining land of the corpus which was a paddy field even at that point of time. Therefore, it is not incorrect to determine that Lot 1 in that plan, it being a block of land of a higher elevation forms part of the land sought to be partitioned.

Therefore, I do not see any error on the part of the learned High Court Judges when they considered the longstanding possession of the 17th defendant to the aforesaid lot 1.

I also must state that the questions of law upon which the leave was granted by this court, entirely depend on the facts of the case. No other clear and specific question of law has been raised in this instance. It is well established that our appellate courts are always slow to interfere with the findings arrived upon considering the facts of the case. In the case of **Alwis vs Piyasena Fernando [1993 (1) S.L.R.at page 119] G.P.S. De Silva C J** held thus:

> *"it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal.The findings in this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the Court of Appeal could have reversed the findings of the trial Judge."*

Long line of authorities could be seen to support this position of the law. A few of those are;

Frad vs. Brown & Co [28 N.L.R. 282]

Mahavithana vs. Commissioner of Inland Revenue [64 N.L.R. 217]

De Silva vs. Seneviratne [1981 (2) S.L.R. 8]

The authorities referred to above too, guides me not to interfere with the findings of the trial judge in this instance. The identity of the lands involved in this case particularly the ascertaining of the boundaries of the old Final Village plan depended on the evidence of surveyor Wijerathne. Learned District Judge having considered his evidence has decided that the lot 1 in the preliminary

plan marked X should not be excluded from the corpus. Therefore, I am reluctant to interfere with his decision considering the authorities referred to above.

For the aforesaid reasons, I am not inclined to interfere with the decision of the learned District Judge as well as the decision of the Judges in the Civil Appellate High Court, Avisswella. Accordingly, all the questions of law raised in this case are answered in favour of the plaintiff-respondent-respondent. This Appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

WANASUNDERA, P.C, J .

I agree

JUDGE OF THE SUPREME COURT

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 from the judgment dated 29th October 2010 judge of the High Court of Western Province (in the exercise of its Civil Commercial jurisdiction) holden in Colombo (Commercial High Court) in case No 86/2001(1), especially in Terms of the Civil Procedure Code and Sections 88 and 754 Thereof, and the High court of the Provinces Special Provinces (Special Provisions) Act No. 10 of 1996 and Sections 5 and 6 thereof.

Selliah Ponnusamy
105, Manning Place, Colombo 6

Defendant-Petitioner-Appellant

SC CHC 01/2011
HC HC (Civil)86/2001(01)

Vs

People's Bank
75, Chittampalam A Gardiner Mawatha
Colombo 2.

Plaintiff-Respondent-Respondent

Before : Priyasath Dep PC, J
Buwaneka Aluwihare PC, J
Sisira J De Abrew J

Counsel : Suren Fernando for the Defendant-Petitioner-Appellant.
Rasika Dissanayke for the Pliantiff-Respondent-Respondent

Argued on : 1.3.2016
Decided on : 22.6.2016

Sisira J De Abrew J.

Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) instituted action against the Defendant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) to recover a sum of Rs.12,000,000/- from Defendant-Appellant. The journal entry dated 13.9.2001 indicates that summons had been served on the Defendant-Appellant. On 13.9.2001, the Defendant-Appellant failed to make appearance in court and as such the case was fixed ex-parte against the Defendant-Appellant. After ex-parte trial, the decree was served on the Defendant-Appellant but he failed to appear in court. Subsequently notice of writ was served on the Defendant-Appellant. Upon notice of writ being served on the Defendant-Appellant, he filed petition and affidavit in court moving, inter alia, to set aside the ex-parte judgment and the decree. At the inquiry he stated, in evidence, that he did not receive summons nor did he receive the ex-parte decree. He however admitted that notice of writ had been handed over to his domestic helper.

The Plaintiff-Respondent, at the inquiry, called Amarasinghelage Gamini a clerk attached to the Commercial High Court as a witness and produced Process Server's reports marked V1 to V4 but failed to call the Process Server as a witness. The learned High Court Judge, by judgment dated 29.10.2010, dismissed the application of the Defendant-Appellant to set aside the ex-parte judgment and the decree. Being aggrieved by the said judgment of the learned High Court Judge, the Defendant-Appellant has appealed to this court. The most important question that must be decided in this case is whether the Defendant-Appellant received summons and/or the ex-parte decree. If this question is answered in the affirmative, the appeal of the Defendant-Appellant should fail. But if this question cannot be

answered in the affirmative or is answered in the negative, the appeal of the Defendant-Appellant should be allowed. I now advert to this question. The Defendant-Appellant, in his evidence, stated that he did not receive summons and/or the ex-parte decree. The Plaintiff-Respondent through a clerk of the Commercial High Court produced the Process Server's reports marked V1 to V4. According to V2, the Process Server had handed over summons to the Defendant-Appellant on 3.7.2001. According to V3, he had handed over the decree to the Defendant-Appellant on 9.1.2002. The Process Server did not give evidence. As against these two documents the Defendant-Appellant under oath stated that he did not receive summons and/or the ex-parte decree. He further stated that he had four other civil cases in court; that he had retained lawyers in those cases and paid 38 million to the bank; and that he had no reasons to keep away from this case if he received summons. Can the court reject this evidence? Learned counsel for the Plaintiff-Respondent contended that the Defendant-Appellant should have called his wife and the domestic helper to corroborate his evidence. I now advert to this contention. The Process Server, in his reports, states that he handed over summons and the ex-parte decree to the Defendant-Appellant. The Defendant-Appellant, in his evidence, denied the said fact. Even if the wife and domestic helper of the Defendant-Appellant were called as witnesses, can they corroborate the evidence of the Defendant-Appellant? No one can assume that the wife and domestic helper are always within the seeing range of the Defendant-Appellant. Therefore in my view, failure to call them as witnesses has not weakened the position taken up by the Defendant-Appellant. For the above reasons, I reject the above contention of learned counsel for the Plaintiff-Respondent. I have gone through the evidence of the Defendant-Appellant and see no reasons to reject his evidence. After considering the evidence led at the trial, I hold the view that the Defendant-

Appellant has established the fact that he did not receive summons and/or ex-parte decree. In a case of this nature once the defendant established the fact that he did not receive summons and/or the ex-parte decree, the burden shifts to the Plaintiff to rebut the said position. How does he discharge this burden? This can be done by leading the evidence of the Process Server. This view is supported by the judicial decision in Wimalawathi Vs Thotamune [1998] 3 SLR 1 wherein Justice Ranaraja observed thus: " The affidavit filed by the Process Server is prima facie evidence of the fact that summons was duly served on the defendants mentioned therein and there is a presumption that summons was duly served. Accordingly, the burden shifts on to the defendants to prove that no summons had been served. The defendants have to begin leading evidence. Once the defendants lead evidence to prove that summons had not been served on them and establish that fact, burden shifts back on to the plaintiffs to rebut that evidence. This can be done by calling the Process Server to give evidence that he had served summons on the defendants"

Did the Plaintiff-Respondent, at the inquiry, call the Process Server? He did not do so. Learned counsel for the Plaintiff-Respondent contended that it was not necessary for the Plaintiff-Respondent to have called the Process Server as his reports V1 and V4 had been produced without objection. In my view although they were produced without objections there was a duty on the Plaintiff-Respondent to call the Process Server when the Defendant-Appellant, in his evidence, took up the position that he did not receive summons and/or the ex-parte decree. The Plaintiff-Respondent in the present case did not rebut the evidence of the Defendant-Appellant that summons or ex-parte decree was not served on him (the Defendant-Appellant) by calling the Process Server when he (the Defendant-Appellant), in his

evidence, took up the above position. The learned High Court Judge has failed to consider the above matters and arrived at a wrong conclusion.

On the evidence led at the inquiry, I hold that the Defendant-Appellant had established that he had not received summons and/or the ex-parte decree.

For the above reasons, I set aside the judgment of the Commercial High Court dated 29.10.2010, ex-parte judgment dated 20.8.2001 and the ex-parte decree of the learned High Court Judge. I direct the learned High Court Judge to permit the Defendant-Appellant to file his answer and thereafter proceed with the case.

Judge of the Supreme Court.

Priyasath Dep 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/CHC/25/2009
Commercial High Court Case
No. HC/Civil/132/2006(1)

Ceylinco Development Bank Limited
No. 69, Janadhipathi Mawatha,
Colombo 01.

PLAINTIFF

Vs.

1. Janaka Kumara Elvitigala
   No. 850, Rukmale Road,
   Kottawa, Pannipitiya.

2. Gunasinghe Arachchige Jayanthi Mala
   No. 850, Rukmale Road,
   Kottawa, Pannipitiya.

DEFENDANTS

AND NOW BETWEEN

1. Janaka Kumara Elvitigala
   No. 850, Rukmale Road,
   Kottawa, Pannipitiya.

2. Gunasinghe Arachchige Jayanthi Mala
   No. 850, Rukmale Road,
   Kottawa, Pannipitiya.

DEFENDANTS-APPELLANTS

Vs.

1. Ceylinco Development Bank Limited
   No. 69, Janadhipathi Mawatha,
   Colombo 01.

PLAINTIFF-RESPONDENT

BEFORE: S.E. Wanasundera P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Palitha Yaggahawita for the Defendants-Appellants

N. R. Sivendran with Ms. S. Somarathne
And Ms. A. Raman for the Plaintiff-Respondent

ARGUED ON: 09.09.2016

DECIDED ON: 13.10.2016

GOONERATNE J.

This is a direct appeal to the Supreme Court from the Judgment delivered on 31.07.2009 by the Commercial High Court of the Western Province exercising Civil Jurisdiction (Holden in Colombo). The action itself was based on

a hire purchase agreement of a vehicle. Plaintiff-Respondent namely Ceylinco Development Bank Limited, by Agreement marked P1 with the 1st Defendant-Appellant leased the vehicle in question on a monthly rental as agreed between the parties. The 2nd Defendant-Appellant was the guarantor to the said agreement. The 1st Defendant-Appellant defaulted in making payment in terms of the said agreement. The Plaintiff-Respondent by notice P2 had given notice of termination of the agreement and the agreement was accordingly terminated by letter P3. It is pleaded that notwithstanding the termination of the agreement the 1st Defendant-Appellant failed to return the vehicle in question as per the agreement and also failed to make the instalment payments.

In the Commercial High Court parties proceeded to trial on five (5) admissions and 34 issues. The learned High Court Judge after trial entered judgment in favour of the Plaintiff-Respondent. At the hearing before us the only point urged by learned counsel for the Appellants, was that the statement of account marked P6 (X3) and produced at the trial is incorrect, and the amounts reflected therein are not due and owing to the Plaintiff-Respondent. On the other hand, learned counsel for the Plaintiff-Respondent raised a preliminary objection before us that the Petition of Appeal filed of record is defective and bad in law and as such no relief could be granted in terms of the prayer to the petition i.e prayer to the petition refer to set aside a judgment dated

05.04.2007, whereas the judgment was delivered on 31.07.2009 and not on 05.04.2007. In fact this court in open court having perused the record found that the correct date of judgment was 31.07.2009. Therefore the point urged by learned counsel for the Plaintiff-Respondent was correct. This being a mistake the Appellant party could have corrected the prayer, since the body of the Petition of Appeal refer to the correct date of the Judgment of the High Court. It is either negligence or carelessness of the Registered Attorney for the Appellants. Under normal circumstances this court could have rejected the Petition of Appeal, there being no application to rectify such obvious error, within a reasonable time. This court is mindful of such objection and to the several authorities cited by learned Counsel for Plaintiff-Respondent, but permitted both parties to address court on the merits of the case.

The learned counsel for the Appellant was only able to urge the above points referred to above, by him in his submissions. We are not convinced on the point raised by the learned counsel for the Appellant. The proceedings in the High Court indicates that the Plaintiff-Respondent produced through their witness, documents marked P1 to P11 which includes the statement of Accounts marked P6 (X3) without any objection as and when the documents were produced and marked in court. Nor was there any objection at the closure of the Plaintiff-Respondent's case for leading in evidence documents P1 to P11.

Therefore we have to hold that the documents are proved for all purposes of the case in hand. That is the cursus curiae of the original court. Perusal of the evidence and the judgment of the High Court it is evident that the Plaintiff's evidence remains un-contradicted, on all material points. On a perusal of all the evidence transpired before the High Court I cannot find a valid acceptable defence placed before the trial court, even to consider the case of the Appellants. The trial Judge in her Judgment refer to the following material points which transpired in cross-examination of the 1st and 2nd Defendant. I would reproduce as follows that portion of the judgment of the learned High Court Judge for purpose of clarity.

> In the course of the cross-examination the 1st Defendant had admitted the signing of the document marked 'P1'. Further he admitted that the Plaintiff had explained the nature of the alleged transaction. The 1st Defendant had also admitted that he could not pay the instalments in terms of the agreement marked 'P1'. This Defendant had also admitted the receipt of the documents marked 'P3' and 'P4' sent by the Plaintiff. It is being viewed from his evidence that the 1st Defendant had accepted a sum of Rs. 665,000/- with the intention of selling the vehicle in question to a third party without the consent and knowledge of the Plaintiff. But it is the contention of the Defendants that the said vehicle in question had been robbed and he is not aware of the fact that the vehicle is in whose possession now.

she placed her signature to the above document only as a witness and not as a guarantor. It is also said that the 1st Defendant had used the above vehicle only for one year and thereafter it had been robbed and was never recovered. In the course of the cross examination the above Defendant had admitted that she placed her signature as a guarantor and the 1st Defendant had failed to pay the Plaintiff as per terms of the lease agreement. Further she admitted that the 1st Defendant had accepted a sum or Rs. 665,000/- from a third part in respect of the vehicle in question.

I observe that the transaction between parties and its characteristics of a hire purchase agreement, conclude that the contract had been breached by the Appellants. Plaintiff-Respondent delivered the vehicle to the Hirer (1st Defendant-Appellant) who took immediate possession. Credit facilities made available to Hirer, who made deposit but defaulted in paying the instalments. Hirer failed to purchase the vehicle by completing the payment of instalments and to comply with the other conditions of the agreement or to determine the hiring by returning the vehicle to the owner (Plaintiff-Respondent).

In all the facts and circumstances of the case in hand we see no basis to interfere with the Judgment of the High Court. As such Judgment of the High Court dated 31.07.2009 is affirmed. This appeal stands dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera 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 for Revision against the Judgment of the learned judge of the Commercial High Court dated 24.1.2006 made in HC (Civil) case No.17/2004(1)

Peoples Bank
No.75, Sir Chittampalam A Gardiner Mawatha
Colombo2.

Plaintiff-Petitioner

SC CHC 29/2009
SC (HC)LA 7/2009
HC Colombo (HC Civil)17/2004 (01)

Vs

1. Ocean Queen Marine(pvt) Ltd,
No.227/03, Jampettah Street, Colombo13.
2. Robert Peiris.
No.227/03, Jampettah Street, Colombo13.

3. Emmanuel Ranjith Arulanandan
No60/20 Church Street, Colombo 15
4. Sivapalan Weerasingham
No.70/33, Rock House Lane, Modara, Colombo 15
5. Pothupitiyaga Nandasena Fernando
No.70/33, Rock House Lane, Modara, Colombo 15
6. Sellapperumage Mahindasiri Fernando
No.29, Jaya mawatha, Keselwatta, Panadura.

Defendants-Respondents

Before : Eva Wanasundera PC, J
Sisira J de Abrew J
Anil Gooneratne J

Counsel : Shanki Parthalingam President's Counsel with Hiran Jayasuriya for the Plaintiff Petitioner
Chandana Prmatilake for the 2nd Defendant Respondent
Argued on : 19.10.2015
Decided on : 28.1.2016

Sisira J de Abrew J.

The 1st Defendant Respondent is a limited liability company and all times material to the transaction that took place in this case, the 2nd to 6th Defendants-Respondents (hereinafter referred to as the 2nd to 6th Respondents) have acted as Directors of the 1st Defendant Respondent Company (hereinafter referred to as the 1st Respondent). The 1st Respondent obtained from the Plaintiff Petitioner (hereinafter referred to as the Petitioner Bank) a sum of Rs.500,000/- as a loan to purchase a Trawler Boat. When the above loan was granted, the 1st Respondent signed a promissory note as security and the 2nd to 6th Respondents signed a guarantee bond [marked as P6 in evidence] securing the repayment of the loan granted by the Petitioner Bank to the 1st Respondent. As the 1st Respondent failed and neglected the repayment of the loan, the Petitioner Bank filed a case in the Commercial High Court of Colombo against the 1st to the 6th Respondents seeking, inter alia, a judgment in a sum of Rs. 5,150,108/49. Upon summons being served on the respondents, the 2nd Respondent appeared in court and filed the answer. It has to be noted here that only the 2nd Respondent appeared in court on summons. As the 1st Respondent and 3rd to 6th Respondents failed to appear in court, the case was fixed exparte against them. Upon conclusion of the trial, the learned trial Judge, by his judgment dated 24.1.2006, granted relief prayed for in the plaint only against the 1st Respondent. The learned trial Judge did not grant relief claimed against the 2nd to 6th Respondents. The learned trial Judge dismissed the case against the 2nd to 6th Respondents.

Being aggrieved by the said judgment, the Petitioner Bank made an application to this Court for Special Leave to Appeal bearing No. SCLA 30/2006. Whilst the Special Leave to Appeal Application was pending in this Court, the judgment in Ceylease Financial Services Ltd Vs Sriyalatha and Another SC/CHC/(Appeal) 48/2004 now reported in [2006] 2 SLR 169 (Ceylease case) was pronounced on 11.12.2006 by this Court. Thereafter the petitioner bank, on 22.1.2007, informed this Court that in view of the judgment pronounced in SC/CHC/(Appeal) 48/2004 (supra) the Petitioner Bank could not proceed with SCLA 30/2006. This Court relying on the said submission dismissed the said Special Leave to Appeal Application. After delivery of the judgment in the Ceylease case, this Court, on 26.1.2008, delivered judgment in SC44/2007and SC45/2007 Seylan Bank Ltd Vs Samdo Macky Sportswear (Pvt) Ltd and Others [now reported in (2008) 1 SLR76]. Thereafter the Petitioner Bank filed the present **application in revision** seeking to set aside the judgment of the trial court (High Court) dated 24.1.2006. This Court, by its order dated 4.11.2009, granted leave to appeal on questions of law set out in paragraph 23 (a), (b) ,(c) and (d) of the petition which are reproduced below.

1. Is the judgment of the learned Judge of the Commercial High Court dated 24.1.2006 dismissing the action of the Petitioner against the 2nd to 6th Respondents contrary to law?
2. Is the Guarantee Bond marked P6 in evidence, duly stamped?
3. Has the learned Judge of the Commercial High Court erred in law and misdirected himself in rejecting the Guarantee Bond P6 as evidence?

4. Are the 2nd to 6th Respondents liable jointly and severally to pay the Petitioner the monies due owing and payable by the 1st Respondent to the Petitioner?

It has to be noted here that this is the 2nd occasion that the Petitioner Bank seeks to set aside the judgment of the trial court which dismissed the action of the Petitioner Bank against 2nd to 6th Respondents. It is interesting to find out the basis on which the learned trial Judge dismissed the action of the Petitioner Bank against the 2nd to 6th Respondents. The learned trial Judge dismissed the case against the 2nd to 6th Respondents on the ground that the guarantee bond (P6) had not been properly stamped as set out in regulations made by the Minister of Finance under Section 69 of the Stamp Duty Act No. 43 of 1982 (published in Govt. Gazette No.1119/7 dated 14.1.2000). The said regulations read as follows.

"The regulations made by the Minister of Finance under Section 69 of the Stamp Duty Act No 43 of 1982 and published in the Gazette Extraordinary No.224/3 of December 20, 1982 as last amended by regulations published in the Gazette Extraordinary No.1020/14 of March 25, 1998 are hereby further amended with effect from the midnight February 14/15th,2000 in part I of the Schedule hereto, by the deletion of item 7(a) and the substitution therefor, of the following item:-

	Column I	Column II Rs: Cts
7(a).	Bond, pledge, bill of sale or mortgage for any definite and certain sum of money affecting any property other than any aircraft registered under the Air navigation Act, (Chapter 365)-	
	(i) where such bond pledge, bill of sale or mortgage is for a sum of Money not exceeding Rs.100,000	

	for every Rs. 1000 or part thereof	2	00
(ii)	where such bond pledge, bill of sale or mortgage is for a sum of money exceeding Rs.100,000		
	On the first Rs.100,000	200	00
	On every Rs.1000 or part thereof in excess of Rs.100,000	5	00

The Guarantee Bond marked P6 only bears only a Rs.100/- stamp. Therefore it appears that guarantee bond marked P6 has not been stamped in accordance with the said regulations. The learned trial Judge, in his judgment, has observed that although the Petitioner Bank was given the opportunity of correcting this mistake it did not make use of the said opportunity on the ground that there was no stamp deficiency in the said guarantee bond. The learned trial Judge finally decided not to consider the said guarantee bond as evidence. He therefore dismissed the case of the Petitioner Bank against the 2nd to 6th Respondents. The learned trial Judge delivered the said judgment on 24.1.2006. It appears that the view taken up by the learned trial Judge in his judgment is in line with the judgment of the Supreme Court in Ceylease Financial Services Ltd Vs Sriyalatha and Another [2006] 2SLR 169 (Ceylease case) delivered on 9.12.2006. This Court in the Ceylease case observed the following facts. “The appellant instituted action against the respondents seeking to recover certain sum of money based on three guarantees and indemnity documents. At the trial when the evidence of the plaintiff’s witness was given the plaintiff appellant sought to mark the guarantee and indemnity. This was objected to by the defendant-respondent on the ground that the said guarantee and the indemnity have not been properly stamped. The High Court after the inquiry into the objection upheld the objection of the defendant-respondent. It was contended by the plaintiff appellant that the guarantee and indemnity sought

to be marked was not a bond." Justice Shirani Bandaranayake (Justice Amaratunga and Justice Marsoof agreeing) held thus:

1. In considering the document in question what is necessary would be to look to the substance of it in order to identify whether that would come within the meaning of a Bond.
2. Guarantee and the indemnity given by the defendants-respondents is security for the facility granted in terms of the lease agreement they had entered into. They had entered into an agreement to pay a fixed sum of money at a definite time and thus the said document falls into the meaning of a Bond.
3. It is apparent that a bond which is an instrument under seal whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date could include a guarantee bond and or indemnity bond.
4. The appellant was entitled to rectify the deficiency of the stamp duty with the payment of penalty.
5. Though sufficient time and opportunity was given to the appellant to rectify the deficiency of stamp duty on the guarantee and indemnity he had not taken any steps in that regard.
6. Where an instrument has to be admitted in evidence and if it is not duly stamped the deficiency has to be cured prior to the instrument being marked in evidence.
7. The person who draws, makes or executes the relevant instrument pertaining to a lease agreement is the leasing company and therefore under and otherwise there is an agreement to the contrary the liability of paying the stamp duty would be with the leasing company.

It is also to be noted that the regulations are made in terms of Section 69 of the stamp Duty Act and the rule of this court is to give effect to the said provisions as it is the bounden duty of any court and the function of every judge to impart justice within the given parameters."

Learned Counsel who appeared for the Petitioner Bank in the Special Leave to Appeal Application [SCLA (HC) No. 30/2006] which sought to set aside the judgment of the learned trial Judge dismissing action of the Petitioner Bank against the 2nd to 6th Respondents, had submitted to the Supreme Court that he could not proceed with said Special Leave to Appeal Application in view of the judgment of the Ceylease case (supra). Now learned President's Counsel who appeared for the Petitioner Bank in the present case contended that he could seek to set aside the judgment of the learned trial Judge in view of the subsequent judgment of the Supreme Court in the case of Seylan Bank Ltd Vs Samdo Mackey Sportswear (Pvt) Ltd and Another (Seylan Bank case) [2008] 1SLR 76 delivered on 26.6.2008 wherein Justice Shirani Thilakawardene (SN Silva CJ and Justice Somawansa agreeing) held thus:

1. Stamp Duty Act imposes a pecuniary burden on persons, and it has to be subject to strict consideration. There is no room for intention, construction or equity about duties or taxation.
2. A bond in the context of the Stamp Duty Act is an instrument where the primary or principal covenant is to create an obligation to pay money, defeasible on the happening of the specified event and binds his property, as security for the debt.

In case of the guarantee bond, the term providing for guarantor liability is not the principal covenant between the parties, but merely a condition subsequent to primary obligation.

The obligation to pay is in the form of a penalty that comes into operation, if and only if the proposed obligation of the principal debtor is violated. The arrangement contemplated by the guarantee bond is merely a transaction where the obligation to pay money arises as a consequence of the commission of breach of the principal debtor obligation.

3. Inherent in the monetary obligation of a 'bond' contemplated by section 7(a) is that such obligation is for an ascertained sum of money. Such a requirement is a necessity given that the value of the stamp duty to be paid depends upon the slab of the amount or value secured. Given the inherently indeterminate nature of the guarantors respective payment obligations under the guarantee bond, such an instrument cannot be construed as the type of bond referred to in section 7(a). As such the guarantee bond does not warrant stamp duty as bond under the Stamp Duty Regulations."

Judicial decision in the Ceylease case has been decided by a three judge bench of the Supreme Court and judicial decision in the Seylan Bank case has also been decided by a three judge bench of the Supreme Court. Therefore the judicial decision in the Seylan Bank case could not overrule the judicial decision in the Ceylease case. In considering the contention of learned President's Counsel appearing for the Petitioner Bank in the present case, it is necessary to consider whether the legal principles enunciated in the Ceylease case have been taken away by the judgment in the Seylan Bank

case. In considering this contention it is important to take into account the following passages of the judgment in Seylan Bank case [2008] 1SLR 76 at pages 98-99.

"The matter to be determined in this case arises out of an appeal against the Commercial High Court order, which held, in response to an attempt by the appellant to submit a Guarantee Bond into evidence in each action, that (i) the Guarantee Bond (marked P9 in the appellant's affidavits for the actions, dated 18th January 2006 and 24th May 2006, respectively, and hereinafter referred to as 'Document P9') was not sufficiently stamped and (ii) the petitioner would be afforded a final opportunity of stamping the said document by 20th September 2007"

"Document P9 did not at the time of the creation of the principal covenant, seek to secure or refer **to any property** in other words it was not a bond that bound the property for the payment of money" [emphasis added] [page 100].

"The arrangement contemplated by document P9 is merely a transaction where the obligation to pay money arises as a consequence of the commission of breach of the Principal Debtor's obligation" [page101].

"However, **the decision in the Ceylease Case is inapplicable to, and therefore not determinative of, the present matter at hand** as the facts of the Ceylease Case are clearly distinguishable in a very material and relevant manner from the facts of the present actions before this Court. **The Ceylease Case is distinguishable as the finance company in that had entered into a bond with the security of the property – more particularly a vehicle – that was mortgaged and which could be considered movable property. No such arrangements exist in the current actions** and suggest their

inclusion within Section 7 of the Stamp Duty Regulations" [emphasis added] [Page 102-103].

It is therefore seen that the judgment in the Seylan Bank case itself clearly states that the decision in the Ceylease case has no application to that case (Seylan Bank case) as the facts are different. The judgment in the Seylan Bank case clearly states that the Ceylease case is distinguishable as the finance company in that case had entered into a bond regarding the security of the property more particularly a vehicle. Therefore it appears that the principles enunciated in the Ceylease case have not been taken away by the decision in the Seylan Bank case. When I consider all these matters, I hold the view that the principles enunciated in the Ceylease case are still in operation. If this is the legal situation, what is the basis on which the Petitioner Bank for the 2nd time moves the Supreme Court to set aside the judgment of the trial court which dismissed the case of the Petitioner Bank against the 2nd to 6th Respondents? There is absolutely no basis. On this ground alone the present Revision Application filed by the Petitioner Bank should be dismissed.

Guarantee Bond P6 only bears Rs.100/- stamp. According to the regulations made under Stamp Duty Act which I have earlier referred to, the guarantee bond has not been properly stamped. In my view if the Stamp Duty Act or regulations made thereunder or any other law specifies that a document should be stamped, such a document cannot be produced in evidence without being properly stamped. In the present case, P6 (Guarantee Bond) has not been properly stamped. In other words it has not been stamped in accordance with the regulation made under the Stamp Duty Act. Therefore P6 could not be produced in evidence. Thus the decision of the

learned trial Judge is correct. The principles adopted by the learned trial Judge in his judgment have been later affirmed by the Supreme Court in the Ceylease case (supra). I have earlier held that the principles enunciated in the Ceylease case have not been taken away by the judicial decision in the Seylan Bank case (supra). When I consider all these matters, I hold that the decision of the learned trial Judge remains as the correct decision even after the delivery of the judgment in the Seylan Bank case (supra). Therefore it is clear that there are no errors in the judgment of the learned trial Judge. When I consider all the above matters, I hold the view that there are no errors in the judgment of the Supreme Court in SCLA 30/2006. If there are no errors in both the judgments, an application for correction of errors of the judgments does not arise for consideration. In view of the aforementioned matters, the present Revision Application of the Petitioner Bank should fail.

In the Special Leave to Appeal Application filed by the Petitioner Bank, the Petitioner Bank had moved the Supreme Court to set aside a part of the judgment of the trial court. This is the part of the judgment whereby the learned trial Judge dismissed the action of the plaintiff (the Petitioner Bank) against the 2nd to 6th defendants (2nd to 6th Respondents). When the Supreme Court, by its order dated 22.1.2007, dismissed Special Leave to Application of the Petitioner Bank it refused to set aside the said part of the judgment of the trial court. Thus refusal by the Supreme Court to set aside the said part of the judgment is in operation even now. If the Supreme Court is to grant relief claimed by the Petitioner Bank in present Revision Application, the Supreme Court will have to act in revision to set aside its own order made on 22.1.2007. If this court now sets aside the said order of the Supreme Court dated 22.1.2007, then it can be interpreted to say that the

judgments of the Supreme Court are not final. The Supreme Court is a court of last resort in appeal. There is finality in its judgments. This view is supported by the judgment in the case of Ganeshanantham Vs Vivienne Goonewardene and three others [1984] 1SLR 319 wherein the Supreme Court held:

"The Supreme Court is a Court of last resort in appeal and there is finality in its judgment whether it is right or wrong. That is the policy of the law and the purpose of Chapter XV of the Constitution".

Can the Supreme Court act in revision and set aside its own order? Answer to this question is found in the following judicial decisions.

In Ganeshanantham Vs Vivienne Goonewardene and three others [1984] 1SLR 319 the Supreme Court held thus:

(1) The Supreme Court has no jurisdiction to act in revision of cases decided by itself. None of the provisions of the Constitution expressly conferring jurisdiction confer such a jurisdiction on it. Nor has the Legislature conferred such a jurisdiction by law. The Supreme Court is a Court of last resort in appeal and there is finality in its judgment whether it is right or wrong. That is the policy of the law and the purpose of Chapter XV of the Constitution.

(2) As a superior Court of record the Supreme Court has inherent powers to correct its errors which are demonstrably and manifestly wrong and where it is necessary in the interests of justice. Decisions made per incuriam can be corrected. These powers are adjuncts to existing jurisdiction to remedy injustice - they cannot be made the source of new jurisdictions to revise a judgment rendered by that court.

In Jeyaraj Fernandopulle Vs Premachandra Silva and others [1996] 1SLR 70 the Supreme Court (five judge bench decision) held as follows:

1. *When the Supreme Court has decided a matter, the matter is at an end and there is no occasion for other judges to be called upon to review or*

revise a matter. The Supreme Court is a creature of statute and its powers are statutory. The Court has no statutory jurisdiction conferred by the Constitution or by any other law to rehear, review, alter or vary its decision. Decisions of the Supreme Court are final.

2. *As a general rule, no Court has power to rehear, review, alter or vary any judgment or order made by it after it has been entered.*
3. *A Court has no power to amend or set aside its judgment or order where, it has come to light or if it transpires that the judgment or order has been obtained by fraud or false evidence. In such cases relief must be sought by way of appeal or where appropriate, by separate action, to set aside the judgment or order. The object of the rule is to bring litigation to finality.*
4. *However all Courts have inherent power in certain circumstances to revise an order made by them such as -*

   (i) An order which has not attained finality according to the law or practice obtaining in a Court can be revoked or recalled by the Judge or Judges who made the order, acting with discretion exercised judicially and not capriciously.

   (ii) When a person invokes the exercise of inherent powers of the Court, two questions must be asked by the Court.
   (a) Is it a case which comes within the scope of the inherent powers of court?
   (b) Is it one in which those powers should be exercised?

   (iii) A clerical mistake in a judgment or order or some error arising in a judgment or order from an accidental slip or omission may be corrected.

   (iv) A Court has power to vary its own orders in such a way-as to carry out its own meaning and where the language is doubtful, to make it plain or to amend it where a party has been wrongly named or described but not if it would change the substance of the judgment.

(v) A judgment against a dead party or non-existent Company or in certain circumstances a judgment entered in default or of consent will be set aside.

(vi) The attainment of justice is a guiding factor.

(vii) An order made on wrong facts given to the prejudice of a party will be set aside by way of remedying the injustice caused.

I have earlier held that the judgments of the trial court and the Supreme Court [in SCLA 30/2006] are correct and that there are no errors in both the judgments. When I consider all these matters, I hold that there is no merit in the Revision Application filed by the Petitioner Bank and it should be dismissed. In view of the above conclusion reached by me, I answer the questions of law raised by the Petitioner Bank in the negative.

For the above reasons, I dismiss the Revision Application filed by the Petitioner Bank with costs.

Judge of the Supreme Court.

Eva Wanasundera PC J

I agree.

Judge of the Supreme Court.

Anil Gooneratne J

I agree.

Judge of the Supreme Court.

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

S.C. (CHC) Appeal No. 36/2004
CHC Case No. 169/2002(1)

CIC Feeds (Pvt) Limited (formerly)
Known as Nutrena (Pvt) Limited of
No. 252, Kurunduwatta Road, Ekala.

PLAINTIFF

Vs.

Pan Asia Bank Limited of No. 450,
Galle Road, Colombo 3.
And having a branch office at 1334,
Kotte Road, Rajagiriya.

DEFENDANT

AND NOW

CIC Feeds (Pvt) Limited (formerly)
Known as Nutrena (Pvt) Limited of
No. 252, Kurunduwatta Road, Ekala.

PLAINTIFF-APPELLANT

Vs.

Pan Asia Bank Limited of No. 450,
Galle Road, Colombo 3.
And having a branch office at 1334,
Kotte Road, Rajagiriya.

DEFENDANT-RESPONDENT

BEFORE: S.E. Wanasundera P.C., J.
Priyantha Jayawardena P.C. J. &
Anil Gooneratne J.

COUNSEL: Prasanna Jayawardena P.C., with Milinda Jayatilleke
For the Plaintiff-Appellant

S.A. Parathalingam P.C., with Varuna Senadheera
For the Defendant-Respondent

ARGUED ON: 17.09.2015

DECIDED ON: 16.03.2016

GOONERATNE J.

This was an action filed on or about 28.03.2001 against the Defendant Bank by the Plaintiff Company, carrying on business of manufacturing and marketing Animal Feed, for the recovery of a sum of Rs. 8,000,000/- with interest thereon upon the 1st cause of action/the five alternative causes of action as pleaded in the plaint. Learned High Court Judge of Colombo dismissed the plaint with costs on 24.3.2004. This appeal to the Supreme Court arise from the Judgment of the said date of the Colombo High Court.

The Attanagalla Livestock Development Company (Pvt) Limited was

a customer of the Plaintiff Company who purchased animal feed from the Plaintiff Company on credit. The above named purchasing company was not a party to the suit. (hereinafter referred to as ALDC). ALDC was a customer of the Defendant Bank, and the Plaintiff Company was a customer of Citibank and Citi-bank provided facilities to the Plaintiff Company such as post-dated cheque discounting and purchasing facility. This facility enabled the Plaintiff Company to present post-dated cheques (issued in favour of Plaintiff Company) to Citi-bank and the Bank gave immediate credit upon these post-dated cheques. However if the post-dated cheques were dishonoured on the due date, Plaintiff was liable to pay the value of such cheque to the Citibank. ALDC who was a customer of the Plaintiff Company having purchased animal feed from the Plaintiff Company, gave post-dated cheques to Plaintiff Company, who presented the cheque to Citibank and obtained credit for same.

The above method of transacting business was not disputed by either party. At the hearing of this appeal both learned President's Counsel admitted certain basic facts, and referred to correspondence between parties and letters written and received by ALDC. The real issue arose on or about June 1999, when ALDC was called upon to make arrangements with the Defendant

Bank to issue a bank guarantee for Rs. 8,000,000/- in favour of Citibank NA. This would secure Citibank against any dishonour of post-dated cheques, presented by ALDC, and enable Citibank to recover payment upon the guarantee.

I would at this point of this judgment refer to the case of the Plaintiff-Appellant based on oral and written submissions of learned President's Counsel for Plaintiff-Appellant, notwithstanding the fact that the plaint filed in the original court disclose several causes of action. It was submitted that, if and when cheques issued in favour of the Plaintiff-Company by ALDC were dishonoured, Plaintiff Company would be liable to pay the value of the cheque to Citibank NA (Plaintiff bank). As such ALDC would make arrangements for the Defendant-Bank to issue a Bank guarantee for Rs. 8,000,000/- in favour of Citibank N A which would enable such guarantee to secure Citibank against dishonoured cheques. In order to enable ALDC to obtain this guarantee from the Defendant Bank, Plaintiff Company would pay the Defendant Bank. Rs. 8,000,000/- so that this sum of Rs. 8,000,000/- would be held by the Defendant Bank as security for the issue of the aforesaid guarantee.

The way the facts were presented by learned President's Counsel for the Plaintiff-Appellant, who rely heavily on the requests to issue a guarantee as stated above, to make the Defendant-Respondent liable in the transaction, the following matters are also noted by this court.

(a) Plaintiff-Appellant issued a cheque for Rs. 8,000,000/- in favour of the Defendant Bank ('A' filed with plaint).

(b) By 17.06.1999 Plaintiff Company sent the cheque 'A' to Defendant Bank along with the format of the intended Bank Guarantee and a request to the Defendant Bank to issue the Bank Guarantee (B1 & B2).

(c) By letter marked 'C' dated 18.06.1999, Defendant Bank acknowledged receipt of cheque 'A' and letter and the format of guarantee, marked B1 and B2. Letter 'C' also states Bank Guarantee could be issued on realisation of cheque and subject to completion of documents.

(d) The above cheque 'A' realised for payment on 21.06.1999 and the Defendant Bank received payment of a sum of Rs. 8,000,000/-.

(e) By letter marked 'D' dated 20th July 1999 by Defendant to Plaintiff Company the Defendant Bank informed the Plaintiff Company that the Bank is unable to issue a guarantee since ALDC has not completed relevant documentation. In the written submissions of the Appellant it is stated that as at the date of filing action Defendant Bank had not issued the requested Bank Guarantee, and had also not returned the sum of Rs. 8,000,000/- which had been paid by the Plaintiff Company to the Defendant Bank on 02.08.1999, had advised the Plaintiff Company that the Defendant Bank released the said sum of Rs. 8,000,000/- to ALDC. The ALDC had not paid the said sum to Plaintiff.

The main argument presented based on the first cause of action was that there was an implied or express agreement and or undertaking or contact between the Plaintiff Company and the Defendant Bank as the Defendant Bank would retain the said sum of Rs. 8,000,000/- to provide security for the guarantee and when such guarantee was not issued by the Defendant Bank, there was a breach of an undertaking or contract as the Bank failed to retain the said sum and issue a guarantee, and thus also failed to return the said sum to the Plaintiff Company. I will also refer to the other alternate causes of action relied upon by the Plaintiff Company, in a gist as follows:

(1) Plaintiff Company is entitled to recover the said sum of Rs. 8,000,000/- and the Defendant Bank has completely failed to carry out its obligation and as such there is a total failure of consideration.

(2) Defendant Bank was in breach of its duty. When monies were received as aforesaid by the Defendant Bank, it had a duty to retain the amount received and issue the guarantee or return the said sum to Plaintiff Company. Failure to do so amounts to a neglect to perform its duty, and caused a loss of Rs. 8,000,000/- to the Plaintiff Company.

(3) In breach of duty of care and negligently/wrongfully failed to retain the said sum which sum was under the control of the Defendant Bank and thereby caused a loss of Rs. 8,000,000/-.

(4) Defendant Bank held the said sum for the benefit of the Plaintiff Company as a trustee and or constructive Trust.

(5) Defendant Bank had been unjustly enriched.

At the hearing of this appeal, it also transpired that evidence was led as regards agreement marked P5 between, the Plaintiff Company and ALDC. Clause 3:2 of P5 reads thus:

> The Company shall provide a further loan of Rupees Eight Million (Rs. 8,000,000/-) in the form of a cheque to be issued in favour of Pan Asia Bank Ltd. The interest charged on this loan shall be 18% per annum.

The said agreement P5 refer to an Arbitration Clause (Clause 7). It was also submitted by learned President's Counsel for Defendant-Respondent-Respondent that Arbitration proceedings have been initiated to recover the said sum from ALDC by the Plaintiff Company. However the Arbitration proceedings were pending and not concluded as at the date of conclusion of the trial in the High Court.

The learned President's Counsel for the Defendant-Respondent-Bank in his submissions emphasised the relationship between the Plaintiff-Company and ALDC with reference to agreement P5 which was entered

between the said parties on or about June 1999, and crucial to the case in hand. By P5 Plaintiff Company agreed to sell animal feed to ALDC upon credit facilities. Defendant-Bank was not a party or privy to the agreement P5. I have already discussed the arrangement to give post-dated cheques by ALDC to Plaintiff Company. Even this fact was emphasised by learned President's Counsel with the consequences that would result in such arrangement. He also referred to certain items of evidence that transpired from the Plaintiff witness who was the only witness at the trial, before the High Court. In pursuance of above arrangement Plaintiff requested ALDC to provide a Bank guarantee for Rs. 8,000,000/- from ALDC banker, who was the Defendant Bank. Evidence reveal that Plaintiff agreed to give ALDC a loan for Rs. 8,000,000/- to enable ALDC to arrange the issue of a Bank guarantee with ALDC. Plaintiff company based their case according to learned President's Counsel on the cheque (P6) drawn by Plaintiff and that it was common ground that it furnished Rs. 8,000,000/- to ALDC according to Agreement P5. He draw the attention of this court to clause 3.2 of P5, referred to above.

The only witness who gave evidence inter alia stated the following:

It was agreed between the Plaintiff Company and ALDC to grant a loan of Rs. 8,000,000/- at the rate of 18% on the loan until payment in full apart from other facilities granted to ALDC by Plaintiff Company. Witness also

admitted that the said sum was advanced by the Plaintiff Company for and on behalf of ALDC, and referred to the letter P7 to confirm that Citibank cheque for Rs. 8,000,000/- was given on behalf of ALDC.

P6 & P7 taken together explains that the cheque had been forwarded on behalf of ALDC and proceeds of the cheque were collected by the Defendant Bank in the ordinary course of business to the credit of the account of ALDC maintained with Defendant Bank (P8 confirm same) It is also clear that cheque P6 was a loan extended by Plaintiff Company to ALDC as per agreement P5. Witness of the Plaintiff Company admitted this fact. The proceeds of the loan is money belonging to the recipient the ALDC. Only ALDC is entitled to utilise the money received by the Bank to utilise it for the agreed purpose.

I have also noted the submissions of learned President's Counsel on another point that the sum of Rs. 8,000,000/- is a debt owing from ALDC to Plaintiff Company. Learned President's Counsel also submitted that Defendant Bank never gave any undertaking and/or entered into a contract with the Plaintiff Company and/or ALDC to issue a Bank guarantee unconditionally, upon the receipt of the money. It was also submitted that Plaintiff Company had suppressed the fact of proceeding to arbitration against ALDC, prior to institution of this action.

One of the matters that need to be kept in mind is that the contract of guarantee which is described as an 'accessory contract', and which is an universally acceptable meaning 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 underlying contract between parties. Although that could be taken as the simplest explanation to a contract of guarantee, in the case in hand the Defendant Bank never issued a guarantee in favour of ALDC, for the reason adduced by the Defendant Bank. Plaintiff Company no doubt, attempts to establish their case based on an undertaking and or express or implied agreement to issue a guarantee by the Defendant Bank to claim the relief prayed for as per the plaint filed of record. I have to accept that the Bank did not issue the guarantee due to the reason that the required documentation was not forthcoming from ALDC. As such the issue of the guarantee was conditional upon the receipt of proper documentation. It is fundamental to this type of transaction that the Banker need to take all necessary precautions, and be satisfied for cogent reasons, upon the guarantor's ability to pay when called upon and the willingness to settle. Banks will be cautious to enter into such a guarantee unless it is based on confidence and trust of the client. Banker's point of view need to be considered since it is more appropriate to take all

precautions, to avoid any doubt and make sure that clients follow proper procedures before accepting or issuing a guarantee.

It is also necessary to consider the following matters which need to be taken note, to ascertain as to whether a cause of action accrued to the Plaintiff Company to sue the Defendant Bank to recover the sums of money referred to in the plaint. Does the set of facts placed before court indicate an emergence of a separate agreement other than P5? (Based on P6, P7, P7A & P8) or whether there had been a total failure of consideration or want of consideration.

I note the following.

(1) Agreement P5 as stated above (clause 3:2) Plaintiff Company to provide a loan of Rs. 8,000,000/- in the form of a cheque issued in favour of Pan Asia Bank Limited

(2) As in P5 (clause 4:1) customer (ALDC) agrees, covenants and undertake to provide a Bank guarantee in favour of the Company for Rs. 8,000,000/- from Pan Asia Bank Ltd. Within three working days of issuing the above cheque.

(3) Plaintiff Company wrote, by letter of 17.06.1999 (P7) to Defendant Bank requesting for a Bank guarantee. It is worded as …. Citi Bank cheque for Rs. 8,000,000/- on behalf of ALDC enclosed. Please issue a Bank guarantee for the same amount using enclosed format.

(4) Cheque (P6) dated 18.06.1999 Payee – Pan Asia Bank Ltd. Amount Rs. 8,000,000/-. Bank guarantee on behalf of ALDC.

(5) P8 letter of 18.06.1999 by Defendant Bank to Plaintiff Company acknowledging receipt of cheque which was placed to credit of ALDC Informing Plaintiff Company that requested Bank guarantee to be issued on realisation of cheque and subject to completion of documentation. Letter issued on request of ALDC.

(6) P9 letter of 16.07.1999 by Plaintiff Company to Defendant Bank. Request to issue Bank guarantee before 22.07.1999 or refund the sum of Rs. 8,000,000/-.

(7) P10 letter of 20.07.1999 by Defendant Bank to Plaintiff Company stating unable to issue guarantee as ALDC has not completed documentation.

(8) P11 letter of 21.07.1999 by Plaintiff Company to Defendant Bank requesting the Bank to inform the required documents. If guarantee cannot be issued calling upon the Bank to refund the money.

(9) P12 letter of 02.08.1999 informing Defendant Bank that there was no response to several letters referred to therein

(10) Letter P13 clearly set out the Defendant Bank's petition on the request for a bank Guarantee, 1 – 14 in P13 reflects good part of Defendant-Bank's position in this case. By P13 Defendant Bank denies liability and indicates that the Bank cannot exceed its authority or ignore instructions of their customers (ALDC)

(11) On the question of completeness of documentation letter P14, P14A, P15 & P16, despatched. Letter P14 & P14A seems to suggest the Plaintiff-Appellant's position that the question of documentation has been fulfilled by ALDC and attempts to establish same with P14A. However the Defendant Bank insists Plaintiff to contact ALDC regarding this issue (P15 & P16).

(12) Further communication by Plaintiff Company by P17 & P18. However Bank does not appear to retract from that stance as stated in P13, P19 & P21.

It is very apparent that, as gathered from the material made available to this court, good part of the factual position and situations discussed above are not in dispute. What is material to the primary issue is whether in fact and in law, parties expressly or impliedly agreed to enter into a contract of guarantee. All that took place within the available facts are that the Plaintiff Company had an arrangement/dealings with ALDC who was not a party to the suit. Each of the dealings of both Plaintiff Company and ALDC surface on post-dated cheques. In

the event of default to secure and ensure guarantee of such payment Plaintiff Company and ALDC by agreement P5 included clauses 3:2 and 4:1 which is more or less a conduit or path to obtain a guarantee from the Defendant-Bank who was not even a party to the agreement P5. I have referred to the above clauses 3:2 and 4:1 and it only contemplates to issue a cheque in favour of Defendant-Bank to enable the bank to issue a contract of guarantee in favour of the Plaintiff-Company. Issue of a guarantee is a separate arrangement for which ALDC is responsible as per agreement P5.

The agreement P5 by clause 7:1 provides an arbitration clause which enable the Plaintiff-Company and ALDC to settle their obligations and duties. Further as observed by the learned trial Judge even though the cheque of Rs. 8 million was issued in favour of the Defendant Bank it is issued on behalf of ALDC a customer of the Defendant-Bank. As such whatever obligation based on the cheque would be between the ALDC and Defendant-Bank. I observe that In these circumstances there is no express or implied agreement between the Plaintiff Company and the Defendant-Bank. A term will not be implied merely because it would be reasonable to imply it, contracts being made by the parties themselves and not by courts. Further the correct factual position is that no contract of guarantee was entered or issued in favour of the Plaintiff Company for the reasons adduced in the several correspondence had between the

Plaintiff Company and the Defendant Bank which material was made available to this court and discussed in this judgment. However if a Guarantee Bond was issued the position would have been different. I would mention just a few instances where a bank was held liable but based on a proper agreement. Vide *Adaicappa Chetty Vs. Thomas Cook and Sons Ltd., 31 NLR 385.* S.C. This is a case where both Supreme Court and the Privy Council held that Bank must bear the loss. This case no doubt is no comparison to the case in hand.

If the emergence of a contract of guarantee was established the universal application of contract of guarantee and or documentary credit would apply which was discussed in *Hemas Marketing (Pvt) Ltd. Vs. Chandrasiri 1994 – (2) SLR 181*, which case also does not apply to the case in hand.

I have no hesitation to agree with the views of the learned trial Judge i.e no cause of action accrued to the Plaintiff to sue the Defendant Bank. As such there is no basis to consider and proceed to grant relief on the alternate causes of action pleaded in the Amended Plaint.

I will add to the position of the Defendant Bank, that there was an absence of intention of creating legal relations. I find that such an intention to create legal relations cannot be gathered or inferred from the available facts between the Plaintiff Company and the Defendant Bank. It is elementary that for the formation of a contract or agreement the intention to create legal

relations is an element necessary for the formation of a contract. Both parties must have this intention. Further what matters is not what they had in mind when concluding the contract or at the stage of discussion, but whether reasonable person would draw the conclusion from the words and actions that they wanted it to be legally bound. If such an intention to create legal relations cannot be gathered courts need to accept and respect the position that both or one of them had no intention. The Bank was vehemently objecting to issue a guarantee as ALDC had not complied with the required documentation, which was essential to formation of the guarantee. Bank rejects any liability on its part with the Plaintiff Company. A request for documents by the bank would be its normal business, to ensure smooth banking operations. The Bank in no uncertain terms makes it clear that it cannot disclose facts to the detriment of the customer (ALDC). Further based on P5 the matter had to be resolved as per agreement P5 and not with Defendant Bank who was not a party to agreement P5. The issuance of a guarantee would always be conditional upon happening of events, in the case in hand, it is the demand by the Bank for proper documentation, especially where a party is not a customer of the Bank. The Bank need to safeguard its own interest. Such a demand cannot be construed to give effect to create legal relations. Nor can a fiduciary relationship arise in the absence of some discretion or power.

In all the facts and circumstances of this case the cheque relied upon by the Plaintiff Company was in favour of the Defendant Bank to be utilised on behalf of ALDC (as per P5). It is in evidence that the cheque was realised and credited to the account of the banks customer namely ALDC. It is for the Plaintiff Company to advice themselves the proper course of action to be adopted based on the given facts as the bank does not take over liability in the manner pleaded by the Plaintiff Company. If at all the only agreement that surfaced is based on P5 and nothing else. Plaintiff Company was never a customer of the Defendant Bank. There is no implied agreement that emerged as contemplated by law or fact. I affirm the Judgment of the learned High Court Judge and dismiss this appeal with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S. E. Wanasundera P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C.,

I agree.

JUDGE OF THE SUPREME COURT

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

SC. CHC. Appeal No. 06/2003

HC. (Civil) 141/99(1)

People's Bank,
No. 75, Sir Chittampalam A. Gardinar Mawatha,
Cololmbo 02.

Plaintiff

Vs.

Ceylinco Insurance Company Limited
2nd Floor, 15 A, Alfred Place,
Colombo 3.
Formerly of
2nd Floor, Ceylinco House,
No. 69, Janadhipathi Mawatha,
Colombo 1.

Defendant

And Now

In the matter of an Appeal preferred under and in terms of Section 754 of the Civil Procedure Code read together with Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

People's Bank,
No. 75, Sir Chittampalam A. Gardinar Mawatha,
Cololmbo 02.

Plaintiff-Appellant

Vs.

Ceylinco Insurance Company Limited
2nd Floor, 15 A, Alfred Place,
Colombo 3.
Formerly of
2nd Floor, Ceylinco House,
No. 69, Janadhipathi Mawatha,
Colombo 1.

Defendant-Respondent

BEFORE : **Eva Wanasundera, PC. Acting CJ.**
Upaly Abeyrathne, J. &
Anil Gooneratne, J.

COUNSEL : Kushan D' Alwis PC. with Ayendra Wickramasekera for the Plaintiff-Appellant.

K. Kanag-Iswaran,PC. with L. Jeyakumar for the Defendant-Respondent.

ARGUED ON : **16.10.2015**

DECIDED ON : **11 .02.2016**

* * * * * *

Eva Wanasundera, PC.J.

This is an appeal preferred under and in terms of Section 754 of the Civil Procedure Code read together with Section 5 of the High Court of the Provinces (Special Provinces) Act No. 10 of 1996.

The High Court (Civil) of the Western Province holden in Colombo (hereinafter referred to as the Commercial High Court of Colombo) heard and decided this case under Case No. HC (Civil) 141/99(1) The judgment was delivered on 10.10.2002 dismissing the plaint with costs. The Plaintiff has appealed to this Court by way of the Petition of Appeal dated 04.12.2002 praying to set aside the judgment of the Commercial High Court dated 10.10.2002 and enter judgment in favour of the Plaintiff-Appellant in a sum of Rs.69,508,854/- with legal interest from the date of the plaint until the date of the decree and thereafter further interest on the aggregate amount until payment in full with costs of suit.

The facts pertinent to this case are very important. In summary I wish to lay down the facts as follows: An International Company by the name "BAT International" entered into a contract with the Road Development Authority of Sri Lanka (hereinafter referred

to as 'RDA') to do the work regarding road rehabilitation, under contract No. "WB. 3/3- Road Works" with the heading "Rehabilitation and Maintenance of the Third Road Project;" Under this contract, the RDA made an advance payment of Rs.69,508,854/- to the said BAT International. In this contract there was a clause, which required the contractor to furnish to RDA an advance payment Guarantee from **a recognized financial institution of Sri Lanka.** It is under Clause 60.7 that the contractor BAT International requested the Peoples' Bank, the Plaintiff-Appellant to issue an Advance Payment Guarantee in favour of RDA, in a sum of Rs.69,508,854/-. The Peoples' Bank issued the same on 19.02.1996 under Advance Payment Guarantee No. 1001/96. At the request of the Contractor BAT International, the said Guarantee was duly extended from time to time until 25.03.1998. I observe that this Advance Guarantee Bond 1001/96 was issued by the Peoples' Bank because in the contract "WB. 3/3- Road Works", RDA demanded from contractor BAT International that the guarantee should be made by a **recognized financial institution of Sri Lanka**, which they did by having identified the Peoples' bank as a recognized Financial Institution in Sri Lanka.

In turn, as the usual practice in Commercial transactions are such, the Peoples' Bank (Plaintiff- Appellant) directed the contractor, BAT International, to enter into a **Counter-Indemnity /Guarantee Bond to the same value** with another recognized financial/Insurance institution in Sri Lanka for the **purpose of indemnifying** the Peoples' Bank (Plaintiff-Appellant) for the said sum of money. The Counter- Indemnity Guarantee Bond was taken for the sole purpose of "indemnifying the Peoples' Bank for Rs.69,508,854/- **in the event** of the Peoples' Bank being called upon to pay on the Advance Payment Guarantee when the BAT International fails to do the work and thereafter to reimburse the Peoples' Bank the said sum of money paid on the Guarantee Bond 1001/96. It is simply understood, if I may say, that when BAT International does not comply with the terms of the contract with RDA, RDA can encash the guarantee bond for Rs.69,508,854/- and recover what is due to RDA. Then Peoples' Bank can turn to the Counter-Indemnity/Guarantee Bond and get reimbursed.

So, BAT International decided to get the Counter-Indemnity/Guarantee Bond from Ceylinco Insurance Company Ltd. and the Counter-Indemnity/Guarantee Bond No. COAB/805 was entered into between BAT International and Ceylinco Insurance Co. Ltd.

on 16.02.1996 for Rs.69,508,854/-. It's validity was extended, at the request of BAT International till 16.04.1998.

Then, BAT International had defaulted on the contract. RDA on 18.3.1998 demanded payment of Rs.69,508,854/- from Peoples' Bank in compliance with the Guarantee Bond No. 1001/96. However, BAT International instituted action in the Commercial High Court in case No. HC Civil 50/98(1) against Peoples' Bank and at the commencement obtained an enjoining order restraining Peoples' Bank from paying any money to RDA on the Guarantee Bond 1001/96. The end of that case was an order dated 10.05.1999 refusing to grant the BAT International an interim injunction and BAT International thereafter withdrew the action. As a result, Peoples' Bank could act legally and correctly in compliance with Guarantee Bond 1001/96. So, the Peoples' Bank on 25.05.1999 paid to the RDA the said sum of money Rs.69,508,854/-. Before this commenced, the Peoples' Bank, acting on the Counter- Guarantee Bond No. COAB/805, demanded from the Ceylinco Insurance Co. Ltd. on 18.03.1998 the sum of Rs.69,508,854/-. But due to the case filed by BAT International as aforesaid and due to the enjoining order, Peoples' Bank could not pay the money legally and correctly which was due to the RDA. At the end of the case, Peoples' Bank correctly paid the money to RDA on 25.05.1999.

I observe that BAT International tried to stop RDA claiming the money from Peoples' Bank by filing a case in which it failed. BAT International knew that if it had failed to perform correctly on the contract, as a result, the money advanced by RDA to BAT International for work to be done, had to go back to RDA on the 1st Guarantee Bond with the Peoples' Bank. The Peoples' Bank paid the money to RDA on behalf of BAT International.

Thereafter the Peoples' Bank in turn made a demand on Ceylinco Insurance Co. Ltd. on the Counter-Indemnity/Guarantee Bond No. COAB/805 on 14.06.1999. Ceylinco Insurance Co. Ltd. denied liability on the said bond on 01.07.1999. Then the Peoples' Bank filed action in the Commercial High Court against Ceylinco Insurance Co. Ltd. under HC. Civil No. 141/99(1) on 07.12.1999.

The trial was taken up on 14 issues; 1st to 11th were raised by the Plaintiff-Appellant, Peoples' Bank and 12th to 14th were raised by the Defendant-Respondent, Ceylinco Insurance Co. Ltd. The Learned High Court Judge delivered judgment on 10.10.2002. I have gone through the whole judgment. The Learned High Court Judge has considered only one document P3 which he has highlighted and read as the subject matter, of this case. He has set aside the document P4 stating that "it has nothing to do with P3", quoting the evidence given by the only witness of the Plaintiff, Peoples' Bank. He seems to have taken P3 on its face value only. He has not looked at it as what it really is, or how it has come into being or why such a document was signed by the parties, etc. which the Plaintiff had tried hard to point out by having marked 20 documents, P1 to P20. The Defendant, Ceylinco Insurance had not called any witnesses.

Document P3, is a document the Ceylinco Insurance Co. Ltd. (Defendant-Respondent) has issued to the Peoples' Bank (Plaintiff-Appellant). It is a printed form where blanks are filled in type-written letters. In the 1st paragraph of this document, the name of the contractor is mentioned as 'BAT International' correctly. The number being COAB/805 indicates that it is a 'Counter-Advance Guarantee-Bond' and not a normal Advance Guarantee Bond. I observe that it refers to a contract. Both parties were aware of this contract which was signed between the BAT International and the Road Development Authority. The employer was RDA and the contractor was BAT International. Yet, I believe this form which is a printed form, not quite suitable for Counter Advance Indemnity/Guarantee Bonds had wrongly placed the word "Employer" within brackets after "Peoples' Bank, Corporate Branch, Colombo". It has created a seemingly absurd situation. This bond was issued to be valid from 16.02.96 to 16.2.98. It was twice extended by P5 and P9 which amply demonstrates and confirms that P3 is a Counter Indemnity Advance Guarantee Bond between Ceylinco Insurance Co. Ltd. and the Peoples' Bank. I hold that P3 should have been read with P4, P5 and P9 to feel the meaning properly.

The Defendant Ceylinco Insurance Co. Ltd. had made out a case to say that P3 is a 'contract' by itself and because the Peoples' Bank had not directly paid any money to the Ceylinco Insurance Co. Ltd. according to this document, P3, the Peoples' Bank cannot claim any money due to it from the Ceylinco Insurance Co. Ltd.

I observe that the Defendant-Respondent Ceylinco Insurance Ltd. had tried its level best to hide the true nature of document P3 taking undue advantage of the bond being printed in the wrong form. I find that it is a very dishonest act by the Defendant-Respondent since it is a document given by the Defendant-Respondent itself to the Plaintiff-Appellant. P3 is a document which was initiated, printed and blanks filled by Ceylinco Insurance Ltd. When P1 to P23 are taken together it is crystal clear that not only P3, P4, P5 and P9 are inter-related documents but even other documents are inter-related. P3 cannot by any means be taken alone and considered and interpreted by itself on the face of the document.

I have gone through the written submissions filed by the Appellant dated 08.07.2011, 22.11.2013, and 06.11.2015 as well as written submission filed by the Respondents dated 08.07.2011 and 06.11.2015.

I am of the view that any Court is entitled to look at the surrounding circumstances in order to identify the scope and object of the guarantee bonds just as much as it would be entitled to look at the factual matrix as an aid to the interpretation of any other commercial agreement. The Court should always seek to construe the document in such a way as to reflect what may fairly be inferred to have been the objective, intention and understanding of the parties.

In this matter it is quite clear that the parties, Plaintiff-Appellant and Defendant-Respondent knew the objective which was the counter indemnity sought and granted by P3. No party should be allowed to take advantage of mistakes done by that party itself and avoid responsibility.

The High Court Judge has totally gone wrong in having construed the document P3 only on the answers given by the witness of the Plaintiff under cross-examination and on the face value of the document. It is a very narrow way of looking at the problems before the Court. He had failed to see that P3 was an on-demand guarantee encashable on demand within 30 days which is a short period. He had not given his mind to the failure on the part of the Defendant-Respondent in not having led any oral or documentary evidence before this Court. He had first treated it as a document and

interpreted it on the words contained on the face of it which gives an absurd meaning to the document.

I set aside the judgment of the Commercial High Court and grant reliefs to the Plaintiff-Appellant as prayed for in the Plaint. Appeal is allowed with costs.

Judge of the Supreme Court

Upaly Abeyratne, 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 (CHC) Appeal No. 09/2009
HC (Civil) Case No. 17/2008(CO)

In the matter of an application under and in terms of Section 224, 225, 214 and 521 of the Companies Act No. 7 of 2007.

1. Gunamuni Buddhima Sudantha de Silva of No. 2/6, Galpotha Road, Nawala.

2. Gunamuni Sujeevan Chandranath de Silva of No. 105, Exeter Road, Raynards Lane, Harrow, England

PETITIONS

Vs.

1. Macarthy Private Hospital Limited of No. 22, Wijerama Mawahta, Colombo 7.
2. Gunamuni Chandima Sudhamma de Silva of No. 22, Wijerama Mawahta, Colombo 7.
3. Gunamuni Subadra Malini de Silva of No. 22, Wijerama Mawahta, Colombo 7.
4. Gunamuni Thusitha Kanthi de Silva of No. 22, Wijerama Mawahta, Colombo 7.
5. Gunamuni Udayi Yasoja de Silva of No. 22, Wijerama Mawahta, Colombo 7.
6. Gunamuni Channa Janaka de Silva of No. 22, Wijerama Mawahta, Colombo 7.
7. Gunamuni Prajapa de Silva of No. 22, Wijerama Mawahta, Colombo 7.

RESPONDENTS

AND NOW BETWEEN

1. Gunamuni Buddhima Sudantha de Silva of
   No. 2/6, Galpotha Road, Nawala.

2. Gunamuni Sujeevan Chandranath de Silva of
   No. 105, Exeter Road, Raynards Lane,
   Harrow, England

PETITIONS-APPELLANTS

Vs

1. Macarthy Private Hospital Limited of
   No. 22, Wijerama Mawahta, Colombo 7.
2. Gunamuni Chandima Sudhamma de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
3. Gunamuni Subadra Malini de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
4. Gunamuni Thusitha Kanthi de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
5. Gunamuni Udayi Yasoja de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
6. Gunamuni Channa Janaka de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
7. Gunamuni Prajapa de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.

RESPONDENTS-RESPONDENTS

AND NOW

In the matter of an application for substitution of the deceased 1st Petitioner-Appellant

1. Gunamuni Praneetha Santhoshini de Silva of
   No. 2/6, Galpotha Road, Nawala.
2. Gunamuni Manthirini Sunanda Mendis of
   No. 2/5, Gregory's Road, Colombo 7.
3. Chandra Kumudini de Silva of
   No. 2/6, Galpotha Road, Nawala.

APPLICANTS-PETITIONERS

AND

Gunamuni Sujeevan Chandranath de Silva of
No. 105, Exeter Road, Raynards Lane,
Harrow, England

2nd PETITION-APPELLANT-PETITIONER

Vs.

1. Macarthy Private Hospital Limited of
   No. 22, Wijerama Mawahta, Colombo 7.
2. Gunamuni Chandima Sudhamma de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
3. Gunamuni Subadra Malini de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
4. Gunamuni Thusitha Kanthi de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
5. Gunamuni Udayi Yasoja de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
6. Gunamuni Channa Janaka de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.
7. Gunamuni Prajapa de Silva of
   No. 22, Wijerama Mawahta, Colombo 7.

RESPONDENTS-RESPONDENTS-RESPONDENTS

BEFORE: Priyasath Dep P.C., J.
Sisira J. de Abrew J.
Anil Gooneratne J.

COUNSEL: Dr. Harsha Cabraal P.C with Revan Weerasinghe
Instructed by Nitti Murugesu for the Petitioner-Appellants

Manjuka Fernandopulle for the Respondents-Respondents-Respondents
Instructed by Paul Rathnayake Associates

ARGUED ON: 13.11.2015

DECIDED ON: 28.01.2016

GOONERATNE J.

This is an appeal to the Supreme Court from the judgment of the High Court of Colombo in the matter of an application in terms of Sections 224, 225, 214 and 521 of the Companies Act No. 07 of 2007. Action in the High Court as per the said sections were filed mainly to prevent oppression of the minority share-holders and to prevent mismanagement of the 1st Respondent Company. (McCarthy Private Hospitals Limited). Judgment in the said case was entered on 06.11.2008 granting relief to the two Petitioners in the High Court (Petitioners-Appellants) in terms of sub paragraphs 'a', 'b', 'g' and 'i' of the prayer to the Petition filed in the High Court but learned High Court Judge refused to grant relief as per sub paragraphs (c), (d), (e) and (h) of the prayer to the petition. By this appeal Petitioner-Appellants seeks a judgment from the Supreme Court in their favour on the above prayer (c), (d), (e) & (h) which was refused by the High Court, and set aside that part of the final judgment of the High Court.

When this appeal was taken up before this court on 18.02.2014, court was informed that the 1st Petitioner-Appellant expired, (on 11.02.2011) and on that day learned counsel moved court to file necessary pleadings to substitute necessary parties and take steps accordingly, in the room of the deceased 1st Petitioner-Appellant. However on 01.07.2014 the necessary

substitution papers had been filed but an objection was taken on behalf of the Respondents for the proposed substitution, on the following grounds as recorded therein

1. An action filed in terms of Section 224 and 225 of the Companies Act is personal in nature and the cause of action would not survive upon the death of the original 1st Petitioner.
2. In terms of the articles of the relevant company marked X1(c), Article 2 confers a discretion on the Directors of the Company to allot or transfer any shares, and that the said discretion has not yet been exercised.
3. In any event the application has been made in regard to an estate which is subject to testamentary proceedings and probate has yet not been issued, leaving the question of who is entitled to succeed is in doubt.

Court granted time for the Respondents to file objections. I had the advantage of perusing the written submissions of both parties. My attention is drawn to the provisions contained in the Civil Procedure Code, Companies Ordinance and the articles of Association of the 1st Respondent. In terms of Section 760A of the Civil Procedure Code the Supreme Court may determine in the opinion of the court the proper person to be substituted or entered on the record in the room of the deceased party.

Section 760A reads thus:

> Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Supreme Court may in the manner provided in the rules made

> by the Supreme Court under Article 136 of the Constitution determine, who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who had died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid.

When such a person is substituted under Section 760A, and as per Rule 38 of the Supreme Court Rules he or she becomes the legal representative, and therefore entitled to prosecute the appeal. As regards the case in hand, the person substituted would be entitled to all benefits as arising from the appeal and similarly has to accept all liabilities arising from the Judgement in appeal.

The Applicant-Petitioners have filed the required petition and affidavit and moved court to have themselves substituted. The 1st and 3rd Applicants-Petitioners are the daughter and wife of the deceased party respectively. The 1st Petitioner-Appellant is a joint executrix of the last will No. 542 and testament of the deceased party and Attorney for the 2nd Applicant-Petitioner (sister of deceased) by a special Power of Attorney No. 796 dated 02.04.2014. It is also pleaded that steps are being taken to file testamentary proceedings and seek probate upon the last will No. 542 (L2). By last will (L2) the 3rd Applicant-Petitioner is the beneficiary of shares owned by the deceased party, in the 1st Respondent Company. At the hearing before this court on 13.11.2005 this court was informed that the testamentary case had been filed.

I wish to observe that the above material placed before court is more than sufficient to effect a proper substitution.

It is trite law that on death of a person his estate comprising of both movable and immovable vests immediately on the heirs, unless the deceased has taken other steps to make disbursements by a last will or other valid instrument during his or her life time. This is by operation of law and the estate passes at once to the heirs and dominium vests in them 10 NLR 242. My attention has been drawn inter alia to the case of Re Greene (1949) Ch 333 which state that "on the death of a sole shareholder the shares vest in his personal representatives; Charlesworth's Company Law 18 Ed pg. 156. As such title to the share would pass to the executor and or legal representative of the deceased party. The term legal representative is defined in Section 529 of the Companies Act to mean "an executor or administrator". As such the objection raised by the Respondent party that the rights accrued to the 1st Petitioner-Appellant who is now deceased and the deceased right to shares ceases and does not survive his death and does not pass to the legal representative cannot be accepted as a valid objection and need to be rejected.

The position taken up by the Respondents and the objections raised in that regard could be met and answers could be provided to same by the provisions contained in the Companies Ordinance and Civil Procedure Code. In

terms of Section 232 of the Companies Ordinance an extended meaning to "shareholder" is contemplated. Section 232 reads thus:

> A reference in sections 224 to 228 to a "shareholder", shall also include a reference to-
>
> (a) a persons on whom shares have devolved through the death of a shareholder;
> (b) the executor or administrator of a deceased shareholder; or
> (c) a person who was a shareholder at any time within six months prior to the making of an application under section 224 or section 225

As stated above the rights of a 'shareholder' will not cease upon his death. The said extended meaning given to 'shareholder' in the above section would provide an answer to the other objection as well. i.e, no document or proof before court to demonstrate that Applicants-Petitioners are in fact 'shareholders' of the 1st Respondent Company or that its Board of Directors of the company have sanctioned the transfer of shares. To effect a proper substitution the above section does not require the Applicant-Petitioner to be registered shareholder of the company or that the board had sanctioned the transfer of shares. Therefore as submitted by learned President's Counsel for Applicant-Petitioners, is that the only requirement for substitution under Section 232 of the Companies Act, is for the deceased party to name and appoint an Executor to the last will, which the deceased had done or the shares have devolved through the death of the shareholder on the beneficiary, as referred

to in last will No. 542 (L2), more particularly paragraph 6 of last will (L2). It states that the testator give device and bequeath all the rest and residue of any property estate and effects whether real or immovable or personal or movable etc.

The above position is further fortified by Section 472 of the Civil Procedure Code. It reads thus:

> "In all actions concerning property vested in a trustee, executor, or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator shall represent persons so interested; and it shall not ordinarily be necessary to make them parties to the action. But the court may, if it thinks fit, order them, or any of them, to be made such parties".

Share or shares as defined by the Oxford Dictionary of Law 6th Ed…' shares as immovable property', and as in the case of any form of property the right to represent the interests of those that would benefit from such property by operation of Section 472 would accrue to the executor. As such it includes the right of substitution in as much as the right to invite a fresh action on behalf of beneficiaries of estate.

All persons die testate or intestate. The property left by such deceased person may include cash, shares in companies or partnership. Land and building, clothing, jewellery furniture etc. or even intangibly rights eg. Right to claim a debt. A will is a document by which a person express his or her

intention and gives directions as to disposal of his or her property (on death) owned during life time. In the will the testator appoints a person or persons called an executor/executrix. Often two or more executors are appointed to act together who are joint executors. Duty of the executor is to administer the estate of the testator e.g collect assets, pay debts, and distribute property as directed by the testator in the last will. Executor is appointed by the testator by last will and not by court. Executor derives title from the will and not from grant of probate (Williams on Executors, 59-61 X111 th Edn. Vol I) executor is entitled to commence certain acts to a point. Probate is merely operative as the authenticated evidence of the executors, title (Williams on Executors 57 X111 the Edn. Vol 1) Executor can commence action before probate and continue as far as probate becomes necessary.

It is not incorrect to observe that it is in order and it will be sufficient if the executor obtains probate in time for that exigency (Williams on Executor 61, X111 th Edn. Vol. 1)

However the following supporting material and provisions in the Companies Act, also cannot be ignored, although a different view on same had been expressed by the Respondents.

Article 22 of the table 'A' in the first schedule to the Companies Act reads thus:

> A person becoming entitled to a share by reason of the death, insolvency or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share…"

Article 20 (Table 'A' schedule 01) reads thus:

> "The legal representative of a deceased sole holder of a share shall be the only person recognized by the company as having title to the share".

Section 80 of the Companies Act reads thus:

> The production to a company of any document which by law is sufficient evidence of probate of a will or of letters of administration of the estate or confirmation as executor of a deceased person having been granted to some person, shall be accepted by the company notwithstanding anything in its articles, as sufficient evidence of the grant.

I have to emphasise that even the above provisions support the right to be substituted. I have referred earlier in this order, the interpretation to legal representative in Section 529 of the said Act. I am unable to make order refusing the application to substitute. I am satisfied that sufficient material had been placed by the party concerned to permit court to arrive at a conclusion that proper persons are to be substituted and their names should be entered on

the record in the room of the deceased party. It is by operation of law and a right in law that substitution need to be permitted in a case of this nature. I proceed to reject all objections of the Respondent party.

It is common knowledge that death of any person or party in a suit cannot be anticipated so easily except where a person is feeble and very old or subject to a terminal illness. Testamentary proceedings in a District Court can prolong even in the absence of objecting parties, as procedural steps contemplated by the code cannot be accelerated. The grant of probate is a matter for the District Court and appointing an executor in a last will is an act solely with the rights and powers of the testator of the last will. In a pending action or appeal, when a party dies the relevant court need to decide on applications made in that regard for substitution. Supreme Court, like the case in hand need to decide and determine in the opinion of court the proper person or persons to be substituted. This decision has to be taken in the best interest of justice, keeping in mind that a party need to prosecute its appeal to ensure the ends of justice and finality in litigation. In the context of the case in hand and in the circumstances there is no necessity to withhold or refuse an application for substitution, on the basis that probate has not been granted hitherto or await the granting of probate by the original court. Subject to the views

expressed by this court the Applicant-Petitioners are the next of kin, entitled as of right to step into shoes of the deceased party.

The application for substitution by the Applicants-Petitioners and the 2nd Petitioner-Applicant is allowed, with costs.

Application allowed with costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew

I agree

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an Appeal from a judgment of the Commercial High Court of Colombo dated 20th November, 2009.

Ispat Corporation (Private) Limited,
No. 19/27, Millagahawatta,
Siwaramulla Road, Nedungamuwa,
Weliweriya, Gampaha.

Plaintiff

SC CHC APPEAL 21/2010
H.C.(Civil) No. 98/2002(1)

Vs

1. Ceylinco Insurance Company Limited
   "Ceylinco House",
   No. 69, JanadhipathiMawatha,
   Colombo 01.
2. National Development Bank of Sri Lanka, No. 40, NawamMawatha,
   Colombo 02.
3. Sampath Bank Limited, No. 110,
   Sir James PeirisMawatha,
   Colombo 02.

Defendant

Ceylinco Insurance PLC,
"Ceylinco House", No. 69,
JanadhipathiMawatha,
Colombo 01.

1st Defendant Appellant

Vs

Ispat Corporation (Private) Limited,
No. 19/27, Millagahawatta,
Siwaralamulla Road, Nedungamuwa,

Weliweriya, Gampaha.

Now at,

No. 101, Pahalawela Road,
Pelawatta, Battaramulla.

Plaintiff Respondent

2. National Development Bank of Sri Lanka, No. 40, NavamMawatha,
Colombo 02.

3.Sampath Bank PLC.,
No. 110, Sir James PeirisMawatha,
Colombo 02.

Defendants Respondents

BEFORE : S. EVA WANASUNDERA PCJ
ANIL GOONERATNE J &
H.N.J.PERERA J.

COUNSEL :Nihal Fernando PC with N.R.Sivendran and Harshula Seneviratne for the 1st Defendant Apellant.
ChandakaJayasundera with ChinthakaFernandoinstructed by K.P. Law Associates for the
Plaintiff Respondent

ARGUED ON: 29.07.2016

DECIDED ON: 15.11.2016

S. EVA WANASUNDERA PCJ.

This is a direct Appeal preferred to this Court by the 1st Defendant Appellant, Ceylinco Insurance PLC from a judgement of the Commercial High Court of Colombo, dated 20th November, 2009.

The hearing of this Appeal was accelerated at the request of the Plaintiff Respondent, Ispat Corporation (Private) Limited in the year 2010. Thereafter, at the conclusion of submissions made by parties, this Court had been of the view that it is a fit and proper matter that could be referred to mediation under the supervision of this Court, and as such, Court had made order, on 08.05.2014 that the parties will be notified when a mediator is appointed. Then, a 'Reference to Mediation' was made by the then Hon. Chief Justice and the other two judges of this Court appointing the retired Supreme Court Judge, Hon. JusticeNimal E.Dissanayake as mediator to hold the mediation proceedings and conclude the matter within 3 months from the date of the reference, i.e. on 07.10.2014. It was recorded that the findings of the said mediator will be adopted by this Court as an order of this Court to which the parties of the proceedings had agreed to abide.

However, Hon. Justice N.E.Dissanayake made order to the effect that mediation between parties had not been successful and referred the matter back to the Hon. Chief Justice for a decision to be made by the Supreme Court. Thereafter, again, this Appeal was mentioned in open Court on 06.03.2015 and all counsel for all the parties appeared before Court and got the matter fixed for hearing on 29.04.2015. Again the hearing of the case had got postponed.

On the dates of hearing before this Bench, when the matter was taken up for hearing i.e. on 21.07.2016 and on 29.07.2016, the only contesting parties were the 1st Defendant Appellant and the Plaintiff Respondent. Hearing was concluded before this Bench.

The 2nd and 3rd Defendant Respondent Banks had been named as parties to this action since in accordance with the terms of the Insurance Policy, all monies payable by the 1st Defendant Appellant insurer to the Plaintiff Respondent, in the event of a claim on the insurance policy was to be paid directly by the 1st Defendant Appellant to the 2nd and 3rd Defendant Respondent Banks and the 2nd

and 3rd Defendant Respondent Banks would receive the said monies on behalf of the Plaintiff Respondent and hold/or apply the said monies on behalf of the Plaintiff Respondent. Accordingly, no relief had been sought against the 2nd and 3rd Defendant Respondents.

Subsequent to the institution of the action, the 2nd and 3rd Defendant Respondent Banks had recovered the money owed to them by the Plaintiff Respondent and therefore are now not entitled to receive any money on behalf of the Plaintiff Respondent. **Accordingly, it is pleaded by the Plaintiff Respondent that any monies now payable by the 1st Defendant Appellant to the Plaintiff Respondent under the Insurance Policy should be paid directly to the Plaintiff Respondent.**

The facts pertinent to the matter before this Court is precisely as follows:--

The Plaintiff Respondent Company (hereinafter referred to as the Plaintiff) was previously named as "Sterling and Walton Steel (Pvt) Limited". It was engaged in the business of manufacturing "steel structural" from the year 1997 at the factory at Weliweriya. On 16th January, 2002, the name of the Plaintiff was changed to "Ispat Corporation (Private) Limited". In 1999 the Plaintiff temporarily ceased production due to a shortage of working capital owing to money market and exchange rate fluctuations. By that time, the Plaintiff had owed substantial sums of money to the 2nd and 3rd Defendant Respondent Banks. The 3rd Defendant Bank had advised the Plaintiff to hand over management of the manufacturing and sale of the products to a company sponsored by the 3rd Defendant Bank named Lanka Consolidated Agencies (Pvt) Limited on the basis that if the Plaintiff agreed to do so, the Bank would restructure the Banking facilities granted to the Plaintiff and grant additional working capital.

The Plaintiff had agreed to the said suggestion and as a result Lanka Consolidated Agencies (Pvt) Limited nominated yet another company

by the name of Orison Management Services (Pvt) Limited to enter into a Management Agreement dated 04.04.2000. and a memorandum of understanding dated 07.04.2000 in terms of which the Plaintiff had handed over only the Management of the Manufacturing and Sale of the Plaintiff's products to the said Orison Management Services (Pvt) Limited for a period of 6 years commencing from 4.4.2000. Subsequently, the Plaintiff issued a special power of attorney to Orison Management Services Private Ltd for specific purposes of only for manufacturing and sale of steel structural and to maintain the accounts etc. **The said company was in sole and exclusive possession and control of the Plaintiff's factory and the Plant, Machinery, Equipment, Buildings , Assets an Stocks therein from 4.4.2000 to 1.3.2001. The Plaintiff had pleaded that the 1st Defendant Appellant was aware of these facts.**

The 1st Defendant Appellant issued the Insurace Policy No. CO 00 CF 007942 dated 11.07.2000 in favour of the Plaintiff and thereby, insured the Plaintiff's factory against many risks and perils. The premium was paid for an aggregate value of Rs. 100 Million. It is alleged that the insurance was against inter alia, all Loss and / damage to the Plaintiff's factory and premises and the plant and machinery, equipment and stocks therein including any loss and damage caused by **several risks or perils including malicious damage.**

Thereafter, the Orison Management Services Private Limited had at one time not performed its duties to the Plaintiff and as such the Agreement for management of the factory of the Plaintiff was terminated. The Plaintiff had taken over possession of the factory on 01.03.2001 in the presence of the representatives of the 2nd and 3rd Defendant Banks.

The Plaint divulged that the Security Company, namely Defence and Security Private Limited had informed the 2nd Defendant on the 1st of March, 2001 that the factory was non operational due to the

removal of the plant and machinery done by the Orison Management Services Private Limited which could not be controlled and that thus damage continued to be caused within the few days prior to 01.03.2001. The Plaint submitted that on 07.03.2001 the Plaintiff had given notice to the 1st Defendant, of the loss and damage caused by malicious damage carried out by Orison Management Private Limited against the Plaintiff. The Plaintiff's employee K.N.Balakrishnan had made a complaint to the Weliweriya Police.

The Plaintiff and the 1st Defendant had discussions with regard to the matter. The Plaintiff had given notice of the claim on the insurance to the 1st Defendant on 18.06.2001. On 21.06.2001 the 1st Defendant had acknowledged in writingthe receipt of the notice and had confirmed the appointment of a Loss Adjuster and had sent a claim form to be completed and returned together with all supporting documents to enable the said 1st Defendant to look into the claim. Thereafter the 1stDefendant's Loss Adjuster and Employees and/or Agents had carried out a detailed inspection of the Loss and Damage caused to the Plaintiff and the Loss Adjuster and the team continued their inspection, with the Plaintiff's unreserved and full cooperation, till the end of September, 2001.

The Plaintiff submitted that following the completion of the Joint Survey and Inspection **both parties formulated a Joint Survey Report according to which, the Loss and Damage caused to the Plaintiff by the malicious, willful and wrongful acts of Orison Management Services Private Limited was estimated at Rs. 48,708,319/57**. The said amount was calculated under 5 items. The claim form dated 27.09.2001, claiming payment from the Defendant the aforementioned sum of money on the Insurance Policy was then submitted to the Defendant by the Plaintiff. After many reminders from the Plaintiff to the Defendant, the Defendant had informed the Plaintiff that the Defendant had sought legal opinion on the matter and would revert no sooner such opinion is received by the 1st

Defendant. The 1st Defendant disclaimed liability on the said claim on 20.02.2002 and also on 4.3.2002. **Thereafter by letter dated 14.03.2002, the Defendant had specifically informed the Plaintiff that, (a) the alleged loss or damage was occasioned by the willful act of the Plaintiff within the meaning of Condition 14 and (b) the claim is excessive and grossly exaggerated within the meaning of Condition 14.**

The Plaintiff filed action in the High Court to recover a sum of Rs. 48,708,319/35 from the said 1st Defendant claiming that the 1st Defendant as the insurer is liable and bound and obliged to pay in terms of the Insurance Policy as a measure of indemnification of the Plaintiff.

The Plaintiff's case was: that there was a **valid and operative insurance policy** between the Plaintiff and the Defendant; that the claim of the Plaintiff was related to **a risk on malicious damage which was an insured risk in terms of the policy**; that the loss and damage was caused to the Plaintiff **arising out of risk malicious damage;** and that the amount of loss and damage was Rs. 48,708,319/35.

The 1st Defendant filed answer and denied liability taking up a lot of different defenses and prayed for a dismissal of the action. But the 2nd and 3rd Defendants filed separate answers and prayed for an order of court that any monies payable by the 1st Defendant on the Policy of Insurance be paid to the 2nd and 3rd Defendants and also prayed for **a just and equitable order from court**.

The Plaintiff raised Issues Nos. 1 to 22 at the trial and the 1st Defendants raised Issues Nos. 23 to 29. The other Defendants had not raised any issues. It is important to reckon the issues raised by the 1st Defendant, the insurer. They are as follows;-

Issue **No. 23**: Does the Plaint not disclose a cause of action against the 1st Defendant?
Issue **No. 24:** Does the Plaint and the annexed documents set out a claim, if any, only against the 2nd and/or 3rd Defendant?
Issue **No. 25**: Is the Plaintiff's action prescribed in law?
Issue **No. 26**(a) Does the Plaint not conform to the imperative provisions of the Civil Procedure Code?
(b) Have the dates of the alleged cause of action not been set out in the Plaint?
Issue **No. 27**: Is there a misjoinder of Defendants as set out in the Plaint?
Issue **No. 28**:Cannot the Plaintiff have and maintain this action

(a) Due to the averments as set out in paragraph 8 of the answer of the 1st Defendant?
(b) In view of condition No. 14 of the Insurance Policy?

Issue **No. 29**: If any one and/or all of the above issues are answered in the 1st Defendant's favour, should the Plaintiff's action be dismissed as prayed for in the answer of the 1st Defendant?

The 1st Defendant had made an application to treat issues Nos. 23 , 26(a) and 26(b) as preliminary legal issues and to be decided by court at the commencement of the trial. The then High Court Judge had then considered the submissions written and oral made by both parties and made a considered order dated 17th March, 2005 stating inter alia that " the contention of the plaintiff that **the cause of action** which had given rise to the filing of this action **is the alleged refusal** of the 1st Defendant to meet the claim preferred by the Plaintiff."He had answered the issue No. 26(a) as "Plaint conforms to the imperative provisions of the Civil Procedure Code" and the issue No. 26(b) as " The dates of the alleged cause of action has been set out in the Plaint." He had refixed the action for trial.

Thus the preliminary issues were answered in favour of the Plaintiff by the sitting judge at that time. Later on, the learned High Court Judge who took up the trial on the said issues of the Plaintiff and the

1st Defendant, had delivered Judgment on 20th of November, 2009. The Judgment was in favour of the Plaintiff.

The Petition of Appeal dated 15th January, 2010 preferred to this Court by the 1st Defendant contains eighteen grounds of appeal in paragraph 15 of the same. I wish to summarise the grounds of appeal for convenience. It is alleged that the High Court had failed to consider that the Plaintiff had failed to comply with the conditions of the Insurance Policy, **especially Condition 14 and Condition 21: that the claim of the Plaintiff was time barred in terms of Clauses 12 and 21 and that there was a gross over estimation of the purported loss and damage and as such the claim of the Plaintiff was fraudulent under Clause 14 of the Insurance Policy.**

The Insurance Policy was named as a Fire Insurance Policy but for the extended premium, the Policy covered risks or perils including Malicious Damage to an aggregate value of Rs. 100 Million. The Plaintiff handed over management and sale of the products to a company named Orison Management Services Private Limited. They were unsatisfactory and the Plaintiff terminated the agreement. Then, close to the date of handing over the factory back to the Plaintiff, Orison MSPL had taken out some machinery and equipment resulting in the Plaintiff becoming unable to go on with any production of steel structural which was the main product of the Plaintiff.

The **Plaintiff** alleges that the damage thus caused to him is covered by the insurance policy **under "malicious damage**". The **1st Defendant Appellant** alleges that the damage thus caused by Orison MSPL **does not come under "malicious damage" but can be categorized as burglary or pilfering** which is not covered by the Insurance Policy.

Condition 12 of the Insurance Policy No. CO 00CF 007942 reads as follows:

"On the happening of any loss or damage, the insured shall forthwith give notice therof to the Company, and shall within 15 days after the loss or damage or such further time as the Company may in writing allow deliver to the Company, (a) A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several ariticles or items of property damaged or destroyed and the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind, (b) Particulars of all other insurance if any.
The Insured shall also at all times, at his own expense, produce, procure and give to the company all such further particulars plans specifications, books, vouchers, duplicates or copies thereof documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, an any matter touching the liability of the amount of the Liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim an of any matters connected therewith. No claim under this Policy shall be payable unless the terms of this condition have been complied with."

The evidence of the Plaintiff and the documents produced by him with regard to notice being given within time, which were not challenged but accepted by way of replies acknowledging the notice of damage etc. is proof before this Court that the aforementioned condition contained in Clause 12 had been complied with by the Plaintiff. I am of the opinion that Clause 12 has been complied with by the Plaintiff and he was entitled to pursue his claim and the Insurer has to accommodate his claim. The Plaintiff has taken steps and complied with the formalities on the occurrence of loss or damage which are contained in Clause 12 of the Policy.

Clause 14 of the Insurance Policy reads:-

"Forfeiture – If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this Policy or if the loss or damage be occasioned by the willful act or with the connivance of the insured; or if the claim be made and rejected and an action or suit commenced within three months after such rejection or (in case of an arbitration taking place in pursuance of the 20th condition of the Policy) within three months after the arbitrator or arbitrators or umpires shall have made their award, all benefit shall be forfeited."

The 1st Defendant had raised a specific issue namely Issue No. 28(b) in regard to Clause 14. Issue 28(b) reads as "Cannot the Plaintiff have and maintain this action in view of Condition No. 14 of the Insurance Policy?" However, in the Written Submissions of the said Defendant, it was alleged that the learned High Court Judge had failed to decide the said issue correctly. I observe that the learned High Court Judge has analysed the evidence before the trial court and decided that the claim was not fraudulent and had answered that issue stating that "The Plaintiff can have and maintain this action". Fraud has not been proved by the 1st Defendant who alleges that the claim was fraudulent as the loss and damage was occasioned by the willful act with the connivance of the Insured. The 1st Defendant depended on the reasoning that ' the claim is an exaggerated one and therefore it is fraudulent'. The 1st Defendant did not bring forward any evidence before the trial court. Nobody gave evidence on behalf of the 1st Defendant.

A general definition of "Fraud" in Insurance matters is contained in **Colinvaux's Law of Insurance** (8th Edition – Sweet and Maxwell South Asian Edition 2009) at page 312 as follows: " A claim can only be

fraudulent if the assured is dishonest or at the very least culpably reckless. Mere negligence on the part of the assured will not suffice." At page 314 it is stated that Exaggerated Loss does not amount to Fraud. It reads thus:- " The amount of a loss may be inflated by the assured for a number of reasons: the assured may be seeking to make a profit from his loss; he may be presenting a bargaining claim in the belief that the ultimate compromise agreement reached with the insurer will approximately represent his actual loss; or he may genuinely have overestimated the value of his property by e.g. including an element for consequential loss not covered by the policy. It is established that the mere fact that a claim has been inflated is not conclusive evidence of fraud and that bargaining claims and innocent overvaluation will not defeat the assured. In the absence of independent evidence of the assured's state of mind, the decisive dividing factor between fraud and innocence will generally be the degree to which the claim has been inflated, as the greater the inflation the easier it becomes to impute a fraudulent intent to the assured. Thus**, a hundredfold exaggeration** of the degree of loss will **be fraudulent**, as will a claim for the purchase price of goods which were at the time of the loss seriously defective or of goods which the assured did not actually loose, **whereas a claim for the value of new goods under a policy which provides cover for replacement value only is a bargaining claim** and **cannot be regarded as fraud…"**

The valuation report done by the Peoples' Bank at the time of handing over the factory to Orison MPSL , of the Machinery and Equipment of the factory of the Plaintiff was placed before the trial court as P5. This was undisputed and uncontradicted. It was prepared by an independent chartered engineer and valuerretained by the Peoples' Bank and not by the Plaintiff. **The value of the Plant and Machinery then was Rs. 93.6 Million.** As a result of the malicious damage caused by Orison MPSL the Plaintiff's factory had closed down and the Plaintiff had suffered a severe losses. **But in the case in hand, he is asking only the amount covered by the Insurance**

Policy due to the damage and loss caused maliciously and nothing more than that.

The **Survey Report marked P40** was undisputedly prepared following a Joint Survey carried out by the **Plaintiff,** the **Defendant's** Loss Adjustor, the **Defendant's** Chartered Engineer and the **Defendant's** other Representatives. This Joint Report has clearly described the Loss and Damage in detail and has set out in great detail the break down and analysis of the manner in which the sum of Rs. 48,708,319/35 was reached as the loss and damage. It consists the calculation of damage under 5 categories as follows:

(a) Estimated cost of repairs /resurrection of Plant and Machinery Rs. 24,811,990/57

(b)Estimated cost of missing inventory items **to be imported**- Rs.16,711,791/28.

(c)Estimated cost of missing inventory **items available locally** – Rs. 3,532,368/50.

(d)Estimated cost of missing inventory items Fabrication Steel- Rs. 1,055,400/00.

(e)Estimated cost of repairs/replacement building/civil work – Rs.2,596,769/35.

This Report had been done during the period of a few months. The Plaintiff's managing director produced this report at the trial. He was not cross examined regading the contents of the report. There was no dispute over the contents of the Report. It was marked subject to proof but at the closing of the case of the Plaintiff, the Defendant did not object to any of the documents which were marked subject to proof. Therefore as a matter of law, according to the ratio decedendi of the case of **Sri Lanka Ports Authority and Another Vs. Jugolinija – Boat East 1981, 1 SLR 18,** the document P 40 stands proven.

It is interesting to note that the Policy of Insurance gives a definition of Malicious Damage as follows under clause "F9" which reads as follows:

Malicious Damage:
"In consideration of the payment of an additional premium it is hereby agreed and declared that the insurance under said Riot and Strike Endorsement shall extend to include **Malicious Damage** which for the purpose of this extension **shall mean**:
Loss of or damage to the property insured directly caused by the malicious act of any person (whether or not such act is committed in the course of a disturbance of public peace) not being an act amounting to or committed with an occurrence mentioned in Special Condition 6 of the said Riot and Strike Endorsement.
But the Company **shall not be liable** under this extension for (1) any loss or damage by fire or explosing**(2) any loss or damage arising out or in the course of a burglary, house breaking, theft or larceny** or any attempt thereat or caused by any person taking part therein and (3) the Excess stated in the Schedule in respect of each and every loss or damage.
Provided always that all the conditions and provisions of the said Riot and Strike Endorsement shall apply to this extension as if they had been incorporated herein."

The Plaintiff claimed that it is a loss of property and damage caused to the property which was insured, directly by Orison MPSL when the management agreement was terminated by the Plaintiff as the Plaintiff was not satisfied with the management carried on by Orison MPSL. The Plaintiff alleged and proved with evidence that Orison MPSL had taken lorry loads of machinery and equipment thus causing damage and loss to the insured property which the security personnel could not stop. Even at the time of giving notice to the Insurance Company, the damage was continuing. **I am of the view that the loss and damage to the insured property was done by a third party acting maliciously according to the aforementioned**

interpretation contained in the Insurance Policy regarding "Malicious Damage".

Clause 21 of the Insurance Policy reads:

"Time Limit for Company's Liability – In no case whatsoever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

The happening of the loss which occurred was found out on the 1st of March, 2001. On the 7th of March, the Plaintiff gave notice to the Insurance Company. On the 30th of July, the1st Defendant informed the Plaintiff to forward the claim document directly to the 1st Defendant for onward transmission to the Loss Adjustor. The Plaintiff by letter dated 18th August gave reasons for the delay and requested time for the submission of the claim form and specifically stated that the estimate of the reinstatement cost would be approximately Rs. 50 million. The Defendant's Loss Adjuster with the cooperation of the Plaintiff carried out the inspection till almost the end of September,2001. The claim form for Rs.48,708,319/35 was sent to the Defendant on 27th September,2001. The Plaintiff kept on writing to the Defendant. Finally, on the 20th February, 2002 the Defendant disclaimed liability. The cause of action to file a case under the Policy arose only at that time.

I hold that the Plaintiff had adhered to Clause 21 by having given notice of the occurrence of the loss and damage immediately and having pursued the claim till it was disclaimed on 20.02.2002. Plaint was filed on 17.05.2002 and it is not time barred.

I have gone through the written submissions and case law submitted by the 1st Defendant, the Insurer, in addition to the oral submissions made by counsel at the hearing on behalf of the Defendant as well as

the submissions made by the Plaintiff. I have considered the case law with regard to the onus of proof.

I am of the opinion that the policy covered the risk of malicious damage. The loss and damage was caused maliciously by the third party, Orison MPSL against the Plaintiff. It was so proven by evidence led by the Plaintiffs. The value of the loss and damage was proven by the Survey Report which was before the trial court. The Insurer's contention that it was a fraudulent claim has failed. The insurer has not proved that the Plaintiff willfully connived in causing damage to the property insured even though it was so pleaded.

I am of the opinion that the learned High Court Judge has considered all matters quite correctly according to the legal principles pertinent to insurance, having analysed the evidence before the trial court and delivered judgment in favour of the Plaintiff. Therefore I dismiss the Appeal of the 1st Defendant Appellant with costs in both courts.

Judge of the Supreme Court

Anil Gooneratne J
I agree.

Judge of the Supreme Court

H.N.J.Perera 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. 31A/2003
H.C (Civil) Case No. 120/98(1)

Seylan Bank Limited
No. 33, Sir Baron Jayathilake Mawatha,
Colombo 1.
Presently at Ceylinco - Seylan Towers
No. 90, Galle Road,
Colombo 03.

PLAINTIFF

Vs.

1. Cosmacorale Patabendige Ali Asker Anver Cadir

2. Abdul Majeed Faleel Jiffry

Both carrying on business in Partnership
Under the name, style and firm of
Island Operators of
No. 37, Nikape Road,
Dehiwela.

Presently of No. 20, Main Street,
Dehiowita.

DEFENDANTS

AND NOW

Seylan Bank Limited
No. 33, Sir Baron Jayathilake Mawatha,
Colombo 1.
Presently at Ceylinco - Seylan Towers
No. 90, Galle Road,
Colombo 03.

PLAINTIFF-APPELLANT

Vs.

1. Cosmacorale Patabendige Ali Asker Anver Cadir

2. Abdul Majeed Faleel Jiffry

Both carrying on business in Partnership
Under the name, style and firm of
Island Operators of
No. 37, Nikape Road,
Dehiwela.

Presently of No. 20, Main Street,
Dehiowita.

DEFENDANTS-RESPONDENTS

BEFORE: S. E. Wanasundera P.C., J.
B. P. Aluwihare P.C., J &
Anil Gooneratne J.

COUNSEL: S. R. de Livera instructed by De Livera Associates
For the Plaintiff-Appellant

Defendants-Respondents are absent and unrepresented

ARGUED ON: 10.02.2016

DECIDED ON: 08.03.2016

GOONERATNE J.

Plaintiff-Appellant Bank filed action against two Defendant-Respondents on or about 25th September 1998, based on two causes of action. On the first cause of action, People's Bank lent and advanced overdraft facilities to the 1st & 2nd Defendants in a sum of Rs. 463,964/84. (pleaded in paragraph 4-10 of plaint) The Defendant-Respondents thereafter requested for a term loan facility of Rs.2 million on or about 21.10.1992 (2nd cause of action). Learned High Court Judge entered judgment in favour of the Plaintiff-Respondent Bank only in terms of sub paragraphs (a) and (c) of the prayer to the plaint. Appellant's complaint in this appeal is that based on the 2nd cause of action the High Court Judge had not granted relief to the Plaintiff-Appellant Bank on the sums of money due on the 2nd cause of action. i.e on the term loan of Rs. 2 million. (pleaded in paragraphs 11-18 of plaint) This is the only point to be considered in this appeal.

I would prefer to note the following extract from the Judgment of the learned High Court Judge which gives some indication as to what he had to

state about the 2nd cause of action. In the Judgment dated 26.09.2003 (Pg. 8/9 folios 364 & 365). It is stated as follows:

"The aforesaid two loans have been granted to the defendants by crediting the current account of the defendants marked "P1". The plaintiff's witness said that as shown in "P1 (xxxii)" the plaintiff has credited Rs. 2 million to the defendants' current account on 22.10.1992 which is the Term Loan referred to in "P3".

The plaintiff's witness said the defendants have failed and neglected to pay the overdraft and loan facilities as promised.

The plaintiff's witness said, by 1992 October overdraft had gone up to Rs. 2 million and thereafter the overdraft had been rescheduled and a Rs. 2 million loan had been granted and as a result the overdraft had been reduced to Rs. 88,217.93. (Vide proceedings dated 16.05.1992 at pages 21 and 22). This position is reflected in "P1 (xxxii)". On 21.10.1992 the aforesaid loan of Rs. 2 million had been granted and credited to the defendants' account.

Accordingly, it appears to me that the overdraft facility and the loan of Rs. 2 million have been combined or amalgamated as one loan".

Whatever stated above the material placed before this court indicates that the Defendant had not repaid any money in settlement of the term loan. The two causes of action are based on two separate transactions. One was money lent and advanced as an overdraft facility which fell into arrears. The other was a term loan. The banking business very often permit rescheduling of loans granted to clients. That is to encourage them to settle the loans offered from the bank which also give the clients more time to adjust that business and repay the bank on the sums due to the bank. To reschedule a loan, seems to me,

to buy some time to settle and whatever done in the process is no gift but yet another facility and repayment would follow.

It is apparent that the Plaintiff Bank pleaded in their plaint two causes of action. That is the overdraft facility and the other is the term loan. The traditional method for banks to grant loans would be the overdraft facility which is a direct line of credit and operates through current accounts. The interest due would be charged on the outstanding sum borrowed. To a client it may be somewhat cheaper as there is regular fluctuation of the account depending on borrowings and sums debited from the customer provided money is available in the account. The alternative to an overdraft facility is the term loan. It is only an alternative but in this instance both facilities are provided. In this case the bank may reserve the right to claim repayment on demand, and the repayment could spread over several years. The repayment method will obviously benefit the client's cash flow.

The above would be just a few methods in which the bank deals with their clients. I do not wish to discuss in this judgment all other facilities, which does not come within the ambit of this case. As such I would understand the case in hand as discussed above. Therefore I am reluctantly compelled to observe that the overdraft facility and the term loan are not combined or

amalgamated as one loan but two separate transactions and two separate loan agreements liable to be settled in favour of the Plaintiff-Bank. The trial Judge in his judgment states that two loans were granted, but I find it difficult to understand as to how the two became one. The Banks are not charitable institutions to lend money and not insist on repayment of loans.

I have to gather from the remarks made by the learned High Court Judge that the rupees 2 million term loan, had also been credited to the debtors' account, from which account the overdraft facility operates. It is also stated by the said High Court Judge that with the granting of the Rs. 2 million term loan the overdraft had been reduced to Rs. 88,217/93. It may be so. But the 2 million term loan being another separate transaction remains as a loan and not charity extended by the bank to the debtor, even if it was given to overcome the debtors' difficulties of settlement of the overdraft facility. As such debtors' liability to repay the term loan remains with interest.

In all the above facts and circumstances the Plaintiff-Bank would be entitled to claim the sums of money due on the 2nd cause of action, based solely on the term loan granted to the Defendants. Therefore I allow this appeal as per

prayer ‘b’ of the plaint, which sums of money are in default and due and owing to the Plaintiff-Appellant-Bank.

Appeal allowed with costs.

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 the matter of an Appeal from the judgment of the High Court of the Western Province (Exercising Civil Jurisdiction) dated 05.05..2006.

SC. CHC. Appeal No. 33/2006

HC. Civil No. 10/2000(3)

Selvarajah Mahera Kanth
of 271, Havelock Road,
Colombo 06.

Presently carrying on business as a sole proprietor under the name and style of 'Marken Enterprises' of No. 29, Ground Floor, Lucky Plaza, No. 70, St. Anthony's Mawatha, Colombo 03.

Plaintiff

Vs.

MTN Networks (Pvt) Ltd.
475, Union Place,
Colombo 04.

Defendant

And Now Between

Selvarajah Mahera Kanth
of 271, Havelock Road,
Colombo 06.

Presently carrying on business as a sole proprietor under the name and style of 'Marken Enterprises' of No. 29, Ground Floor, Lucky Plaza, No. 70, St. Anthony's Mawatha, Colombo 03.

Plaintiff-Appellant

Vs.

MTN Networks (Pvt) Ltd.
475, Union Place,
Colombo 04.

Defendant-Respondent

*** * * * * * ***

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

COUNSEL : Mohamed Adamaly with Ms. Shanya de Mel and Ms. Shashika Amarasinghe for the Plaintiff- Appellant.

Gomin Dayasiri with Mrs. Manoli Jinadasa and Sulakshana Senanayake for the Defendant- Respondent.

ARGUED ON : **12. 10. 2015**

DECIDED ON : **16. 02. 2016**

*** * * * * * ***

EVA WANASUNDERA, PC.J.

This is an appeal from the judgment of the Commercial High Court of Colombo dated 5th May, 2006. The Plaintiff-Appellant in his Petition of Appeal dated 03rd July 2006 has moved this Court to set aside the judgment of the Commercial High Court and grant relief as prayed for in his plaint on the grounds enumerated in the Petition of appeal in paragraph 6.1 to 6.6 of the same.

The alleged main grounds on which the Plaintiff-Appellant seeks relief seem to be that,

(a) the Learned High Court Judge has erred in interpreting the provisions pertaining to the registration of Industrial Designs contained in the now repealed Code of Intellectual Property Act No. 52 of 1979 and the new Code of Intellectual Property Act No. 36 of 2003.

(b) the Learned High Court Judge has erred in applying the burden of proof with regard to the Respondent's claim to have the Appellant's registered Industrial Design declared null and void and

(c) the Learned High Court Judge has erred in interpreting the concept of "novelty" with regard to the registration of Industrial Designs.

The Plaintiff-Appellant (hereinafter referred to as the 'Plaintiff') claimed that he is the registered owner of a 'new specialty envelope', the design of which is in Document P5. It is described under registered No. 5590 dated 07.10.1999 as "Rectangular in shape, with the window opening on to the top left or right hand side, on the longer 'top end' of the envelope. It may be made of any material like, Kraft paper, brown paper etc. and may have a rigid back surface to prevent the crushing of the documents inside". The Plaintiff claims that he is the registered owner of another 'protector specialty envelope marked P6 registered under No. 5504 dated 01.04.1999.'

Defendant-Respondent (hereinafter referred to as the 'Defendant') filed answer praying not only that the plaint be dismissed but also for a declaration that the said Industrial Design which is registered with the Registrar of Patents and Trade Marks under Reg. No. 5590 and 5504 be declared a nullity. The trial commenced with 9 answers and 30 issues. At the early stages of the High Court case, Plaintiff had made applications for interim reliefs and Court had refused to grant the same. The High Court dismissed the Plaintiff's action and the registration of the industrial designs of the Plaintiff bearing Nos. 5590 and 5504 were declared null and void. The drawing of the said envelopes were marked as P3 and P4.

The Defendant Company is in the business of telecommunication and markets a digital cellular telecommunication products under the brand name of "Dialog". The Plaintiff had a business registration under the name "Marken Enterprises". That Company manufactured postal envelopes. He made special envelopes with the window as in P3 and P4 for the Defendant on the Defendant's orders. P5 and P6, registration of the designs was done in the name of the Plaintiff. The Plaintiff had done such envelopes for the Defendant from the year 1996. In 1996 the envelopes ordered by the Defendant was 5000 to 6000 per month but in 1999 the orders increased the amount to 50,000 to 60,000 envelopes. In September 1999, there was a purchase order P13 for 50,000 of 9" x 12" size envelopes. Thereafter it was withdrawn by Ishara Jayanetti, a

worker in the Defendant Company allegedly with a promise to amend the order and return the same to the Defendant. But it never happened. The Plaintiff's evidence also was to the effect that, his company delayed one order earlier for which he apologized to the Defendant. The Plaintiff also claims that he was the exclusive supplier of envelopes to the Defendant.

The Plaintiff claimed that he had a 'buffer stock' of one hundred thousand envelopes at Rs.3.62 per envelope manufactured and stocked expecting the Defendant to buy. He further claimed damages for the unsalable stock and storage of the same. Plaintiff also produced a draft only of a contract which was to be signed but not signed. The Defendant marked 'Suntel' and 'Mobitel' envelopes with the same design through the Plaintiff in cross examination as D1 and D2. It was admitted by the Plaintiff in cross examination that his own other company called M/s Marken (Pvt) Ltd. supplied envelopes in the year 2000 to the Defendant.

I observe that the Plaintiff's evidence in Court under cross examination does not favour him in support of his allegations contained in the plaint against the Defendant. The evidence of the Plaintiff had not established that there was an existing purchase order at the time when the Defendant practically stopped purchasing the envelopes from the Plaintiff. Neither was there an existing contract between the Plaintiff and the Defendant. It was accepted in evidence that the Plaintiff's second company got orders from the Plaintiff in the year 2000, and they were supplied. The question arises whether having a buffer stock in one company of the Plaintiff as claimed in the plaint, from September 1999, why did he not supply the orders of the Plaintiff from the buffer stock kept specifically for the Plaintiff in his own other company. Therefore the stance claimed by the Plaintiff regarding a buffer stock cannot be accepted as correct. The Plaintiff had answered in cross examination that he manufactured new envelopes and supplied to the Respondent for orders made to the second company, which again is not credible.

The Plaintiff complained that the Defendant got the said 'specialty envelopes' done through other suppliers and that act infringes the Plaintiff's right as a registered owner of an Industrial Design. The Plaintiff prayed from High Court for declarations that the Defendant has infringed the exclusive rights granted to the Plaintiff by the registration of Industrial Design No. 5590 and 5504 amongst all other reliefs which are based on the

alleged infringement of Industrial Design No. 5590 and 5504. The said registrations marked as P5 and P6 were the vital documents.

The Plaintiff's position is that the registration of the design is prima facie proof of novelty in the Plaintiff's favour and the burden shifts to the Defendant to establish that others used the design prior to the Plaintiff. The Defendant's position is that since P5 and P6 registrations were the vital documents for securing relief from court, the burden of proof was on the Plaintiff to prove that the registration of the said Industrial Designs were correctly and properly effected and that he is the lawful and legal registered owner of the industrial designs which he claimed that the Defendant was attempting to infringe. I observe that if there is evidence before Court that the said registration amounted to a nullity then the plaint fails or in other words, if the Plaintiff was not entitled to have had the design registered, then the plaint fails because the basis of the Plaintiff's case is that the Defendant had tried to infringe the Plaintiff's rights secured by the registered designs.

When the case was filed in 2001, the prevalent law was contained in the Code of Intellectual Property Act No. 52 of 1979. It was in the year 2003 that the new Code of Intellectual Property Act No. 36 of 2003 was enacted.

Section 174 of Act No, 52 of 1979 reads:-

> "A certificate purporting to be under the hand of the Registrar as to any entry, matter or thing which he is authorized by this Code or regulations made hereunder to make or do, shall be prima- facie evidence of the entry having been made and of the contents thereof, and of the matter or thing having been done or not done."

I find that the Certificate of Registration is only prima facie evidence of, (1) the entry having been made (2) the contents thereof and (3) matter or thing having been done. The Certificate can be challenged under Section 179.

Section 179 reads:-

> "Where the registered owner of an industrial design, patent or mark proves that any person is threatening to infringe or has infringed the said industrial design, patent or mark, as the case may be, or is performing acts which make it likely that infringement will occur, the Court may grant an injunction restraining any such person from committing or continuing such infringement or performing such

acts and may award damages and such other relief as to the Court appears just and appropriate".

The **Plaintiff did not go beyond just producing the Certificates of Registration** at the trial. The Defendant argued that the designs registered were **not new designs and were available to the public** before they were registered.

An Industrial Design is defined in Section 27 of Act 52 of 1979.
Section 27 reads:-

"For the purposes of this Part any composition of lines or colours or any three dimensional form, whether or not associated with lines or colours, that gives a special appearance to a product of industry or handicraft and is capable of serving as a pattern for a product of industry or handicraft shall be deemed to be an industrial design.

Provided that anything in an industrial design which serves solely to obtain a technical result shall not be protected under this Part."

According to this Section "An Industrial Design which serves solely to obtain a technical result does not qualify for protection". It means that a purely functional design cannot obtain protection as an Industrial Design.
The Industrial Design in this instance is a specialty envelope. It can be seen that it is a functional design. The design had been made to suit the functional need of the Defendant to send 'Dialog' bills and invoices to customers. There invoices and bills could have been sent in similar envelopes without the window, which had existed in the public domain. The difference made by 'a window' being there is a functional trait. I am of the opinion that therefore according to the proviso of Sec. 27 of the Act No. 52 of 1979 it does not qualify to be registered as an industrial design.

Section 26 of Act No. 52 of 1979 reads:-

"The protection provided under this Part shall-

(1) apply only to new industrial designs;

(2) not apply to an industrial design which consists of any scandalous design or is contrary to morality or public order or which in the opinion of the Registrar

of the Court, is likely to offend the religious or racial susceptibilities of any community."

The industrial design should be 'new'. Novelty is defined in Section 28.

Section 28 of Act No. 52 of 1979 reads:-

28 (1) For the purposes of this Part a new industrial design shall mean an industrial design which had not been made available to the public anywhere and at any time whatsoever through description, use or in any other manner before the date of an application for registration of such industrial design or before the priority date validly claimed in respect thereof.

(2) An industrial design shall not be deemed to have been made available to the public solely by reason of the fact that, within the period of six months preceding the filing of an application for registration, it had appeared in an official or officially recognized international exhibition.

(3) An industrial design shall not be considered a new industrial design solely by reason of the fact that it differs from an earlier industrial design in minor respects or that it concerns a type of product different from a product embodying an earlier industrial design."

In this case, the Plaintiff had admitted in his plaint as well as in evidence that he had been supplying the envelopes marked as P3 in respect of which the registration of industrial design was sought and obtained, as far back as in August/September 1996. He sought registration of these designs in December 1999 which is 3 years later. So, the Plaintiff had been aware that the particular envelopes had been freely available to the public before the date of the application as he himself had by then supplied to the Defendant right along for 3 years. Defendant marked similar Mobitel and Suntel envelopes as D1 and D2 through the Plaintiff in cross examination and he had admitted in evidence that they are similar. He further said he did not supply then to Mobitel and Suntel thus admitting that his declaration to the Registration of Patents and Trade Marks that 'it is a new design' is false because it is evident that others also by that time were manufacturing the same envelope. The Plaintiff could have surely sued Suntel and Mobitel envelope manufacturers for infringement of his design but he had not done

so against either Mobitel envelope manufactures or Suntel envelope manufacturers. This implies that he must have had other reasons for filing action against the Defendant.

From the Plaintiff's evidence, it is seen as admitted by the Plaintiff that his intention of filing this action was to compel the Defendant to purchase envelopes from only the Plaintiff and not from any others. It sounds like the Plaintiff wanted the Defendant to be an exclusive customer by compulsion. On the evidence of the Plaintiff, he had admitted many matters which was not in his favour or rather which disproved his own Plaint. It is clear that the envelopes were known to have been used by others before he registered the two Designs. Leaving that aside, he himself had made the same envelope three years before registration and continued to supply the same to the Defendant all those three years. So, it cannot be said in law that there was novelty in the said Designs.

I am of the opinion that the Plaintiff had failed to prove his Plaint and the Commercial High Court had correctly made order in the Judgment dismissing the Plaint and declaring that the Registration of the Designs Nos. 5590 and 5504 were null and void. The grounds alleged against the Judgment of the Commercial High Court are without merit.

The Appeal is hereby dismissed. However I order no costs.

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 a Rule in terms of Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 20 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 for committing contempt against or in disrespect of the authority of the Commission to Investigate Allegations of Bribery or Corruption..

Mrs. Dilrukshi Dias Wickramasinghe, P.C.,
Director General,
36, Malalasekara Mawatha,
Colombo 07.

Complainant

SC Contempt No.04/2016

Vs.

Hon. Lakshman Namal Rajapaksha, M.P.
"Carlton", Tangalle.

Respondent

BEFORE **:** K**.** Sripavan, C.J.
P. Dep, P.C., J.
B.P. Aluwihare, P.C. , J.

COUNSEL Mrs. Dilrukshi Dias Wickramasinghe P.C. with Mrs. Ranjani Seneviratne, Deputy Director General and Mrs. Disna Gurusinghe for the Complainant.

Gamini Marapana, P.C. with Jayantha Weerasinghe, P.C., Ali Sabry P.C., Shavindra Fernando, P.C., W. Dayaratne, P.C., Navin Marapana, Wijesiri Ambawatta, Kaushalya Molligoda, Sampath Mendis, Premachandra Epa, Isuru Somadasa, Sampath Mendis, Premanath Dolawatta instructed by Athula de Silva for the Respondent.

ARGUED ON : 25.07**.**2016 and 03.08.2016

WRITTEN SUBMISSIONS FILED ON : 29.08.2016

DECIDED ON **:** **15.09.2016**

K. SRIPAVAN, C.J.,

When this matter was taken up on 03.08.2016, the learned President's Counsel for the Respondent took up a Preliminary Objection that it is imperative when proceedings of Contempt in terms of Section 20(4) and 20(5) of Act No. 19 of 1994 are initiated, such proceedings should commence by Petition and Affidavit together with the documents and a Certificate setting out the determination of the Commission.

Section 20 of Act No. 19 of 1994 deals with punishment for Contempt. It is significant that the offence of contempt committed against or in disrespect of the authority of the "Commission" shall be punishable by the Supreme Court as though it were an offence committed against or in disrespect of the Supreme Court. Under Section 20(3)(c) , if any person refuses or fails without cause, **which in the opinion of the Commission is reasonable** to comply with the requirements of a notice or written order issued or made to him by the Commission, shall be guilty of an offence of Contempt against, or in disrespect of the authority of the "Commission". Thus, the opinion has to be formed by the "Commission" and not by Court. (emphasis added)

In terms of Section 20(4) once the "Commission" determines that an offence of Contempt has been committed under Section 20(3), a certificate setting out such determination shall be signed by the "Chairman" of the Commission.
Section 20(5) further provides that the Supreme Court may think fit, take cognizance of the certificate signed and transmitted to Court under Sub-section (4). The expression "take cognizance" means judicial application of the mind of the Court to the facts mentioned in the Certificate with a view to take further action. Therefore, when the Court takes cognizance of the Certificate, such Certificate shall be of evidence of the facts stated and contained in the Certificate, unless the contrary is proved.

Article 105(3) of the Constitution declares that the Supreme Court of the Republic of Sri Lanka shall be a superior Court of record and shall have all the powers of such Court including the power to punish for Contempt itself- **whether committed in the Court itself or elsewhere.** (emphasis added)

Indeed, Samarakoon, C.J. in the case of *Regent International Hotels Ltd.* Vs. *Cyril Gardinar & Others* (1978-79-80) 1 S.L.R. 278 at 286 construing Article 105(3) of the Constitution held as follows:-

> *"The Supreme Court being the highest and final superior Court of record in the Republic and the Court of Appeal being a superior Court of Record with appellate jurisdiction have all the powers of punishing for Contempt, wherever committed in the island* ***infacie curiae or ex-facie curiae".***

In *Kandoluwe Sumangala* Vs. *Mapitigama Dharmarakitta et el.* 11 N.R.R. 195, Wood Renton J. went on to state that the law of Contempt exists not for the glorification of the Bench, but rather, it exists solely for the protection of the public.

In the matter of *Armand de Souza,* Editor of Ceylon Morning Leader 18 N.L.R. 33, the defendant, an editor, published an article suggesting that the Police Magistrate of Nuwara Eliya was unduly influenced by the suggestions of the Police and that he could not be relied upon to justice in cases involving European Planters. A **Rule** was issued at the instance of the Supreme Court, (without Petition and Affidavit) to show cause why he should not be committed for Contempt of the authority of the Police Court of Nuwara Eliya. Wood Renton C.J. held that the language used by the defendant was contemptuous and was an instance of Contempt of Court committed **ex facie curiae** and accordingly the defendant was sentenced to one month's simple imprisonment.

In the case of *Attorney-General* Vs. *M. De Mel Laxapathy* (1936) 1 Ceylon Law Journal Reports p. 111 – The respondent a Proctor of the Supreme Court, presided over a public meeting, held in pursuance of a notice which referred to the non-summary proceedings pending before the Police Court and during which meeting the charges against the accused in the non-summary proceedings pending before the Police Court discussed. It was held by the Supreme Court that, though the Respondent had no intention of prejudicing the fair trial of the case, he was guilty of Contempt of the Supreme Court as the holding of the meeting tended to interfere with the due administration of justice. It must be noted that Contempt

proceedings were initiated by way of a **Rule** on an application made by the Attorney General. This was an instance of contempt committed **ex facie curiae.**

The case of *Attorney General* Vs. *Vaikurthavasan* 53 N.L.R. 558 is also relevant to be mentioned. The Respondent in this case who was the Editor, Printer and Publisher of an English Weekly Newspaper called "Peoples' Voice" published an article containing matters calculated to prejudice the fair trial of a case pending before a Magistrate's Court and a **Rule Nisi** was issued at the instance of the Attorney General. The Respondent unreservedly admitted the commission of a Contempt by him and having tendered his apologies submitted himself to the mercy of Court. The **Rule** was made absolute and a fine was imposed upon the Respondent.

> It could thus be seen that the power of the Court to act **suo moto** is drawn from the cases cited above. The object of the discipline enforced by the Court in the case of Contempt is not to vindicate the dignity of the Court or the Judge but more intended for the protection of the public and to uphold and maintain the reputation of the Court as regards its authority, fairness and impartiality. The confidence in the Courts of Justice which the public possess must in no way tarnished, diminished or wiped out by contumacious behaviour of any person. Athukorale, J. in *Nanayakkara* Vs. *Liyanage Cyril* (1984) 2 S.L.R. 193, upon certain facts being brought to the notice of Court by the Attorney General issued a **Rule** on the respondent to show cause why he should not be punished for the offence of Contempt of the Magistrate's Court of Kandy.

In Fernando *Vs. Attorney General* (2003) 2 S.L.R. 852, the Petitioner appearing in person misbehaved and disturbed the proceedings. The Court held the conduct of the Petitioner constituted Contempt for which he was liable to be summarily judged and punished without even a formal charge, **(infacie curiae)** Quoting Lord Denning, S.N. Silva C.J. made the following observations:-

> "*To maintain law and order the Judges have and must have the power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without trial – but is a necessary power.*"

The cases cited above amply demonstrate the manner in which the Court dealt with the contemners. Before any action is taken, the Respondent must be issued with a **Rule** to show cause against the proposed action and his explanation must be sought. It is a sine qua non of the right of fair hearing. Fairness is a rule to ensure the wide power in the Court is not abused but properly exercised. Whatever procedure that is adopted, it must be fair and an opportunity be given to the Respondent to defend the case against him. In *Nally Bharat Engineering Co. Ltd.* Vs. *State of Bihar* (1990) 2 S.C.C. 48 at 55 the Supreme Court observed that the terms "fairness of procedure", "fair play in action", "duty to act fairly" are used as alternatives to "natural justice". Fairness is thus a prime test for proper administration of judicial power. It has no set form or procedure. It depends upon the facts of each case and no hard and fast rule can be laid down.

I would like to quote the following passage from "ARLIDGE, EADY & SMITH ON CONTEMPT"(3rd Edition – page 64) :-

> *"Although the jurisdiction to punish for Contempt is frequently referred to as "summary", the term has to be approached with some caution. Each of the categories of Contempt described in the previous paragraph is made the subject of* ***different procedure.***
>
> *…… the description "summary" is appropriate only in the sense that the trial is by judge alone, and that some of the safeguards that would attend the hearing of a criminal prosecution are absent."*

However, there are other instances where contempt maters are referred to the Supreme Court/Court of Appeal by Tribunals, Commissions etc., which has no power to deal with contempt matters either **infacie curiae** or **exfacie curiae** as the jurisdiction is vested with the Supreme Court/Court of Appeal by law.

Article 118 of the Constitution deals with the general jurisdiction of the Supreme Court and Article 118(g) confer jurisdiction on the Supreme Court `in respect of other matters which Parliament may by law vest or ordain'. Commission to Investigate Allegations of Bribery and

Corruption Act No.19 of 1994 could be considered as one of such Acts of Parliament which confer jurisdiction in respect of contempt matters. These Acts provide for the manner of communication or reference to the Supreme Court. As an example under Section 40A(3) of the Industrial Disputes Act every complaint of contempt committed against or disrespect of the authority of any arbitrator or Industrial Court or Labour Tribunal shall be communicated to the President of the Court of Appeal by a letter signed by the Arbitrator, President of the Labour Tribunal or by the Industrial Court. Likewise, there are similar provisions in the other statutes dealing with Tribunals, Commissions etc. Therefore, special acts could provide for the manner of reference or communication to the Supreme Court or Court of Appeal.

According to Section 20(4) of Act No. 19 of 1994, proceedings could be initiated by way of a certificate setting out the determination of the Commission. Under Section 20(5), the Supreme Court can take cognizance of this certificate. If the Court takes cognizance of the certificate, it tantamounts to initiation/instituting of the proceedings. Therefore, the Commission has properly invoked the jurisdiction of the Supreme Court. Further, the deeming provisions contained in Section 20(5) (a) and (b) give validity to this certificate. **Therefore, there is no necessity to file a Petition and an Affidavit.**

The complainant is directed to frame the charges against the Respondent. The Charges shall be in writing and shall state precisely and concisely all material particulars constituting the offences charged. It should also contain a list of documents/Statements, a list of Witnesses in support of the Complainants' case. The Charges, list of documents and Witnesses would be served on the Respondent through the Registrar of this Court, once it is received from the Complainant. The Court shall record the plea of the Respondent and decide what further proceedings would be taken against the Respondent.

CHIEF JUSTICE.

P. DEP, 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 the matter of an Application under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. (F/R) Application No. 01/2015

01.Jahangir Sheriffdeen.
No. 50A, Edward Lane,
Colombo 03.

02.Harshika Samadhi Ranasinghe Sheriffdeen,
No. 50A, Edward Lane,
Colombo 03.

On behalf of their daughter NauyaaSheriffdeen (Minor) of

No. 50A, Edward Lane,
Colombo 03.

PETITIONERS

-Vs

01.Sandamali Aviruppola,
Principal,

VisakhaVidyalaya,
No. 133, Vajira Road,
Colombo 04.

02.KalaniSuriyapperuma,
Deputy Principal,
VisakhaVidyalaya,
No. 133, Vajira Road,
Colombo 04.

03.RanjithChandrasekara,
Director of Education for
National Schools,
Ministry of Education,
Isurupaya,
Battaramulla.

04.AnuraDissanayake,
Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.

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

RESPONDENTS

Before : Sisira J De Abrew J
Upaly Abeyratne J
Anil Gooneratne J

Counsel : JC Waliamuna for the Petitioner
Janak de Silva Senior DSG for the Respondents

Argued on : 1.7.2016, 8.7.2016, 11.7.2016

Written Submission
tendered : on 25.7.2016 by the Petitioners

Decided on : 3.10.2016

Sisira J De Abrew J

The Petitioners have filed this petition seeking a declaration that their fundamental rights guaranteed by Article 12(1) and 12(2) of the Constitution have been violated by the Respondents. They also seek a declaration that their child be admitted to year one for the academic year 2015 at Vishaka Vidyalaya, Colombo.

This court, by its order dated 16.1.2015, granted leave to proceed for alleged violation of Article 12(1) of the Constitution. The Petitioners state that their application to admit the child to Vishaka Vidyalaya, Colombo to year one for the academic year 2015 was rejected by the 1st to 4th Respondents. They, in their petition, affidavit and counter affidavit, state that they reside at No.50A, Edward Lane, Colombo 3 from 2009. The

Petitioners state that according to the circular issued by the Ministry of Education they are entitled to receive marks as stated below.

1. Electoral Register : 28 marks
2. Registered Lease agreement for four years 4x75% : 3 marks
3. National Identity Cards (NIC) : 1 mark
4. Marriage Certificate : 1 mark
5. Grama Sevaka Certificate : 1 mark
6. Distance between the school and residence : 40 marks

It is common ground that no applicant is entitled to receive marks regarding admission for the year 2015 on the ground that his or her name appears in 2014 electoral register. The Petitioners contend that they reside at No.50A, Edward Lane, Colombo 3 from 2009 and that for the years 2009 to 2013 they are entitled to 28 marks on the basis of electoral register (4 years x 7=28). They further contend that the 1st Respondent in paragraph 18 of her affidavit admitted that the Petitioners were entitled to marks according to the following schedule.

1. Voters' List (2011,2012,2013) (3x7) : 21
2. Documentary proof of residence : 2
3. Additional documentation to prove residence (NIC) : 1
4. Distance between the school and residence : 40

Total : 64

It is common ground that the cut off mark for the admission for the academic year 2015 at Visakha Vidyalaya is 65. Although the Petitioners contend so, it has to be noted that the 1st Respondent, in paragraph 18 of her affidavit filed in this court, has stated that the above 64 marks could be granted only if the application of the Petitioners considered to be genuine. When I consider the above matters, it is important to consider whether the application of the Petitioners is a genuine one. In short it is important to consider whether facts contained in the application are genuine. If the application is not a genuine one, the petitioners are not entitled to 64 marks stated in paragraph 18 of the affidavit of the 1st Respondent.

Learned Senior Deputy Solicitor General (Senior DSG) relied on the declaration made by the applicant (1st or 2nd Petitioners) in the application marked P2. The applicant at the end of the application has declared that the all the information supplied is true and if the said information proved to be false or forged, the application would be rejected. Learned Senior DSG contended that the applicant (1st or 2nd Petitioners) had agreed with the said conditions. He contended that in the application marked P2 the applicant (1st or 2nd Petitioners) had stated that in 2009 and 2010 the petitioners were residing at No.50A, Edward Lane, Colombo3 and that this information was false. I now advert to this contention. Although the Petitioners state that they, in 2009, were residing at Edward Lane, Colombo 3, birth certificate of the child (P2A) reveals that in July 2009, the father of the child, the 1st Petitioner was residing at No 100, Temple Road, Nawala. The Respondents have produced the Electoral Register of the Petitioner pertaining to year 2009 as R11. According to R11, the residence of the 1st Petitioner in 2009 was at 100, Temple Road, Nawala. From the above facts it is clear that in

2009, the 1st Petitioner was not residing at No.50A, Edward Lane, Colombo3. Thus when the 1st Petitioner, in the application marked P2, stated that in 2009 the Petitioners were residing at No.50A, Edward Lane, Colombo3, it appears to be false.

The Petitioners in the application marked P2, claim that, in 2010, they were residing at No.50A, Edward Lane, Colombo. To prove the said fact, they have produced the Electoral Register for 2010 marked P25B wherein it states that they were, in 2010, residing at No.50A, Edward Lane, Colombo3. But the NIC number of the 1st Petitioner given in P25B is 751380496**X**. The 1st Petitioner has produced a copy of his NIC marked P2G according to which his NIC number is 751380496**V**. Thus the NIC number of the 1st Petitioner stated in P25B is wrong. This document has been prepared on the information given by the 1st Petitioner. It appears from the above mentioned material that the 1st Petitioner has submitted a wrong NIC number to the Election Department with the chief occupant list relating to No.50A, Edward Lane, Colombo3. The Respondents have produced marked R1 the Electoral Register for the year 2010 relating to No.100, Temple Road, Nawala wherein it states that the 1st Petitioner, in the year 2010 was residing at No.100, Temple Road, Nawala and the NIC number is 751380496V. This NIC number of the 1st petitioner is correct according to the copy of his NIC (P2G). From R1 and P25B it appears that the 1st Petitioner, in the year 2010, has had two places of residences. According to R1(Electoral Register for the year 2010 produced by the Respondents), in the year 2010, the 1st Petitioner was residing at No.100, Temple Road, Nawala. But according to P25B(the Electoral Register for the year 2010 produced by the Petitioners), in the year 2010, he was residing at No.50A,

Edward Lane, Colombo3. At the hearing before us the petitioners submitted that the two other persons mentioned in R1 are the parents of the 1st Petitioner. Further I would like to observe that according to R1, the 1st Petitioner and his parents were, in the year 2010, were residing at No.100, Temple Road, Nawala. Therefore the above information contained in R1 would have been supplied to the Grama Sevaka by the father of the 1st Petitioner. According to the particulars in P25B (the Electoral Register for the year 2010 relating to No.50A, Edward Lane, Colombo3), the 1st Petitioner and his wife, the 2nd Petitioner, were, in the year 2010, residing at No.50A, Edward Lane, Colombo3. Thus the particulars in P25B would have been supplied to the Grama Sevaka by the 1st Petitioner. Can the 1st Petitioner contend that the particulars contained in R1supplied by his father are false? On the other hand can the 1st Petitioner contend that the particulars contained in P25B supplied by him are correct in view of his father's declaration? When I consider the above natters it is relevant to consider Section 7 of the Registration of Electors Act No.44 of 1980 which reads as follows:

7(1) *"No person shall be entitled to have his name entered or retained in more than one register, notwithstanding that he may be qualified to have his name entered or retained in two or more registers."*

7(2) *"No person shall be entitled to have his name entered or retained more than once in the same register, notwithstanding that he may be qualified to have his name so entered or retained."*

It appears from the above section, that the 1st Petitioner is not entitled to maintain that he was residing in more than one place.

In view of the particulars in P25B and R1, the 1st Petitioner, by letter marked P24, had written to the Commissioner of Elections clarifying the matters set out in the said documents. The Commissioner of Elections, by letter marked P25, replied the 1st Petitioner. According to P25, in the year 2010, the people who were residing at No.100, Temple Road, Nawala would have declared that the 1st Petitioner was residing at Nawala and the 1st Petitioner would have declared that he was, in the year 2010, residing at No.50A, Edward Lane, Colombo3. According to P24, the 1st Petitioner informed the Commissioner of Elections that he, on 1.2.2009, changed his residence from No.100, Temple Road, Nawala to No.50A, Edward Lane, Colombo3. Thus he, by P24 takes up the position that he changed his residence from Nawala to Edward Lane Colombo3 on 1.2.2009. Is this position true? In finding an answer to this question, it is relevant to consider the child's birth certificate marked P2A. According to P2A, the 1st Petitioner, in July 2009, had declared that he was residing at No.100, Temple Road, Nawala. Therefore the 1st Petitioner's declaration in P24 that he changed his residence on 1.2.2009 from No.100, Temple Road, Nawala to No.50A, Edward Lane, Colombo3 **is proved to be false** by his own declaration. The 1st Petitioner in his counter affidavit states that prior to the birth of the child he and his wife were residing at No.50A, Edward Lane, Colombo3 and his wife left for the delivery of child to the hospital on 30.7.2009; that after the child was born he took his wife to his parent's house at No.100, Temple Road, Nawala as his wife required the assistance of his mother immediately after the child's birth; that they temporarily

stayed for few weeks at the parent's home; and that in these circumstances birth certificate of the child carried the address of his parents. If his said story in the counter affidavit is correct, his temporary residence was his parent's residence at Nawala and his residence was at No.50A, Edward Lane, Colombo 3. Then why did he declare his temporary residence as his residence in the child's birth certificate without declaring his residence at Edward Lane? The above facts demonstrate that No.100, Temple Road, Nawala was not his **temporary** residence but his residence at the time of child's birth. The document marked P24 has been produced to this court by the 1st Petitioner with his counter affidavit. When I consider the above matters, it appears that the 1st Petitioner has submitted a document (P24) which contained falsehood to this court.

The Petitioners, by unregistered lease agreement dated 31.1.2009 marked P2J state that they took premises at No.50A, Edward Lane, Colombo 3 on a lease. Thus they try to prove that they came to reside at No.50A, Edward Lane, Colombo3 on 1.2.2009. The 1st Petitioner, by his letter marked P24, too states that he came to reside at the said address on 2.1.2009. This lease agreement was for two years from 31.1.2009 to 31.1.2011. Thus if the Petitioners' contention is true, they had taken residence at No.50A, Edward Lane, Colombo3 from 2.1.2009 and continued till 31.1.2011 as per lease agreement marked P2J. The 2nd lease agreement for the period of four years from 31.1.2011 to 31.1.2015 was produced marked P2I. In the said lease agreement the 1st Petitioner stated that his address on 31.1.2011was No.100, Temple Road, Nawala. If the Petitioners on 31.1.2011 were residing at No.50A, Edward Lane, Colombo3 as admitted in previous lease agreement P2J, why did the 1st Petitioner state that his address on 31.1.2011

was No.100, Temple Road, Nawala? This cannot be considered as a mistake because the 1st Petitioner very strongly takes up the position that he changed his residence from Nawala to No.50A, Edward Lane, Colombo3 1.2.2009. He even wrote a letter to the Commissioner of Elections (P24) informing his change of residence. When I consider all the above matters, I hold that the Petitioners have not proved that in 2009 and 2010 they were residing at No.50A, Edward Lane, Colombo3 and that the Petitioners' claim that they were, in 2009 and 2010, were residing at No.50A, Edward Lane, Colombo3 is false.

According to the Electoral Register of the Petitioners for the year 2010 (P25B), the Petitioners were, in 2010, living at No.50A, Edward Lane, Colombo3. But the Respondents have produced marked X a Electoral Register for the year 2010 which states that the 2nd Petitioner with three others namely Ranasinghe Arachchige Nimal, Roshan Lalinda Ranasinghe and Swrana Ranasinghe was living at No.387/E/1 Ratmalana Road, Ratmalana in the year 2010. Therefore the declaration in the application for the admission of the child to Visakha Vidyalaya (P2) that the 2nd Petitioner was in 2010 living at No.50A, Edward Lane, Colombo3 appears to be false and cannot be accepted.

According to the birth certificate of the child, the 1st Petitioner, in July 2009, was living at No.100, Temple Road, Nawala. But as I pointed out earlier, the 1st Petitioner, in P24, states that he on 1.2.2009, changed the his residence from Nawala to at No.50A, Edward Lane, Colombo3 and that from 1.2.2009, he has been living at No.50A, Edward Lane, Colombo3.

The above facts are disproved by his own declaration in the birth certificate of the child.

When I consider the above matters, I hold that the Petitioners, declaration that they, in 2009 and 2010, were living at No.50A, Edward Lane, Colombo3 is false. The 1st Petitioner, at the end of the application marked P2, has admitted that if the particulars in the said application (P2) are found to be false, his application would be rejected. On this ground alone, the application of the 1st Petitioner for school admission (P2) had to be rejected by the school authorities. If the particulars furnished in the application marked P2 are false, the petitioners are not entitled to the reliefs claimed in their petition filed in this court. For the above reasons, I hold that the application marked P2 is not a genuine one. Therefore the petitioners are not entitled to 64 marks stated in paragraph 18 of the affidavit of the 1st Respondent. The petitioners contended that in any event that even without marks for the electoral registers for the years 2009 and 2010 being assigned, they are entitled to 69 marks which should be higher than the cut off mark (65 marks) for the admission to Visakha Vidyalaya. In considering this contention, it is necessary to consider whether the Petitioners have shown uberima fide when they filed the present petition in this court. When a person files a fundamental rights application in court, he makes a declaration to court that all what he has submitted to court in his petition and affidavit was true and moves court to act on the said material and further he enters into a contractual obligation with the court to the effect that all what would be submitted by him by way further documents would be true. Subsequently, if the court finds that his declaration to be false and/or he has not fulfilled the said contractual obligation, his

application or the petition should be dismissed in limine. Further when he seeks intervention of court in a case of this nature, he must come to court with frank and full disclosure of facts. If he does not do so or does not disclose true facts, his petition should be rejected on that ground alone. This view is supported by the following judicial decisions. In Jayasinghe Vs The National Institute of Fisheries [2002] 1SLR 277, the petitioner sought a declaration that his fundamental rights guaranteed under Article 12(1) of the Constitution have been violated by some of the respondents. The Supreme Court held thus:

> *"The petitioner's conduct lacked uberima fides. The application has to be rejected in limine on this ground as well. This is a principle which applies to cases coming up before the Court in writ cases as well as in injunction applications and even in admiralty cases. In such cases relief will be refused in limine without hearing the case on the merits even where the decision is alleged to have been made without jurisdiction. The same principle applies to applications under Article 126 (2)."*

Fernando Vs Ranaweera [2002] 1SLR 327. This was a fundamental rights application. This court held as follows:

> *"The Petitioner's conduct in particular, in obtaining interim relief showed lack of oberima fides. This too disentitled him to redress from court."*

In RPPN Sujeewa Sampath and RPPN Hasali Gayara Vs Sandamali Aviruppola, Principal Visakha Vidyalaya SC FR 31/2014 decided on 26.3.2015 wherein Justice Anil Gooneratne held as follows:

> *"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 that the application was presented. If incorrect particulars are provided by an applicant, the school authorities could reject the application."*

In the case of R Vs Kensington Income tax Commissioner (1917) 1 KB 486 at 495 Viscount Reading CJ observed thus:

> *"... if the Court comes to the conclusion that an affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the court as to the true facts, the Court ought, for its own protection and to prevent the abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court, that it has been deceived."*

His Lordship K Sripavan CJ in SC FR 13/2015 (Fundamental Rights case), (DT Wickramaratne and Others Vs University Grants Commission

and Others- Decided on 20.7.2016) considered the above legal literature and remarked thus*:*

> *"... Failure to attach the schedule in Annexure I to the letters filed by the Petitioners amounts to suppression of a material fact and the application of the Petitioners is liable to be dismissed without proceeding further with the examination on the merits."*

I have earlier pointed out that the Petitioners have submitted documents which contained false facts. When I consider the above matters, I hold that the petitioners have not disclosed true facts to this court; that they have not come to court with frank and full disclosure of facts; and that their conduct lacked uberima fides. I therefore hold that they are not entitled to get relief from this court and that their petition should be dismissed. For the above reasons, I reject the above contention of the Petitioners. The Petitioners tried to contnd that at least the 2nd Petitioner was living at No.50A, Edward Lane, Colombo 3 from the year 2010 in view of the Electoral Register for the year 2010. But according to the document marked X by the Respondents which is the electoral register for 2010, the 2nd Respondent was, in year 2010, residing at Ratmalana. Therefore the above contention of the petitioners cannot be accepted. The petitioners tried to contest that their application was rejected on the ground that they carry a Muslim surname. The petitioners support this position on the basis of submission made by the Respondents at the Human Rights Commission Inquiry marked P9. Page 2 of the above report reveals material relating to the above submission. But can the court basing above material alone, make an order to admit the child to Visakha Vidyalaya in view of the above findings? From the matters that I

have stated in this judgment, it is clear that their application P2 was rejected as they did not obtain sufficient marks. Therefore the above contention cannot be accepted.

For the aforementioned reasons, I hold that the Petitioners are not entitled to the reliefs claimed in their petition. I therefore dismiss the petition of the petitioners. Considering the circumstances of the case I do not order costs.

Petition dismissed.

Judge of the Supreme Court.

Upaly Abeyratne 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 and in terms of Article 126 of the Constitution.

1. R.H.A.S.S. Karunarathna,
   Na Sevana,
   Deraniyagala

2. K.M. Rupasinghe,
   'Rupani',
   Angulugalla,
   Nawandugala.

3. V.S. Wanasinghe,
   61/F, Parakum Mawatha,
   Bandarawatta,
   Gampaha.

4. M.A.G.C.Wijesekara,
   Apsara,
   Urapalawwa,
   Kuruwita

5. M.M.N. Kumari,
   No. 75, Dunupothagama,
   Nochchiyagama.

6. J.A.R. Jayasooriya,
   Agalawatta,
   Memeripitiya,
   Parakaduwa.

7. K.J.A.W.L. Jayasinghe,
   538, Bodhimaluwa,
   Parakaduwa.

8. R.P.R. Madusanka,
   775, Thaligala,
   Barawakumbuka.

9. K. G.P.S. Samarasinghe,
   Ananda,
   Balawinna,
   Godakawela,

10. M.C.C. Perera,
    104, Katuwapitiya Rd.,
    Negombo.

11. D T Ratnayaka ,
    289/4,
    Thalapatuhenpita North,
    Kiribathgoda,
    Kelaniya.

12. K.K.C. Harshanai,
    265C,
    Hidakaraldeniya,
    Ihalamitiyala,
    Matara.

13. B.L.S. Madhushani,
    Thekkawatta,
    Jayawardane Mawatha,
    Malimbada.

14. W.P. Heshan,
    85/3,
    Silverwaliwatta,
    Koralaima, Gonapola.

15. D.M.M. Menaka,
    01, Pahalaramawa,
    Ketawala,
    Landewala,
    Haliela.

16. P.M.A. Nipunika,
    Boyawalana,
    Kappetiwalana,
    Alawwa.

17. C.D. Padmaperuma,
    493/2B, Sirrimedurawatta,
    Meegoda.

18. M.G.N. Dilhani,
    58, Rathmalkaduwa,
    Gampola.

19. H.P.S.T. Wickramaratna,
    538, Thalliyadda,
    Dorawaka.

20. W.M.N. Udayajeewa,
    Udakumbura,
    Pussallawagama,
    Pussallawa.

21. H.P.T. Subashini,
    B2/65,
    Beligodapitiya,
    Rambukkana.

22. D.A.U. Sandamini,
    87, Sri Piyarathana Road,
    Bandaragama.

23. H.P.S. Rasadari,
    195C,
    Moragahakandawatta,
    Vilegoda, Kalutara North.

24. D.C. Dahanayake, 19,
    Poramba Lane,
    Akuressa.

25. H.M.S.T. Sandaruwan,
    118, Isuru Vimana,
    Munagama,
    Horana.

26. N.H.M. Lakmini,
    Maduranga,
    Ankenduwa Kapuduwa,
    Thihagoda,
    Matara.

27. K.B.T.U.K. Bandara,
    711/A, 2 Piyawara,
    Anuradapura.

28. R.M.C.L. Weerasinghe,
    Hitawala,
    Hiriwadunna.

29. L.B.U. Sandamali,
    357/87A, Gallawatta,
    Raddoluwa,
    Seeduwa.

30. B.S. Thisarasinghe,
    Godaparagahawatta,
    Yatalamatta,
    Galle.
31. R.M.A.P. Ramanayake,
    43/C-4,
    Pragathi Mawatha,
    Udariyagama,
    Peradeniya.

32. N.A.S.D. Madushani,
    14, 4th Piyawara,
    Ruwaneliya,
    Nuwaraeliya.

33. G.L.I. Dhananjani,
    548/55,Daminnagahawatta,
    Kimbulapitiya.

34. H.M.N.G.C. Bandara,
    117, Udalumada,
    Rikillagaskada

35. S.D.N.C. Fernando,
    No. 16,
    Giragama Land Sale,
    Kuriwela, Ukuwela

Petitioners

SC FR No. 09/2015 Vs.

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

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

3. Additional Secretary (Academic Affairs and
   University Admissions),
   University Grants Commission,
   No. 20, Ward Place,
   Colombo 7.

4. Mr. W.M.N.J. Pushpakumara,
   Commissioner General of Examinations,
   Department of Examinations,
   P.O.Box 1503,
   Colombo.

5. Secretary,
   Ministry of Higher Education,
   No. 20, Ward Place,
   Colombo 7.

6. The Registrar,
   University of Colombo,
   94, Cumarathunga Munidasa Mawatha,
   Colombo 3.

7. The Registrar,
   University of Peradeniya, Galaha Road,
   Peradeniya.

8. The Registrar,
   University of Sri Jayawardanepura,
   Gangodawila, Nugegoda.

9. The Registrar,
   University of Kelaniya,
   Dalugama,
   Kelaniya.

10. The Registrar,
    University of Moratuwa, Bandaranayaka
    Mawatha, Katubedda, Moratuwa.

11. The Registrar,
    University of Jaffna,
    Puliyadi Lane,
    Jaffna.

12. The Registrar,
    University of Ruhuna,
    Tangalle Road,
    Matara.

13. The Registrar,
    Eastern University,
    Batticaloa.

14. The Registrar,
    South Eastern University,
    Oluvil.

15. The Registrar,
    University of Rajarata,
    Mihintale.

16. The Registrar,
    University of Sabaragamuwa,
    Belihuloya,
    Balangoda.

17. The Registrar,
    North Western University,
    Kuliyapitiya.

18. The Registrar,
University of Uva Wellassa,
Badulla.

19. Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents

BEFORE **:** K**.** Sripavan, C.J.
B.P. Aluwihare, P.C., J.
Anil Gooneratne, J.

COUNSEL Saliya Pieris with T. Nandani for the Petitioners.

Nerin Pulle , Deputy Solicitor General with S. Gnanaraj, State Counsel for 1st , 2nd , 4th 5th 8th 9th 12th 13th 15th 16th and 19th Respondents.

WRITTEN SUBMISSIONS FILED ON **:** 27.05.2016 by the Petitioners
26.05.2016 by the Respondents

ARGUED ON : 04.05.2016

DECIDED ON **:** **20.07.2016**

K. SRIPAVAN, C.J.,

The Petitioners are citizens of Sri Lanka who sat for their G.C.E. (Advanced Level) Examinations in the years 2012 to 2014. The 1st to the 20th Petitioners claim that they sat for the G.C.E. (Advanced Level) Examinations in 2013 in their first attempt and in 2014 in their second attempt. The 21st to the 35th Petitioners claim that they sat for the G.C.E. (Advanced Level) Examinations in2012 and 2013 in their first and second attempts respectively and in 2014 they sat for the examination for the third time which was the final attempt for University admissions. Thus, all the Petitioners sat for the G.C.E. (Advanced Level) Examinations in the year 2013.

The grievances of the Petitioners are as follows:-

a. the Petitioners have obtained 'better' results at the 2014 examination as against the 2013 examination;
b. the registration process based on the 2013 results had not been concluded even though the Petitioners have already registered for various courses of study;
c. the academic sessions of the respective courses of studies had not commenced; and
d. there was no positive rule barring a student from deregistering from the Course of Study to which he has already registered.

The Court granted leave to proceed on 06.05.2015 for the alleged violation of the Petitioners' fundamental rights guaranteed by Article 12(1) of the Constitution.

Before examining the rival stand of the parties, it may be necessary to consider the relevant provisions of the Universities Act No. 16 of 1998 (hereinafter referred to as the "Act") with regard to admission of students to various Faculties of the Universities.

Section 15 of the Act provides, inter alia, as follows :-

The University Grants Commission is vested with power :-

(i) to determine from time to time in consultation with the governing authority of each Higher Educational Institution, the total number of students which shall be admitted annually to each Higher Educational Institution and the appointment of that number to the different Courses of study therein; and
(ii) to select for admission to each Higher Educational Institution in consultation with an with an "Admission Committee" whose composition, powers, duties and functions should be prescribed by the Ordinance.

The legislative intent is therefore crystal clear that the authority to manage and conduct the affairs relating to University admission vests solely with the University Grants Commission. It is to be borne in mind that the Court will not intervene, in the exercise of its power by the

University Grants Commission unless the exercise of such power was for an improper purpose not defined in the statute which confers it.

This Court while examining the policy of the University Grants Commission held in *Seneviratne and another* Vs. *University Grants Commission* (1980) 1 S.L.R. 182 at 220 as follows:-

> *"This Court would be going outside its judicial powers, were it to substitute its own judgment for that of the University Grants Commission on what is essentially a matter of policy and which has been properly entrusted for decision to that body. When a similar submission was made in Kumar*i *Vs. State of Mysore*, the Supreme Court of India observed …
>
> *But cases of hardship are likely to arise in the working of almost any rule which may be framed for selecting a limited number of candidates for admission out of a long list. This however would not render the rule unconstitutional. For relief against hardships in the working of a valid rule the Petitioner has to approach elsewhere because it relates to the policy underlying the rule"*

The legal position that emerges out of the decision extracted above is that once the University Grants Commission lays down a policy, it has to follow it uniformly even if it causes hardship in certain instances. The first respondent Commission cannot resort to such policy in certain cases where it likes and depart from the said policy as it chooses. Having laid down a definite policy the Commission cannot follow the irrational method of pick and choose. Such action of pick and choose would become arbitrary and violative of Article 12(1) of the Constitution and has to be struck down as being contrary to the constitutional provisions.

It is in this backdrop, I have to consider the complaint of the Petitioners. The Petitioners sat for the G.C.E. (Advanced Level) Examination 2013, the results of which were released on 20.12.2013. The First Respondent thereafter published notices calling for applications for University admission from eligible candidates. The closing date of receiving the said application was 19.05.2014. The Petitioners state that they applied for University

admissions by filling the application forms provided by the First Respondent in its handbook and forwarding them to the First Respondent for the academic year 2013/14.

Clause 6.1 of the Handbook refers to the categories of persons who do not qualify for admission as internal students of a University/Campus/Higher Educational Institute. (Clause 6.1 (b) reads thus:-

> *"Students who were/are registered (See Note 1) as internal students for courses of study in any institution listed under Paragraphs 1.2 & 1.4 of this Handbook."*
>
> *<u>Note</u> 1 :- Once a student forwards an application to the respective Higher Educational Institution/Campus/Institute for registration after paying the registration fee to the relevant Higher Educational Institution upon receiving a letter from the respective Higher Education Institution or otherwise, he/she is deemed to be registered student.*

Paragraph 1.2 of the Handbook refers to the following Higher Educational Institutions/Campuses/Higher Educational Institutes.

1. *University of Colombo*
2. *University of Peradeniya*
3. *University of Sri Jayewardenepura*
4. *University of Kelaniya*
5. *University of Moratuwa*
6. *University of Jaffna*
7. *University of Ruhuna*
8. *Eastern University, Sri Lanka*
9. *South Eastern University of Sri Lanka*
10. *Rajarata University of Sri Lanka*
11. *Sabaragamuwa University of Sri Lanka*
12. *Wayamba University of Sri Lanka*
13. *Uva Wellassa University of Sri Lanka*

14. University of the Visual & Performing Arts

15. Sripalee Campus

16. Trincomalee Campus

17. Vavuniya Campus

18. Institute of Indigenous Medicine

19. Gampaha Wickramarachchi Ayurveda Institute

20. University of Colombo School of Computing

21. Swami Vipulananda Institute of Aesthetic Studies, Eastern University, Sri Lanka

22. Ramanathan Academy of Fine Arts, University of Jaffna

Paragraph 1.4 refers to the following two institutions:-

1. *Institute of Human Resource Advancement (IHRA). University of Colombo.*
2. *Institute of Technology, University of Moratuwa.*

The Petitioners at Paragraph 16 of the Petition aver that based on the results of the G.C.E. (Advanced Level) Examination 2013, that registration of the Petitioners for different Courses of Study commended on or around 30.09.3014 and they had to register for their respective Courses of Study on the dates contained in the Chart marked **P1.** The Respondents by way of a motion dated 23.07.2015 produced the Schedule in Annex 1 of the letters requesting the Petitioners for registration to Universities for the Academic Year 2013/14. The letters marked **P4A** to **P4AH** and annexed to the Petition refers to the conditions subject to which the Petitioners would be selected for admission. Those conditions are given in Annex I which was not produced to Court by the Petitioners. The attention of every student who wishes to register at a University as from the commencement of the Academic Year 2013/14, was drawn to certain matters in Annexe 1. One of the matters referred to therein reads as follows:-

(d) Please note that if you will get registered to follow this Course of Study for the Academic Year 2013/14, you will not be eligible for University admission **based on the results of a subsequent G.C.E. (Advanced Level) Examination.** (emphasis added).

Thus, the Schedule in Annex I in a definite and clear terms notifies the policy of the First Respondent with regard to University admissions on the basis of the results of a subsequent G.C.E. (Advanced Level) Examination.

Learned Deputy Solicitor General sought to argue that the Petitioners have suppressed this material fact from this Court by failing to attach Annexe I of the schedule sent to them and referred to in the Petitioners' documents marked **PA** to **P4AH.** In my view, there is much substance in the contention raised by the learned Deputy Solicitor General. It is well settled that the relief under Article 126 of the Constitution is just and equitable and the Petitioners who approach this Court for such relief must come with frank and full disclosure of facts. If the Petitioners fail to do so and suppress material facts, their application is liable to be dismissed on that ground alone.

In a leading case of *R* Vs. *Kensington Income Tax Commissioners* (1917) 1K.B. 486 at 497 Viscount Reading C.J. of Divisional Court observed :-

> "……*if the Court comes to the conclusion that an affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent the abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court, that it has been deceived."*

Scrutton L.J. made an independent opinion on the following lines:-

> *" ……an applicant who does not come with candid facts and clear hands cannot hold a writ of the Court with soiled hands. Suppression or concealment of material facts is not an advocacy. It is a jugglery, which has no place in equitable and prerogative jurisdiction."*

I therefore hold that failure to attach the Schedule in Annexe I to the letters filed by the Petitioners marked **P4A** to **P4AH** amounts to "suppression of a material fact" and the application of the Petitioners is liable to be dismissed without proceeding further with the examination on the merits.

However, considering Article 27(2)(h) of the Constitution, which reflects the policy of the State to assure to all persons of the right to universal and equal access to education at all levels and the purported legal wrong as claimed by the Petitioners committed by the First Respondent against the Petitioners, I decide to go into the merits as well. The following facts are not disputed :

(i) The results of the G.C.E. (Advanced Level) Examination 2013 were released on 20.12.2013.

(ii) The First Respondent issued the cut off marks for admission to various Courses of Studies on 06.09.2014.

(iii) The registration period to various Courses of studies commended on 30.09.2014

(iv) The registration for all Courses of Study for the academic year 2013/ 14 completed on 06.02.2015.

(v) The results of the G.C.E. ((Advanced Level) Examination 2014 were released in December 2014.

Learned Counsel for the Petitioners contended that the Petitioners would be entitled to register for a Course study which is considered to be better or requiring a higher 'Z' score than the courses/streams for which they were registered, based on the results of G.C.E. (Advanced Level) Examination 2014. The Petitioners state that between 28.12.2014 and 02.01.2015, the Petitioners and their parents made representations and appeals to various parties including the 1st Respondent, seeking that they be permitted to cancel their registration for the academic year 2013/14, so that they could apply for University admission based on their results at the G.C.E. (Advanced Level) Examination 2014. The question therefore arises whether the Petitioners have any expectation to apply for and to register for a preferred Course of Study for the next academic year, namely, 2014/15 based on their results at the G.C.E. (Advanced Level) Examination 2014.

In a leading case of *Attorney General of Hong Kong* Vs. *Ng Yuen Shin* [(1983) 2 A C 629 / (1983) 2 W.L.R. 735] the Privy Council on the question of expectation made the following observations:-

"*The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.*"

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"It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law. A crucial requirement is that the assurance must itself be clear, unequivocal and unambiguous. Many claimants fail at this hurdle after close analysis of the assurance."

Based on the discussion of Wade quoted above, the Court has to consider whether the First Respondent Commission did give any assurance to the Petitioners in a clear, unequivocal and unambiguous term, that based on the results of the G.C.E. (Advanced Level) Examination of 2014, they would be permitted to cancel their registration for the academic year 2013/14 to enable them to apply for the next academic year 2014/15. Neither the Handbook relating to University Admission for the Academic Year 2013/14 nor the Annexe I referred to in the letters marked **P4A** to **P4AH** refer to any such assurances. On the contrary, the Schedule in Annexe I attached to the letters marked **P4A** to **P4AH** clearly and unambiguous states that once a student registers to follow the Course of Study for the academic year 2013/14, he/she will not be eligible for University admission based on the results of a subsequent G.C.E. (Advanced Level) Examination. Thus, I hold that the Petitioners do not have a legitimate expectation to register for a preferred Course of Study for the Academic year 2014/15 based on their results at the G.C.E. (Advanced Level) Examination 2014.

I shall go further and examine whether any such benefit has been regularly granted by the

First Respondent in the past and such benefits have been denied to the Petitioners. The Second Respondent in his affidavit dated 08.06.2015 states that the policy of the First Respondent morefully reflected in Clause 6.1(b) of the Handbook for the relevant academic year was introduced by the First Respondent in the year 2007 and the First Respondent gave wide publicity to the same and **this policy has never been challenged to date.** (emphasis added.)

A notice marked **R6** and published in the Newspaper in October 2006 for all prospective candidates for University Admission from 2007 G.C.E. (Advanced Level) Examination onwards reads thus:-

> *"……a Candidate who is registered for a particular Course of Study in a Higher Educational Institution/Institute, based on the results of the G.C.E. (Advanced Level) Examination in 2007 or a later year is not eligible for University admission based on the results of the subsequent G.C.E. (Advanced Level) Examination."*

Hence, the Petitioners cannot succeed based on a benefit given to students in the past as such benefit or concession was not extended to students after 2007.

It is settled principle of law that where a power is given to do a certain thing in a certain manner, that thing must be done in that way and not in any other way. Thus, having laid down the conditions/rules subject to which admissions to the Universities could be made the First Respondent cannot deviate from the conditions/rules laid down thereafter. This Court in *Noon* Vs. *University Grants Commission and Others* S.C. F.R. 352/2010 (S.C. Minute 23.11.2013) observed as follows :

> *" …….that in terms of Section 15(vii) of the Universities Act No. 16 of 1978, as amended, the selection of students for admission to Universities has to be done in consultation with the Admission Committee.* ***Once the governing criteria for admission is decided by the Commission, it is the duty of the Commission to apply the said criteria strictly in terms of the powers vested in it. The conditions given in***

the Handbook with regard to admission of students to the University shall not be changed in an ad hoc manner……" *(emphasis added)*

For the reasons stated above, I hold that the Petitioners have failed to establish the violation of their fundamental rights enshrined in Article 12(1) of the Constitution, by the Respondents. The application is therefore dismissed in all the circumstances without costs.

CHIEF JUSTICE

B.P. ALUWIHARE, P.C.,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 and in terms of Articles 17 and 126 of the Constitution.

1. D.T. Wickramaratna,
   Green crescent,
   Godagama,
   Matara.

2. B.M.A.L. Basnayaka,
   Imbulgoda,
   Metikumbura.

3. K.K.K.B. Dhanawansha,
   124/3/B, Samanala Uyana Road,
   Ihala Kobbakaduwa.

4. N.A.R. Sandakalum,
   8, Ruwanalla,
   Navimana, Matara.

5. H.P.E. Liyanaarachchi, 304/13/08,
   Araliyamawatha, Pinnagollawatta,
   Nittambuwa

6. G.K.S. Wishwajith,
   25/A,Wataraka, Ginthota West.

7. I.D.Weerasinghe,,
   113, Senanayake Avenue,
   Nawala,
   Rajagiriya.

8. A.R. Senarath,
   40/1, Kidammulla,
   Gampaha

9. M.R.G. Wijithasena,
   551/10/1, Aldeniya, Kadawatha

10. L.B.M.T. Gunawardane
    Anidigama Govipala,
    Dambadeniya.

11. B.M.B.D.B. Basnayake,
    Kandaragama, Higula.

12. Nuwani Kaushalya Dissanayake, 05,
    Telecompituwa,
    New Town, Embilipitiya.

13. W.K.S.M. Wethtawa, Hospital Quarters,
    Government Hospital, Senapura.

14. J.L.L.G. Senarath,
    Halpe, Dodampe,
    Ratnapura.

15. M.K.D. Manjula Lakmali,
    Samodagama,
    Meekanuwa, Ampitiya.

16. S.S.S. Fernando,
    207/2, Haldummula.

17. Y.K. Rambukwella,
    5D, Kalugala Road,
    Katugastota.

18. W.K.U. Wimalasena,
    44, Wanniarachchigama,
    Borala, Palmadulla.

19. B.S.N. Madushani,
    B1/GF/2,
    Government Officer's Housing Scheme, Jalthara,
    Hanwella.

20. D.M.A.M. Dissanayake
    Dambagalla Road, 3 Kanuwa, Papoladeniya,
    Madagama

21. D.A.G.K. Rashmika Kumarapura,
    1st Lane,
    Depot Road,
    Monaragala.

22. M.G.K.C. Piyaratne
    1/3, Nilmini,
    Hiddawulla, Handessa.

23. K.D.P.S.M. Diyawadana,
    147, Walipillawa, Ganemulla.

24. J.P.B. Gangoawila,
    60/2, Malaboduwa, Gonapala Junction.

25. M.N. Tharaka,
    146/D, Udumulla, Padukka.

26. W.M.H.K. Weerasekara, 47/29, Gurugama,
    Kesbewa, Piliyandala.

27. M. Abdulla,
    Aluth Dennewa, Kagama.

28. A.I. Dilshani 47/B/3, Rathmalawinna,
    Balangoda.

29. Shyam Sriyantha, No. 613, Kiribanwewa,
    Sevanagala.

30. K.A.T.M. Medhavi, No. 6, Shanthi Mawatha,
    Koswatta, Battaramulla.

31. M.M.S. Hasaranga, No. 335/C, Ratnapura Road,
    Pallegama, Embilipitiya.

32. S. Senaratna,
    391/1,
    Himbutana Road, Angoda.

33. V.G.Y. Dayananda,
    Nisala, Wiiliamgewatta,
    Dehigahalanda,
    Ambalanthota.

34. M.S.P.K. Gunasinghe,
    200/6, Gamamada Road, Raddoluwa, Seeduwa.

35. M.L.L. Neranjana 42/B,
    Pansalapara, Katugasthara,
    Gampaha

36. K.S.K.C. Thilakaratna,
    6/A/2, Inlamba Junction,
    Munagama, Horana.

37. K.I.M.Premaratna,
    313, Kotagedara,
    Minuwangoda.

38. P.G.K.D. Ananda,
    182/27A, Galaudahena,
    Andurapotha, Kegalle.

39. Shasindu Lakmujthu Punchihewa,
534, Nadigamwila, Gonagamuwa,
Tissamaharamaya.

40. S. Purusantha,
Ward No. 7, Puthukkuiyiruppu,
Mullativu.

41. S.H. Chanaka Madhusanka,
No. B/80, Kudaoya,
Labukelle.

42. A.I. Dilshani,
47/B/3, Rathmalawinna,
Balangoda.

Petitioners

SC FR No. 13/2015 Vs.

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

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

3. Additional Secretary (Academic Affairs and
University Admissions),
University Grants Commission,
No. 20, Ward Place,
Colombo 7.

4. Mr. W.M.N.J. Pushpakumara,
Commissioner General of Examinations,
Department of Examinations,
Colombo.

5. Secretary,
Ministry of Higher Education,
No. 18, Ward Place,
Colombo 7.

6. University of Colombo,
94, Cumarathunga Munidasa Mawatha,
Colombo 3.

7. University of Peradeniya, Galaha Road,
Peradeniya.

8. University of Sri Jayawardanepura,
Gangodawila, Nugegoda.

9. University of Kelaniya,
Kelaniya.

10. University of Moratuwa, Bandaranayaka
Mawatha, Katubedda, Moratuwa.

11. University of Jaffna,
Thirunelvely,
Jaffna.

12. University of Ruhuna,
Wellmadama,
Matara.

13. Eastern University,
Vantharumoolai,Chenkalady

14. South Eastern University,
Univerisity Park,
Oluvil.

15. University of Rajarata,
Mihintale.

16. University of Sabaragamuwa,
Sabaragamuwa,' ,

17. Wayamba University, Lional Jayatilake
Mawatha, Kanadulla,
Kuliyapitiya.

18. University of Uva Wellassa,
Badulla.

19. Hon. Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents

BEFORE **:** K**.** Sripavan, C.J.
B.P. Aluwihare, P.C., J.
Anil Gooneratne, J.

COUNSEL J.C. Weliamuna with Pulasthi Hewamanne for Petitioners.

Nerin Pulle , Deputy Solicitor General with S. Gnanaraj, State Counsel for 1st , 2nd , 4th 5th 8th 9th 12th 13th 15th 16th and 19th Respondents.

WRITTEN SUBMISSIONS
FILED ON **:** 30.05.16 by the Petitioners
26.05.2016 by the Attorney General

ARGUED ON : 04.05.2016

DECIDED ON **:** **20.07.2016**

K. SRIPAVAN, C.J.,

The 1st to 16th Petitioners sat for their G.C.E. (Advanced Level) Examination in the years 2012 and 2013. They sat for the said Examination for the Third time in 2014. The 17th to 43rd Petitioners sat for the said Examination in the years 2013 and 2014. All Petitioners are currently registered at various Universities for different Courses of Study based on the results of the G.C. (Advanced Level Examination 2013, for the academic year 2013/14. The Petitioners claim that the registration process took place prior to the release of the results of the G.C.E. (Advanced Level) Examination 2013, for the academic year 2013/14. The Petitioners claim that the registration process took place prior to the release of the results of the G/C/E/ (Advanced Level) Examination 2014 which forms the basis for registration for the academic year 2014/15.

In the instant application, the Petitioners challenge, inter alia, the failure on the part of the Respondents to permit the Petitioners to cancel their registration for the academic year 2013/14 and to permit them to register for their preferred Course of Study for the academic year 2014/15 based on the results of their G.C.E. (Advanced Level) Examination 2014.

Court granted leave to proceed on 06.05.2015 for the alleged violation of the Petitioners' fundamental right guaranteed by Article 12(1) of the Constitution.

Before examining the rival stand of the parties, it may be necessary to consider the relevant provisions of the Universities Act No. 16 of 1998 (hereinafter referred to as the "Act") with regard to admission of students to various Faculties of the Universities.

Section 15 of the Act provides, inter alia, as follows :-

The University Grants Commission is vested with power :-

(i) to determine from time to time in consultation with the governing authority of each Higher Educational Institution, the total number of students which shall be admitted annually to each Higher Educational Institution and the appointment of that number to the different Courses of study therein; and

(ii) to select for admission to each Higher Educational Institution in consultation with an with an "Admission Committee" whose composition, powers, duties and functions should be prescribed by the Ordinance.

The legislative intent is therefore crystal clear that the authority to manage and conduct the affairs relating to University admission vests solely with the University Grants Commission. It is to be borne in mind that the Court will not intervene, in the exercise of its power by the

University Grants Commission unless the exercise of such power was for an improper purpose not defined in the statute which confers it.

This Court while examining the policy of the University Grants Commission held in *Seneviratne and another* Vs. *University Grants Commission* (1980) 1 S.L.R. 182 at 220 as follows:-

> *"This Court would be going outside its judicial powers, were it to substitute its own judgment for that of the University Grants Commission on what is essentially a matter of policy and which has been properly entrusted for decision to that body. When a similar submission was made in Kumar*i *Vs. State of Mysore*, the Supreme Court of India observed …
>
> *But cases of hardship are likely to arise in the working of almost any rule which may be framed for selecting a limited number of candidates for admission out of a long*

list. This however would not render the rule unconstitutional. For relief against hardships in the working of a valid rule the Petitioner has to approach elsewhere because it relates to the policy underlying the rule"

The legal position that emerges out of the decision extracted above is that once the University Grants Commission lays down a policy, it has to follow it uniformly even if it causes hardship in certain instances. The first respondent Commission cannot resort to such policy in certain cases where it likes and depart from the said policy as it chooses. Having laid down a definite policy the Commission cannot follow the irrational method of pick and choose. Such action of pick and choose would become arbitrary and violative of Article 12(1) of the Constitution and has to be struck down as being contrary to the constitutional provisions.

It is in this backdrop, I have to consider the complaint of the Petitioners. The Petitioners sat for the G.C.E. (Advanced Level) Examination 2013, the results of which were released on 20.12.2013. The First Respondent thereafter published notices calling for applications for University admission from eligible candidates. The closing date of receiving the said application was 19.05.2014. The Petitioners state that they applied for University admissions by filling the application forms provided by the First Respondent in its handbook and forwarding them to the First Respondent for the academic year 2013/14.

Clause 6.1 of the Handbook refers to the categories of persons who do not qualify for admission as internal students of a University/Campus/Higher Educational Institute. (Clause 6.1 (b) reads thus:-

"Students who were/are registered (See Note 1) as internal students for courses of study in any institution listed under Paragraphs 1.2 & 1.4 of this Handbook."

<u>Note</u> 1 :- Once a student forwards an application to the respective Higher Educational Institution/Campus/Institute for registration after paying the registration fee to the relevant Higher Educational Institution upon receiving a letter from the respective Higher Education Institution or otherwise, he/she is deemed to be registered student.

Paragraph 1.2 of the Handbook refers to the following Higher Educational Institutions/Campuses/Higher Educational Institutes.

1. *University of Colombo*
2. *University of Peradeniya*
3. *University of Sri Jayewardenepura*
4. *University of Kelaniya*
5. *University of Moratuwa*
6. *University of Jaffna*
7. *University of Ruhuna*
8. *Eastern University, Sri Lanka*
9. *South Eastern University of Sri Lanka*
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Paragraph 1.4 refers to the following two institutions:-

1. *Institute of Human Resource Advancement (IHRA). University of Colombo.*
2. *Institute of Technology, University of Moratuwa.*

The Petitioners at paragraph 6(g) of the Petition state that they were informed by the 1st Respondent to register for their higher education at their offered Universities from 30.09.2014 onwards, and 80 registered at the Universities as borne out by the document marked **P1.**

The Respondents by way of a motion dated 23.07.2015 produced the Schedule in Annex 1 of the letters requesting the Petitioners for registration to Universities for the Academic Year 2013/14. The letters marked **P5B** to **P6** and annexed to the Petition refers to the conditions subject to which the Petitioners would be selected for admission. Those conditions are given in Annex I which was not produced to Court by the Petitioners. The attention of every student who wishes to register at a University as from the commencement of the Academic Year 2013/14, was drawn to certain matters in Annexe 1. One of the matters referred to therein reads as follows:-

(d) Please note that if you will get registered to follow this Course of Study for the Academic Year 2013/14, you will not be eligible for University admission **based on the results of a subsequent G.C.E. (Advanced Level) Examination.** (emphasis added).

Thus, the Schedule in Annex I in a definite and clear terms notifies the policy of the First Respondent with regard to University admissions on the basis of the results of a subsequent G.C.E. (Advanced Level) Examination.

Learned Deputy Solicitor General sought to argue that the Petitioners have suppressed this material fact from this Court by failing to attach Annexe I of the schedule sent to them and referred to in the Petitioners' documents marked **P5B** to **P6.** In my view, there is much substance in the contention raised by the learned Deputy Solicitor General. It is well settled that the relief under Article 126 of the Constitution is just and equitable and the Petitioners who approach this Court for such relief must come with frank and full disclosure of facts. If the Petitioners fail to do so and suppress material facts, their application is liable to be dismissed on that ground alone.

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> *" ……an applicant who does not come with candid facts and clear hands cannot hold a writ of the Court with soiled hands. Suppression or concealment of material facts is not an advocacy. It is a jugglery, which has no place in equitable and prerogative jurisdiction."*

I therefore hold that failure to attach the Schedule in Annexe I to the letters filed by the Petitioners marked **P5B** to **P6** amounts to "suppression of a material fact" and the application of the Petitioners is liable to be dismissed without proceeding further with the examination on the merits.

However, considering Article 27(2)(h) of the Constitution, which reflects the policy of the State to assure to all persons of the right to universal and equal access to education at all levels and the purported legal wrong as claimed by the Petitioners committed by the First Respondent against the Petitioners, I decide to go into the merits as well. The following facts are not disputed :

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(iv) The registration for all Courses of Study for the academic year 2013/ 14 completed on 06.02.2015.

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Learned Counsel for the Petitioners contended that the Petitioners would be entitled to register for a Course study which is considered to be better or requiring a higher 'Z' score than the courses/streams for which they were registered, based on the results of G.C.E. (Advanced Level) Examination 2014. The Petitioners state that between 28.12.2014 and 02.01.2015, the Petitioners and their parents made representations and appeals to various parties including the 1st Respondent, seeking that they be permitted to cancel their registration for the academic year 2013/14, so that they could apply for University admission based on their results at the G.C.E. (Advanced Level) Examination 2014. The question therefore arises whether the Petitioners have any expectation to apply for and to register for a preferred Course of Study for the next academic year, namely, 2014/15 based on their results at the G.C.E. (Advanced Level) Examination 2014.

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consideration of policy or law. A crucial requirement is that the assurance must itself be clear, unequivocal and unambiguous. Many claimants fail at this hurdle after close analysis of the assurance."

Based on the discussion of Wade quoted above, the Court has to consider whether the First Respondent Commission did give any assurance to the Petitioners in a clear, unequivocal and unambiguous term, that based on the results of the G.C.E. (Advanced Level) Examination of 2014, they would be permitted to cancel their registration for the academic year 2013/14 to enable them to apply for the next academic year 2014/15. Neither the Handbook relating to University Admission for the Academic Year 2013/14 nor the Annexe I referred to in the letters marked **P5B** to **P6** refer to any such assurances. On the contrary, the Schedule in Annexe I attached to the letters marked **P5B** to **P6** clearly and unambiguous states that once a student registers to follow the Course of Study for the academic year 2013/14, he/she will not be eligible for University admission based on the results of a subsequent G.C.E. (Advanced Level) Examination. Thus, I hold that the Petitioners do not have a legitimate expectation to register for a preferred Course of Study for the Academic year 2014/15 based on their results at the G.C.E. (Advanced Level) Examination 2014.

Counsel for the Petitioners relied on Clause 11.4 of the University Grants Commission Handbook and argued that the said Clause can be waived, specifically where academic sessions have not commenced. Clause 11.4 states that the successful candidates will be informed of their course of study and the University to which they have been selected. If they accept the offer they should register with the University concerned where called upon to do so within the time period stipulated by the University Grants Commission.

If a candidate does not register or informs the 1st Respondent or the University of his/her desire not to accept the request for registration, then the 1st Respondent would be required to fill that vacancy. Thus, the 1st Respondent would be required to ascertain the next most eligible candidate and fill such vacancy notwithstanding the fact such candidate has already registered to another Course of Study. Such a candidate will be informed in writing requiring him to be present on another date to register for the Course of Study in which the vacancy has arisen. This process provides an opportunity to another candidate to fill a vacancy that had been created and does not provide an opportunity to permit candidates to await the

release of the results of the subsequent G.C.E. (Advanced Level) Examination.

I shall go further and examine whether any such benefit has been regularly granted by the First Respondent in the past and such benefits have been denied to the Petitioners. The Second Respondent in his affidavit dated 08.06.2015 states that the policy of the First Respondent morefully reflected in Clause 6.1(b) of the Handbook for the relevant academic year was introduced by the First Respondent in the year 2007 and the First Respondent gave wide publicity to the same and **this policy has never been challenged to date.** (emphasis added.)

A notice marked **R6** and published in the Newspaper in October 2006 for all prospective candidates for University Admission from 2007 G.C.E. (Advanced Level) Examination onwards reads thus:-

> "……*a Candidate who is registered for a particular Course of Study in a Higher Educational Institution/Institute, based on the results of the G.C.E. (Advanced Level) Examination in 2007 or a later year is not eligible for University admission based on the results of the subsequent G.C.E. (Advanced Level) Examination."*

Hence, the Petitioners cannot succeed based on a benefit given to students in the past as such benefit or concession was not extended to students after 2007.

It is settled principle of law that where a power is given to do a certain thing in a certain manner, that thing must be done in that way and not in any other way. Thus, having laid down the conditions/rules subject to which admissions to the Universities could be made the First Respondent cannot deviate from the conditions/rules laid down thereafter. This Court in *Noon* Vs. *University Grants Commission and Others* S.C. F.R. 352/2010 (S.C. Minute 23.11.2013) observed as follows :

> *" …….that in terms of Section 15(vii) of the Universities Act No. 16 of 1978, as amended, the selection of students for admission to Universities has to be done in consultation with the Admission Committee.* ***Once the governing criteria for***

admission is decided by the Commission, it is the duty of the Commission to apply the said criteria strictly in terms of the powers vested in it. The conditions given in the Handbook with regard to admission of students to the University shall not be changed in an ad hoc manner……" *(emphasis added)*

For the reasons stated above, I hold that the Petitioners have failed to establish the violation of their fundamental rights enshrined in Article 12(1) of the Constitution, by the Respondents. The application is therefore dismissed in all the circumstances without costs.

CHIEF JUSTICE

B.P. ALUWIHARE, P.C.,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 and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Ceylon Electricity Board Accountants' Association**,**
No. 50, Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

Petitioner

SC FR No. 18/2015

Vs.

1. Hon Patali Champika Ranawaka,
   Minister of Power and Energy,
   Ministry of Power and Energy,
   No. 80, Sir Ernest De Silva Mawatha,
   Colombo 07.

1a. Hon. Ranjith Siyambalapitiya,
   Minister of Power and Renewable Energy,
   Ministry of Power and Renewable Energy,
   No. 80, Sir Ernest De Silva Mawatha,
   Colombo 07.

2. Dr. B.M.S. Batagoda,
   Secretary, Ministry of Power and Energy,
   No. 80, Sir Ernest De Silva Mawatha,
   Colombo 07.

3. Ceylon Electricity Board,
   No. 50, Sir Chiththampalam A. Gardiner
   Mawatha, Colombo 02.

4. M.C. Wickremasekara,
   General Manager, Ceylon Electricity Board,
   No. 50, Sir Chiththampalam A. Gardiner
   Mawatha, Colombo 02.

5. W.D.A.S. Wijayapala,
   Chairman, Ceylon Electricity Board,
   No. 50, Sir Chiththampalam A. Gardiner
   Mawatha, Colombo 02.

6. B.N.I.F.A. Wickramasuriya,
   Vice Chairman,
   Ceylon Electricity Board,
   No. 50, Sir Chiththampalam A. Gardiner
   Mawatha,
   Colombo 02.

6a. W.A. Gamini Wanasekara,
Vice Chairman,
Ceylon Electricity Board,
No. 50,
Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

7. N.K.G. Gunatilake,
Working Director,
Ceylon Electricity Board,
No. 50, Sir Chiththampalam A. Gardiner
Mawatha, Colombo 02

7a. W.R.G. Sanath Bandara
Working Director,
Ceylon Electricity Board,
No. 50, Sir Chiththampalam A. Gardiner
Mawatha, Colombo 02

8. Jeevani Kariyawasam,
Member,
Ceylon Electricity Board,
No. 50,
Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

9. S.S. Miyanwala,
Member,
Ceylon Electricity Board,
No. 50,
Sir Chiththampalam A. Gardiner Mawatha,
Colombo 02.

9a. T.N.K.B. Tennekoon,
Member, Ceylon Electricity Board,
No. 50, Sir Chiththampalam A. Gardiner
Mawatha, Colombo 02.

10. J. Dadallage,
Member,
Ceylon Electricity Board,
No. 50, Sir Chiththampalam A. Gardiner
Mawatha, Colombo 02.

10a. S.D.A.B. Boralessa,
Member, Ceylon Electricity Board,
No. 50, Sir Chiththampalam A. Gardiner
Mawatha, Colombo 02.

11. R. Semasinghe,
Member, Ceylon Electricity Board,
No. 50, Sir Chiththampalam A. Gardiner
Mawatha, Colombo 02.

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

13. Ceylon Electricity Board Engineers' Union,
Projects and Heavy Maintenance Branch-DD04,
Ceylon Electricity Board,
Sir Devananda Mawatha,
Piliyandala.

14. Neville Piyadagama,
Chairman,
National Pay Commission,
No. 1/116, BMICH,
Bauddaloka Mawatha,
Colombo 7.

15. B. Wijayarathna, Secretary, National Pay
Commission, No. 1/116, BMICH,
Bauddaloka Mawatha, Colombo 7.

Respondents

BEFORE **:** K**.** Sripavan, C.J.
P. Dep, P.C., J.
Upaly Abeyrathne, J.

COUNSEL Romesh de Silva**,** P.C. with Shanka Cooray for the Petitioner.

Nerin Pulle, Deputy Solicitor General, for the 1st – 12th Respondents.

Faisz Musthapha, P.C. with Thushani Machado instructed by H. Chandrakumar de Silva for the 13th Respondent.

J.C. Weliamuna with Shantha Jayawardane for the Intervenient Petitioner.

ARGUED ON : 11.03.2016

DECIDED ON : 03.05.2016

K. SRIPAVAN, C.J.,

When this application was taken up, the learned Deputy Solicitor General and the learned President's Counsel for the 13th Respondent raised a preliminary objection to the maintainability of the application on the ground that the Petitioner being a Trade Union has no locus standi to institute an application in terms of Article 126 of the Constitution. Court therefore directed the parties to file their written submissions and took up the matter for hearing on 11.03.16. However, the Petitioner filed its written submissions on 01.03.16 and the Respondents written submissions were filed on 24.02.16, well before the date of hearing.

On 11.03.16, learned Deputy Solicitor General informed that he would be relying on the determination made by this Court in S.C. (S.D.) No.19/2016 dated 23.02.16 and moved to file a copy of the said determination with notice to the Petitioner and the other Respondents. Mr. Romesh de Silva, P.C. moved Court to grant him one week's time to file further written submissions, if any, after considering the determination in S.C. (S.D.) No. 19/2016. Mr. Faisz Musthapha, P.C. informed that he would not be filing any further written submissions and that he too would be relying on the determination made in S.C. (S.D.) No. 19/2016.

Article 126(2) of the Constitution reads thus:-

> "*Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement.*"

Learned Deputy Solicitor General sought to argue that Articles 17 and 126(2) make no provision for a broad definition of the word "person" to include an unincorporated body or persons. Thus, the remedy provided for in Article 126(2) is a personal remedy, exercisable

by the person whose fundamental rights are allegedly violated through "***himself or by an Attorney-at-Law on his behalf"*** (emphasis added)

Mr. Faisz Musthapha P.C. too made his submissions on the strict interpretation of Article 126(2) and relied on the decision of *Somawathie* Vs. *Weerasinghe* (1990) 2 S.L.R. 121, where Amerasinghe, J. at page 124 observed that *"Article 126 confers a recognized position only upon the person whose fundamental rights are alleged to have been violated and upon an Attorney-at-Law acting on behalf such person"* and added that "*no other person has the right to apply to the Supreme Court for relief or redress in respect of the alleged infringement of fundamental rights."* Counsel further submitted that a liberal approach relating to locus standi was adopted in *Sriyani Silva* Vs. *Iddamalgoda* (2003) 1 S.L.R. 14, where Bandaranayake, J. held that a widow had locus standi to institute proceedings under Article 126 where the Petitioner's husband had died due to injuries sustained as a result of being tortured by the respondents. At page 21, Bandaranayaka J. stated thus:--

> "*Hence, when there is a* ***casual link between the death of a person and the process which constitutes the infringement of such person's fundamental rights, any one having a legitimate interest could prosecute that right*** *in a proceeding instituted in terms of Article 126(2) of the Constitution. There would be no objection in limine to the wife of the deceased instituting proceedings in the circumstances of this case."* (emphasis added)

I would like to mention that in *Sriyani Silva's case* (supra) Edussuriya J. while dissenting with the majority view, observed that there was nothing in Article 17 read with Article 126(2) which even remotely suggests that a widow had such a right or that such right devolves on a widow or heirs of a person whose fundamental rights have been infringed. Accordingly, Edussuriya, J. went on to hold that it was preposterous to hold that the legislature intended that the right to apply for redress should pass to the heirs of a deceased whose fundamental rights have been infringed. However, the majority decision was to allow the wife of the deceased who was a "person" within the meaning of Article 126 to continue with the fundamental rights application.

Mr. Romesh de Silva, P.C. strenuously contended that the Petitioner union is *"an association*

or a combination of workmen" and that the fundamental rights of the workmen, namely, the Accountants have been violated. Counsel drew the attention of Court to Section 28 and Section 30 of the Trade Unions Ordinance. For purposes of clarity, I reproduce below the said Sections.

Section 28:

"Every trade union shall be liable on any contract entered into by it or by an agent acting on its behalf, provided that a trade union shall not be so liable on any contract which is void or unenforceable at law".

Section 30:

"*A trade union may sue and be sued and be prosecuted under its registered name."*

Counsel thus argued that it is ludicrous to state that a trade union cannot initiate proceedings under Article 126(2), when a trade union can either be a plaintiff or a defendant in a civil action;

In this context, it may be appropriate to reproduce the observations made by Sharvananda, J., in the case of *The Ceylon Mercantile Union* Vs. *The Insurance Corporation of Sri Lanka* 80 N.L.R. Page 309 at 314.

> "*A registered Trade Union has thus been given recognition by law as a body distinct from individuals who from time to time compose it, although it is an unincorporated body. By registration, the Trade Union acquires some 'existence' in law apart from the members. It is thus a statutory legal entity capable of rights and duties. A Trade Union (which is a body unincorporated) is a separate entity. ……*
>
> *……..*
>
> ***The dispute complained of in the plaint is the dispute of each member with the Corporation. The plaintiff-Union has no direct interest in the said dispute. In the circumstances, it has no locus standi at all and is not entitled to come to Court for any relief based on the contracts of its members…****……*
>
> *……unfortunately for the Plaintiff,* ***the legislature has not made any provision giving legal sanction for a registered trade union to institute an action on behalf of its members in a Court of law.*** *It is to be noted however, that the legislature has, in*

the Industrial Disputes Act (Chapter 131), provided that a trade union could on behalf of a workman who is a member of that union, make an application in writing to a Labour Tribunal for relief (Section 31B). Thus, ***though the legislature is aware of the status and function of a trade union, it has to date, failed to make statutory provision for a registered Trade Union to represent its members in civil proceedings in a Court of Law."*** *(emphasis added)*

Thus, it is abundantly clear that a Trade Union is not legally empowered to represent its member as a Plaintiff or a Defendant in civil proceedings in a Court of law.

Mr. Romesh de Silva, P.C. further relied on the case of Public Services United Nurses Union Vs. Jayawickrama & Others (1988) 1 S.L.R. 229 and argued forcefully that when the Trade Union and its Secretary instituted proceedings under Article 126, the Supreme Court without striking out the Petitioner union as having no locus standi, allowed the application with costs in a sum of Rs. 5000/= which should be paid by the State to the **Petitioners.** (emphasis added). It is on this basis, Counsel submitted that the Court recognized the right of the trade union to institute proceedings under Article 126.

I do not find myself able to accede to the argument advanced by Mr. Romesh de Silva for two reasons. Firstly, no objection was taken by the Respondents in the said application that the Public Services United Nurses Union had no locus standi to institute an application under Article 126 of the Constitution and the Court did not have the benefit of any argument of the learned Counsel on that issue. Secondly, in any event, the Second Petitioner was a Nurse and the Secretary of the First Petitioner Union, whose fundamental right of equality guaranteed under Article 12 had been violated. Furthermore, the Second Petitioner is a "Person" within the meaning of Article 126(2) of the Constitution. Thus, the case could have proceeded even if the first Petitioner, namely Public Services United Nurses Union was struck down.

Mr. Romesh de Silva also referred to the case of *Environmental Foundation Ltd*. Vs. *Urban Development Authority* (2009) 1 S.L.R. 123 and argued that the Court took a liberal approach whilst arriving at a conclusion that the word "person" in Article 12 includes a juristic person.

In the Case of Environmental Foundation Ltd. (supra) when an objection was raised as to the maintainability of the application on the ground that the Petitioner was an incorporated company, S.N.Silva, C.J. held that the word "persons" as appearing in Article 12(1) should not be restricted to "natural" persons but extended to incorporated bodies having legal personality. His Lordship further noted that in several cases this Court has given relief to **incorporated bodies** that have a legal personality recognized by law. (emphasis added) (*Janatha Finance and Investments Ltd.* Vs. *Liyanage and Others*, 1983 – 2 S.L.R. 111; *Smithkline Beecham Biological S.A. and Smithkline Beecham Mackwoods Ltd.* Vs. *State Pharmaceutical Corporation of Sri Lanka and Others* 1997 – 3 S.L.R. 20; *Leader Publications (Private) Ltd.* Vs. *Ariya Rubasinghe and Others* 2000- 1 S.L.R. 265) In any event, *Environmental Foundation Ltd.* (supra) case was filed in the public interest in order to preserve, safeguard and protect public interest. Hence, incorporated bodies recognized by law were permitted to file action in terms of Article 126(2) of the Constitution.

On 29th March 2016, a Motion was filed by the Attorney-at-Law for the Petitioner seeking permission to amend the caption to the Petition by adding Mr. J.M.D. Wijeweera who is the Secretary of the Petitioner Union as the Second Petitioner, out of an abundance of caution. When the Motion was supported on 01st April 2014, learned Deputy Solicitor General and Mr. Mustapha, P.C. objected to the said Motion and submitted that order on the Preliminary Objection that has been raised by them is reserved and in any event, the patent lack of jurisdiction to maintain the application cannot be cured at this stage. In these circumstances, the request of the Petitioner contained in the Motion dated 29th March 2016 was refused by Court.

Thereafter, on 7th April 2016, Attorney-at-Law for the Petitioner filed another Motion citing an Order made by this Court in S.C.(L.A.) Appeal No. 74/16 on 1st April 2016, stating that the Order is relevant to the present application where an objection was taken that the Petitioner failed to comply with Section 8 of the Supreme Court Rules, in that the Petitioner failed to serve notice on the Respondents, the Court made the following Order :-

> *In consideration of his preliminary objection, we have considered that this objection is of technical nature. In this regard I cite the judgment of AbrahamCJ. In Velupille Vs.*

Chairman Urban Council Jaffna, 39 N.L.R. 434. His Lordship remarks thus. "This is a court of Law. This is not an academy of law." In W.A. Mendis and Company vs. Excise Department in 1991 – 1 SLR 351 citing Velupille Vs. the Chairman of Urban Council of Jaffna remarks thus; "Supreme Court is a Court of Justice which would not be trampled by technical objections and that it is not an academy of law." In Alghan and others vs. Udeshi and others, His Lordship G.P.S. De Silva CJ. Observes thus: "that it is to remember that court should not be petted by technical matters and only on matters of principle." In the legal literature, I hold that preliminary objection raised by respondent is a technical objection and we are of the view that this Court should not be fettered with technical objections. We are of the view that appeal must be heard on merits. We therefore overrule the preliminary objection. Petitioner's Counsel is allowed to support his application."

However, it may be noted that in the case of *Tissa Attanayake Vs. Commissioner General of Elections & Others* (S.C. Spl.L.A. 55/2011 – S.C. Minutes of 4.7.11) where an objection was taken by the Senior State Counsel that the Application for Special Leave to Appeal should be dismissed as the Petitioner had not complied with Rule 8(3) and Rule 40 of the Supreme Court Rules, 1990. Dr. Shirani A. Bandaranayake, C.J. (with P.A. Ratnayake, P.C. J. and Priyasath Dep, P.C., J. agreeing) observed as follows:

"*The Supreme Court Procedure laid down by way of Supreme Court Rules made under and in terms of the provisions of the Constitution cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court. When, there are mandatary Rules that should be followed and when there are preliminary objections raised on non-compliance of such Rules, those objections cannot be taken* ***as mere technical objections.*** *(*emphasis added).

In a subsequent case of *Batugahage Don Udaya Shantha* Vs. *Jeevan Kumaratunga* (S.C. (Spl.) L.A. 4/2010 – S.C.Munutes of 29.3.2012) when an objection was taken for non-compliance with Rule 8(3) Dr. Shirani A. Bandaranayake, C.J. (with K. Sripavan, J. & Priyasath Dep, P.C., J. agreeing) upheld the said objection and notes as follows:-

"If a party neglects or ignores to comply with such Rules, if the other party takes an objection on that basis, such an objection ***cannot be ignored on the basis of***

categorizing it as a technical objection *as the fault lies with the party who had been reckless and negligent so as to ignore the written procedures laid down under the Supreme Court Rules. (emphasis added)*

However, in the case of *Sumith Ediriwickrama & another* Vs. *Richard Ratnasiri & others* (S.C. Appeal No. 85/2004 – S.C. Minutes of 18.12.2012) an objection was raised by the Counsel for the Respondents nearly ten years after the Special Leave to Appeal Application was filed and after leave was granted by Court, on the basis that the Appellants failed to comply with Rule 8(3) of the Supreme Court Rules, 1990. Learned Solicitor General argued that after leave was granted, the Appellants and the Respondents made several attempts to settle the matter and in fact, the Appellants had released a sum of money to the Respondents that was available, as an ex-gratia payment, the Respondents were precluded in law from raising the said Preliminary Objection at a late stage. The Court speaking through Marsoof, P.C. J. (with Sripavan J. & Imam J. agreeing) agreed with the submission of the learned Solicitor General and overruled the objection. It must therefore be emphasized that much depends on the facts and circumstances of each case where the Court makes order with regard to non-compliance with the Supreme Court Rules. However, if a party decides to act recklessly and an objection is taken without delay the Court has held that such a party would have to face the consequences which would follow in terms of the Supreme Court Rules or the relevant legal provisions of the law.

The case cited by the Petitioner is in respect of a Leave to Appeal Application where the Petitioner failed to follow the procedure laid down in the Supreme Court Rules. However, the Preliminary Objection raised by the Respondents in this application affects the jurisdiction of the Court in entertaining the application. Thus, there is a fundamental difference between the two cases. This Court cannot simply disregard the Preliminary Objection which goes to the root of its jurisdiction.

The fundamental rights, which are declared and recognized and set out in detail in Chapter III of the Constitution, have been, by Article 4(d) directed to be respected, secured and advanced by all organs of the Government and shall not be restricted save in the manner and **to the extent provided in the Constitution.** (emphasis added). Provision is made by Article 126(2) for a person who alleges that a fundamental right of his has been infringed or

is about to be infringed, to present a petition to the Supreme Court for relief or redress within a period of one month. It specifies the manner in regard to the taking of steps by an aggrieved party. While interpreting the provisions of the Constitution, it has to be remembered that although a Constitution, being essentially in the nature of a statute, the general rules governing the construction of statues apply to the construction of the Constitution also, and that the fundamental rule of interpretation of the same, namely, that the Court will have to ascertain the intention gathered from the words of the Constitution, yet, by reason of a Constitution as being the Supreme and fundamental law, some special rules apply for the interpretation of a Constitution.

In this regard, I respectfully adopt the words of a learned judge who stated thus :-

> *"Although we are to interpret the words of the Constitution on the same principle of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting – to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be" – (1908) 6 Com. L.R. 469 per Higgin J. "*

Bindra on "*Interpretation of Statutes" 10th Edition at page 1308 states thus :*

> *"A cardinal rule in dealing with constitution, however, is that they should receive a consistent and uniform interpretation, so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstance may have so changed as to make a different rule seem desirable. Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein, recorded is the same inflexible law until changed by their own deliberative action, and therefore, the courts should never allow a change in public sentiment to influence them in giving a construction to a written Constitution not warranted by the intention of its founder. If the words of the article are clear, notwithstanding any relevant convention, effect will, no doubt, be given to the words, while interpreting a Constitution, which establishes a parliamentary system of government with a Cabinet, one may well keep in mind the conventions prevalent at the time the Constitution was framed"*

Thus, it is the duty of the Court to determine in what particular meaning and particular shade of meaning the word or expression was used by the Constitution makers. In the determination of S.C. (S.D.) No. 19/2016, the Court observed that in Chapter III dealing with fundamental rights a "citizen" has been guaranteed the fundamental rights as set out in Articles 12(2) and 14(1) whereas a "person" has been guaranteed the fundamental rights enshrined in Articles 10,11,12(1) and 13. This clearly shows that Parliament has used different words as disclosed by the phraseology which is intended to fulfil the aspirations of the people. For example, in Articles 14A and 121(1), a different interpretation was given to the word "Citizen" which includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens. In Article 158, the definition given to the word "person" includes a body of persons or any authority. However, no such extended meaning has been given to the word "person" in Article 126(2). Where the scheme of the Constitution clearly shows that certain words or phrases were deliberately omitted by the legislature for a particular purpose or motive, it is not open to the Court to add those words either by conforming to the supposed intention of the legislature or because the insertion suits the ideology of the Judges deciding the case.

In S.C. (S.D.) No. 19/2016(supra) the Court made the following observations:

> "*The learned Counsel for the Petitioners claimed that the Petitioners are Trade Unions registered under the Trade Unions Ordinance and as such, they can sue and be sued in view of Section 30(1) of the Trade Unions Ordinance. Bindra (Interpretation of Statutes, 9th Edition- page 1168) states that , "While the Constitution is the direct mandate of the people themselves, the statute is an expression of the will of the legislature only, though the legislature is also the representative of the people. A Constitution is but a higher form of statutory law…." We are of the view, that Section 30(1) gives the Petitioners the right to sue and be sued whereas Article 121(1) of the Constitution which is the Supreme Law of Sri Lanka lays out a different constitutional requirement which has to be mandatorily complied with. " If the language of a statute is plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results :*

Vacher & Sons Ltd. V. London Society of Compositors (1913) All E.R. at121 – Per Lord Atkinson".

It would thus be seen that Article 126(2) makes no provision for a broad definition of the word "person" to include an unincorporated body of persons or trade unions. However, the Court has extended the meaning of "person" to incorporated bodies, by judicial decisions. I am unable to extend the meaning of "person" to unincorporated bodies like a trade union, as that was never the intention of the legislature. Explicit words are necessary to achieve that purpose. The primary rule of construction is to intend the legislature to have meant what they have actually expressed. The object of all interpretation, is to discover the intention of the legislature. On a plain reading of Article 126(2) it is indeed clear that no other rule of interpretation can be applied so as to modify the plain meaning of the word "person". To do so, in my view would be to amend the said Article and thereby participate in a naked usurpation of the legislative function under the thin guise of interpretation.

The traditional rule in regard to **locus standi** is that only a person who has suffered or likely to suffer legal injury has the right to seek judicial redress. I have had the privilege of examining as to how the rule of **locus standi** has been broadened by the Indian Courts. Article 32 of the Indian Constitution guarantees the right to move the Supreme Court **by appropriate proceedings** for the enforcement of the rights. However, under Article 17 of our Constitution read with Article 126(2) only the person whose fundamental right has been violated may invoke the jurisdiction of this Court either by himself or by an Attorney-at-Law on his behalf. The Indian Constitution did not state that the aggrieved person himself shall have the right to move Court, whereas our Constitution mandates that the right to move the Supreme Court is restricted to the person whose own rights have been infringed or about to be infringed. Further, Article 32 of the Indian Constitution permits for the enforcement of fundamental rights against legislative action as well. The provision of Acts of Parliament and the Ordinances of State Assemblies may be struck down as violating the fundamental rights in proceedings under Article 32. The fact that the Indian Supreme Court widened the rule of locus standi in several of its judgments does not mean our Courts have to give a broader definition to the words "person aggrieved". I am firmly of the view that an interpretation to Article 126(2) should not be guided by the interpretation given to Article 32 of the Indian

Constitution as there is a fundamental difference in the conceptual structure of the said two Articles. (emphasis added)

In *Fernandes* Vs. *Liyanage* (FRD (2) 409 at 418) Sharvananda J. noted that "one cannot claim standing in Court to vindicate the constitutional rights to some third party, however much one may be interested in that party." In *Visualingam and Others* Vs. *Liyanage and others* (1983) 2 S.L.R. 311 at 344, Soza J. reiterated the views of Sharvananda, J. in the following manner :-

> *"Sharvananda J proceeds (in case No. 116/82) to point out that in accordance with the provisions of Articles 17 and 126 of our Constitution the Court will grant relief only if the infringement is by executive or administrative action and the complainant is directly affected by the infringement. A complainant cannot seek relief because someone else in whom he is interested is affected by the act complained ".*

The case of *Somawathie* Vs. *Weerasinghe* (1990) 2 S.L.R. 121 is also relevant to be considered. When an application was made by the Petitioner on behalf of her husband who was in detention, Amerasinghe, J. held that the Petitioner had no locus standi to make an application on behalf of her husband as Article 126(2) is precise and unambiguous and as such the words themselves declare the intention of Parliament.

The rulings of the Supreme Court is not scriptural sanction but is of ratio-wise luminosity within the edifice of facts where the judicial lamp burns the legal flame. Considering the background and the circumstances in which Article 126(2) was enacted, it is not possible for me to accept the contention suggested by Mr. Romesh de Silva, P.C. on behalf of the Petitioner.

The Court has in certain circumstances allowed a public spirited individual or a social action group to bring an action for vindication of the fundamental right of a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position unable to approach a Court of Law for justice. It is a fascinating exercise for the Court to deal with public interest litigation because it is a new jurisprudence which the Court must be careful to see that a member of the public who approaches the Court in cases of

this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. However, the instant application filed by the Ceylon Electricity Board Accountants Association is not a public interest litigation nor has it been filed on behalf of a group of persons who are in a disadvantaged position by reason of poverty or some disability.

In view of the foregoing reasons, I hold that in the absence of a specific provision permitting a Trade Union to institute action on behalf of its members, the Petitioner Union cannot have and maintain this application on behalf of its members in terms of Article 17 read with Article 126(2) of the Constitution. The preliminary objection raised by the learned Deputy Solicitor General and the learned President's Counsel for the 13th respondent is entitled to succeed. The application is therefore dismissed in all the circumstances without costs.

This order does not however preclude a person who has in fact suffered an injury by reason of actual continuous violation of his fundamental rights, bringing an action against the Respondents for judicial remedy. The Court is mindful that it would be disastrous for the rule of law, if such a person is prevented from bringing action, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it.

CHIEF JUSTICE.

P.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 Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Warushamannadi Saman de Silva

2. Yamuna Subhashini Dissanayake

Both of : No. 188/7/2, 6th Avenue Apartment, Havelock Road, Thimbirigasyaya, Colombo 05.

For and on behalf of :
Chathuni Malintha de Silva

PETITIONERS

SC FR. 19 / 2015

Vs

1. S.S.K. Aviruppola,
   Principal, Visakha Vidyalaya,
   Colombo 05.

2. Upali Marasinghe, Secretary,
   Ministry of Education, Isurupaya,
   Battaramulla.

2(a) W.M.Bandusena, Secretary,
Ministry of Education, Isurupaya,
Battaramulla.

3. Ranjith Chandrasekera, Director –
National Schools, Ministry of Education,
Isurupaya, Battaramulla.

3(a)I.A.P.N. Illeperuma, Director –
National Schools, Ministry of Education,
Isurupaya, Battaramulla.

4.U.M. Prasanna Upasantha, Principal,
Mahanama College, Colombo 03.

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

RESPONDENTS

BEFORE : S. E. Wanasundera PC. J.
B.P. Aluvihare PC. J. &
Upaly Abeyrathne J.

COUNSEL : Uditha Egalahewa PC with Ranga Dayananda for the Petitioners
Sanjay Rajaratnam PC , ASG for the Respondents

ARGUED ON : 21. 01. 2016.

WRITTEN SUBMISSIONS
BY THE PETITIONERS : 16. 02. 2016.
BY THE RESPONDENTS : 09. 02. 2016.

DECIDED ON : 11 .07.2016.

S. Eva Wanasundera PC. J

This Application was filed by the Petitioners as parents on behalf of their daughter namely Chathuni Malintha de Silva on the 5th of February, 2015. It is with regard

to the denial of admission of the said child to Grade 1 of Visakha Vidyalaya in the year 2015, by the 1st Respondent.

The Petitioners alleged that their fundamental rights guaranteed by Article 12(1) of the Constitution are violated by the 1st to 4th Respondents or any one or more of them by such denial.

The 1st Respondent is the Principal of Visakha Vidyalaya and at the time of filing this case the 4th Respondent was the head of the Appeals Board. The 2nd and the 3rd Respondents were the other members of the Appeals Board who sat with the 4th Respondent to decide the Appeal filed by the Petitioners.

Leave to proceed was granted on the 11th March, 2015 by this Court under Article 12(1) of the Constitution after hearing the Counsel for the Petitioners and the Additional Solicitor General who defended the 1st to the 4th Respondents and appeared for the 5th Respondent, the Hon. Attorney General as well.

The admitted facts are:-

1. That the Petitioners sought admission of their daughter to Grade 1 of Visakha Vidyalaya for the year 2015, under the category of Chief Occupant in terms of the Circular No. 23/2013.
2. At the first interview held by the school, the Petitioners' daughter was awarded 54 marks.
3. The Board of Appeal increased the marks to 62.
4. The cut off mark under the Chief Occupant category for admission for Grade 1 was 65.

I observe that the Petitioners had been residing at No. 556/1/c, Galle Road, Colombo 3 from June 2007 to September 2010 .The said premises were acquired by the State for the Marine Drive in 2010 and then the Petitioners had moved to No. 176/22, Thimbirigasyaya Road, Colombo 5, in the month of October, 2010. They lived there until August, 2012. Then they moved to No. 188/7/2, 6th Avenue Apartments, Havelock Road, Colombo 5 in August, 2012 having obtained the said place on a lease. They are living in this apartment up to date.
All these premises come under the Grama Niladari area of Thimbirigasyaya.

The Petitioners submitted an application for admission of their daughter to Visakha Vidyalaya. They were not called for any interview even though others had been called. When inquired from the school, the security personnel had advised them to make an entry in the log book maintained at the school. So they did and consequent upon that log entry, they were asked to come for an interview at 1.30 p.m. on the 8th September, 2014 by way of a telephone call which they received on the same day. It was a Poya day, a holiday.They were interviewed along with the daughter under Ref. No. CO/142.

I find no explanation given by the school authorities for not having called the Petitioners in the normal course of granting an interview , in any affidavit filed by any of the Respondents in this case. If the Petitioners had not been alert, perhaps they would never have got a chance to face an interview, which is an entitlement of an applicant living in the feeder area of this school for admission.

The Circular No.23/2013 is the most important document since it is according to the provisions therein that the selection criteria is decided by the School. It is marked and produced as P2. Clause 6.1 deals with the applications of children living in close proximity to the school. The Petitioners are qualified to apply to Visakha Vidyalaya under Clause 3.5 of the aforementioned circular as they are within the feeder area of that school.

The 1st Respondent's affidavit dated 8th May, 2015 discloses in paragraph 10(d) that the Petitioners were granted marks under ' Close proximity to school from the Residence'. Para 10(d) of the said Affidavit reads: " A total of 45 were allotted to the Petitioner from 50 marks to be given on the proximity to school. Five marks were deducted from the aforesaid 50 marks for the proximity of the Petitioners to Visakha Vidyalaya. " This sentence sounds wrong in its context.

Anyway it was submitted by the Additional Solicitor General in his submissions that there is another school between the Residence and the Visakha Vidyalaya by the name Vidyathilaka Vidyalaya and it is due to that reason that the 5 marks were deducted from 50 marks. Yet there is no evidence before this Court that such a school exists. The Petitioners have submitted that such a school is not shown in the maps prepared by the Surveyor General's Department. The fact that it is not mentioned in the 1st Respondent's affidavit

before this court and the fact that such evidence is not produced by any Respondent before this Court by any other means under oath or affirmation, this Court cannot see and recognize the existence of such a school. There should be evidence before Court with regard to any fact submitted by any party, for this Court to act on the same when considering a Fundamental Rights Application. I conclude that in the circumstances the Petitioners marks were reduced. It has been done in an arbitrary manner by the 1st Respondent and the Appeals Board has failed to recognize the same and not given due consideration thereto.

The marks given by the school on the electoral registers being only 7, it was argued by the Petitioner that it should be 14. I am of the opinion that the enhanced mark granted by the Appeals Board includes more than 7 marks as contested and therefore the Petitioners can be satisfied taking that mark to include the 7 more marks they claim to be entitled to under 'electoral register' mentioned in Clause 6.1.I.

Under Clause 6.1.II. , registered deeds of lease and unregistered deeds of lease are recognized to prove the residence. As agreed and confirmed by the affidavit of the 1st Respondent, in paragraph 10(b) , the registered lease has been given 2 marks. The unregistered lease covering the period from 1.09.2012 to 31.08.2013 was not given any marks even though the 1st Respondent has admitted that the Petitioners had moved to the present address in August, 2012. I observe that the Petitioners are entitled to 50% of the maximum marks of 2 according to Clause 6.1.II., i.e. one mark. I hold that the Petitioners are legally entitled to that one mark. The learned Additional Solicitor General argued that if marks are given , literally according to Clause 6.1.II , it would lead to absurdity which, when analysed. I fail to agree with him.

I feel that the interpretation of Clause 6.1 which includes items I,II, and III should be considered very carefully, because the decision to be made at the end of the granting of marks is crucial to the Petitioners who come for the interview under the category of " Residents in close proximity to the school ".

This Clause uses the phrase, " the year of application ". The calculation of the period of lease, the year of getting title by way of deeds, the electoral lists and other documents in proof of residence have to be calculated from the year of

application backwards. What is the " year of application "? When a child has to start schooling in the year 2016, to determine ' the year of application for the purpose of admission ' should be reckoned in a meaningful way. Does the school want to know where the child is living in January, 2016 or where the child was living in January, 2015? If discovering evidence of residence 5 years before 2015 is done, then the full year of 2015 residence will be a void which is not considered. The year of application therefore should mean the year of proposed admission. The documents should prove a continuation of residence upto the date of admission. Otherwise, the documents could prove only 5 years before the application was written down. The writing of the application to get admission would be the previous year. That date is not important. The year of "application for admission" is the year which is important. It is meaningful when documents of the previous year could be shown that the child has been there upto the date of the writing of the application and at the time the interview is held.

In the case of Dasanayakage Gayani Geethika and Two Others Vs DMD Dissanayake and Four Others (SCFR 35/2011 – SC Minutes dated 12th July, 2011) it was held by the Supreme Court that " It is clear that the interview panel should always have to look at the establishment of evidence to prove residence and consider the totality of what has been put forward as evidence by a parent to establish evidence rather than only carrying out an exercise of ticking the relevant box in relation to the specified documents mentioned in the circular alone ".

The Petitioners were not given any marks for documents produced under item III of Clause 6.1. Considering the number of documents produced and their nature to show that the Petitioners are residing at the Apartment they came into occupation in August, 2012, I am of the opinion that, if not the maximum marks, some marks could have been granted since those documents prove that the Petitioners are at present residing at the given address in the application for admission to the school. The maximum number of marks which can be given is five. I am of the opinion that the reasons for not giving the due marks are not explained in evidence before court and reasons given for the same, in the oral submissions made before court are frivolous. Therefore I hold that the Petitioners are entitled to get full marks.

The 1st Respondent has in her affidavit complained that the Appeal Board had incorrectly given one mark in the Appeal. I am of the opinion that she has no right to criticize the decision of the Appeal Board since the said Board has the legal right to scrutinize her decisions and grant relief to the Appellants who come before the Board at its discretion.

In addition to the number of marks that the Appeal Board has granted to the Petitioners, I am of the opinion that the Petitioners are entitled to 5 more marks on the proximity rule under Clause 6.1. IV. and another 5 marks under 'other documents relating to residence'. I believe another 3 marks for the registered and unregistered deeds of lease must have got included when the Appeals Board increased the marks to 62. Then the total number of enhanced marks by this Court are ten more, which brings the total number of marks to 72.

I hold that the Petitioners daughter is entitled to be admitted to Visakha Vidyalaya under the Chief Occupant Category. The denial of the same by the 1st Respondent was arbitrary, capricious, illegal and unlawful and thus was in violation of their fundamental rights guaranteed under Article 12(1) of the Constitution. This Court further grants the relief as prayed for in the prayer (c) to the Petition.

This Court directs the 1st, 2(a) , and 3(a) Respondents to admit the daughter of the Petitioners, namely Chathuni Malintha de Silva to Grade 2 of Visakha Vidyalaya for the year 2016 forthwith since she has already missed one year in school in Grade 1 in the year 2015.

Judge of the Supreme Court

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

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

Dr. K. Kobindarajah
130. Kannaki Amman Kovil Lake Road,
Poompuhar, Batticaloa

Petitioner

SC FR Application No. 24/2016 Vs.

1. Eastern University, Sri Lanka
   Vantharumoolai,
   Chenklady

2. Prof. Uma Coomaraswamy
   Competent Authority
   Council Chairman,
   Eastern University, Sri Lanka
   Vantharumoolai,
   Chenkalady

3. Mr. V. Kanagasingam,
   Rector, Trincomalee Campus
   Council Member,

4. Dr. K.T. Sundaresan
   Dean, Faculty of Health –Care Sciences
   Council Member,

5. Dr. K. Rajendram
   Dean, Faculty of Arts & Culture
   Council Member,

6. Mr. R. Uthayakumar,
   Dean, Faculty of Commerce and Management
   Council Member,

7. Dr. F.C. Ragel
   Dean, Faculty of Science
   Council Member,

8. Dr. P. Sivarajah
   Dean, Faculty of Agriculture
   Council Member,
9. Mr. T. Baskar
   Dean, Faculty of Communication & Business Studies,

Trincomalee Campus,
Council Member,

10. Dr. K.E. Karunakaran,
    Senate Nominee,
    Council Member,

11. Mr. P. Sachithananthan,
    Senate Nominee,
    Council Member,

12. Mr. A. Gnanathasan,
    UGC Appointed Council Member,

13. Rev. Fr. Dr. Paul Robinson,
    UGC Appointed Council Member,

14. Mr. P. Kannan,
    UGC Appointed Council Member,

15. Prof. R. Sivakanesan,
    UGC Appointed Council Member,

16. Dr. H.R. Thabavita,
    UGC Appointed Council Member,

17. Mrs. P.S.M. Charles,
    UGC Appointed Council Member,

18. Dr. M.S.M. Ibralebbe,
    UGC Appointed Council Member,

19. Dr. M. Thamilvannan,
    UGC Appointed Council Member,

20. Mr. S.M. Hussain,
    UGC Appointed Council Member,

21. Mr. P.T. Abdul Hassan,
    UGC Appointed Council Member,

22. Dr. S. Maunaguru,
    UGC Appointed Council Member,
    The 3rd to the 22nd Respondents abovenamed all of the Eastern University, Sri Lanka, Vantharumoolai, Chenkalady

23. Mr. A. Paheerathan,
    Acting Registrar/Secretary to the Governing

Council, Eastern University, Sri Lanka,
Vantharumoolai,
Chenkalady

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

25. Prof. Mohan de Silva,
Chairman,
University Grants Commission
No. 20, Ward Place,
Colombo 7.

26. Prof. P.S.M. Gunaratne
Member,
University Grants Commission
No. 20, Ward Place,
Colombo 7.

27. Prof Malik Ranasinghe
Member,
University Grants Commission
No. 20, Ward Place,
Colombo 7.

28. Dr. Wickrama Weerasooriya
Member,
University Grants Commission
No. 20, Ward Place,
Colombo 7.

29. Prof Hemantha Senanayake
Member,
University Grants Commission
No. 20, Ward Place,
Colombo 7.

30. Dr. Ruvaiz Haniffa
Member,
University Grants Commission
No. 20, Ward Place,
Colombo 7.

31. Prof. Kumarvadivel
Member,
University Grants Commission
No. 20, Ward Place,
Colombo 7.

32. Dr. Priyantha Premakumara
    Secretary to the
    University Grants Commission
    No. 20, Ward Place,
    Colombo 7.

33. Hon. Lakshman Kiriella
    Minister of University Education & Highways
    Ministry of University Education & Highways
    No. 18, Ward Place,
    Colombo 07.

34. Mr. D.C. Dissanayake
    Secretary to the Ministry of University Education & Highways,
    Ministry of University Education & Highways,
    No. 18, Ward Place,
    Colombo 7.

35. Dr.Thangamuthu Jeyasingam
    Department of Botany,
    Eastern University
    Vantharumoolai
    Chenkalady

36. Dr. Mylvagaganam Pagthinathan,
    Department of Animal Science,
    Eastern University
    Vantharumoolai
    Chenkalady

37. Dr. Jeevaretnam Kennedy
    Department of Languages
    Eastern University
    Vantharumoolai
    Chenkalady

38. Dr. Ponniah Sivarajah
    Dean of Faculty of Agriculture
    Eastern University
    Vantharumoolai
    Chenkalady

39. Dr. Theivanayagam Thiruchelvam
    Faculty of Agriculture
    Eastern University
    Vantharumoolai
    Chenkalady

40. Dr. (Mrs.) Chandrakantha Mahendranathan
    Department of Botany,

Eastern University,
Vantharumoolai,
Chenkalady

41. Professor S Ratnajeevan Hoole
86, Chemmani Road,
Nallur,
Jaffna

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

Respondents

BEFORE **:** K**.** Sripavan, C.J.
P. Jayawardena, P.C., J.
A. Gooneratne, J.

COUNSEL Faiz Musthapha, PC. With Uditha Egalahewa, PC. and Dhamitha Karunarathne for the Petitioner.

Milinda Gunathilake, Deputy Solicitor General for the 1st – 34th and 42nd Respondents.

M.A. Sumanthiran for the 35th Respondent.

ARGUED ON : 03.03.2016

WRITTEN SUBMISSIONS FILED ON **:** 04.04**.** 2016 by the Petitioner

04.04.2016 by 1st to 3rd and 42nd Respondents
03.03.2016 by 1st – 34th and 42nd Respondents.
31.03.2016 by 35th Respondent.

DECIDED ON **:** **21.06.2016**

K. SRIPAVAN, C.J.,

The Petitioner in this application, seeks directions, inter alia,

(a) against the 1st to 34th and 42nd Respondents to conduct a fresh election to the post of Vice Chancellor, having included the name of the Petitioner in the Ballot Paper in terms of the University Grants Commission Circulars No. 880 dated 15.08.2006, University Grants Commission Establishments Circular No. 15/2006 dated 11.12.2006 read with Section 34 of the Universities Act; and

(b) a declaration that the appointment of the 35th Respondent to the post of Vice Chancellor of the 1st Respondent University is null and void and in violation of Article 12(1), 12(2) and 14(1)(g) of the Constitution.

When the application was taken up for support, the Learned Deputy Solicitor General appearing for the 1st to 34th and 42nd Respondents raised two preliminary objections to the maintainability of the Petition on the following basis :

i. The complaint of the Petitioner relating to the alleged infringement of his fundamental rights on 12.12.2015 as set out in paragraph 36 and the succeeding paragraphs of the Petition is time barred in terms of Article 126(2) of the Constitution.

ii. The relief claimed against His Excellency the President in terms of the prayers to the Petition (paragraphs (b) and (c) of the Petition) is in violation of Rule 44(1) of the Supreme Court Rules, in that the Petition does not set out a plain and concise statement of the facts relating to the manner in which His Excellency the President allegedly violated the rights of the Petitioner.

Mr. Sumanthiran, Counsel for the 35th Respondent associated with the Preliminary Objections raised by the Learned Deputy Solicitor General.

The Petitioner in paragraph 36 of the Petition claims that the election for the post of Vice Chancellor of the 1st Respondent University was held on 12.12.2015, contrary to the direction of this Court made in case No. S.C. F.R. 397/15 dated 10.12.2015 by the 2nd to 23rd

Respondents and the Petitioner was illegally prevented from contesting at the election as the Petitioner's name was excluded from the Ballot Paper. Thus, the Petitioner was aware that his name was excluded from the Ballot Paper at the said election held on 12.12.2015. In other words, the alleged infringement of the Petitioner took place on 12.12.2015. According to Article 126(2) of the Constitution, where a person alleges that his fundamental right has been infringed or is about to be infringed by executive or administrative action, he must apply to the Supreme Court within one month thereof.

The Supreme Court in *Gamaethige* Vs. *Siriwardena and Other* (1988) 1 S.L.R. 384 made it very clear that the fundamental rights jurisdiction of the Supreme Court under Article 126(1) is sole and exclusive and any time spent in making appeals does not prevent or delay the operation of the time limit of one month. In *Ramanathan* Vs. *G.A. Kandy* (1988) 2 C.A.L.R. 187, the Petitioner argued that the delay was due to an appeal made to Director for Human Rights. The Court followed the legal principle in the majority judgment in *Gamaethige* Vs. *Siriwardena and Others* and held that the application was out of time.

However, in N*amasivayam* Vs. *Gunawardena* (1989) 1 S.L.R. 394 Sharvananda C.J., overruling a Preliminary Objection that the Petitioner was out of time, stated that to make the remedy under Article 126 meaningful to the Petitioner, the one month period should be calculated from the time the Petitioner is under no restraint. Thus, the one month prescribed by Article 126(2) was made available to the Petitioner from the time he had free access to the Supreme Court. Therefore, where the Petitioner establishes that he became aware of an infringement, the very day the act complained of was committed, the period of one month would be computed only from the date on which the Petitioner did in fact become aware of such infringement and was in a position to take effective steps to invoke the jurisdiction of this Court, unless the Petitioner establishes that his free access to Supreme Court is restrained.

The Petitioner in this application was aware of the infringement on 12.12.2015. The jurisdiction of this Court was invoked on 29.01.2016. I therefore hold that the Petitioner cannot in this application seek to challenge the decision of the Council to exclude the Petitioner's name from the Ballot Paper and made known to the Petitioner on 12.12.2015

as the application is time barred. The Court cannot and will not grant the relief sought in paragraph (d) of the prayer to the Petition, without setting aside the election held on 12.12.2015. Thus, the Petitioner is not entitled to the relief sought in paragraph (d) of the prayer to the petition.

The next matter to be considered is whether the Petitioner could seek a declaration that the appointment of the 35th Respondent to the post of Vice Chancellor of the 1st Respondent University is null and void. The Petitioner in paragraph 41 of the Petition states thus :-

> "*The Petitioner states that the 35th Respondent was appointed on the results of the said illegal election/decision making process that had been communicated to the 24th Respondent University Grants Commission which the 24th Respondent had forwarded the results of the said illegal election/decision making process to His Excellency the President. His Excellency the President, acting upon the said purported results of the said illegal election/decision making process appointed the 35th Respondent Dr. Thangamuthu Jeyasingam to the post of Vice Chancellor of the 1st Respondent University, on or about 21.01.2016.*"

It must be noted that His Excellency the President exercises his discretion and appoints one person as the Vice Chancellor out of the names forwarded by the University Grants Commission. What happens if His Excellency the President refuses to appoint anyone out of the names sent by the University Grants Commission? Hence, the violation, if any takes place only when the appointment is made.

On the face of the averments contained in Paragraph 41 of the Petition, the appointment of the 35th Respondent was made on 21.01.2016 and the Petitioner filed this application on 29.01.2016 well within the one month time prescribed by Article 126(2) of the Constitution.

This Court as the protector and guarantor of the fundamental rights, cannot refuse to entertain such application seeking protection against infringement of such rights. Accordingly, the Petitioner is entitled to support his application for leave to proceed in so far as it relates to the appointment of the 35th Respondent to the post of Vice Chancellor of the

1st Respondent University and whether such appointment violates the fundamental rights guaranteed to the petitioner by Article 12(1), 12(2) and 14(1)(g) of the Constitution.

CHIEF JUSTICE.

P. JAYAWARDENA,P.C.,J.

I agree.

JUDGE OF THE SUPREME COURT

A.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 and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SCFR Application No:26/2009

Dodampe Gamage Asantha Aravinda,
No,466, Madawalamulla,
Galle.
(Presently detained at the Welikada Remand Prison)

Petitioner

Vs.

1. Atapattu (21899)
   Police Sergeant,
   Police Station,
   Pitabeddara.

2. Bandu Saman (64017)
   Police Constable,
   Police Station,
   Pitabeddara.

3. Jinadasa (24187)
   Police Sergeant,
   Police Station,

Pitabeddara.

4. Hemachandra (22331)
Police Sergeant,
Police Station,
Pitabeddara.

5. Edirisinghe (25156)
Police Sergeant,
Police Station,
Pitabeddara.

6. Karunarathne (858)
Police Sergeant,
Police Station,
Pitabeddara.

7. Gamini (58881)
Police Constable,
Police Station,
Pitabeddara.

8. Wajira (14705)
Police Constable,
Police Station,
Pitabeddara.

9. Jayawardane (62785)
Police Constable,
Police Station,
Pitabeddara.

10. Sugath (3089)
Police Constable,
Police Station,
Pitabeddara.

11. Officer in Charge,
Police Station,
Pitabeddara.

12. P.V. Chandrasiri,
Naththawila Road,
Tennahena,
Pitabeddara.

13. Deputy Inspector General of Police of Southern Range,
Office of the Deputy Inspector General
of Police of the Southern Range,
Galle.

14. Inspector General of Police,
Sri Lanka Police Head Quarters,
Colombo 01.

15. Honourable Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents

Before : Eva Wanasundera PC, J
Sisira J de Abrew J
K T Chitrasiri J

Counsel : Upul Kumarapperuma for the Petitioner

Rasika Dissanayake for the 1st to 10th Respondents
Yohan Abeywickrama SSC for the 13th, 14th and 15th Respondents

Argued on : 10.3.2016

Decided on : 2.8.2016

Sisira J De Abrew J.

The Petitioner, by this petition, inter alia, seeks a declaration to the effect that his fundamental rights guaranteed under Article 11,12(1),13(1) and 13(2) of the Constitution have been violated by the Respondents . This Court by its order dated 11.2.2009, granted leave to proceed for alleged violation of Article 11 and 12(1) of the Constitution. The Petitioner in his petition alleges the following facts.

When the petitioner on 28.2.2008 riding his motor cycle with his friend Thushara Chaminda on the pillion in Pitabeddara (name of a village) area, lorry driven by the 12th Respondent knocked his motor cycle and as a result of this accident both fell on the road with the motor cycle. The Petitioner however states that the 12th Respondent deliberately did the said act due to an argument that took place little prior to this incident between the two of them. After the said accident the 12th Respondent fled the scene. Thushara Chaminda sustained serious injuries due to the accident. Thereafter Officer-in-Charge of Pitabeddara Police Station late Mr.Karunasena with the 1st to the 9th Respondents and 12th Respondent arrived at the scene of incident. Thereafter the said officers started assaulting the Petitioner and his friend without any reason. Whilst the Petitioner was being assaulted he pleaded for some water then the 12th Respondent opened the mouth of the Petitioner and poured some liquid into his mouth. The Petitioner having realized

that this liquid was acid threw it away. At this stage the 12th Respondent threw the balance portion of the liquid in the cup to the Petitioner's face. The Petitioner sustained acid burns on his face and the left eye. The petitioner and his friend Thushara Chaminda were later taken to the police Station. The Officer-in- Charge (OIC) of Pitabeddara Police Station late Mr.Karunasena and several other police officers assaulted the Petitioner and Thushara Chaminda at the Police Station. Later they were locked up in the police cell. At the police station, the police officers and the 12th Respondent started consuming liquor and the OIC opened police cell and asked the 12th Respondent to assault the Petitioner and Thushara Chaminda. Thereupon 12th Respondent threw liquor to the Petitioner's face. The Petitioner's father and the brother of Thushara Chaminda on 29.2.2008 visited the Police Station Pitabeddara, but they were not permitted to speak to the Petitioner and Thushara Chaminda.

On 1.3.2008 around 8.00p.m the Petitioner and Thushara Chaminda were taken to Morawaka hospital by the police and the Medical Officer who examined them transferred them to the general Hospital Matara. The Petitioner states that due to the acid burns his left eye is permanently blind. This is the story narrated by the Petitioner in his petition.

The 1st and the 10th Respondents have filed a joint statement of objections. They have annexed investigation notes to the statement of objections. Their story is somewhat different from that of the Petitioner. They state the following facts in their statement of objections.

On 29.2.2008 (not on 28.2.2008) around 17.25 hours, the OIC Pitabeddara late Mr.Karunasena received an information that two people on a motor cycle after shooting the 12th Respondent fleeing from the scene. On receiving this information,

the OIC Pitabeddara late Mr. Karunasena and 1st to 10th Respondents rushed to the scene. According to the investigation notes of the OIC Pitabeddara, he had arrived at the scene around 17.35 hours on 29.2.2008 and had found an empty T 56 cartridge and a motor cycle. He, with the assistance of the police officers and the villagers, searched the areas and around 22.30 hours villagers shouted saying that the suspect was coming to the road. At this stage somebody in the crowd threw some liquid to the said person (the person who was coming to the road) and then the OIC Pitabeddara late Mr.Karunasena arrested the said person. According to the National Identity Card found in his trouser pocket, this person is the petitioner in this case. The OIC Pitabeddara late Mr.Karunasena found a live hand grenade in his trouser pocket. The other person who was later identified as Thushara Chaminda was arrested in a nearby jungle when he was aiming a gun at late Mr. Karunasena. Late Mr. Karunasena took the said gun into his custody and on searching the suspect he found a live hand grenade and three live T56 cartridges in his possession. The petitioner, in his counter objections, denied the said facts.

The 12th Respondent, in his affidavit filed in this court, has stated that on 29.2.2008 a motor cycle overtook his lorry; that the pillion rider who is the petitioner in this case opened fire at his lorry; that the motor cycle collided with his lorry; that he stopped his lorry; that in fear he fled the scene and went into hiding in a nearby tea estate; and that later came to the scene of offence after the police arrived at the scene.

Learned Counsel for the 1st to the 10th Respondents submitted that the petition of the petitioner should be dismissed as it had not been filed within one month of the alleged incident. Learned Counsel for the petitioner submitted that within one month of the incident the petitioner's father had complained to the

Human Rights Commission (HRC). P8 reveals that the petitioner's father had made an oral complaint to the Matara office of the HRC on 28.3.2008. It appears that his complaint was not in the approved form although the approved form was handed over to him. However the Document marked P8 reveals that the petitioner's father had made a complaint to the HRC. In this regard I would like to consider Section 13(1) of the HRC Act No.21 of 1996 which reads as follows.

"Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month from the alleged infringement imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such compliant is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."

P8A reveals the Petitioner's written complaint dated 8.4.2009 was receiving attention of the HRC. When I consider the documents marked P8 and P8A, I am of the opinion that the Petitioner's father had made a complaint to the HRC within one month of the alleged incident and it was receiving attention of the HRC. Learned counsel for the 1st to the 10th Respondents submitted that the Petitioner's father cannot be considered as an aggrieved person. I now advert to this contention. The Petitioner received acid burns on his face and the left eye and was in hospital. On two B reports filed by the Police against the petitioner, he was remanded. He was granted bail on 21.11.2008. Under these circumstances, the petitioner's father too can be considered as an aggrieved person. Since the complaint made by the petitioner's father is receiving attention of the HRC, it can be said that the inquiry regarding the complaint is pending in the HRC. When the above matters are

considered, I hold that the objection raised by learned counsel for the 1st to 10th Respondents has no merit and therefore overrule the same.

The main complaint of learned counsel for the Petitioner was that the Petitioner was not taken to the hospital immediately after he received acid burns (injuries). According to the MLR of the Petitioner, he had received acid burns on the left side of the face, left shoulder, right shoulder, left side of the chest and scrotum. Thus the fact that the petitioner had received acid burns has been proved. The OIC Pitabeddara late Mr. Karunasena at page 3 of 1R1 (investigation notes) had admitted the arrest of the Petitioner which took place around 22.30 hours on 29.2.2008; that soon after the arrest somebody threw some liquid to the Petitioner's body; and that he shouted in pain. The medical report confirms that the Petitioner had received acid burns. Thus the OIC Pitabeddara late Mr. Karunasena, in his notes, had admitted that the Petitioner received acid burns on 29.2.2008. PS 21899 Atapattu, in his notes – page 5 of 1R1, admits that the petitioner and Thushara Chaminda were detained at the Police Station Pitabeddara and he ,on the instructions of the OIC, took them around 18.45 hours on 1.3.2008 to Morawaka Hospital. Why did the OIC Pitabeddara late Mr. Karunasena keep the Petitioner in the custody of the Police from 22.30 hours on 29.2.2008 to 18.45 hours on 1.3.2008 knowing very well that the Petitioner had sustained acid burns? There is no answer to this question. If a person, after receiving acid burns, is not taken to the nearest hospital immediately and kept in the custody of Police, I hold the view that such person has been subjected to cruel, inhuman and degrading treatment by the Police. For the above reasons, I hold that the OIC Pitabeddara Police Station late Mr. Karunasena has violated the fundamental rights of the Petitioner guaranteed by Article 11 of the Constitution. Further when I consider the above matters, I hold that the Petitioner had not received equal protection of the law and

the OIC Pitabeddara late Mr. Karunasena has violated the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution.

I will now discuss steps taken by PS 21899 Atapattu. As I pointed out earlier when the Petitioner was arrested at 22.30 hours on 29.2.2008, he had already received acid burns (he received acid burns soon before the arrest). PS 21899 Atapattu (the 1st Respondent) at page 7 of 1R1(his investigation notes) admits that around 23.50 hours on 29.2.2008, he, at the place of arrest itself, on the instructions of the OIC Pitabeddara late Mr. Karunasena, recorded the statement of the Petitioner. The Petitioner, in his statement made to the Police, admits that at the time of arrest villagers threw some liquid to his face and he felt that it was acid. It can be contended that PS Atapattu should have taken the Petitioner to the nearest hospital before and after recording the statement of the Petitioner. But one must not forget the fact that PS Atapattu was under instructions of OIC Pitabeddera to record the statement of the Petitioner. It appears from the facts of the case, that OIC Pitabeddera late Mr. Karunasena had taken charge of the investigations and that the Petitioner was detained at the Police Station on the instructions of the OIC. Thus PS Atapattu could not have gone against the instructions of the OIC.I have earlier held that the OIC Pitabeddara late Mr. Karunasena had violated the fundamental rights of the Petitioner guaranteed by Article 11 and 12(1) of the Constitution. In my view he has violated the said fundamental rights of the Petitioner whilst discharging his duties as a Police Officer. I therefore hold that the State should pay compensation to the Petitioner. I make order that the State should pay Rs.200,000/- to the Petitioner. I direct the Inspector General of Police (IGP) to take steps to ensure the payment of this amount to the Petitioner.

In my view the other Police Officers (1st to 10th respondents) have assisted the OIC Pitabeddara late Mr. Karunasena in discharging his duties and when the OIC took a decision to detain the Petitioner in his custody they could not have gone against the decision of the OIC. For the aforementioned reasons, it is difficult to conclude that the 1st to 10th Respondents have violated the fundamental rights of the Petitioner. I therefore hold that the 1st to 10th Respondents are not guilty of violating the fundamental rights of the Petitioner.

The OIC Pitabeddara late Mr. Karunasena has violated the fundamental rights of the Petitioner guaranteed by Article 11 and 12(1) of Constitution.

The 1st to 10th Respondents have not violated the fundamental rights of the Petitioner

Judge of the Supreme Court

Eva Wanasundera PC J

I agree.

Judge of the Supreme Court

K T Chitrasiri 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. T.D. Mataraarachchi,
   No. 3A, Mawatha II, Sevana,
   Aruppola, Kandy

2. K.P. Geema Udara Wijerathna,
   No. 40, "Sevana", Kanda Mawatha,
   Ambalangoda

3. K.D.M. Senanayake,
   Thalangalla, Malgalla,
   Galle.

4. L.T.W. Rajapaksha,
   279. "Sirimadura", Mahalwarawa,
   Junction, Kottawa,
   Pannipitiya

5. A.W.R.T. Ekanayake,
   "Ranjeewa",Thinkida, Thaligama.

6. T.P.D.P. Kumara,
   No. 5B/81, Namalthalawa,
   Ampara.

Petitioners

SC FR No. 45/2015 Vs.

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

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

3. Additional Secretary (Academic Affairs and Admissions),
   University Grants Commission,
   No. 20, Ward Place,
   Colombo 7.

4. Mr. W.M.N.J. Pushpakumara,
   Commissioner General of Examinations,
   Department of Examinations,

P.O.Box 1503,
Colombo.

5. Secretary,
   Ministry of Higher Education,
   No. 20, Ward Place,
   Colombo 7.

6. The Registrar,
   University of Colombo,
   94, Cumarathunga Munidasa Mawatha,
   Colombo 3.

7. The Registrar,
   University of Peradeniya, Galaha Road,
   Peradeniya.

8. The Registrar,
   University of Sri Jayawardanepura,
   Gangodawila,
   Nugegoda.

9. The Registrar,
   University of Kelaniya,
   Dalugama,
   Kelaniya.

10. The Registrar,
    University of Moratuwa, Bandaranayaka
    Mawatha, Katubedda, Moratuwa.

11. The Registrar,
    University of Jaffna,
    Puliyadi Lane,
    Jaffna.

12. The Registrar,
    University of Ruhuna,
    Tangalle Road, Matara.

13. The Registrar,
    Eastern University,
    Batticaloa

14. The Registrar,
    South Eastern University,
    Oluvil.

15. The Registrar,
    University of Rajarata,
    Mihintale.

16. The Registrar,
University of Sabaragamuwa,
Belihuloya, Balangoda.

17. The Registrar,
North Western University,
Kulipitiya.

18. The Registrar,
University of Uva Wellassa,
Badulla.

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

Respondents

BEFORE **:** K**.** Sripavan, C.J.
B.P. Aluwihare, P.C., J.
Anil Gooneratne, J.

COUNSEL Saliya Pieris with T. Nandani for the Petitioners.

Nerin Pulle , Deputy Solicitor General with S. Gnanaraj, State Counsel for 1st , 2nd , 4th 5th 8th 9th 12th 13th 15th 16th and 19th Respondents.

WRITTEN SUBMISSIONS FILED ON **:** 30.05.2016 by the Petitioners
01.06.2016 by the Attorney General

ARGUED ON : 04.05.2016

DECIDED ON **:** **20.07.2016**

K. SRIPAVAN, C.J.,

The Court granted leave to proceed on 06.05.2015 for the alleged violation of the Petitioners' Fundamental Rights guaranteed by Article 12(1) of the Constitution.

The facts in this application are identical to the facts in S.C. F.R. Application 09/2015.

Accordingly, the Court makes order that the judgment delivered in S.C. F.R. Application 09/2015 shall apply to this case.

For the reasons stated in S.C. F.R. Application 09/2015, I hold that the Petitioners have failed to establish the violation of their fundamental rights guaranteed by Article 12(1) of the Constitution by the Respondents.

The application is therefore dismissed in all the circumstances without costs.

CHIEF JUSTICE.

B.P. ALUWIHARE, P.C.,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 in terms of Articles 17 and126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

OmaththaMudalige Don Gamini
262, Panchawatta, Himbutana,
Angoda.

Petitioner

SC/FR 81/2011

Vs

1. Nishantha Silva
   Inspector of Police,
   Special Unit,
   Criminal Investigation Department,
   Colombo 01.
2. Police SergeantMendis 14209
   Special Unit,
   Criminal Investigation Department,
   Colombo 01.
3. M.A.S. RanjithMunasinghe
   Inspector of Police,
   Officer-in-Charge,
   Special Unit,
   Criminal Investigation Department,
   Colombo 01.
4. G.S. Abeysekara
   Assistant Superintendent of Police,
   Special Unit,
   Criminal Investigation Department,
   Colombo 01.
5. Inspector General of Police
   Police Head Quarters,
   Colombo 01.
6. Hon. Attorney General

Attorney General's Department,
Colombo 12.

Respondents

Before : Sisira J de Abrew J
Anil Gooneratne J
K T Chitrasiri J

Counsel : Shyamal A Collure with AP Jayaweerafor the Petitioner
Anoopa de Silva SSC for all the Respondents

Argued on : 26.4.2016

Decided on : 22.9.2016

Sisira J De Abrew J.

The Petitioner, by this petition, inter alia, seeks a declaration that his fundamental rights guaranteed under Article 11, 12(1), 12(2), 13(1) 13(2) and 14(1) (g) of the Constitution have been violated by the 1st to 5th Respondents. This Court by its order dated 3.6.2011, granted leave to proceed for alleged violation of Article 12 (1) of the Constitution. The Petitioner, in his petition and counter affidavit state the following facts.

On 26.1.2011 around 5.45 p.m. the 1st and the 2nd Respondents came to his shop at Keyzer Street Colombo and showed him an open warrant issued on one OM Don Gamini and took him to the Criminal Investigation Department (CID) Colombo. The 1stRespondent thereafter showed him a petition sent to His Excellency the President and to the Inspector General of Police (IGP) and informed him that there are allegations against him (the Petitioner) regarding a double murder alleged to have been committed in 1982 and an incident relating to threating three people with a pistol. Although the Petitioner denied all the

allegations, he was handcuffed and taken to his residence at Himbutana in a jeep by four Police Officers including the 1st and the 2nd Respondents. They searched the Petitioner's house but could not recover any illegal items. Thereafter the Petitioner was taken to the CID and his statement was recorded. The recording of the statement came to an end around 5.30 a.m. on the following day (27.1.2011). The Petitioner was thereafter kept in a cell. On 27.1.2011 around 3.30 p.m. the Petitioner was produced before the Chief Magistrate under Case No.5051/1/2011 alleging that he had committed an offence punishable under Section 483 of the Penal Code read with Section 44(b) Firearms (Amendment) Act No. 22of 1996. The Petitioner was remanded till 1.2.2011. On 8.2.2011 he was produced at an identification parade but he was not identified by the witnesses. While the above case was pending in the Magistrate's Court, Police filed another case bearing No.4245/2/2014 against the Petitioner. The charge in the said case was that he being armed with a pistol intimated one Dharmadasa Silva. The charge states that it is an offence punishable under Section 486 of the Penal Code. This case was referred to Mediation Board for settlement and at the inquiry Dharmadasa Silva stated that he did not make such a complaint and that such an incident did not take place. When the report of theMediation Board was submitted to the learned Magistrate, he discharged the Petitioner. In the other case too (B 5051/1/2011) the Petitioner was discharged by the learned Magistrate.

The 1st Respondent, in his affidavit filed in this court, admits that he with his team of Police Officers arrested the Petitioner on 26.1.2011for illegal use of firearms and for the alleged offence of criminal intimidation (vide paragraph 6(c) of his affidavit). He in his affidavit states the following facts.

The Inspector General of Police (IGP) forwarded to the CID an anonymous petition received by him on 3.9.2009 for investigation. A copy of the petition has been marked as 1R1. The said petition contained information that a person by the

name of OMD Gamini residing atMullariyawa was terrorizing the area whilst engaging in various illegal activities.The 1st Respondent was a member of the investigating team. On information gathered in the course of the investigation, he and the police team, on 26.1.2011, arrived at the Petitioner's shop at Keyzer Street Colombo and arrested the Petitioner for the alleged offence of illegal use of firearms and for the alleged offence of criminal intimidation. Prior to the arrest, the 1st Respondent had received a copy of the warrant issued by the Magistrate Nugegoda in case No. 42359 against one and OM Don Gamini and he showed the copy of the warrant to the Petitioner. This is the summary of the 1st Respondent story.The other respondents have not filed affidavits.

The Petitioner states that at the time of his arrest there were no cases filed against him. He further states, in his counter affidavit, that no one has made any complaint against him. At this stage it is relevant to note what the complainant had stated at theMediation Board inquiry. The complainant, Dharmadasa Silva, stated that he did not make a complaint of this nature. It has to be noted here that the learned Magistrate discharged thePetitioner from both the cases filed against him.

I now advert to the contents of the affidavits filed by both parties. The 1st Respondent tries to justify the arrest of the Petitioner on the strength of the warrant issued by the Magistrate Nugegoda in case No.42359. Although the 1st Respondent, in his affidavit, states that the said warrant has been issued against OM Don Gamini, I can't accept the said position in view of P7 which is a certified copy of case No. MC Nugegoda 42359. According to P7 the name of the accused is Meemadamudalige Don Gamini and not OMD Gamini. Thus the 1st Respondent and his police team could not have arrested the petitioner on the strength of the warrant issued in MC Nugegoda 42359. Further the 1st Respondent tries to justify the arrest of the Petitioner on the information gathered in the course of the investigation that he conducted on the petition sent to the IGP marked as 1R1. This

was an anonymous petition. If he gathered information in the course of thesaid investigation, where is the statement made by the aggrieved party? He has failed to produce in this court any statement made against the Petitioner by the aggrieved party. Where is his investigation report submitted to the IGP or Director CID? He has not produced any of these documents to this court. On what grounds does the 1st Respondent justify the arrest of the Petitioner? In my view the respondents have not shown any ground to justify the arrest of the Petitioner. As I pointed out earlier, the other Respondents have not filed any affidavits in this court. Having considered all the above matters, I hold that there were no reasons for the 1st and the 2nd Respondents to arrest the Petitioner. For the above reasons, I hold that the arrest of the Petitioner by the 1st and the 2nd Respondents is illegal. If the arrest is illegal then the detention of the Petitioner at the CID under the hands of the 1st and 2nd Respondentsalso becomes illegal. For the above reasons, I hold that 1st and the 2nd Respondents have violated the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution.

The allegation levelled against the 3rd Respondent is that he signed the B report in case No. B 5051/1/11 describing the Petitioner as an underworld character. The 3rd Respondent is the Officer-in-Charge of the Special Unit in the CID. When the report, containing matters relating to the investigation, is brought to his notice by the other Police Officers of his team, he, as the OIC of the unit,has to sign it placing trust on his officers. The above facts in my opinion are not sufficient to hold that the 3rd Respondent has violated the fundamental rights of the Petitioner. There are no allegations leveled against the 4th and 5th Respondents.

Earlier I have held that the 1st and the 2nd Respondents have violated fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution.

The next question that must be considered is that whether the 1st and the 2nd Respondents are personally liable to pay compensation to the Petitioner. It appears from the facts of this case that the 1st and the 2nd Respondents have not taken any personal revenge from the Petitioner. They were conducting investigations on the petition marked 1R1 forwarded by the IGP.

When I consider all the above matters, I hold the view that it is not justifiable for me to hold that the 1st and the 2nd Respondents should pay compensation from their personal funds. They have arrested the Petitioner in the course of their duties. Having considered the aforementioned matters, I hold that compensation should be paid from the State funds. I make order that the State should pay Rs.300,000/- to the Petitioner as compensation. I direct the IGP (the 5th Respondent) to take steps to pay the said amount from the funds of the Police Department.

Judge of the Supreme Court.

Anil Gooneratne J
I agree.

Judge of the Supreme Court.

K.T.CHITRASIRI, J

I had the opportunity of reading the draft judgment of Sisira De Abrew J. wherein His Lordship has found that the fundamental rights of the petitioner guaranteed under Article 12(1) of the Constitution had been violated by the actions of the two Police Officers namely the 1st and the 2nd respondents to this

application. At the same time, he has also come to the conclusion that the 3rd respondent who was the Officer in Charge of the Special Unit in the Criminal Investigation Department could not be made liable for the reason that he had placed trust on his subordinates namely the 1st and the 2nd respondents when he signed the reports filed in court containing matters relating to the investigation carried out in respect of the allegations made against the petitioner.

Admittedly, the 1st and the 2nd respondents were the officers who were instrumental in physically arresting the petitioner. According to the 1st respondent, the reason for the arrest of the petitioner had been a result of an investigation conducted by the officers in the Special Unit of the CID, pursuant to a direction given by the Inspector General of Police. The said direction of the IGP was made consequent upon a petition received by him where allegations have been made against a person named O.M.D.Gamini. In the aforesaid petition, it is also alleged that the said O.M.D.Gamini had been associating with illegal use of firearms and explosives and that he had close connection to the underworld. It was an anonymous and undated petition. It was marked as 1R1 and was filed with the affidavit of the 1st respondent. Upon receiving the said petition, the IGP has made an endorsement on it on the 5th September 2009 directing the Deputy Inspector General of Police of the CID to conduct an inquiry over the matters contained therein. Therefore, it is clear that the arrest of the petitioner was a result of the aforesaid anonymous petition received by the IGP. [vide paragraph 6 of the affidavit 24.08.2012 of the 1st respondent]

In the aforesaid petition, consequent to which the investigation was commenced also alleges that the petitioner had killed two persons. No evidence whatsoever had been found in connection with such an offence. However, the Police also have investigated as to a warrant, alleged to have been issued on the petitioner in the case bearing No.42359 filed in the Magistrate's Court of Nugegoda though such an allegation had not been made in the said anonymous petition. The virtual complainant namely Dharmadasa de Silva in that case 42359 has said that he never made a complaint against the petitioner. Indeed, it was later revealed that the said warrant that was made use of to arrest the petitioner was not a warrant issued against the petitioner.

The affidavit of the 1st respondent reveals that the petitioner was arrested for having firearms without obtaining permission from the authorities and for committing the offence of criminal intimidation. [vide paragraphs 6 (c) and 7 of the 1st respondent's affidavit] The 1st respondent in his affidavit has admitted that the police have failed to recover any firearm or explosive from the custody of the petitioner though they have searched even his residence in Himbutana. Therefore, it is seen that the police have failed to find any evidence against the petitioner in relation to the matters contained in the petition marked 1R1, upon which the investigation against the petitioner had commenced. Accordingly, I agree with the decision of His Lordship Justice Sisira J.de.Abrew that the 1st and the 2nd respondents have violated the fundamental rights of the petitioner, guaranteed by Article 12(1) of the Constitution.

Having agreed with the decision of De Abrew J, I wish to add my views over the liability of the 3rd respondent namely, M.A.S.Ranjith Muasinghe. Petitioner in his petition filed in this Court has complained that his rights enshrined in Article 12(1) of the Constitution have been violated by the 3rd respondent as well. He was the Officer-in-Charge of the Special Unit of the Criminal Investigation Department who gave instructions to his subordinates to conduct investigations into the matters contained in the petition 1R1. Also, he was the person who reported facts to courts having studied the progress of the investigation carried out against the petitioner. The question that comes to my mind then is whether it is correct to decide that the 3rd respondent, he being the Officer in Charge of the Special Unit of the CID whose duty is to supervise and direct the investigations in this instance, was not involved personally or whether he had any hand in the process that led to incarcerate the petitioner.

At this stage, it is necessary to note that when the Police are called upon to investigate an alleged crime, the person who directs or command the investigation shall first ascertain whether a crime had, in fact, been committed. If so, then he shall proceed to investigate the case in order to discover any reasonable material which points to the identity of the offender and to find out other material which tends to corroborate or contradict the matters complained of. Finally, all that is required of a Police officer is to investigate an offence, in order to ascertain the true facts relevant to the case irrespective of whether these facts are in favour or against the suspect.

The Police should remember that they exercise their powers only in order to safeguard the rights of those very same members of the public whom they seek to arrest, interrogate and detain. A Police officer, whilst displaying initiative, skill and finesse, should not make the investigation of crime, a personal crusade. He must investigate with an open mind and be always ready to change any theories he may have regarding the manner in which the crime was committed or the identity of the offender, on the basis of fresh material which of course has to be carefully verified.

The issue in this instance is whether there was sufficient material to arrest and then to produce the petitioner in courts with a report that had been prepared and signed by the 3rd respondent. Accordingly, the question arises as to whether there was sufficient material or not, for the Police to genuinely think or at least to suspect that the petitioner has committed an offence known to the law. Therefore, I must mention that it will not be a bar for the Police to arrest a suspect and produce him in courts according to law, if reasonable suspicion exits in the minds of the investigator as to committing of an offence. "Suspicion" in the mind of the investigator had been discussed in several authorities including that of the following.

In **Withanachchi Vs Herath [1988 (ii) CALR 170 at 181] Seneviratne J** held that;

> *In the sphere of criminal law there are varying degrees of proof that is sufficient in law in the circumstances... "beyond reasonable doubt", "has reason to believe", "is probable" and "has reason to suspect". In*

this instance the Court has to consider the degree of proof "has reasonable ground for suspecting". In these degrees of proof "suspicion" seems to be the lowest degree of proof required by law in certain instances. Section 32(1) of the Code of Criminal Procedure Act No.15 of 1979 lays down as follows;

(a) Any peace officer may…without a warrant arrest any person.

(b) Reasonable suspicion exists of having been so concerned in any cognizable offence.

In **Weerawansa Vs The Attorney General and others [SC Application 730/96 SC Minutes dated 06.06.200] Fernando J** has held as follows:

"A reasonable suspicion may be based either upon matters within the officer's knowledge or upon creditable information furnished to him, or a combination of both sources. He may inform himself either by personal investigation or by adopting information supplied to him or by doing both. A suspicion does not become "reasonable" merely because the source of the information is creditworthy."

In the case of **Udaya Prabath Gammanpila Vs M.D.C.P. Gunathillake and 7 others [2016 BLR Vol.XXII at page 121] Sripavan C J** held thus:

"The question therefore arises whether investigators had sufficient material giving reasonable suspicion to the 1st and the 7th respondents to cause the arrest of the petitioner."

Having dealt with the manner that should be adopted when arresting a person by the Police, I will now turn to consider whether it is possible for the 3rd respondent to suspect reasonably that the petitioner may have committed an

offence when he prepared the report in order to produce the petitioner in court. In this instance, the person who directed the 1st and the 2nd respondents to investigate on the matters contained in the document marked 1R1 is the 3rd respondent. He gave such instructions pursuant to an order made by the IGP upon receiving the aforesaid anonymous petition marked 1R1 in the year 2009 i e two years before the arrest of the petitioner. 3rd respondent is the officer who signed the "B" Report dated 27th January 2011 by which the petitioner was produced for the first time in Court. Under those circumstances, the 3rd respondent should have been satisfied as to the correctness of the matters in the report that he prepared and tendered to court.

In that "B" Report filed in Court, 3rd respondent has stated that the police have recorded a statement from one Selliah Krishnan as well. In that statement of Krishnan, he supposed to have stated that he was intimidated by the petitioner having a pistol in his hand. In that "B" report, it further states that another statement by Mohamed Usuff was also been recorded. He supposed to have stated that he saw the petitioner shooting at the air with a pistol in hand.

The aforesaid Selliah Krishnan, when he was directed to identify the petitioner at an identification parade held by the learned Magistrate, has stated that he cannot remember even going to the Criminal Investigation Department to make a complaint. Also, nothing is revealed to show that any further steps had been taken against the aforesaid Krishnan for giving false statement to the police though he had treated as an adverse witness at subsequent proceedings in court.

In the "B" Report subsequently filed on 01.02.2011, the 3rd respondent has stated that Asurumunige Dharmadasa Silva alias Sunil also had made a complaint stating that the petitioner has made an attempt to shoot him. No criminal proceedings had been commenced against the petitioner on that complaint even though it is a serious allegation. Those circumstances suggest that no such incident had taken place.

Accordingly, it is seen that the 3rd respondent has not verified the facts in the "B" report signed by him before it was submitted to courts or in other words he may have submitted falsehood to the Magistrate. Being the Officer-in-Charge of the Division, it is the duty of the 3rd respondent to direct his subordinates to investigate the matters referred to in the petition marked 1R1 in a sensible and fair manner. More importantly, nothing is stated in that "B" report to show that there existed material for them to suspect that the petitioner had committed a crime referred to in the petition 1R1.

All the "B" Reports filed in the Magistrate's Court had been signed by the 3rd respondent himself. Then he must take the responsibility of informing Court as to the correctness of the allegations made against the petitioner without being a mere rubber stamp as to what his subordinates have reported. By looking at those reports, it seems that the 3rd respondent being the Officer-in-Charge of the police station had gone on a voyage of discovery of material in order to justify the arrest of the petitioner or it may have been to satisfy his superiors.

Moreover, the 3rd respondent has not denied the allegations made against him in the petition filed in this Court. He has not even filed an affidavit in this

case even though serious allegations had been made against him in that petition. Such inaction of the petitioner would deem to result in accepting those allegations made against him since such circumstances would be considered as unchallenged. Therefore, failure to file an affidavit by the 3rd respondent which he could have easily done would also show that he has no explanation to the allegations made against him by the petitioner.

In the circumstances, it is my opinion that the 3rd respondent M.A.S.Ranjith too is responsible for the violation of the Fundamental Rights of the petitioner guaranteed under Article 12(1) of the Constitution. However, I do not wish to make an order as to any payment of compensation by him since Sisira De Abrew J has adequately dealt with on the question of payment of compensation.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. Tirathai Public Co.Ltd.,
   516/1, Moo 4 Bangpoo Industrial Estate, Praksa Muang
   Samutprakan 10280
   Thailand
2. H.R.Holdings (Pvt) Ltd.,
   476/10, Galle Road
   Colombo 03

Petitioners

S.C.[FR] No.108/2016

Vs.

1. Ceylon Electricity Board
   No.50, Sir Chittampalam Gardiner Mawatha, Colombo 2,
   and 17 others

Respondents

BEFORE : **K. SRIPAVAN, C.J.**
K.T.CHITRASIRI, J.

COUNSEL : Romesh de Silva, P.C. with Palitha Kumarasinghe P.C, Pubudini Wickramaratne and Viraj Bandaranayake for the Petitioners

Viveka Siriwardane, DSG for the 1st to 13th and 18th Respondents

ARGUED ON : 07.07.2016

WRITTEN : 14.07.2016 by the Petitioners
SUBMISSIONS ON : 14.07.2016 by the 1st to 13th and 18th Respondents

DECIDED ON : **08.08.2016**

CHITRASIRI, J.

When this matter was taken up for the consideration of granting leave to proceed with the application, learned Deputy Solicitor General submitted that the two affidavits affirmed to by Brandigampolage Hemantha Prasanna Perera and Adithep Sajjaviriyapong which were annexed to the petition dated 24.03.2016 contain plethora false material and also contradictions. In support of her submissions, she referred to the matters contained in paragraphs 1& 4 to 14, 39 to 43 of the two affidavits dated 24.03.2016 affirmed to by the aforesaid Brandigampolage Hemantha Prasanna Perera and Adithep Sajjaviriyapong. Accordingly, she argued that the petitioners cannot have and maintain this application since the petitioners have failed to file valid affidavits as required by Article 126 (2) of the Constitution which is to be read with the Rule 44 (1) (c) found in Part 4 of the Supreme Court Rules 1990.

Basically, the objection of the learned Deputy Solicitor General is that there is no valid affidavit filed by the petitioners for them to proceed with this application. The objection so raised poses two questions to be looked at. First issue is whether the two affidavits filed in this case would amount to non existence of an affidavit due to the inclusion therein of false material and the

second being the issue as to the requirement of an affidavit when invoking jurisdiction under Article 126 (2) of the Constitution.

I will now advert to the first issue namely the validity of the affidavit due to the inclusion of false material therein. Manner in which an oath or an affirmation is to be administered in an affidavit is described in the Oaths Ordinance No.9 of 1895 as amended. Section 12 of that Ordinance stipulates thus:

> *"A Commissioner for Oaths appointed under this Ordinance may administer any oaths or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a Justice of the Peace is authorized by law so to do ..."*

The aforesaid Ordinance also provides for punishment on the persons who willfully or dishonestly swears or affirms falsehood in any oath or affirmation administered or taken for the purpose of any legal proceedings. However, it is to be noted that nothing is mentioned in that Ordinance, as to an affidavit becoming invalid when false material is included in such an affidavit. If the oath or affirmation had been properly administered or taken before a Justice of the Peace then it will become a valid affidavit made under and in terms of the Oaths Ordinance. Basically, criteria in determining the question of the existence of an affidavit depend on the manner in which the oath or affirmation was administered.

In this instance, there is no allegation as to the manner in which the affirmation of the deponents in the two affidavits was administered. *Jurat* in those affidavits has not been challenged either. Steps referred to in the Oaths Ordinance that is to be followed at the time, the affirmation of the deponents was administered by the Justice of Peace had been complied with. Therefore, it is clear that the affidavits filed in these proceedings cannot be considered as invalid. Accordingly, the two affidavits filed in this case are to be considered as valid affidavits though allegations had been made stating that it contains false material.

Inclusion of false material in the two affidavits is a matter that should be looked at by Court when considering the facts of the case. Section 13 of the Oaths Ordinance also provides as to the manner in which it is to be dealt with when false material is brought into an affidavit. Accordingly, for the reasons set out above, I am not inclined to accept the position that there is no valid affidavit filed with the petition in this instance.

The next question is whether it is mandatory to file an affidavit when invoking jurisdiction of this Court under Article 126 (2) of the Constitution read with Rule 44 (1) (c) of the Supreme Court Rules 1990. At this stage it is pertinent to refer to Article 17 of the Constitution too, since it ensures the right to make an application to the Supreme Court for relief when the fundamental rights enshrined in Chapter III of the Constitution have been infringed or to be infringed imminently by executive or administrative action.

The aforesaid Articles referred to in the Constitution provide for this Court to exercise sole and exclusive & *sui generis* jurisdiction. **[Jayanetti Vs. Land Reform Commission [1984 (2) SLR 179]** Therefore this Court is bound to entertain such applications filed under Article 126(2) of the Constitution and of course, the Court is also necessarily guided by the Rules of Procedure stipulated in the relevant rules if available when proceeding with such an application. Hence, it is necessary to refer to the procedure referred to in Article 126(2) of the Constitution and in Rule 44(1) (c) of the Supreme Court Rules 1990.

Article 126(2) of the Constitution reads thus:

> *"Where any person alleges that any fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof,* ***in accordance with such rules of court as may be in force****, apply to the Supreme Court by way of a petition in writing addressed to such Court …" (emphasis added)*

Rule 44(1) (c) of the Supreme Court Rules 1990 reads as follows:

> *"Where any person applies to the Supreme Court by a petition in writing, under and in terms of Article 126(2) of the Constitution for relief or redress in respect of an infringement or an imminent infringement of any fundamental right or language right, by executive or administrative action, he shall - (c) tender in support of such* petition *such affidavits and documents* ***as are available to him.****" (emphasis added)*

By looking at the Rule 44(1) (c) above, it is seen that the affidavits and/or documents are to be produced only when those are available to the petitioner in such an application. Obviously, it does not mean that it is essential to file those documents with the application under Article 126(2). However, needless to say that there should be adequate material before Court to consider an application made to it. That material may be in the form of an affidavit or even by way of other documents which could be relied upon. Therefore, even the literal meaning of the Rule 44(1) does not indicate that it is mandatory to file affidavit evidence when invoking jurisdiction of this Court under Article 126(1) of the Constitution.

Be that as it may, requirement of affidavit evidence in applications under Article 126(1) of the Constitution had already been interpreted by this Court in numerous occasions. In the case of **Upaliratne and others vs. Tikiribanda and others, [1995 (1) SLR 165 at 172] Dr.Amerasinghe, J** has clearly stated that there is no obligation to tender an affidavit from any one or more of the petitioners in cases filed under Article 126(2) of the Constitution. He has clearly said that what is required is evidence of the facts submitted through affidavits and/or through other documents. His findings in that case are as follows:

> *"Mr.Jayasinghe raised another objection in limine. He submitted that the petitioners cannot have and maintain this application and/or that the application is not properly constituted due to non-compliance with Rule 44(1) in that all these petitioners have not given affidavits. The obligation of a petitioner is to tender in support of the petition" such affidavits and documents as are available to him. (Rule 44(1) (c).*

There is no obligation to tender an affidavit from any one or more of the petitioners. What is required is evidence of the facts submitted through affidavits and other documents. I therefore overrule the objections."

In **Hewawasam Sarukkalige Rathnasiri Fernando v. Police Sergeant Dayaratne, [SCFR 514/2010 S.C.Minutes of 15.12.2014] Priyasath Dep.P.C.J** has held thus:

"The next question that arises is whether a fundamental rights application could be dismissed due to want of an affidavit or defective affidavit in civil cases regulated by the Civil Procedure Code whenever there is a requirement to file a petition, the petition should be supported by an affidavit or accompanied by an affidavit. In Article 126(2) of the Constitution a person who invokes the jurisdiction of the Court can do so by way of a petition. The rules require the parties to tender in support of the petition affidavits and documents available to him. There is no requirement that a petition should be supported by an affidavit. The question that arises is whether an affidavit is a mandatory requirement or not. According to the rules under certain circumstances a person could invoke the jurisdiction of the Court by submitting a statement or a complaint. Rule 44(7) states by way of writing a person could bring to the notice of the court an alleged infringement or imminent infringement of fundamental rights by executive or administrative action the court could treat the statement/complaint as a petition and initiate action.

In fundamental rights applications, at the time of filing a petition it need not be supported by an affidavit. Rule 44(1) states 'tender in support of

such petition such affidavits and documents available to him'. Therefore rules require the petitioner or the complainant to provide affidavits and documents available to him. However, for the Court to act on facts stated in the complaint or petition in the absence of other materials there should be evidence..."

By looking at the two decisions referred to above, it is clear that the issue as to the requirement to file an affidavit with the petition in fundamental rights applications filed under Article 126(2) have been clearly settled. Hence, it is not necessary for me to elaborate on the issue as it had been adequately dealt with by this Court.

In the circumstances, it is my considered opinion that it is not mandatory to file an affidavit along with a petition filed in terms of Article 126(2) of the Constitution. However, as mentioned in Rule 44(1) (c) of the Supreme Court Rules 1990 the petitioners in such applications may tender affidavits and documents that are available to them in support of their application. Unless it is supported by those materials, the Court will not be in a position to consider the grievance or the alleged infringement advanced by the petitioner but certainly not on false materials as alleged in this instance.

For the aforesaid reasons, the objection raised by the Deputy Solicitor General is overruled.

Petitioners are to support this application for leave of this Court on a future date fixed by Court.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, CJ.

I agree.

CHIEF JUSTICE

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.

SC / FR 123 / 2015

Mohammed Mukthar Aisha,

No 230, Kumaratunga Mawatha,

Matara.

Petitioner

Vs.

1. W.B. Piyatissa,
   The Principal,
   (Chairman of the Interview Board)
   St. Thomas Boys College,
   Matara.
2. Hon. Akila Viraj Kariyawasam,
   Minister of Education,
   Ministry of Education,
   Isurupaya,
   Battaramulla.
3. Upali Marasinghe,
   The Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla.
4. The Chairman of the Appeal Board
   Grade 1 Admission Year 2015,
   St. Thomas Boys College,
   Matara.

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

Respondents

BEFORE	:	B. P. ALUWIHARE, PC, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Razik Sarook PC with Rohana Deshapriya and Chanakya Liyanage for the Petitioner Yuresha De Silva SSC for the Attorney General
RGUED ON	:	27.11.2015
DECIDED ON	:	14.07.2016

UPALY ABEYRATHNE, J.

The Petitioner Mohammed Mukthar Aisha made an application to St. Thomas College Matara for the admission of her child Akib Ahamed to Grade 1 for the year 2015. The Petitioner preferred the said application which was produced with the Petition marked P 2, under the 'proximity category' of the circular bearing No. 23/2013, on admission of students to Grade 1 of the Government schools. In her said application she has mentioned that her residence was at No 230, Kumaratunga Mawatha, Matara. When she was called for an interview she has produced the documents marked P 3(i) to P 3 (xi) in order to

prove her residence and on the said documents she has received 85 marks. The Petitioner has complained that although the cut of mark was 85 her child's name was included in neither the temporary list nor the permanent list.

The 1st Respondent in his statement of objections has stated that the cut-off mark for the admission to Grade 1 of the St Thomas' College, Matara, for the year 2015 was 86 marks and not 85 marks. Hence the Petitioner's position that cut-off mark was 85 is erroneous.

The Petitioner has further complained that 5 marks were not awarded to her child in the proximity category on the basis that there was another school namely Medananda Vidyalaya closer to her residence than St Thomas' College, Matara. But according to the plan P 4 the St Thomas College was the closest school to her residence and thus she should have been given 90 marks at the interview.

It is clear from the document produced by the 1st Respondent marked 1R3 that the Petitioner was given 85 marks subject to a site inspection which was a requirement under the said circular. No doubt that the Petitioner was aware of the said requirement of site inspection to be carried out after the interview to ascertain the truthfulness of the documents produced by the Petitioner in order to establish the Petitioner's residence since she had preferred the application to admit her child to the St Thomas' College under the proximity category of the said circular.

The Petitioner has further stated that although the closest school to her residence was St. Thomas' College, Matara, she was not given full marks for the proximity category and 05 marks which she was entitled had been reduced on the basis that Medananda Vidyalay is closer to her said residence than St. Thomas College. She has produced a surveyor plan marked P 4 to prove that the St.

Thomas College was the closest school to her residence. The 1st Respondent too has produced a map of St. Thomas' Kumara Vidyalaya, Matara, prepared by the Survey Department, marked 1R4 to prove that Medananda Vidyalaya was closer to the Petitioner's residence than St. Thomas' College.

It must be noted that the alleged violation of the fundamental rights of the Petitioner has to be established by cogent evidence having a high degree of probability which is proportionate to the subject matter. The Petitioner does not discharge her burden merely by placing a bulk of documents before court to fulfil the task of establishing her case when the authenticity of the same documents is in question.

The Petitioner has produced the plan P 4 to establish the closest school to her residence. It is to be noted that from a perusal of plan P 4 the author of the document cannot be ascertained. The most vital descriptions such as the number of the plan, the name of the surveyor and the date of preparing the same are not available. Hence the authenticity of P 4 has not been established by the Petitioner. One M. L. M. Rashmi claimed to be a Surveyor and Court Commissioner has made certain entries on P 4 in red colour. He has highlighted a certain point of the said plan as 'A' in red and has drawn a red line from point A to St Thomas' College which is depicted on the east and also an another red line to a pond which is depicted on the west of the said plan P 4. The surveyor has described the said point 'A' as No 230 of Kumaratunge Mawatha, Matara. The learned President Counsel submitted that the Medananda Vidyalaya is situated at the place where the said pond in P 4 is depicted. Except the said submissions there is no iota of evidence to show that the Medananda Vidyalaya is situated where the said pond is depicted in P 4.

Also on the other hand the place shown as No 230 of Kumaratunaga Mawatha by the said surveyor Rashmi, has been depicted in P 4 as No 186, Kumaratunga Mawatha. Hence the Petitioner, by plan P 4, has failed to establish that St. Thomas' College is closer to her residence than Medananda Vidyalaya. Therefore reducing the 5 marks from the total of 50 marks given to proximity category is correct.

Now I deal with the next submission of the Petitioner that whether the Petitioner was able to establish that she was residing at No. 230, Kumaratunga Mawatha, Matara.

The question of residence has to be considered paying attention to the averments contained in paragraph 22 of the statement of objection filed by the 1st Respondent. In proof of the said averment he has produced a site inspection report dated 10.10.2014 marked 1R6 prepared by the members of the interview board who had carried out the site inspection after the interview. According to observation made by the said team in 1 R 6, they had discovered that No 230 was a building which was situated among the boutiques along Kumaratunga Mawatha. At the time of the inspection the Petitioner was not at the given address. They had observed that one Abusalam Abdul Cadar was running a medical centre called "Suwasewa" at No 230, Kumaratunga Mawatha. They had also observed that the said premises No 230 had only one door for entrance and exit both. Accordingly they had come to the conclusion as contained in 1 R 6 that "a person by the name Mohammed Mukthar Aisha was not in occupation of the premises No 230".

It must be noted that the Petitioner in her counter affidavit dated 07th of October 2015 except a general denial contained in paragraph 10, has not specifically denied the averments contained in paragraph 22 of the statement of

objection of the 1st Respondent and also has not answered to the averments contained in paragraph 22 of the said statement of objection. Also it must be noted that the Map of Matara Town which was produced with the counter affidavit marked P 13 does not provide any evidence as regard the Petitioner's residence at No 230, Kumaratunga Mawatha. P 13 does not contain the assessment or premises numbers of the buildings depicted in the said map. Also it does not show a road by the name Kumaratunga Mawatha. At least the Petitioner in her counter affidavit or her witness M. L. M. Rashmi in his affidavit dated 24.09.2015 have not identified the Kuaratunga Mawatha among the roads depicted in the said map P 13.

The Petitioner has produced a lease agreement bearing No 318 dated 8th September 2014 to establish the fact that she was in occupation of No 230, Kumaratunga Mawatha. Although a defined portion from the front portion of the premises No 230 has been rented out to her uncle to carry on an Ayurveda Dispensary, the Petitioner has not given any description about a remaining portion of the said premises which was occupied by her as claimed as her residence.

The Petitioner has produced a letter sent to the Divisional Secretary, Matara, dated 20.01.2012 marked P 3(X) F. By the said letter she had requested to delete the name of one B. L. A. Dayawathie Nagahawatta which appears in the water bill and to enter her name therein. It is clear from the water bill produced marked P 3(X)A, which was for the period commencing from 07th June 2011 to 07th July 2011, had been issued in the name of said Dayawathie Nagahawatta. Furthermore the said letter dated 20.01.2012 marked P 3(X) F crystallized the fact that said B. L. A Dayawathie Nagahawatta was the tenant of the said premises No 230 and the Petitioner had instituted a case bearing No L 9512 against said Dayawathie Nagahawatta seeking a declaration of title and under the decree entered in the said case No L 9512, which was produced marked P 3(iii)b, the

Petitioner became entitled to the land and the said premises No 230. In the said case it has been decreed that said Dayawathie Nagahawatta to be ejected from the land and the said premises No 230 and vacant possession thereof to be handed over to the Petitioner. But the Petitioner, in her petition and affidavit, has not averred the date of issue of a writ of possession and also the date of handing over the vacant possession of the said premises No 230 to her under the said decree. Accordingly said documents P 3(X) F and P 3(iii) b clearly show that the petitioner was not in occupation of the said premises at least until July, 2011.

The Petitioner has produced an extract from the Muslim Divorce Register dated 15.10.2011 marked P 3(V) to establish that the marriage between the Petitioner and Mohamed Ahlam Mohamed Ariff has been dissolved. According to P 3(V) the Petitioner's residence at the time of divorce was at No 236/5, Kumaratunga Mawatha, Matara.

The 3rd Respondent has produced a letter sent by the Petitioner to the Coordinating Secretariat of the Member of Parliament for Hambantota dated 19.11.2014. In the said letter she has mentioned her address as No 236/5, Kumaratunga Mawatha, Matara.

P 3(ii) is a certificate on residence and character of the Petitioner issued by Grama Niladari of 417B, Kade Veediya South. In the said certificate Grama Niladari had stated that the Petitioner was known to him from 02nd May 2012, during the tenure of his office in the area.

Facts aforementioned clearly reveal that the Petitioner was not able to establish that she was residing at No. 230, Kumaratunga Mawatha, Matara, during the 05 years preceding to the year 2015 as required by the said circular No 23/2013.

When I consider the facts and circumstances of the instant application I am of the view that the Petitioner has failed to establish the requirements under the proximity category as stipulated in Circular No 23/2013. Hence I hold that by not admitting the Petitioner's child to grade 1 of the St Thomas College, Matara, for the year 2015, the Respondents have not violated the fundamental rights of the Petitioner under Article 12(1) of the Constitution. Therefore I dismiss the instant application of the Petitioner without costs.

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

In the matter of an application under Article 126 of the Constitution of Sri Lanka.

D.G. Wijotmanna,
No.195, Ranawana Road,
Katugastota

PETITIONER

S.C. F.R. No: 138/2007

Vs.

1. Diyakeliyawela, Officer in Charge
2. Samarakoon, Inspector of Police
3. Bandara, Sub Inspector
4. Dissanayake, Sergeant
5. Police Officer (No. 47093)
6. Police Officer (No. 29277)
7. Abeysinghe Jayawardene, Sergeant

1st to 7th Respondents All of Katugastota Police Station, Katugastota

8. Victor Perera,
Inspector General of Police
Police Headquarters, Colombo

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

RESPONDENTS

Before : Chandra Ekanayake, J.
Wanasundera, PC J.
Jayawardene , PC J.

Counsel : J.C.Weliamuna for Petitioners
Ranil Samarasooriya with Madhawa Wijayasriwardene for the 1st- 7th Respondents.
A. Navavi, SSC. for 8th & 9th Respondents

Written Submissions tendered on : By the petitioner:11.8.2014

By the 1 – 7 Respondents : 05.11.2014.

Decided on: 31.03.2016.

CHANDRA EKANAYAKE, J

The petitioner by his petition dated 15. 05. 2007 (filed together with his affidavit) had sought leave to proceed against the respondents for the alleged infringement of his rights guaranteed under Articles 11,12 (1),13 (1), and 13 (2) of the Constitution of the Republic of Sri Lanka and for a declaration that the respondents have violated the rights guaranteed under the above Articles. In addition to the reliefs outlined above he had further sought compensation in a sum of Rs. 1,000,000 /= and for an order directing the 8th respondent to take disciplinary action against 1st to 7th respondents.

When this application was supported on 17. 07. 2007 this Court had proceeded to grant leave to proceed in respect of the alleged violations of rights guaranteed under Articles 11, 13(1) and 13(2) of the Constitution.

It has been alleged by the petitioner that on or about 04. 02 .2007 around 4.30 p.m. he had boarded a bus from Katugasthota town to return to his business place. As there was a person standing on the upper stand of the foot-board of the bus, he had to request that person to move inside, in order to get inside the bus. This having led to an exchange of words between two of them, the said person had kicked the petitioner hard resulting the petitioner losing his balance requiring him to hold on to the said person to prevent himself falling off the bus. However the said incident had ended without any further altercation, but it was later transpired that the said person who kicked him was the 7th respondent. As averred in paragraph 5 of the petition, following day (05. 02 .2007) around 8.30 a.m. the petitioner had gone to Katugasthota town to purchase some vehicle spare parts. When he came back to his business place at around 9.30 a.m. he had seen a police jeep parked in front of his business premises. Thereafter he had been ordered to be taken to the police jeep which was parked in front of his business place. He alleges that police officers failed to inform the petitioner the reasons for the arrest and also he was abused by the 6th respondent saying that he would be framed for possessing Ganja (cannabis) and would be sent to jail.

The petitioner complains that around 10 a.m. having reached the Katugasthota police station he was slapped by the 2nd respondent on both sides of the cheek and dragged inside

the station and put into to the cell. Thereafter the 3rd and 4th respondents who came over there had severely beaten him and after a short while the 5th respondent had taken the petitioner to the upstairs of the building. At that time petitioner submits that he saw the 7th respondent who was working on a computer in the room was the passenger who assaulted the petitioner in the bus on the previous day. As per the averments in the petition the petitioner had been severely assaulted on the face and his head had been hit against the wall several times. Further it is alleged that the 5th respondent thereafter proceeded to fill the sink fixed to the wall in a corner of the room with water and having dragged the petitioner plunged his head into the sink with water and held his head for nearly 30 seconds. In the result petitioner nearly got drowned and it caused him unbearable pain. Thereafter he had been taken to the cell on the ground floor.

Petitioner has alleged that he was kept in the police cell overnight and produced before the Magistrate, Kandy on 06. 02 .2007 around 12 noon for a charge of having in possession 1200 mg of Ganja, as evidenced by the document marked as P4 annexed to the petition to this court. Then the learned Magistrate had released him on bail.

Further he had to consult Dr. Ranjith Wicramasinghe- a Neuro-Surgeon as he was undergoing unbearable pain in the head at a channelled consultation centre in Kandy. Thereafter he had been admitted to Kandy Teaching Hospital on the same evening around 5 p.m. It is his position that a complaint was made to the Human Rights Commission (HRC)-Kandy as evidenced by the copy of the complaint marked as P2.

He has complained that in the aforesaid circumstances his arrest, detention and torture violates his Fundamental Rights guaranteed under Articles 11, 12 (1), 13(1) and 13(2) of the Constitution and has sought the reliefs prayed in the prayer to the petition.

The 1st to 7th respondents had filed statement of objections to the petitioner's application denying all the allegations made against them. A perusal of the record reveals that there had been ample evidence with regard to the torture committed at the hands of the respondents. This position is further strengthened by the Medico-Legal Report (MLR) submitted in respect of the petitioner by an Assistant Judicial Medical Officer, Dr. D.P.P Senasinghe from General hospital (Teaching), Kandy. The short history given by the patient namely Dambadeniya Gedara Vijothmanna (who is the present Petitioner) demonstrates the

version of the petitioner as to how the incident occurred on 05. 02. 2007 around 9.30 AM at his garage. The short history given by the petitioner (as appearing in the MLR) is reproduced below:

> " According to the examinee on 05-02-2007 around 9.30 a.m. some police officers from Katugasthota Police station came to his garage. They took him to the police station Katugasthota. When he got down from the jeep, 'Inspector Samarasekara' slapped him on both cheeks, near the police station. Then he was put into a police cell. Later 'Subinspector Bandara' and a officer called 'Rajan' came and hit him on the face with clenched fist. Then a traffic police officer came and took him out of the cell. He took the petitioner upstairs and hit his head on the wall and punched on his jaw. Then he was put into the cell again."

Under ' Nature, size, shape, disposition and site of injury' following appear (at page 2 of the MLR):

(1) Contusion, measuring 1x1 cm, circular shaped, placed on the middle of the \ forehead,3cm above the root of the nose.

(2) Contusion, measuring 3x2 cm, oval shaped, placed on the front of the right cheek, close to the right side of the nose.

The petitioner's daughter had complained to the Human Rights Commission of Sri Lanka on 05 – 02 - 07 and the officers from the Human Rights Commission came to the police station on the same day. The petitioner was produced before the Magistrate of Kandy on 06.02.2007 around noon for having in possession 1200 mg. of 'ganja' (case No.1670) and he was bailed out forthwith.

It is noteworthy that no other explanation was forthcoming from the respondents.

Since this Court had proceeded to grant leave to proceed on the alleged violations of Articles 11, 13 (1) and 13(2) of the Constitution necessity would arise to consider the above Articles. Article 11 of the Constitution thus reads as follows:-

"No person shall be subjected to torture or to cruel, inhumane or

degrading treatment or punishment ”

What has to be examined now is whether there is cogent evidence to justify violation of Article 11 in the backdrop of total denial of allegations by the police. In this regard the observations made by this court in *Ansalin Fernando Vs. Sarath Perera*, Officer in Charge Police Station- Chilaw and others (1992) 1 SLR 411 would lend assistance. In the above case after giving a detailed account of the physical assaults and humiliative treatment the 6th respondent was subjected to, at page- 491 it was observed as follows :

> “He states that after such treatment he was taken to Kalutara Police Station. Events thus averred to also have the ring of truth and can be relied upon by this court. Whilst I shall not accept each and every allegation of assault / ill- treatment against the police unless it is supported by cogent evidence I do not consider it proper to reject such an allegation merely because the police deny it or because the aggrieved party cannot produce medical evidence of injuries. Whether any particular treatment is violative of Article 11 of the Constitution would depend on the facts and circumstances of each case. The allegation can be established even in the absence of medically supported injuries”

Thus it is amply clear that an allegation of torture can be established even in the absence of medically supported injuries. But in the case at hand the MLR gives the injuries on the petitioner more particularly (as appearing at page 2 of the MLR). As per page 3 of the said report doctor had been of the opinion that the two injuries were caused by blunt weapons.

The history given by the petitioner confirms the sequence of events that had taken place from the time of arrest until he was produced before the Magistrate and bailed out.

Necessity has now arisen to consider the legal principles enunciated by decided cases on torture. In this regard observations of Justice Athukorala in Sudath Silva v Kodithuwakku (1987) 2 SLR 119 at Pg- 126, 127 to the following effect would be relevant:

> “Article 11 of our Constitution mandates that no person shall be

subjected to torture, or cruel, or inhuman or degrading treatment or punishment. It prohibits every person from inflicting torturesome , 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 other member of the police force, so he is 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 petitioner may be a hard-core criminal whose tribe deserves 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".

Further in the case of Channa Pieris & Others vs Attorney General & Others 1994 1SLR p-1 at p.6, the Court proceeded to enunciate three (3) general observations that would apply when examining whether torture has been established: -

"(i) The acts or conduct complained of must be qualitatively of a kind that a Court may take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated.

(ii) Torture, cruel, inhuman or degrading treatment or punishment may

take many forms, psychological and physical.

(iii) Having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or cruel, inhuman or degrading treatment."

In the case at hand the suffering occasioned was of an aggravated nature. In my view the assaults and hitting the petitioner's head against the wall, punching on his jaws, having dragged the petitioner and plunged his head into a sink filled with water holding the head for nearly 30 seconds in water would suffice to be taken cognizance of as a violation of Article 11. Having considered the nature and the gravity of the issues here a high degree of certainty exists before the balance of probability is said to tilt in favour of the petitioner. I therefore declare that the Article 11 of the Constitution was violated by 2 – 7 respondents.

Articles 13(1) and 13(2) of the Constitution are reproduced below:-

"13(1). No person shall be arrested except according to the procedure established by law. Any person arrested shall be informed of the reason for his arrest"

"13(2) Every person held in custody, detained otherwise deprived of personal liberty shall be brought before judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of an of an order of such judge made in accordance with procedure established by law."

It has become amply clear that when the petitioner was arrested no reasons have been given for the arrest. It is the contention of the petitioner (supported by affidavit) the person who had the altercation with him on 04.02.2007 was identified on the following day at the upstairs of the police station as the 7th respondent. It appears that this altercation had

led to the arrest and detention and torture as complained of on the petitioner and therefore 7th respondent was privy to the entire incident which had taken place on 05.02.2007. The petitioner has further complained that the police told the petitioner that he would be framed for possessing *'ganja*' and would be sent to jail. In fact the petitioner has been maliciously prosecuted in the Magistrate's Court for possession of *'ganja'*. Further, the alleged version of the 7th respondent with regard to the arrest of the petitioner for having a powdered packet in shirt pocket has not been corroborated by the arrest notes of the respondents. The arrest notes have not been even produced. The stance of the respondents had been (as per note P3) which was given to the petitioner's son at his business place requesting the petitioner to be present at the police station is different to the version of the petitioner. The petitioner's stance with regard to him being arrested without giving reasons has not been controverted by any of the respondents. In view of the above I am inclined to the view that Article 13(1) has been violated. However facts and circumstances of this case can be clearly distinguished from SC.FR.No.252/2006 (SC. Minutes of 15/12/2010) R.M.Ukwatta v S.I.Marasinghe & Others.

Now what needs consideration is the alleged violation of Article 13(2):

> "In Channa Peiris v Attorney General and others (1994) 1SLR 1 at pp. 75 and 76 Justice A.R.B.Amarasinghe having considered the previous decisions regarding the constitutional requirement to produce an arrested person before a Magistrate proceeded to outline the object of Article 13(2) in the following terms: -
>
> "However, in general, the purpose of the provision is to enable a person arrested without a Warrant by a non-judicial authority to make representations to a judge who may apply his "judicial mind" to the circumstances before him and make a neutral determination on what course of action is appropriate in relation to his detention and further custody, detention or deprivation of personal liberty."

Further in the case of **Queen v Jinadasa** 59 CLW 97 (1960) (CCA) it was held by the Supreme Court that section 37 of the Criminal Procedure Code and section 66 of the

Police Ordinance require that a person arrested without a warrant should be produced before a Magistrate with the least possible delay. The limit of twenty four hours prescribed in both sections does not enable the police to detain a suspect for the length of time even when he can be produced earlier or to deliberately refrain from producing him before a Magistrate. In this case per His Lordship Basnayaka C. J. at page 100:-

> "The law requires (section 66 of the Police Ordinance) that an accused person taken into custody by a police officer without a warrant must forthwith be delivered into the custody of the officer in charge of the Station *in order that such person may be secured* until he can be brought before a Magistrate to be dealt with according to law. That is the lawful purpose to be served by means of detention and we would sternly and emphatically disapprove of what seems to have become the common practice of compelling an accused to accompany the Police from place to for the purpose of participating in the detection of a crime. The delay of his production before a Magistrate in order that this unlawful purpose may be served is illegal and deserving of censure."

The respondents have attempted to establish that the petitioner was a witness in Magistrate Court of Kandy case No.33041 filed against one A.G.Piyadasa. But no material had been submitted that they went to the business place of the petitioner on 05.02.2007 to get the relevant information in respect of prosecution witness No.3 of that case namely, one Ubaya Ekanayake. The respondents have failed in their attempt. There is no other evidence also to support their contention. Further, it appears that no evidence has been submitted by the respondents to refute the allegation that the petitioner was kept in custody without producing before a Magistrate for more than 24 hours. In view of the above it is evident that rights guaranteed under Article 13(2) also have been violated.

In view of the above analysis I accordingly grant declarations with regard to violations of fundamental rights guaranteed by Articles 11, 13(1) and 13(2) of the Constitution against 2

– 7 respondents. I award the petitioner a sum of Rs. 120,000/- as compensation. The State is directed to pay the said amount and a further sum of Rs,.30,000/- as costs of this application to the petitioner. The said amounts of money shall be paid within three (3)months from today.

Judge of the Supreme Court

Wanasundera, PC J

I agree.

Judge of the Supreme Court

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 under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Muthuwahennadi Roshan Koitex
No. 57, Thuduwegodawela, Hikkaduwa
2. Muthuwahennadi Harison alias Tennyson
Opposite Jananandaramaya, Hikkaduwa

Petitioner

SC/FR 158/2008

Vs

1. Sub Inspector Sanjeewa Seneviratne
Police Station, Hikkaduwa
2. Police Constable Suranga 64244
Police Station Hikkaduwa
3. Officer-in-Charge, Police Station Hikkaduwa
4. Keembiyage Susani Anjala, Opposite Hospital Archchikanda, Hikkaduwa
5. The Inspector General of Police
6. Hon. Attorney General

Respondents

Before : K Sripavan CJ
Sisira J de Abrew J
Priyantha Jayawardene PC J

Counsel : Sarita de Fonseka for the Petitioner
D. Akuregoda for the 1st and 2nd Respondenet
Madhawa Tennakoon SSC for the 3rd,5th and 6th Respondents
Chula Bandara for the 4th Respondent

Argued on : 23.10.2015
Decided on : 17.2.2016

Sisira J De Abrew J.

The Petitioners, in this application seek a declaration that their fundamental rights guaranteed under Article 11 of the Constitution have been violated by the 1st and the 2nd Respondent and /or the State; that their fundamental rights guaranteed under Article 12(1) of the Constitution have been violated by the 1st ,the 2nd , 3rd and 4th Respondents and/ or the State; and that their fundamental rights guaranteed under Article 13(1) of the Constitution have been violated by the 1st, 2nd, 3rd Respondents and/ or the State. This Court by its order dated 3.6.2008, granted leave to proceed for the alleged violations of Articles 11,12(1) and 13(1) of the Constitution. Facts set out by the petitioners in their petition may be briefly summarized as follows. The 1st petitioner is the son of the 2nd petitioner. The 1st petitioner has been cohabiting with the 4th respondent for over eight years. The 1st petitioner, who works as a fisherman, had built a temporary hut within 100 meters of the coastal line in close proximity to Police Station Hikkaduwa. His hut was destroyed by the tsunami in 2004. He was subsequently given a house two years after the tsunami by an organization called Kurier Aid Austria. The 1st petitioner and the 4th respondent who lived together for over six years had issues that turned into quarrels regarding various relationship that the 4th respondent was having with the men in the area and as a result of the said disputes the 1st petitioner could not live with the 4th respondent. The 1st petitioner states that the 1st respondent maintains intimate relationship with the 4th respondent. The 1st respondent, on the instigation of the 4th respondent, on several occasions came to arrest the 1st petitioner. As the 1st petitioner was living in fear of being arrested or assaulted, the 2nd petitioner who is the father of the 1st petitioner on 26.3.2008 took the 1st petitioner to the Police

Station Hikkaduwa in order to meet the 3rd respondent, the Officer-in-Charge of the said Police Station. However they could not meet him as he was not available at the Police Station. On 28.3.2008 the 1st petitioner met the 1st respondent at the Police Station Hikkaduwa and explained to him the behaviour of the 4th respondent. At this stage the 1st respondent instructed a person to bring the 4th respondent to the Police Station. The 1st respondent in the presence of the 4th respondent, suggested to the 1st petitioner that he leaves the house and allows the 4th respondent to remain in the house. The 1st petitioner states that even on this occasion the 1st respondent and the 4th respondent demonstrated intimate relations with each other. The 1st petitioner disagreed with this said suggestion and left the police station. The 1st petitioner states that at this time the 1st respondent was in the habit of visiting the 4th respondent in his house and even on the previous day (27.3.2008) around 11.30 p.m. when he came home the 1st respondent was in his house. In order to avoid encounter with the 1st respondent, he without entering the house went away and came back around 12.30 a.m.(the following day) by which time the 1st respondent had left the house.

On 2.4.2008 on hearing that the 4th respondent was loading the household items in his house to a tractor, the 1st petitioner came to his house and then saw the 1st respondent and the 2nd respondent who were in civvies present at home. On seeing the 1st petitioner, the 1st respondent ordered the 2nd respondent to apprehend the 1st petitioner saying 'catch this man to give him two blows'. Thereupon the 2nd respondent assaulted the 1st petitioner. When the 1st petitioner ran to his father's house (the 2nd petitioner's house) the 1st respondent and the 2nd respondent followed the 1st petitioner to the 2nd petitioner's house and assaulted the 1st petitioner in front of the 2nd petitioner

and neighbours. When the 2nd petitioner who is the father of the 1st petitioner asked the 1st respondent the reason for such assault, the 1st respondent assaulted the 2nd petitioner too. The 2nd respondent, at one stage, held the 1st petitioner enabling the 1st respondent to assault the 1st petitioner. Thereafter the 1st and the 2nd respondents dragged both petitioners to the Police Station Hikkaduwa and put them in the cell of the Police Station. Thereafter the 2nd respondent took the 1st petitioner out of the cell and hit his head several times on the floor. As a result of this assault, the 1st petitioner collapsed on the floor. After the 1st petitioner collapsed on the floor, the 2nd respondent turned the 1st petitioner face down, got on to the top of his body and assaulted him with hand and legs. The 1st and 2nd respondents assaulted the 1st petitioner at the Police Station for about 15 minutes. The 2nd petitioner pleaded with them not to assault the 1st petitioner. Thereafter the 1st and the 2nd respondents handcuffed the petitioners and took them to Archchikanda Hospital where they were examined by a doctor. The 2nd petitioner told the doctor that he and the 1st petitioner had been assaulted by the police. Thereafter 1st and the 2nd respondents took the petitioners near the house where the 4th respondent was living and scolded the petitioners in foul language also saying 'here both the father and son are handcuffed.' At this place too the 1st respondent slapped the 1st petitioner several times. Thereafter the petitioners were brought to the Police Station Hikkaduwa and put into the cell.

At the Police Station the 2nd respondent brought an envelope and a ganja cigar wrapped in a polythene bag; put it into the envelope and asked the 1st petitioner to place his thumb impression. When the 1st petitioner refused to do so, the 2nd respondent scolded and forcibly kept the 1st petitioner's thumb impression on it. On 3.4.2008 the 1st petitioner was brought before the 3rd

respondent who asked the petitioner what happened. When the 1st petitioner told the 3rd respondent that ganja had been falsely introduced on him, he told an officer who was standing near him 'it is our people who have put this man into trouble'. Later the 1st petitioner was produced before the learned Magistrate Galle and the 1st petitioner pleaded not guilty to the charge. The number of the case is MC Galle 7568. The learned Magistrate released the 1st petitioner on bail. It is pertinent to mention here that the learned Magistrate, after trial, by order dated 9.6.2014, found the 1st petitioner not guilty and acquitted him of the charge. This order has been produced in this Court by motion dated 1.10.2014.

On 2.4.2008 itself the 2nd petitioner was bailed out by the Police and asked to be present in court on 8.4.2008. When the 2nd petitioner asked for the reasons to file charges against him he was told that he was drunk. On 8.4,2008 although he attended the Magistrate's Court Galle as instructed by Police, he found that there was no such case filed against him on the said date. Later when he complained to the 3rd respondent about it, the 3rd respondent directed a police officer to give the correct case number without harassing people. Thereafter the said police officer informed the 2nd petitioner that case number 8049 filed against him would be called on 22.4.2008. It is pertinent to mention here that the learned Magistrate after trial, by order dated 28.4.2014, found him not guilty and acquitted him of the charge. The said judgment of the learned Magistrate was produced in this court by motion dated 1.10.2014.

The 1st petitioner who was on severe pain due to the assault on him by the 1st and the 2nd respondents got himself admitted to Karapitiya Teaching Hospital on the same day (3.4.2008) and was treated for his wounds until

5.4.2008 on which day he was discharged. While he was in the hospital he was examined by Judicial Medical Officer (JMO). A copy of his admission card has been produced as P3. On 6.4.2008 the 1st petitioner complained the said incident to the Senior Superintendant of Police Galle. The petitioners state that the 1st petitioner suffered severe body aches following the assault by the 1st and 2nd respondents. The 2nd petitioner being a sixty year old heart patient was also severely disturbed by the attack on him and his son and was deeply ashamed to have received blows by the police in front of his neighbours. The petitioners therefore state that the conduct of the 1st and the 2nd respondents amounts to not only torture but also degrading treatment. The petitioners state that the above conduct and/or actions of the 1st and the 2nd respondents constitute violation of their fundamental rights guaranteed under Article 11, 12(1) and 13 (1) of the Constitution. The petitioners have also complained this incident to the Human Rights Commission, National Police Commission, 5th and 6th respondents and the Deputy Inspector of Police (Legal). This was the story narrated by the petitioners in their petition and affidavits filed in this court.

The 1st and the 2nd respondents, in their affidavits filed in this court, have denied the entire incident complained by the petitioners. They have even annexed affidavits of Rev. Hikkaduwe Gnanarathana, the Chief Incumbent of Jananandarmaya, Baddgama Road, Hikkaduwa (1R1), Mayor of Urban Council Hikkaduwa (1R2), and the Leader of Opposition of Urban Council Hikkaduwa (1R3). They, in their affidavits, say that the 1st respondent is a very honest officer who has taken steps to eradicate the drug menace in the area. The 1st and the 2nd respondents in their statement of objections state that the petitioners are hirelings of heroin dealers. But the 1st and the 2nd

respondents have failed to produce any previous convictions of the 1st and the 2nd petitioners regarding drugs. Even at the time of arrest were there any pending cases against the 1st and the 2nd petitioners? If there were any such cases, the 1st and the 2nd respondents would definitely have produced details of such cases. Thus conclusion that can be reached is that they did not have any pending cases. The only drug case that was pending against 1st petitioner was the ganja case from which he was, after trial, acquitted by the Magistrate. Even that case was filed after the petitioners were arrested. In fact as I pointed out earlier, the 1st and the 2nd petitioners have been acquitted from the cases filed against them. The charge against the 1st petitioner was that he was in possession of five grams of ganja and the charge against the 2nd petitioner was that he had, under the influence of liquor, behaved at Hikkaduwa town in an indecent manner using filthy language. When I consider the above matters, I am of the opinion that said affidavit marked 1R1, 1R2 and 1R3 do not in any way affect allegations levelled against the 1st and the 2nd respondents by the petitioners.

Kuruwage Somasiri a neighbour of the 1st petitioner, in his affidavits, states the following facts. On 2.4.2008 he saw some people loading goods to a tractor from the house of the 1st the petitioner and also saw the 4th and 1st respondents and another police officer near the house of the 1st the petitioner. When the 1st the petitioner came to this place the 4th respondent pointed out him to the 1st respondent who uttered the following words ‘catch him to give two blows’. Then the other police officer apprehended the 1st the petitioner and assaulted him. When the 1st petitioner ran away, both police officers chased after him. Later the 1st and 2nd the petitioners were dragged to the police station by the two police officers.

Dedduwa Mahage Indrarathne a neighbour of the 2nd petitioner in his affidavit states the following facts. On 2.4.2008 on hearing shouts of somebody he came out to see what it was. He then saw the 1st the petitioner being assaulted by some people. The 1st the petitioner uttered the following words 'Father I am being assaulted'. The 2nd petitioner at this stage came out of his house and inquired reasons for the assault. When Indrarathne and other neighbours ran to the place of attack, he saw two people attacking the 1st petitioner and identified one of them as the 1st respondent. When he realized that the person assaulting the 1st the petitioner was a Sub Inspector attached to the Police Station Hikkaduwa, he did not go to rescue the 1st the petitioner from the assault. When the 2nd petitioner came to the place of attack, the 1st respondent uttering the following words 'catch him, he too is wanted' went and caught the 2nd the petitioner and assaulted him leaving the 1st the petitioner at the scene. Later both petitioners were dragged to the Police Station. Thereafter, when he and the wife of the 2nd the petitioners went to the Police Station Hikkaduwa, the 3rd respondent, the Officer-in-Charge of the Police Station made inquiries about their presence. When replied that he came to ask for bail for the 2nd petitioner, the 3rd Respondent instructed them to be seated and went out of the Police Station. Whilst they were in the Police Station, the 1st Respondent using offensive words addressed him (Indrarathne) in the following language. "Are you the one who came to ask for bail"? The 2nd petitioner was later bailed out by the Police. On the following day (3.4.2008) three of them (Indrarathne, the 2nd Petitioner and his wife) went to Magistrate's Court, Galle and the 1st Petitioner was released on bail by the learned Magistrate. This is the story revealed by Indrarathne in his affidavit filed in this court. When the above facts are considered it is clear that

Kuruwage Somasiri and Indrarathne corroborate the attack on the 1st Petitioner by the 2nd Respondent.

The Medico Legal examination Form (MLE form) of the 1st Petitioner has been produced by the 3rd Respondent as 3R3. This document has been signed by the Medical Officer-in-Charge of Government Hospital Hikkaduwa. According to this document, the 1st Petitioner did not have any injuries when he was examined by the doctor at 2.45 p.m. on 2.4.2008. Can this document be accepted as a true document? When leave to proceed was granted on 3.6.2008, this court called for the Medico Legal Report (MLR) and the Bed Head Ticket (BHT) of the 1st Petitioner from the Director of Karapitiya Teaching Hospital. These documents are now available in the case record. According to the MLR of the 1st Petitioner, the Judicial Medical officer (JMO) has certified that the 1st Petitioner was having an abrasion 2x1c.m in size and oval in shape situated on the left forehead. According to the MLR, this injury could have been caused by a blunt weapon and the patient has complained of headache and body aches. It is noted that the Petitioner was admitted to Karapitiya Teaching Hospital on 3.4.2008 and was examined by the JMO on 6.4.2008. It has to be noted hare that the 1st Petitioner was released on bail by the learned Magistrate only on 3.4.2008. Thus there was no opportunity for him to get himself admitted to a hospital prior to 3.4.2008. When the contents of the MLR are considered, can the MLE Form signed by the Medical Officer of Government Hospital Hikkaduwa be accepted? This question has to be answered in the negative. When I consider the above matters I am of the opinion that the contents of the MLE form cannot be accepted as true. The 1st and the 2nd Respondents have denied the allegation leveled against them by the petitioners.

Article 11 of the Constitution reads as follows.

> "No Person shall be subjected to torture cruel, inhuman or degrading treatment or punishment."

At this stage it is relevant to consider certain judicial decisions of this court.

In Amal Sudath Silva Vs Kodituwakku Inspector of Police and others [1987] 2 SLR 119 at 126 Athukorale J (with whom Sharvananda CJ and LH de Alwis J agreeing) held as follows.

> "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."

In Mrs WMK de Silva Vs Chairman Ceylon Fertilizer Corporation [1989] 2 SLR 393 at 405this Court held as follows.

"In my view Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom shall refer to as 'the victim') by a public official acting in the discharge of his executive or administrative duties or under colour of office, for such purposes as obtaining from the victim or a third person a confession or information, such information being actually or supposedly required for official purposes, imposing a penalty upon the victim for an offence or breach or a rule he or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person to do or refrain from doing something which the official concerned believes the victim or the third person ought to do or refrain from doing, as the case may be."

I would like to quote the following passage from the book titled "Fundamental Rights in Sri Lanka" 2nd edition by Dr. Jayampathy Wickramaratne pages 215 to 216.

"The petitioners in Adhikary Vs Amarasinghe [2003] 1 SLR 270 were husband and wife. The first petitioner was an Attorney-at-Law while the second petitioner was a teacher. They were travelling in their car

with their infant child and close relatives. At a traffic jam, the respondents, all security officers of a Minister, prevented the vehicle from proceeding any further and the first and the second respondents punched the car with their fists. When the first petitioner questioned them as to why they were preventing petitioners from proceeding, the first and second petitioners abused and humiliated the petitioners and their family. The first petitioner was pulled out and slapped. The second petitioner, who came to the rescue of her husband with the child in her arms, was slapped and abused. The first and second respondents shouted, saying that they were security officers of a particular Minister and that they could shoot and kill the petitioners.

Shirani Bandarnayake J, with Edussuriya and Yapa JJ agreeing, held that "the protection of Article 11 is not restricted to the physical harm caused to a victim, but would certainly extend to a situation where a person who has suffered psychologically due to such action. The learned Judge had no hesitation in holding that the ordeal faced by the petitioners was of an aggravated nature. The anguish faced by the wife was sufficient to prove the required level of severity needed for an act to be violative of Article 11. The psychological trauma faced by the innocent child added to the severity of the actions of the first and second respondents."

Considering the facts of this case and applying the principles laid down in the above legal literature, I hold that the first petitioner has been subjected to inhuman and degrading treatment by the 1st and the 2nd respondents. For the above reasons I hold that the 1st and the 2nd respondents have violated the

fundamental rights of the 1st petitioner guaranteed by Article 11 of the Constitution.

The next point that must be considered is whether there is sufficient evidence to conclude that the 1st and the 2nd respondents assaulted the 2nd petitioner. The 1st petitioner got himself admitted to Karapitiya Teaching Hospital soon after he was released on bail by the learned Magistrate. According to the evidence the 2nd petitioner too was present in the Magistrate Court of Galle when the 1st petitioner was released on bail. But the 2nd petitioner chose not to enter the Karapitiya Hospital. When I consider these matters, I feel that there is no sufficient evidence to conclude the 1st and the 2nd respondents have violated the fundamental rights of the 2nd petitioner guaranteed by Article 11 of the Constitution.

The petitioners allege that their fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the 1st, 2nd,3rd and 4th respondents. I now advert to this contention. Article 12(1) of the Constitution reads as follows.

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

The allegation of the petitioners is that the 1st and the 2nd respondents fabricated two cases against them and the 1st and 2nd respondents have produced arresting notes marked 1R9. According to 1R9, on 2.4.2008 around 1.30 p.m. when the 1st and the 2nd respondents were travelling in a private vehicle the 1st petitioner came to the road on a bicycle. When he was getting ready to stop his bicycle he (the 1st petitioner) ran away leaving the bicycle.

The 2nd respondent chased after him and arrested him. The Police Officers found a packet of ganja weight of which was about 5 grams hidden in his trouser pocket. Little prior to this arrest (twenty minutes before) the 1st and the 2nd respondents have arrested the 2nd petitioner. If a packet containing five grams of ganja was hidden in his trouser pocket, it could not been seen by anybody. Then the question that arises is whether the evidence of two police officers could be accepted when they said that the 1st petitioner ran away on seeing the police officers. The 1st petitioner was charged for being in possession of five grams of ganja. According to the judgment of the Magistrate both petitioners have given evidence under oath. After considering the above question and the evidence of the case, the learned Magistrate acquitted the 1st petitioner of the charge leveled against him. The most important thing that must be taken into consideration is that the failure on the part of the police to take the bicycle into custody as a production. Normally if a person is detected with ganja or heroin in a vehicle such vehicle is taken into custody as a production. Surprisingly the police did not take the bicycle of the 1st petitioner. When the above matters are considered I have to ask the following question. Is the story narrated by the police true?

The 1st and the 2nd respondents also filed a case against the 2nd petitioner who is the father of the 1st petitioner, for behaving in an indecent manner and using filthy language under the influence of liquor near Hikkaduwa bus stop. Both petitioners have given evidence under oath and denied the charge. The learned Magistrate has observed that the 2nd petitioner was arrested twenty minutes prior to the arrest of the 1st petitioner. The 2nd petitioner was arrested at 1.10 p.m. and the 1st petitioner was arrested at 1.30 p.m. The learned

Magistrate after considering the evidence led at the trial has acquitted the 2nd petitioner of the charge. It has to be stated here that both the petitioners were acquitted after trial. It appears from the facts of this case and from the judgment of the learned Magistrate that these two cases were fabricated by the 1st and the 2nd respondents. If the two police officers arrested the petitioners on a complaint which was subsequently proved false, then they (the police officers) cannot be blamed. But it has to be stressed here that the case filed against the 2nd petitioner was not a case where the two police officers went and arrested the petitioners on a compliant which was subsequently proved to be false. According to the two police officers (1st and 2nd respondents) they arrested the 1st petitioner as they found ganja in his possession and the 2nd petitioner was arrested as the two police officers observed that the 2nd petitioner was, under the influence liquor, behaving in an indecent manner using filthy language. If the two petitioners were arrested and produced before the Magistrate on false charges fabricated by the two police officers, can't it be construed to say that two police officers have taken away their (petitioners) liberty to live peacefully and their happiness in life? Yes it can. In this country people should have the liberty to live peacefully and are entitled to their happiness to live peacefully. Police can't take away this right of the people. If the police take away this right of the people, then their Fundamental Rights namely that all persons are equal before the law and are entitled to the equal protection of the law are violated by the police action. In the present case it appears that the 1st and the 2nd respondents have filed two cases against the two petitioners in order to justify the wrongful arrest of the petitioners made by them (the 1st and the 2nd respondents). In my view, if a police officer in order to justify his wrongful arrest of a person files a false

case in court, he violates Fundamental Rights of that person guaranteed by Article 12(1) of the Constitution. Primary duty of the police is to maintain law and order. In doing so police officers must work as true public servants. In this country, police officers must impress the principle that they serve and protect the people. I have earlier pointed out that the 1st and the 2nd respondents have filed two false cases against the petitioners in order to justify their wrongful arrest of the two petitioners. For the above reasons, I hold that the 1st and 2nd respondents have violated the fundamental rights of the two petitioners guaranteed by Article 12(1) of the Constitution.

The petitioners allege that their fundamental rights guaranteed by Article 13(1) of the Constitution have been violated. I will now deal with this contention. According to the respondents, the 1st petitioner was arrested for being in possession in five grams of ganja and the 2nd petitioner was arrested as he was, under the influence of liquor, behaving in an indecent manner and using filthy language in a public place (Hikkaduwa Town). I have earlier held that both cases have been fabricated by the 1st and 2nd respondents. Article 13(1) of the Constitution reads as follows.

> "No person shall be arrested except according to the procedure established by law. Any person arrested shall be informed of the reason for his arrest."

In this connection it is relevant to consider the judgment in Channa Peiris and Others Vs Attorney General and Others [1994] 1 SLR 1 at page 47 wherein Supreme Court held thus:

> "However the officer making an arrest cannot act on a suspicion founded on mere conjecture or vague surmise. His information must

> give rise to a reasonable suspicion that the suspect was concerned in the commission of an offence for which he could have arrested a person without a warrant. The suspicion must not be of an uncertain and vague nature but of a positive and definite character providing reasonable ground for suspecting that the person arrested was concerned in the commission of an offence".

If the charges levelled against petitioners have been fabricated by the Police then the arrest has been made on false grounds. Then the arrest itself is illegal and wrong. It cannot therefore be contended that the arrest was made according to the procedure established by law. In the present case the 1st and the 2nd respondents fabricated false charges against the petitioners and arrested them. Therefore the two petitioners had been arrested not according to the procedure established by law. I thus hold that the 1st and the 2nd respondents have violated the fundamental rights of the petitioners guaranteed by Article 13(1) of the Constitution. This situation would have been different if a police officer, on a complaint made by a person regarding commission of an offence which was subsequently proved to be false, arrested the person against the allegation was made. I have, in this judgment, held that the 1st and 2nd respondents have violated fundamental rights of the 1st petitioner guaranteed by Articles 11,12(1) and 13(1) of the Constitution and that the 1st and the 2nd respondents have violated the fundamental rights of the 2nd petitioner guaranteed by Articles 12(1) and 13(1) of the Constitution. Thus both petitioners are entitled to receive compensation. As I pointed out earlier the 1st and the 2nd respondents fabricated two cases against the petitioners and arrested them. This is not a case where the two police officers, in discharging

their duty to protect state property and/or to protect National Security, have arrested the petitioners. When I consider all these matters I hold that the 1st and the 2nd respondents are personally liable to pay compensation to the petitioners. I direct that the 1st respondent to pay Rs. 75,000/- to the 1st petitioner and Rs.50,000/- to the 2nd petitioner. The 2nd respondent is directed to pay Rs.75,000/- to the 1st petitioner and Rs.50,000/- to the 2nd petitioner. However the 1st and the 2nd respondents, at the time of the arrest of the petitioners and filing of two cases against the petitioners, have functioned as police officers. Therefore the State too is liable to pay compensation to the petitioners. I order the State to pay Rs.100,000/- to the 1st petitioner and Rs.50,000/- to the 2nd petitioner. The 5th respondent is directed to ensure the said payments from the State funds.

The next question that must be considered is whether the 3rd respondent who was the Officer-in-Charge of Hikkaduwa Police Station has violated the fundamental rights of the petitioners. He did not participate in the arrest of the petitioners. There is no allegation that he assaulted the petitioners. In fact when the 1st petitioner informed the 3rd respondent when he was brought to the police station that ganja had been falsely introduced, he (the 3rd respondent) told another police officer that it is our people who have put this man into trouble. When the 2nd petitioner complained to the 3rd respondent that a wrong date of the case in MC Galle was given to him, the 3rd respondent instructed a police officer to give the correct case number and the date without harassing people. These facts must be considered in favour of the 3rd respondent. The only evidence available against the 3rd respondent is that he as the Officer-in-Charge of the Police Station signed the B Report of the 1st

petitioner. By doing this has he violated the fundamental rights of the 1st petitioner? I now advert to this question. When the 1st and the 2nd respondents who are subordinate officers of the 3rd respondent complained to him that a person had been arrested for being in possession of ganja, can he refuse to sign the B Report. He was, at that time, was unaware of the falsity of the charge. For the above reasons, I hold that the 3rd petitioner has not violated the fundamental rights of the petitioners.

The next question that must be considered is whether the 4th respondent has violated the fundamental rights of the petitioners. The 4th respondent, in her affidavit, says that she was living with the 1st petitioner for about eight years in a hut built by her parents and that this hut was destroyed by tsunami. Thereafter a NGO donated the present house for both of them and some furniture too was given by the said NGO to be used by both of them. She denies that she came in a three wheeler with the 1st respondent. The person to whom the ownership of the house was donated by the NGO has not been decided by any State Officer. The complaint of the 1st petitioner was that the 4th respondent was loading the household items of the said house to a tractor. If the house and the furniture were given to the 1st petitioner and the 4th respondent, the 4th respondent cannot be blamed for removing some household items when they could not live together. One must not forget that both of them were living in this house but could not live together after some time. Under these circumstances it is not possible to conclude that the 4th respondent have violated the fundamental rights of the petitioners. Accordingly I hold as follows:-

The 3rd and the 4th respondents have not violated the fundamental rights of the petitioners.

The 1st and 2nd respondents have violated the fundamental rights of the 1st petitioner guaranteed by Articles 11, 12(1) and 13(1) of the Constitution.

The 1st and 2nd respondents have violated the fundamental rights of the 2nd petitioner guaranteed by Articles 12(1) and 13(1) of the Constitution.

The 1st respondent is directed to pay Rs.75,000/- to the 1st petitioner and Rs. 50,000/- to the 2nd petitioner personally.

The 2nd respondent is directed to pay Rs. 75,000/- to the 1st petitioner and Rs. 50,000/- to the 2nd petitioner personally.

The State is directed to pay Rs.100,000/- to the 1st petitioner and Rs 50,000/- to the 2nd petitioner.

The aforesaid sums should be paid within two months from today.

The Registrar of this court is directed to send a certified copy of this judgment to the Inspector General of Police for necessary action.

Judge of the Supreme Court

K Sripavan CJ

I agree.

Chief Justice

Priyanth 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 an Application under and in terms of Article 17 read with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Sri Lanka Telecom PLC,
Lotus Road,
P.O. Box 503,
Colombo 01.

Petitioner

SC FR Application No. 194/2016

Vs.

1. Telecommunications Regulatory Commission of Sri Lanka,
   276, Elvitigala Mawatha,
   Colombo 08.

2. Dialog Broadband Network (Pvt.) Ltd.,
   No. 475, Union Place,
   Colombo 02.

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

Respondents

BEFORE **:** K**.** Sripavan, C.J.
Upaly Abeyrathne, J.

COUNSEL Faisz Musthapha, PC. with Chanaka de Silva, Aruna Samarajeewa and Niranjan Arulpragasam instructed by G.G. Arulpragasam for the Petitioner.

Romesh de Silva, P.C., with Sugath Caldera and Buddhika Illangatilake instructed by Sanath Wijewardane for 1st Respondent.

K. Kanag-Isvaran, P.C., with Avindra Rodrigo, Lakshmanan Jeyakumar and Nimesha de Silva instructed by M/s. F.J. & G. de Saram for the 2nd Respondent.
Viraj Dayarathne, Senior Deputy Solicitor General for the 3rd Respondent.

ARGUED ON	:	12.07.2016
WRITTEN SUBMISSIONS FILED ON	**:**	09.08.2016 by the Petitioner 09.08.2016 by the First and the Second Respondents
DECIDED ON	**:**	07. 10.2016

K. SRIPAVAN, C.J.,

The Petitioner in this application seeks, inter alia,

(a) a declaration that the fundamental right of the Petitioner under Article 12(1) of the Constitution has been violated by the First Respondent by making a recommendation contained in the letter dated 05.01.2016 referred to as **X1** in the Motion dated 12.05.2016 marked **P22** ; and

(b) an Order quashing the decision of the First Respondent to recommend the issuance of the proposed integrated transmission network licence and communicated by letter dated 05.01.2016 referred to as **X1** in the Motion dated 12.05.2016 marked **P22.**

The basis upon which the Petitioner seeks the aforesaid reliefs are contained in Paragraph 56 of the Petition dated 09.06.2016. When the application was taken up for support the learned President's Counsel for the First Respondent raised two Preliminary Objections to the maintainability of the Application in the following manner:-

(i) The Petition does not disclose an infringement of the Fundamental Rights of the Petitioner; and

(ii) The Application is not properly constituted in that the Hon. Minister of Telecommunications has not been made a party.

Learned President's Counsel for the 2nd Respondent too raised a Preliminary Objection as follows:-

(i) The Court is without jurisdiction to entertain the Petition because there has been no violation of the Fundamental Rights of the Petitioner and the recommendation spoken of in the Petition is a result of a statutory

process undertaken by the Telecommunications Regulatory Commission in terms of Section 17 of the Act upon an application for a renewal of the licence by the Second Respondent which enables the Petitioner to participate which the Petitioner did not make use of.

The Court having heard the parties, directed to file written submissions within three weeks. However, both the First and the Second Respondents moved for further time to file written submissions.

The Motion dated 12.05.2016 marked **P22** and referred to as **X1** in the reliefs sought by the Petitioner was one filed in the Court of Appeal Writ Application No. 289/15. One of the Paragraphs of the said Motion reads as follows:-

> *"AND WHEREAS, the 1st Respondent by its letter of 5th January 2016 informed the Petitioner that "the Commission has decided to recommend the issuance of the licence of Dialog Broadband Networks (Pvt) Ltd to the President" (as per Section 17(2) of the Act) and called upon the 2nd Respondent to make payment of the licence fee of Rs. 800,000,000/= together with NBT and Stamp Duty payable thereon."*

Two of the grounds urged by the Petitioner in Paragraphs 56(j) and 56(m) are as follows:-

(i) the decision to recommend has been made in violation of the principles of natural justice as the Petitioner has not been granted a hearing despite filing objections……..; and

(ii) the said decision is ultra virus the powers of the First Respondent in as much as it is in violation of Section 17 of the Telecommunication Regulatory Commission Act for the reason that an expired licence cannot be lawfully renewed/modified.

The submission of the learned President's Counsel for the Petitioner is that midway through the argument in the Court of Appeal Application No. 289/15, the Second Respondent Company filed a Motion dated 12.05.2016 marked **P22** and annexed

to the Motion, a copy of the letter dated 05.01.2016 marked **X1** which is significantly four months anterior to the said Motion.

It is the duty of this Court to consider whether Section 17 of the Sri Lanka Telecommunications Act No. 25 of 1991 as amended by Act No. 27 of 1996 has been complied with. If a recommendation has in fact been made without following the procedure laid down in the aforesaid Act, it would make the decision so arrived null and void.

In *Jayawardena* Vs. *Dharanai Wijayatilake* (2001) 1 S.L.R. 132, the Petitioner alleged that the First Respondent had no power to cancel his appointment and in any event the cancellation was without cause or inquiry and hence invalid. Fernando, J. observed as follows:-

> *"It is accepted today that powers of appointments and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice. [Bandara* Vs. *Premachandra].* I *am of the view that this Court can, and indeed must, take judicial notice of the fact that, generally, a person holding an office which is public in character, is not removed without legal authority, without cause, without complying with the audi alteram partem rule and without notice.* ***Since the Petitioner was not treated in accordance with "these essential requirements of justice and fair play" he was denied the equal protection of the law."*** (emphasis added).

When an argument was put forward on behalf of the First Respondent in Jayawardena's case that a Writ of Certiorari was the proper remedy for a breach of natural justice and not a Fundamental Rights Application, Fernando, J. noted that some fundamental breaches of the law will result in denying the protection of the law and the case is plainly covered by the language of Article 12(1) of the Constitution.

The Indian Supreme Court in *Erusian Equipment and Chemicals Ltd. Vs. State* of *West* Bengal (AIR 1975 SC 266) held that the denial of an opportunity of being

heard before a person could be blacklisted, violated equal protection of the law. In the case of *W.K.C. Perera* Vs. *Prof. Daya Edirisinghe* (1995) 1 S.L.R. 148, Fernando J. emphasized the fact that by entrenching fundamental rights in the Constitution the scope of writ jurisdiction has become enlarged, is implicit in Article 126 (3), which recognizes that a claim for relief by way of writ may also involve an allegation of the infringement of a fundamental right.

The cases cited above show the tendency to incorporate the Principles of Administrative Law to equal protection of law embodied in Article 12(1) of the Constitution. In fact, in *Wickramatunga* Vs. *Anuruddha Ratwatte* (1988) 1 S.L.R. 201 Amerasinghe, J. stated that where there is a breach of contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances, there was no justification in law for holding that only one of the available remedies can be availed of and the other consequently stands dismissed.

Thus, this Court has to decide in the first instance as to whether Section 17 of the Act No. 25 of 1991 as amended by Act No. 27 of 1996 has been complied with prior to the recommendation referred to as **X1** in the Motion dated 12.05.2016 marked **P22** was sent. As I observed in Noble Resources International (Pvt) Ltd. Vs. Hon. Ranjith Siyambalapitiya (S.C. F.R. 394/15 – S.C. Minutes of 24.06.2016) it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it in accordance with the provisions of the Constitution and the law, the Court cannot close its eyes and allow the actions of the State or the Public Authority go unchecked in its operations.

The only Preliminary Objection of the First Respondent that needs consideration is whether the application is not properly constituted in that the Hon. Minister of Telecommunications has not been made a party. The reliefs sought by the Petitioner are directed against the First Respondent and not against the Hon. Minister. Since no relief is sought against the Hon. Minister, he need not be made a party to this application. The Preliminary Objections are overruled. The Petitioner in my view has established a prima facie case of alleged violation of its Fundamental rights by the First and the Second Respondent.

Court therefore grants leave to proceed for the alleged violation of the Petitioner's Fundamental right enshrined in Article 12(1) of the Constitution by the First and the Second Respondents.

CHIEF JUSTICE

U. ABEYRATHNA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

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

S.C F.R. 206/2008

1. **DEMUNI SRIYANI DE SOYZA**
   No.8, 6th Lane,
   Jambugasmulla Mawatha,
   Nugegoda.
2. **S.M.SRIYALATHA**
   No. 515, Kuruppu Junction,
   Polonnaruwa.
3. **Y.H. SANATILAKE**
   No. 309/1/A, BOP 316,
   Thalpothe, Polonnaruwa.
4. **C.A.P. DE SILVA**
   No.7, Ela Hingurakgoda,
   Minneriya.
5. **K.K.U.J.N. PERERA**
   Merlin Mawatha,
   Horagolla, Maravila.
6. **P.A.J.S. SAMARAKOON**
   No. 40, Dewala Mawatha,
   Nattandiya.
7. **D.M. GUNATHILAKE**
   Baddegama, Kosdeniya.
8. **J.A.G.S. BANDARA**
   No.554 3/4, 6th Lane,
   Bandaranayake Mawatha,
   Gonahena, Kadawatha.
9. **P.G. DIAS**
   No. 12, Sadananda
   Mawatha, Panadura.
10. **H.D. WIMALASENA**
    Kudirippuwa, Galmuruwa.
11. **W.A. ARIYARATNE**
    Kalawana, Metikumbura.
12. **W.D. PERERA**
    No. 125, Temple Road,
    Maharagama.
13. **J.M. PEMADASA**
    Ihalagama, Gampaha.

14. I.M.M. KUMARIHAMI
Dela Walauwa,
Pussella, Parakaduwa.

15. H.M.L.S.B. HERATH
No. 46 E, Hendeniya,
Peradeniya.

16.M.A.MANURATHNA
No.11, Ganga Mawatha,
Panadura.

17. M.K.G.MUDIYANSE
No. 451, Zone 4,
Nawanagaraya, Medirigiriya.

18. A.M.P.I.M.K. HERATH
No.77/7,
Ihalakaragahamuna,
Kadawatha.

19. H.N. CHANDRALATHA
No. 955/5, 1st Lane,
Gothatuwa, Angoda.

20. W.M. CHANDRALATHA
No.8, Irrigation Quarters,
Kundasale.

21. J.WICKRAMASINGHE
Palapathwala,
Totagamuwa, Weliwatte.

22. C. RUPASINGHE,
"Shanthi",Talatuoya,
Mudunkada.

23. H.C.S. WATHULANDA
No.7 F/1,Hendeniya,
Peradeniya.

24. H.B.DENIYAWATTE
No. 16, Dharmashoka
Mawatha, Aruppola,
Kandy.

25. D.M.D. KODIPPILI
No. 24, Uyankele Road,
Panadura.

26. C.WITHANAWASAM
No. 49/3, Wekanda Road,
Homagama.

27. M.P.L.DE SILVA,
No. 145/3, Old Nawala
Road,Nawala, Rajagiriya.

PETITIONERS

VS.

1(b). DHARMASENA DISSANAYAKE
Chairman.

2(b). A.SALAM ABDUL WAID
Member.

3(b). DR.PRATHAP RAMANUJAM
Member.

4(b). MS.D.SHIRANTHA WIJAYATILAKA
Member.

5(b). MRS.V. JEGARASINGHAM
Member.

6(b).SANTI NIHAL SENEVIRATHNE
Member.

7(b). S.RANNUGGE
Member.

8(b). D.L.MENDIS
Member.

9.(b).SARATH JAYATHILAKE
Member.
All of the Public
Service Commission,
No.177, Nawala Road,
Narahenpita, Colombo 5.

10(b).H.M.G. SENEVIRATHNE
Secretary,
Public Service
Commission,
No.177,NawalaRoad,
Narahenpita.

11. D.DISSANAYAKE
Secretary,
Ministry of Public
Administration and Home
Affairs.

12. HON.ATTORNEY GENERAL
Attorney-General's
Department, Colombo 12.

RESPONDENTS

BEFORE: Eva Wanasundera, PC, J
Anil Gooneratne J
Prasanna Jayawardena, PC, J

COUNSEL: J.C. Weliamuna for the Petitioners.
Indika Demuni de Silva PC, ASG for the 1B, 2B, 3B, 4B, 5B, 6B, 7B, 8B, 9B, 10B and 11th Respondents.

ARGUED ON: 29th July 2016.

WRITTEN SUBMISSIONS FILED ON: By the Petitioners on 15th September 2016
Not filed by the Respondents.

DECIDED ON: 09th December 2016

Prasanna Jayawardena, PC, J.

The 25 Petitioners are public servants who joined the General Clerical Service ["the GCS"] of the State in the latter half of the 1970s and early 1980s. In the year 1995, the Petitioners were appointed to the `Supra Class' of the GCS *on a* ***Supernumerary*** *basis* with effect from 01st July 1989. This was done following a settlement entered in Fundamental Rights Application Nos. 197/93 and 198/93.

The Petitioners claim that, by a letter dated 17th January 1995 , the Director - Establishments confirmed that, although the Petitioners were serving on a Supernumerary basis consequent to the settlement entered in the aforesaid Fundamental Rights applications, the Petitioners were entitled to all the general rights [පොදු අයිතිවාසිකම්] of public servants who serve in the `Supra Class' of the GCS.

When the Public Management Assistants' Service ["the PMAS"] was established in 2004, the Petitioners were absorbed into it from 01st January 2004. It is relevant to note that, during their period of service in the PMAS too, the Petitioners continued to be in service on a Supernumerary basis.

On 05th February 2007, the Secretary of the Ministry of Public Administration and Home Affairs issued the Combined Services Circular No. 01/2007 inviting applications for appointment to Class II Grade II of the Sri Lanka Administrative Service ["the SLAS"]. The Circular stated that, officers who had completed 15 years service by 31st December 2004 and had been absorbed into Class I of the PMAS from 01st January 2004 onwards or who had completed 10 years service by 31st December 2004 and had been absorbed into the Supra Class of the PMAS from 01st January 2004 onwards, were eligible to apply.

The aforesaid Combined Services Circular No. 01/2007 stated that, the selection of applicants for appointment to Class II Grade II of the SLAS would be made based on: (i) the marks obtained at a written examination; and (ii) marks for seniority.

It should be mentioned here that, Clause (3) under the Heading *"Marking Scheme for Seniority"* in Section 5 of the aforesaid Combined Services Circular No. 01/2007 dated 05th February 2007 stated, *"Appointment to any post on **Supernumerary** basis or antedating of any appointment will **not** be considered for computing marks for seniority……"* [emphasis added].

The Petitioners applied for appointment to Class II Grade II of the SLAS and sat for the written examination which was held on 26th August 2007. The Petitioners' position is that, it was only in April 2008 that they learnt the results of the written examination when the Merit List was released and marks allotted for seniority became known. The Petitioners had *not* been selected. The Petitioners' position is that, *none* of the applicants who had been serving on a Supernumerary basis at the time they applied, had been selected for appointment to Class II Grade II of the SLAS.

On 05th June 2008, the Petitioners made this application alleging that, the Respondents' failure to allocate marks for the period of the Petitioners' service on a Supernumerary basis in the `Supra Class' of the GCS and later in the PMAS, violated the Petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution.

The Respondents to the Petition dated 05th June 2008 filed by the Petitioners were the Chairman and Members of the Public Service Commission, the Secretary of the Ministry of Public Administration and Home Affairs and the Hon. Attorney-General.

In their Petition, the Petitioners averred that, the non-allocation of marks for the period of their service on a Supernumerary basis, was the reason for their not being selected for appointment to the SLAS. They stated that, when promotions or appointments had been made in other Services in the public service, the period of service on a Supernumerary basis was taken into account.

The aforesaid letter dated 17th January 1995 issued by the Director-Establishments was annexed to the Petition marked **"P7"** and, the Combined Services Circular No. 01/2007 dated 05th February 2007 was annexed to the Petition marked **"P9"**.

The Petitioners pleaded that, the aforesaid Clause (3) in Section 5 of the Circular marked **"P9"** was discriminatory and unfair. The Petitioners also pleaded that, the failure to allocate marks for the period of their service on a Supernumerary basis, denied them of their legitimate expectations.

The Petitioners stated that, some of them had made the appeals dated 08th July 2005, 07th October 2005,16th June 2007, and 17th October 2007 marked **"P12(a)"**, **"P12(b)"**, **"P12(c)"** and **"P12(d)"**, to the Secretary of the Ministry of Public Administration and Home Affairs and to the Public Service Commission, urging that, marks be allocated for periods of service on a Supernumerary basis.

This Court granted the Petitioners, leave to proceed under Article 12 (1) of the Constitution.

The 1st Respondent – who is the Chairman of the Public Service Commission - has filed an Affidavit stating, *inter alia,* that: the Petitioners are not entitled to be allocated marks for the period of service on a Supernumerary basis; there had been 88 vacancies in Class II Grade II of the SLAS and the marks which the Petitioners obtained upon their results at the written examination and on account of their seniority, did not entitle them to selection to fill these 88 vacancies; the rule that, when computing seniority, marks are not allocated for periods of service on a Supernumerary basis, had also been applied to appointments to Class II Grade II of the SLAS made in pursuance of the schemes of recruitment which commenced in 1998 and 2001, as set out in the Combined Services Circular No. 02/2001 and the Combined Services Circular No. 03/2005 filed with the 1st Respondent's affidavit marked **"1R3A"** and **"1R3B"**; and denying that, the Petitioners' fundamental rights had been infringed.

The 1st Respondent pleaded that, the Petitioners had been well aware that, in terms of the applicable Marking Scheme (which is set out in **"P9"** dated 05th February 2007), they would not be allocated marks for the period of service on a Supernumerary basis but that they did not challenge this rule earlier. The 1st Respondent further pleaded that, the Petitioners had acquiesced to this Marking Scheme when they applied for appointment to Class II Grade II of the SLAS. In this connection, copies of the applications submitted by the Petitioners were filed with the 1st Respondent's affidavit marked **"1R4A"** to **"1R4V"**.

On the aforesaid basis, the 1st Respondent took up the position that, the Petitioners' application is time barred.

The 10th Respondent - who is the Secretary of the Ministry of Public Administration and Home Affairs - has filed an Affidavit stating, *inter alia,* that: the Petitioners are not entitled to be allocated marks for the period of service on a Supernumerary basis. The 10th Respondent too has pleaded that the Petitioners' application is time barred.

The Petitioners filed a Counter Affidavit.

This Application raises the question whether the Respondents' aforesaid rule stated in the Combined Services Circular No. 01/2007 dated 05th February 2007 marked **"P9"** that, when computing seniority for the purpose of making selections for promotion to Class II Grade II of the SLAS, marks will not be allocated for the period of an applicant's service on a Supernumerary basis; is reasonable and justified *or* unreasonable and arbitrary.

The Shorter Oxford English Dictionary [5th ed.] defines the word "Supernumerary" as *"in excess of the usual, proper or prescribed number; additional, extra;"* and also as *"Beyond the necessary number"*. Thus, when it said that an employee is serving `on a Supernumerary basis', it is usually understood that, he is a person who has been employed to serve in a particular post or grade at a time when the permitted number

of the substantive cadre of employees for that post or grade, was filled. The connotation is that, he is an *`extra'* employee serving in that post or grade.

Neither party to the application before us have cited any previous decisions of a Court which examines the question of the eligibility of persons who are serving on a Supernumerary basis for promotion to a higher post in the substantative cadre. My search for previous decisions of this Court on the issue, was not successful either. One can take the view that, where cadres in a particular grade or post are limited, it is only service in a substantive post which counts when computing seniority and that a period of service on a Supernumerary basis will not be taken into account unless the Supernumerary post has been absorbed into the substantive cadre at some point in time prior to making the promotions. However, in circumstances where the material before the Court establishes that, the service though nominally classified as being on a Supernumerary basis, was *de facto* service in a substantive post, there could be instances where a Court may be inclined to cast aside artificiality of nomenclature and take the period of that service into account when computing seniority.

In the present case, the Petitioners contend that, though they were classified as serving on a Supernumerary basis, they performed the duties of a public officer in the substantive cadre and that too, for many years. Thus, a question will arise in this case as to whether the facts and circumstances before this Court justify taking into account the period of the Petitioners' service on a Supernumerary basis, when computing seniority for promotion to Class II Grade II of the SLAS.

Further, the documents before us make it is clear that, the placing of the Petitioners on a Supernumerary basis was a decision taken by the Respondents, in 1995, to remedy the injustice caused to the Petitioners as a result of some administrative anomalies, which were highlighted in the aforesaid Fundamental Rights Application No.s 197/93 and 198/93. It seems to me that, the Petitioners were placed on a Supernumerary basis due to the administrative needs and constraints of the Executive and not due to any fault or weakness on the part of the Petitioners or due to an indulgence granted to the Petitioners. But, those administrative measures taken in 1995 have resulted in the Petitioners not being allowed to take into account their many years of service on a Supernumerary basis, when computing seniority for the purposes of seeking promotion to Class II Grade II of the SLAS. If that is so, the Petitioners may be able to justifiably complain that they have been unfairly treated due to no fault of their own.

On the other hand, the cadre in the public service is limited and it should be ensured that, the public service is managed in a manner which promotes efficiency and economy. The State cannot allow the bloating of numbers in the public service so as to accommodate everyone who is qualified for appointment or promotion. In doing all this, the interests of all public servants have to have be balanced and fair treatment across the board, has to be ensured. Therefore, there may have been good reasons for the decision taken by the Respondents, in 1995, to place the Petitioners on a

Supernumerary basis and for the adoption of the rule that, marks will not be allocated for the period of service on a Supernumerary basis when computing seniority for purposes of making promotions. Further, this rule may have been applied equally to all public officers for several years and been accepted as a fair and reasonable measure and, thereby, become immune from challenge now.

Thus, the questions that arise in this application are intriguing and they engage attention. At the same time, this Court is aware that, the aforesaid rule adopted by the Respondents has, *ex facie*, deprived the Petitioners and other public servants of a possible opportunity for promotion.

But, however captivating the issues that would arise in a determination of this application upon its merits may be, I have to first consider the objection taken by the Respondents that, the Petitioners' application is time barred.

Article 126 (2) of the Constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or administrative action may *"….. within one month thereof ….. "* apply to this Court by way of a Petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126 (2) is that, a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here.

The rule that, an application under Article 126 which has *not* been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution. Thus, in EDIRISURIYA vs. NAVARATNAM [1985 1 SLR 100 at p.105-106], Ranasinghe J, as he then was, stated *"This Court has consistently proceeded on the basis that the time limit of one month set out in Article 126 (2) of the Constitution is mandatory."*.

In ILLANGARATNE vs. KANDY MUNICIPAL COUNCIL [1995 BALJ Vol.VI Part 1 p.10] Kulatunga J explained that, the result of the express stipulation of a one month time limit in Article 126 (2) is that, this Court has no jurisdiction to entertain an application which is filed out of time – *ie:* after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is complained of. Thus, Kulatunga J stated [at p.10] *"….. if it is clear than an application is out of time, the Court has* ***no jurisdiction*** *to entertain such application."*. [emphasis added].

Accordingly, if it turns out that the Respondents' objection that the Petitioners' application is time barred is well founded, the result would be that, this Court does not have the jurisdiction to award the Reliefs prayed for by the Petitioners and the application would have to be dismissed.

In this connection, in Paragraph [15] of their Petition, the Petitioners state that, *"….. in or about April 2008, they learnt that the final results of the said Examination (with marks for seniority) had been released. Upon inquiry they were able to obtain a copy*

of the Merit List and they found that they had not been selected. They further observed that none of the supernumerary appointees have been selected. A copy of the Merit List is annexed hereto marked ***P11***.".

The Merit List marked **"P11"** has been signed by the Deputy Commissioner of Examinations on 03rd March 2008. Therefore, it is reasonable to conclude that, in the month of March 2008 itself, the Petitioners became aware that marks had not been allocated for their period of service on a Supernumerary basis and they had not been selected. However, as set out above, in Paragraph [15] of the Petition, the Petitioners state that they learnt of this only in April 2008.

Even if the Petitioners are accorded the benefit of reading the somewhat less than specific averment *"….. in or about April 2008….."* in the manner most favourable to the Petitioners, this Court has to conclude, upon the Petitioners' own pleadings, that, by 30th April 2008, the Petitioners were aware of the alleged infringement of which they complain of in this application.

A period of one month from 30th April 2008 will end on 31st May 2008. However, this application has been filed on 05th June 2008 and, therefore, appears, *prima facie*, to be time barred.

However, I do not think it is fitting to refuse this application by simply applying the aforesaid formula of dates and looking no further, since, as I mentioned earlier, there are several substantial issues which would arise for determination in this application *if* this Court has jurisdiction to do so under and in terms of the applicable Law which has developed with regard to the time limit of one month stipulated in Article 126 (1).

Therefore, it is necessary to look at some of the principles that have developed over the nearly four decades during which this Court has interpreted and applied Article 126 (2) of the Constitution; apply those principles to this application; and then ascertain whether the time bar is insurmountable.

In this regard, as stated earlier, the general rule is clearly that, this Court will regard compliance with the 'one month limit' stipulated by Article 126 (2) of the Constitution as being mandatory and refuse to entertain or further proceed with an application under Article 126 (1) of the Constitution, which has been filed after the expiry of one month from the occurrence of the alleged infringement or imminent infringement.

However, this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose Fundamental Rights have been infringed by executive or administrative action, requires Article 126 (2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances which found the application. This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied by rote and the Court remains blind to facts and circumstances which have denied a Petitioner of an opportunity to invoke the jurisdiction of Court earlier.

Thus, Sharvananda CJ observed in MUTUWEERAN vs. THE STATE [5 Sri Skantha's Law Reports 126 at p. 130] that, *"Because the remedy under Article 126*

is thus guaranteed by the Constitution, a duty is imposed upon the Supreme Court to protect fundamental rights and ensure their vindication. ***Hence Article 126 (2) should be given a generous and purposive construction****."* [emphasis added]. In the same vein, Ranasinghe J stated in EDIRISURIYA vs. NAVARATNAM [at p. 106] that, *"A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured to the citizens of the Republic as part of their intangible heritage. It, therefore, behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations."*.

Several decisions of this Court have discussed the circumstances which would justify permitting an `extension' of the time limit of one month stipulated in Article 126 (2) of the Constitution.

In RAMANATHAN vs. TENNEKOON [1988 2 CALR 187 at p.190], De Alwis J observing that, the time limit of one month would usually be applied, stated *"I must however not be understood to say that this Court cannot exercise its discretion in entertaining an application which is ex facie out of time in appropriate circumstances where the principle lex non cogit ad impossibilia is applicable"*.

The *"appropriate circumstances"* which His Lordship, Justice De Alwis was referring to were:

(i) Instances where the Petitioner becomes aware of the alleged infringement more than a month after it occurred - in this connection, De Alwis J cited the decision in SIRIWARDENE vs. RODRIGO [1986 1 SLR 384]; and:

(ii) Instances where the Petitioner was prevented, by reason beyond his control, from taking measures which would enable the filing of a Petition within one month of the alleged infringement and the maxim *lex non cogit ad impossibilia* applied – in this connection, De Alwis J cited the decision in EDIRISURIYA vs. NAVARATNAM [1985 1 SLR 100].

With regard to (i) above – *ie:* where the time period of one month is to be computed not from the date of the occurrence of the alleged infringement but from the day the Petitioner becomes aware of the alleged infringement - in the decision cited by De Alwis J, namely, SIRIWARDENE vs. RODRIGO, Ranasinghe J, as he then was, held [at p.387] *"Where however, a petitioner establishes that he became aware of such 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 a 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.".* This principle has been reiterated time and again.

It should be added here that, if the facts and circumstances of an application make it clear that, a Petitioner, by the standards of a reasonable man, *should have become* aware of the alleged infringement by a particular date, the time limit of one month will

commence from that date on which he *should have* become aware of the alleged infringement. Thus, in ILLANGARATNE vs. KANDY MUNICIPAL COUNCIL, Kulatunga J held [at p.11], *"…..it would not suffice for the petitioner to merely assert that he personally had no knowledge of the discriminatory act, if on an objective assessment of the evidence he ought to have had such knowledge."*.

The criteria that are to be applied when determining when a Petitioner became aware of the alleged infringement or should have become aware of it, are objective – *vide:* ILLANGARATNE vs. KANDY MUNICIPAL COUNCIL.

With regard to (ii) above - *ie:* where, due to circumstances, beyond his control, the Petitioner has been prevented from invoking the jurisdiction of this Court under Article 126 (1) for more than one month after the occurrence of the alleged infringement - in the decision cited by De Alwis J, namely, EDIRISURIYA vs. NAVARATNAM, Ranasinghe J, as he then was, referred to a period where a Petitioner is held in custody and *incommunicado* without a reasonable opportunity to take meaningful steps to invoke the jurisdiction of this Court and observed [at p. 106] that, such a period *"should not and would not be counted in computing the period of one month referred to in sub-article (2) of Article 126 of the Constitution and that the maxim lex non cogit ad impossibilia would, in such a situation, apply".* This principle has also been reiterated time and again.

The abovementioned decision and, in fact, most of the decisions on this issue deal with situations where the Petitioner was held in detention or was hospitalized after torture or assault while in custody and, therefore, could not take steps to invoke the jurisdiction of this Court under Article 126 (1) and, for that reason, there was no fault, lapse or delay which, could be reasonably attributed to the Petitioner, in invoking the jurisdiction of this Court – *vide:* NAMASIVAYAM vs. GUNEWARDENE [1989 1 SLR 394], SAMAN vs. LEELADASA [1989 1 SLR 1] and several other decisions on the same lines including, more recently, Ekanayake J in UKWATTA vs. MARASINGHE [SC F.R. 252/2006 decided on 15.12.2010].

However, there are circumstances, other than those in which a person is *incommunicado* as a result of being in custody or in hospital, where a Petitioner who complains of an alleged infringement of his Fundamental Rights is, nevertheless, unable to invoke the jurisdiction of this Court due to circumstances which are beyond his control. In such circumstances, there could be cogent reasons to apply the maxim *maxim lex non cogit ad impossibilia* and allow the Petitioner to maintain an application filed under Article 126 despite the one month period stipulated in Article 126 (2) having ended *provided* there has been no lapse, fault or delay on the part of Petitioner and, further, he has filed the Petition within one month of the date on which his disability could be reasonably held to have ceased.

Thus, in GAMAETHIGE vs. SIRIWARDENA [1988 1 SLR 384], which was an application relating to the Petitioner's complaint that he had been unfairly discriminated against in the allocation of residential quarters, Fernando J set out the general principle that, *" While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an*

application made out of time.". More recently, in GOONETILLEKE vs. PIYADIGAMA [SC F.R. 308/2009 decided on 30.01.2014], where the Court was considering an application for intervention in proceedings regarding promotions in the Police Force, His Lordship, the Chief Justice stated [at p.13] *"While the time limit is mandatory in ordinary circumstances, in exceptional circumstances, this Court has a discretion to entertain an application if there is no lapse, fault or delay on the part of the parties seeking to intervene"*. In ALAWALA vs. THE INSPECTION GENERAL OF POLICE [SC F.R. 219/2015 decided on 15.02.2016], which was also an application relating to alleged unfair discrimination in the making of promotions, Aluwihare, PC, J stated [at p.10], *"Even though the time limit of one month is mandatory in ordinary circumstances, in exceptional circumstances, the Court has discretion to entertain a fundamental rights application were the delay in invoking the jurisdiction of the Court under Article 126 is not due to a lapse on the part of the Petitioner."*

The nature of circumstances (other than being in custody or being hospitalized following assault or torture while in detention) do not seem to have been identified or listed in the decisions of this Court, and quite rightly so, since this would always be a question of fact to be determined by the Court considering the facts and circumstances of the particular case before it and applying an objective test. In this regard, it is apt to cite Fernando J's observation in GAMAETHIGE vs. SIRIWARDENA [at p. 401] that, *"The question whether there is a similar discretion where the petitioner's failure to apply in time is on account of the act of a third party, or some natural or man–made disaster, would have to be considered in an appropriate case when it arises."*.

Needless to say, a Petitioner who seeks an exemption from the time limit of one month stipulated in Article 126 (2) of the Constitution by claiming unavoidable circumstances which prevented him from invoking the jurisdiction of this Court earlier, will have to satisfy the Court that, he should be granted that exemption. In this connection, Fernando J commented, in GAMAETHIGE vs. SIRIWARDENA [at p. 401], *"….. there is a heavy burden on a petitioner who seeks that indulgence"*.

However, while there is no doubt that, a Petitioner who seeks an extension of the time limit must satisfy the Court that such unavoidable circumstances did exist and prevented him from coming to Court earlier, a Court would, no doubt, find it salutary to keep in mind Sharvananda CJ's counsel that, *"…. Article 126 (2) should be given a generous and purposive construction."* and ensure that, an unrealistic or impractical burden is not cast on a Petitioner. A Court would, in appropriate circumstances, be alive to any real obstacles, be they tangible or intangible, that were insurmountable and lay in the path of a Petitioner who later seeks to exercise his constitutional right to invoke the jurisdiction of this Court under Article 126 of the Constitution, which is a `just and equitable jurisdiction', as stated in Article 126 (4).

At this point, since it is relevant to this application, another principle that has emerged from the decisions of this Court should be mentioned. That is the principle that, other than in limited circumstances, time spent by a Petitioner in making appeals or seeking other administrative or judicial relief would not, normally, be excluded when calculating the period of one month stipulated by Article 126 (2) of

the Constitution. Therefore, if, upon the occurrence of an infringement of his Fundamental Rights, an aggrieved person does not file an application invoking the jurisdiction of this Court under Article 126 (1) of the Constitution but, instead, choses to pursue other avenues of seeking relief, the time he spends perambulating those avenues will not, usually, be excluded when counting the one month he has to invoke the jurisdiction of this Court under Article 126 (1).

Thus, Fernando J held in GAMAETHIGE vs. SIRIWARDENA [at p.396], *"If a person is entitled to institute proceedings under Article 126 (2) in respect of an infringement at as certain point in time, the filing of an appeal or application for relief, whether administrative or judicial, does not in any way prevent or interrupt the operation of the time limit."*. Similar views were expressed by this Court in JAYAWEERA vs. NATIONAL FILM CORPORATION [1995 2 SLR 120] and RAMANATHAN vs. TENNAKOON.

For the sake of completeness, it should be mentioned that, a statutorily created interruption in the passage of the one month stipulated in Article 126 (2) is set out in Section 13 (1) of the Human Rights Commission of Sri Lanka Act No.21 of 1996.

In GAMAETHIGE vs. SIRIWARDENA, Fernando J listed the aforesaid principles [at p. 402] stating *"Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126 (2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both the infringement and knowledge exist (Siriwardena vs. Rodrigo). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."*.

There is another development in the interpretation and application of Article 126 (2) which should be mentioned here. That is, the principle that, in appropriate circumstances, this Court may be inclined to consider whether it should extend the time limit of one month beyond the date on which an infringement of Fundamental Rights commenced, if that infringement is of a *continuing* nature.

In SASANASIRITISSA THERO vs. DE SILVA [1989 2 SLR 356], Kulatunga J identified the unlawful detention of a person as being a continuing infringement. In JAYASINGHE vs. THE ATTORNEY- GENERAL [1994 2 SLR 74], Fernando J referred to the likelihood that, a long delay to issue a Charge Sheet and commence disciplinary proceedings against an employee who had been interdicted, will amount to a continuing infringement. In WIJESEKERA vs. THE ATTORNEY GENERAL [2007 1 SLR 38], Silva CJ identified the denial of the right of the people of a Province to have a Provincial Council constituted by the election of members to it, as a continuing infringement. In DE SILVA vs. MATHEW [S.C. F.R. 64/2009 decided on 27.03.2014], Ekanayake J considered the categorization of the Petitioners in a particular Grade, as being a continuing infringement. In WIJESEKERA vs. LOKUGE [S.C. F.R.342/2009 decided on 10.06.2011] Tilakawardane J referred to the

suspension of the Petitioners from a Rugby team as being in the nature of a continuing infringement. However, none of these decisions further discussed the concept or nature of a continuing infringement.

In the recent decision of LAKE HOUSE EMPLOYEES UNION vs. ASSOCIATED NEWSPAPERS OF CEYLON LTD [SC FR 637/2009 decided on 17.12.2014], where the Petitioners complained that their Fundamental Rights had been violated by the Respondents removing Notices which the Petitioner had put up on a Notice Board provided for their use and that this had happened over a long period of time, learned Counsel for the Petitioners contended that, there had been a continuing violation of the Petitioners' Fundamental Rights.

Marsoof J held [at p.7], *"In the absence of any decision of this Court on this point, I wish to adopt the distinction recognised by the courts in the United States between discreet acts of discrimination and continuing violations through a series of such acts.* His Lordship cited NATIONAL RAILROAD PASSENGER CORP. vs. MORGAN, which was a decision of the US Supreme Court and observed *"In analyzing the statute of limitations issue, the Court differentiated between discrete acts and continuing violations, noting that some discrete acts, `such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify'. The Court held that such incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable `unlawful employment practice', and that accordingly, for limitations purposes, a discrete retaliatory or discriminatory act occurs on the day that it happens. In contrast, Court described a continuing violation as `a series of separate acts that collectively constitute one unlawful employment practice' and went on to hold that `such cause of action accrues on the day on which the last component act occurred'."*.

His Lordship held that, *"Adopting the reasoning of the United States Supreme Court in Morgan's case discussed above, I am inclined to the view that, any complaint based on a continuing violation of fundamental rights may be entertained by this Court if the party affected invokes the jurisdiction of this Court within the mandatory period of one month from the last act in the series of acts complained of."*.

Before turning to the present case, I should also refer to NANYAKKARA vs. CHOKSY [2009 BLR 1 at p.28-29] where, Amaratunga J overruled an objection that the application was time barred for the reason that, the impugned transaction was an ongoing one and also since, *in applications which have been filed in the public interest*, the Court can take cognizance of the time required to obtain relevant documents, study the subject matter of the impugned transaction and formulate the application to be submitted to this Court. His Lordship appears to have taken the view that, the time period of one month should be deemed to commence only after the Petitioners had a reasonable opportunity to complete the preparatory work which was essential to formulate and file their application.

It remains for me to apply the aforesaid principles to the present application and consider whether the Respondents' objection that this application is time barred, should be sustained.

When doing so, it is convenient to apply the aforesaid principles sequentially, by asking the following questions:

(i) (a) When did the alleged infringement occur ?; or, if Petitioners claim they became aware of the alleged infringement only sometime after it occurred, when did they become aware of it or when should they have become aware of it ?

(b) If the alleged infringement is in the nature of a continuing one which the Petitioners were aware of, till when did it continue ?;

(ii) If the application has been filed more than one month after the latest date determined when considering (a) and (b) above, have the Petitioners established that, they were unable to invoke the jurisdiction of this Court due to circumstances which were beyond their control and that, there has been no lapse, fault or delay on their part ?

(iii) If so, have the Petitioners filed this application within one month of any such disability ending ?

The date determined in answer to the first subset of questions will determine the date on which the one month period stipulated in Article 126 (1) *commences* to run. Quite obviously, if the Petition has been filed within one month of that date, it is within time.

However, if the Petitioners have filed this application more than one month after that date, the Petition will be time barred *unless* the answers to the second and third question are in the affirmative.

Accordingly, it is necessary to first identify *when* the alleged infringement occurred.

As stated earlier, the Petitioners' complaint is that, the Respondents' failure to allocate marks for the period of the Petitioners' service on a Supernumerary basis in the `Supra Class' of the GCS and later in the PMAS, violated the Petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution. In this connection, the Petitioners have pleaded that, Clause (3) under the Heading *"Marking Scheme for Seniority"* in Section 5 of the Combined Services Circular marked **"P9"** was *"discriminatory and unfair"*.

"P9" is dated 05th February 2007 and Clause (3) of **"P9"** clearly states that, when computing seniority for the purpose of making selections for promotion to Class II Grade II of the SLAS, marks will *not* be allocated for the period of an applicant's service on a Supernumerary basis. There is no ambiguity or room for any misunderstanding of the effect of that statement that – *ie:* that, marks will not be allocated for the period of the Petitioners' service on a Supernumerary basis.

Further, **"P9"** was *directly and immediately applicable* to the Petitioners since they claim eligibility for promotion and, in fact, applied for promotion in pursuance of **"P9"**.

This is *not* a case where **"P9"** introduced a Scheme of Promotion in terms of which the Petitioners may apply for promotion at some point in the future. Further, it is also clear that, the Petitioners applied for promotion in pursuance of **"P9"** and that it must be deemed that they did so with full knowledge of Clause (3) and its aforesaid effect.

Therefore, it is clear that, the alleged infringement occurred on or soon after 05th February 2007 when the Circular marked **"P9"** was issued and made known to the Petitioners.

Similar circumstances were before Court in GUNARATNE vs. SRI LANKA TELECOM [1993 1 SLR 109] at p.115] where Kulatunga J held *"….. if a scheme, such as the one before us, affecting promotions in an existing service is inherently discriminatory, the right to relief accrues immediately upon the adoption of such scheme and prospective candidates for promotion under such scheme may apply for a declaration that such scheme is invalid on the ground that it constitutes an infringement or an imminent infringement of their rights under Article 12 (1)."*. On the same lines, in DAYARATNE vs. NATIONAL SAVINGS BANK [2002 3 SLR 116 at p.124], Fernando J stated *"*The *first limb of the Respondents' preliminary objection is that after the lapse of one month the Petitioners were not entitled to challenge the scheme of promotion. The 1st Respondent was entitled, from time to time, and in the interests of the institution, to lay down the basis on which employees would be promoted, and that became part of the contract of employment. The scheme of promotion published on 12. 02. 2001 was directly and immediately applicable to the petitioners, and became part of the terms and conditions of their employment. If they did not consent to those terms and conditions, as being violative of their rights under Article 12, they should have complained to this Court within one month."*.

Next, the question that arises for consideration is whether the Petitioners were aware of (or, should have been aware of) the alleged infringement on or about 05th February 2007 itself *or* whether it was only on some later date that they became aware of the alleged infringement (or should have become aware) of it.

In this regard, the Petitioners' position is that, they relied on the Letter marked **"P7"** issued by the Director-Establishments and the terms of settlement entered in the aforesaid two Fundamental Rights Applications and believed that they would be treated in the same manner as officers in the substantive cadre in all matters including promotions. It is on this basis that, they state in Paragraph [15] of the Petition that it was only in April 2008 that they learnt marks had not been allocated for their period of service on a Supernumerary basis and they had not been selected and, thereby, seek to maintain their claim that they became aware of the alleged infringement only in April 2008.

However, a perusal of the appeal dated 08th July 2005 marked **"P12(a)"** evidences that, even in 2005, the Petitioners were aware that they were not entitled to claim marks for their period of service on a Supernumerary basis [*vide:* the statement "ජ්‍යේෂ්ඨත්වය සඳහා ලකුණු අහිමිය." in Item 5 of **"P12(a)"**. This complaint is reiterated and expanded upon in the appeal dated 16th July 2007 marked **"P12(c)"**

which states “අධි පන්තියට උසස් කිරීමේදී සඳහන් කොන්දේසි අනුව අධි පන්තිය වෙනුවෙන් ජේෂ්ඨත්වය සඳහා මොවුන්ට ලැබෙන්නේ ලකුණු 0 කි.”.

Thus, there is no merit in the Petitioners' claim that they became aware of the alleged infringement only in April 2008. In any event, as observed, earlier, this Petition has been filed after the expiry of one month from 30th April 2008.

Next, I should consider whether the infringement complained of by the Petitioners is a continuing one. In this regard, it should be mentioned that, in Paragraphs [18] and [20] of the Petition, the Petitioners have pleaded that, they have been *“continuously discriminated and treated unfairly”* and that they have been subject to a *“continuing infringement”*.

No doubt, the Respondents' decision not to allocate marks for the periods of the Petitioners' service on a Supernumerary basis has an *effect* which continues to cause prejudice to the Petitioners since the Petitioners have been and continue to be deprived of the ability to count that period when computing seniority for the purpose of promotion to Class II Grade II of the SLAS.

But, it has to be kept in mind that, many, if not most, executive or administrative decisions and acts which are challenged under Article 126, are, usually, single and distinct acts or decisions done or taken on a particular day which immediately affect a person or decide his alleged rights, but which have a continuing *effect* on the persons who are subject to such acts and decisions. However, all such executive or administrative decisions cannot be challenged after the expiry of one month simply because they have a continuing *effect*.

Instead, what is relevant when determining the start date of the one month period specified in Article 126 (2), is the **occurrence** of the infringement and *not* its *effect*.

An infringement can be constituted by a single, distinct and `one-off' act, decision, refusal or omission. However, some other infringements can be constituted by a series of acts, decisions, refusals or omissions which continue over a period of time. It is only the second type of infringement which can be correctly identified as a `continuing infringement'.

It seems to me that, the essential characteristic of a `continuing infringement' which is constituted by an **act or decision** is that, such act or decision or similar acts or decisions are committed or are taken several times throughout the period the infringement continues. There is a series of acts or decisions, each of which infringe the Petitioner's Fundamental Rights, which occur throughout the period of the infringement. The result is a 'continuing infringement' in relation to which the time period of one month starts on the day the last such act is done or decision is taken. It should be understood that, the type of decision contemplated here is, usually, a decision taken for the first time on a particular set of facts and not a decision affirming a previous decision.

The position is less easily deciphered in cases where the infringement is a **refusal or omission** to perform an act which should be done. In such instances, much would depend on the facts and circumstances of each case. It seems to me that,

where the infringement consists of the refusal or omission to perform an act that should be done, the infringement will be a continuing one as long as the refusal remains in force or the omission persists and the time period of one month specified in Article 126 (2) will start on the day on which the such refusal is made and becomes known to the Petitioner or omission to perform the act becomes known to the Petitioner.

This line of reasoning is in line with the views expressed in NATIONAL RAILROAD PASSENGER CORP. vs. MORGAN which was cited by Marsoof J in LAKE HOUSE EMPLOYEES UNION vs. ASSOCIATED NEWSPAPERS OF CEYLON LTD and His Lordship's aforesaid observations in that case, with which I am in respectful agreement.

With regard to the present case, it is evident that, the alleged infringement was constituted by the decision set out in the impugned Clause (3) of the Circular marked **"P9"**. This is a distinct and `one-off' decision. The effect of Clause (3) has been implemented from the time **"P9"** was issued. There has been no subsequent decision on a different set of facts. There was no ambiguity or lack of understanding. Thus, on an application of the aforesaid tests, I hold that, the alleged infringement which the Petitioners complain of, was not a `continuing infringement'.

Even if the Petitioners' contention that, the infringement occurred in April 2008 when the results of the selection were issued and became known is assumed to be correct, the alleged infringement will still be a distinct and `one-off' infringement constituted by the non-allocation of marks for the period of service on a Supernumerary basis and the non-selection. Thus, even if this approach is taken, the alleged infringement which the Petitioners complain of, is not a continuing one.

For the aforesaid reasons, I hold that, the alleged infringement which the Petitioners complain of, occurred when the Circular dated 05th February 2007 marked **"P9"** was issued. I further hold that, the Petitioners were aware of the alleged infringement from or about 05th February 2007 when **"P9"** was issued. In fact, they were aware even much earlier that, they would not be allocated marks for the period of service on a Supernumerary basis, as demonstrated by their appeal dated 08th July 2005 marked **"P12(a)"**.As set out above, it has also been determined that, the alleged infringement is not a continuing one.

The Petition has been filed on 05th June 2008 which is more than 16 months after the day the Petitioners themselves state the alleged infringement occurred. Therefore, the Petition is time barred and liable to be dismissed unless the Petitioners can seek an extension of the time limit on grounds that, they were prevented from filing the Petition earlier.

Thus, it only remains for me to consider whether the Petitioners have established that, they were unable to invoke the jurisdiction of this Court due to circumstances which were beyond their control and that there has been no lapse, fault or delay on their part. However, the Petitioners have not made any such claim and this question does not arise for consideration.

At this point, it is apt to cite the recent decision of this Court in KUMARASIRI vs. BANDARA [S.C. F.R. 277/2009 decided on 28.03.2014] which has several parallels with the application now before us. In that case, the Petitioners were seeking promotion and submitted themselves for interviews, in September 2008, at which they were made aware that, an amended Marking Scheme would be applied. The Petitioners did not challenge the amended Marking Scheme then. Seven months later, they filed a Petition alleging that, the amended Marking Scheme violated their Fundamental Rights. Sripavan J [as His Lordship, the Chief Justice then was] held [at p.08],*"It is necessary to state at the outset that I am not inclined to favour the conduct of the Petitioners who participated in the interview without any protest, fully availed themselves to the interview process and then when they observed that selection has gone against them came forward to challenge the addendum* ***P6*** *[*nb: this was the amended Marking Scheme*] on the ground of unknown disability on their part. The participation, without challenging the addendum* ***P6*** *with full knowledge of all the circumstances, preclude the Petitioners from objecting to the selection process embodied by* ***P1*** *and* ***P6*** *by an application filed seven months thereafter, namely, on 07.04.2009. The conferment of exclusive jurisdiction in terms of Article 126 (1) and the imposition of a time-limit in Article 126 (2) demonstrate with certainty the need for the prompt invocation of the jurisdiction of this Court. The addendum embodied in* ***P6*** *therefore cannot be challenged in these proceedings."*. The same reasoning will apply to the present application which is before us and result in the same conclusion.

For the aforesaid reasons, I uphold the Respondents' objection that, the application is time barred. The application is dismissed. In the circumstances of the case, I make no order with regard to costs.

Judge of the Supreme Court

Eva Wanasundera J.,PC
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 and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Udaya Prabhath Gammanpila,
65/14, Wickremasinghe Mawatha,
Kumaragewatta Road, Pelawatta,
Battaramulla.

Presently at :
Magazine Prison,
Colombo 08.

Petitioner

S.C. F.R. Application No. 207/2016 Vs***.***

1. M.D.C.P. Gunathilake,
   Inspector of Police,
   Special Investigation Unit,
   Police Headquarters,
   Colombo 01.

2. Mevan Silva, Senior Superintendent of Police,
   Director,
   Special Investigation Unit,
   Police Headquarters,
   Colombo 01.

3. Pujitha Jayasundara,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

4. Brian John Shaddick,
   2, Martins Knockrow,
   New South Wales 2479,
   Australia.

5. Lasitha Indeewara Perera,
   726 Sri Nanda Mawatha,
   Madinnagoda Road,
   Rajagiriya.

6. J.C.P. Jayasinghe,
   20 Tickell Road,
   Colombo 08.

7. Bandara,
   Assistant Superintendent of Police,
   Special Investigation Unit,
   Police Headquarters,
   Colombo 01.

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

Respondents.

BEFORE **:** K**.** Sripavan, C.J.
U.Abeyrathne. J.

COUNSEL : Romesh de Silva, P.C., with Sugath Caldera for the Petitioner.

Ayesha Jinasena, Senior Deputy Solicitor General with Sahanya Naranpanawe, State Counsel for the 1st, 2nd, 3rd, 7th and 8th Respondents.

Amarasiri Panditharathne with Sanjeewa Kaluarachchifor the 5th Respondent.

Manohara de Silva, P.C.,with Arindra Wijesurendra for the 6th Respondent.

ARGUED ON : 29.06.2016

WRITTEN SUBMISSIONS
FILED ON : : 01.07.2016 (By the Petitioner, Attorney-General and the 5th Respondent)

DECIDED ON **:** **11.07.2016**

K. SRIPAVAN, C.J.,

On a complaint made by the 4th Respondent to the Criminal Investigation Department on the ground that shares of Pan Asia Bank Ltd. worth $ 100,000 held by the 4th Respondent had been sold by the Petitioner, allegedly using a fraudulent Power of Attorney, the Petitioner was summoned before the 1st Respondent for purposes of recording a statement. Counsel

submits at the investigation before the 1st Respondent the Petitioner denied any involvement in the share-transaction using a fraudulent Power of Attorney.

The Petitioner at Paragraph 59 of the Petition alleges that another complaint was made by the 5th Respondent that the shares of Pan Asia Bank worth $ 1,000,000 had been sold illegally by the Petitioner using a fraudulent Power of Attorney.

Learned President's Counsel submits that the 1st, 2nd and 3rd Respondents sought the advice of the Attorney-General to arrest the Petitioner, inter alia, on charges of fraud and/or forgery of documents.

It is alleged that the Petitioner was arrested by the Special Investigation Unit of the Police by the 1st and the 7th Respondent on 18.06.2016. On the same day, a "B" report was filed before the Colombo Fort Magistrate's Court, and the learned Magistrate placed the Petitioner on remand until 01.07.2016.

The legal position appears to be that if an offence is disclosed, the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed. If the Court interferes with the proper investigation where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of justice suffers. The Court emphasizes that when a "B" Report is filed, the Magistrate has to apply his judicial mind to the said Report and give appropriate directions to the Police if further investigations are necessary. The Magistrate shall not make orders mechanically without applying his judicial mind.

In *Dayananda* Vs. *Weerasinghe and Others* (1983) 2 S.L.R. 84, the Petitioner filed application under Article 126 of the Constitution alleging violation of his fundamental rights under Article 13(2) of the Constitution on the ground that, based on the false reports made by the 1st and 2nd Respondents, the Magistrate had made orders for remand. The Petitioner's case was that the remand orders made by the learned Magistrate were due to false and malicious reports filed by the 1st Respondent who was aided and abetted by the 2nd Respondent who in addition made false statement to the Magistrate in Open Court. It was contended that

these actions of the 1st and 2nd Respondents resulted in the Petitioner being deprived of his personal liberty.

Ratwatte, J. (with Colin Thome, J. and Rodrigo, J. agreeing) at (1983) 2 S.L.R. 90 noted as follows :

> *"The question that arises for consideration is whether though the remand orders were made by a judicial officer, the Petitioner is entitled to relief on the ground, as alleged by him, that the remand orders were made as a result of the wrongful acts of the 1st and 2nd Respondents. This question is now covered by authority . In S.C. Application No. 54/82 a similar question arose for decision. The Petitioner in that case alleged that among the fundamental rights infringed was the fundamental right declared by Article 13(2). It was held in that case that there had been a "violation of the fundamental rights guaranteed by Article 13(2) of the Constitution, but this violation has been more the consequence of the wrongful exercise of judicial discretion as a result of a misleading Police report". In view of this, this Court went on to state that it was unable to grant the Petitioner the relief prayed for by him. In my view this judgment is directly in point. I do not think it is necessary to consider the allegations of the Petitioner that the 1st and 2nd Respondents were actuated by malice and ill will towards him. The fact remains that the remand orders were made by the Magistrate in the exercise of his judicial discretion. Even if such orders were made on false or misleading reports it does not help the Petitioner in this case because orders made by a Judge in the exercise of his judicial discretion do not come within the purview of the special jurisdiction of the Supreme Court under Article 126 of the Constitution,* ***even though such orders may be the result of a wrongful exercise of the Judge's judicial discretion. In such an event an aggrieved person's remedy is to invoke the appellate or revisionary powers of the Appellate Courts. For these reasons we are unable to hold that the petitioner is entitled to any relief on this application."*** (emphasis added)

The argument of the Counsel for the Petitioner was that the judicial order concerned was "in consequence of executive and administrative acts". The Court held that the order in question was made in the exercise of the Magistrate's discretion and as such it was not the consequence of an executive action.

It may be relevant to consider the observations made by Wanasundera, J. in the case of *Joseph Perera* Vs. *The Attorney-General and Others* (1992) 1 S.L.R. 199 at 236 –

> "*The principles and provisions relating to arrest are materially different from those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting-point of criminal proceedings while the other constitutes the termination of those proceedings and is made by the judge after hearing submissions from all parties.* ***The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand, for an arrest a mere reasonable suspicion or a reasonable complaint of the commission of an offence suffices.*** *I should however add that the Test is an objective one."* ……
>
> ……..
>
> *"This wider discretion vested in the Police is logical and is also necessary for the proper performance of the functions of the Police and for the maintenance of the law and order in the country."* (emphasis added)

In the case in hand, the Petitioner was arrested on 18.06.2016 and produced before the Magistrate on the same day. In the words of Wanasundera, J. in Joseph Perera's case "*that this is not a case of the Police riding roughshod over the rights of the citizens. The Police action was bona fide and within the scope of their functions and the outcome of the case has depended on a legal issue."*

The fundamental rights jurisdiction under Article 126 of the Constitution vis-à-vis the judicial orders made by a Magistrate was considered by Colin-Thome, J. in the case of Leo Fernando Vs. Attorney General (1985) 2 S.L.R. 341 by a Bench of Five Judges. At page 357 Colin-Thome J. observed as follows :-

> "*Within the framework of our Constitution there is a fundamental reason for excluding judicial action from review under the procedure provided for in Article 126. Articles 138 and 139 invest the Court of Appeal with an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution. Under Article 128 an appeal shall lie to the*

Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal which involves a substantial question of law. ***In the circumstances there is no basis for a collateral jurisdiction in respect of such action under Article 126.*** *In the case of Naresh S. Murajikar v. State of Maharashtra , AIR [1967] S.C. 1(ii) heard by a Bench of nine Judges, it was held by a majority of eight to one, that the remedy in respect of judicial action is by way of appeal and not by way of writ-petition for a violation of fundamental rights. Similar reasoning was adopted in the decision of the Privy Council in Chokalinge* Vs. *Attorney General of Trinidad and Tobago* (1981) 1 All E.R. 244."(emphasis added)

In a separate judgment, Ranasinghe, J. at page 368 noted as follows :-

"Section 70 of the Penal Code protects a judge from criminal liability in respect of acts done by him in good faith when acting judicially.

On a consideration of the foregoing, I am of opinion that, under our law, a judge is immune from claims for damages in respect of anything said or done by him bona fide in his capacity as a judge in the discharge of judicial functions. "

On a similar line of reasoning, Ameratunga, J. (with S.N. Silva, C.J. and Raja Fernando, J. agreeing) in *Divalage Upalika Ranaweera* Vs. *Sub-Inspector Vinisias & Others* [S.C. Application 654/2003 – S.C. Minutes on 13.05.2008] stated thus :-

"Under the Roman Dutch Law, which is the Common Law of Sri Lanka, a Judge enjoys complete immunity from civil liability for the acts done in the exercise of his judicial functions. "No action lies against a judge for acts done or words spoken in honest exercise of his judicial office." ***R.W. Lee. An Introduction to Roman Dutch Law 5th Edition page 341. _Section 70 of the Penal Code extends the same protection against criminal liability. Since judicial acts do not fall within the ambit of Article 126 of the Constitution, a Judge is not liable for the violation of fundamental rights arising from a judicial act."*** (emphasis added)

Learned Senior State Counsel in the course of her argument relied on the observation made by Seneviratne , J. *in the Case of Withanachchi* Vs. *Herath* (1988) II C. A.L.R. page 170 at 181 –

> *"In the sphere of criminal law there are varying degrees of proof that is sufficient in law in the circumstances…. "beyond reasonable doubt", "has reason to believe", "is probable" and "has reason to suspect". In this instance the Court has to consider the degree of proof "has reasonable ground for suspecting". In these degrees of proof "suspicion" seems to be the lowest degree of proof required by law in certain instances. Section 32(1) of the Code of Criminal Procedure Act No. 15 of 1979 lays down as follows:*
>
> > *"(a) Any peace officer may… without a warrant arrest any person.*
> >
> > *(b) … **a reasonable suspicion** exists of having been so concerned in any cognizable offence."* (emphasis added)

The question therefore arises whether investigators had sufficient material giving reasonable suspicion to the 1st and the 7th Respondents to cause the arrest of the Petitioner. It is not the duty of the Court to determine whether on such available material the arrest should have been made or not made.

Learned Senior State Counsel, inter alia, submitted that the Petitioner bought 2 Million shares from Nandadeva Perera for a sum of Rs. 22 Million on 15th May 1997. On 3rd August 1997, Petitioner bought 50,000 shares from Upulwan Welaratne for a sum of Rs. 500,000/-. Again, on 11th August 1997, 50,000 shares were bought from Lalitha Siritunga for a sum of Rs. 500,000/- . All these shares were bought in the name of Digital Nominees [Pty] Ltd. using Power of Attorney dated 18th April 1997 marked **P3.** The Petitioner claims that, on 25th September 1997 using the same Power of Attorney marked **P3**, the Petitioner transferred 2.1 Million shares to Vanik Incorporation Ltd. in settlement of the financial facilities that had been obtained by the 6th Respondent. The Power of Attorney marked **P3** was registered at the Registrar-General's Office only on 17th January 2000. Thereafter, in July 2000, the Petitioner sold 2 Million shares to Dhammika Perera for a sum of Rs. 20 Million using the said Power of Attorney marked **P3,** as evidenced by the share transfer form marked **P10.** The Proceeds of Rs. 20 Million were never credited to the account of Digital Nominees (Pty)

Ltd. In these circumstances, the investigators are under a legal duty to ascertain as to what happened to the proceeds of Rs. 20 Million obtained by the Petitioner on behalf of Digital Nominees (Pty) Ltd., especially when a complaint was lodged by the 4th Respondent through his Attorney namely, the 5th Respondent with the I.G.P. regarding the loss caused to him due to alienation of the said shares. Thus, when the proceeds so received by the Petitioner had not been credited/ handed over to its owner, namely, Digital Nominees (Pty.) Ltd., a reasonable suspicion may arise whether an offence of criminal misappropriation has been committed by the Petitioner.

Learned President's Counsel for the Petitioner submitted that the said sum of Rs. 20 Million was given to the Power of Attorney holder of the Digital Nominees (Pty.) Ltd. , namely, the 6th Respondent who holds a Power of Attorney to conduct and manage the affairs of Digital Nominees (Pty.) Ltd. in Sri Lanka.

Learned Senior State Counsel, on the other hand, submitted that investigations have revealed of a close association between the Petitioner and the 6th Respondent, therefore, a reasonable suspicion arises whether the Petitioner and the 6th Respondent together with a common purpose acted in conspiracy to commit the offence of criminal breach of trust. An investigation into the matter therefore necessarily follows in the interest of justice. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. It is on this basis of principle that the Court normally does not interfere with the investigations of a case where an offence has been disclosed. The report of the investigation was filed before the learned Magistrate, when the Petitioner was produced. The learned Magistrate exercising her judicial discretion decided to remand the Petitioner till 1st July 2016. Thus, one does not find fault with the investigators for arresting the Petitioner and producing him before the learned Magistrate on the same day. While I agree with the learned President's Counsel for the Petitioner, that the Petitioner shall be pronounced innocent until he is proved guilty, such fundamental right recognized in Article 13(5), shall be subject to such restrictions as my be prescribed by law. Otherwise, as Wanasundera, J. noted in *Joseph Perera's Case* (supra) no Police Officer would be inclined to perform his functions not only in doubtful cases but practically in all cases,

thereby bringing the administration of justice to a standstill. It had to be remembered that in the public interest, it is important that Police Officers should be protected in the reasonable and the proper execution of their duties. They should not be unfairly criticized if they act on a reasonable suspicion.

Learned President's Counsel for the Petitioner contended that if the Petitioner has forged documents, then the remedy available to the party suffered by such forgery was civil and not criminal.

The facts in the present case have to be appreciated in the light of various decisions of this Court cited above. When somebody suffers injury to person, his property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. There are a large number of cases where criminal law and civil law can run side by side. The two remedies are not mutually exclusive but clearly co-extensive and essentially differ in their content and consequence. The object of the criminal law is to punish the offender who commits an offence against a person, property or the state for which the accused, on proof of the offence is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred.

Learned President's Counsel for the Petitioner strenuously argued that this Court could grant bail to the Petitioner, exercising its jurisdiction under Article 126(4) of the Constitution. Considering the judicial decisions and the ambit of Article 126(2), I do not think that this Court while exercising its jurisdiction under Article 126(1) of the Constitution can interfere with any "judicial orders" made by Magistrates. If the Petitioner is not satisfied with the Order made by the Magistrate, he is free to seek further remedies as provided by law. I must however, emphasize that the Powers of Magistrates while dealing with the applications for grant of bail are regulated by the punishment prescribed for the offence in which bail is sought. The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner.

While granting bail, Court has to keep in mind the nature of the accusations, the nature of evidence in support thereof, the severity of punishment which conviction will entail, the character, the standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the prevention of further crime and obstruction of Police inquiries etc.

The only question to be considered is whether the Petitioner was informed of the reason for his arrest. While at Paragraph 95 of the Petition, the Petitioner alleges that he was not informed of any reasons for his arrest, learned Senior State Counsel tendered to Court a document marked **'G'** and argued that the nature of the allegations or the charges were explained to the Petitioner, prior to his arrest. The Court does not have any affidavit from the Respondents with regard to this matter. Accordingly, the Court grants leave to proceed for the alleged violation of the Petitioner's fundamental right as enshrined in Article 13(1) by the First and the Seventh Respondents.

CHIEF JUSTICE

U. ABEYRATHNE,J.

I agree.

JUDGE OF THE SUPREME COURT.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPU BLIC OF SRI LANKA

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Arabegedera Sanjeewa Ravindra Rajapakse,
No.130, Kotakadeniya Road,
Weligalla

PETITIONER

S.C.F.R. Application No.211/2010

Vs.

1. The University of Peradeniya
   Peradeniya.
2. Prof. S. B. S. Abayakoon,
   Vice Chancellor,
3. Prof. K. Premaratne,
   Deputy Vice Chancellor,
4. Dr. K. Samarasinghe,
   Dean/Agriculture,
5. Dr. A. S. P. Abayaratne,
   Dean/ Arts,
6. Prof. E. A. P. D. Amaratunga,
   Dean/ Dental Sciences,
7. Prof. W. M. S. B. Weerakoon,
   Dean/ Engineering,
8. Dr. A. G. Buthpitiya,
   Dean/ Medicine,

9. Prof. S. H. P. P. Karunaratne
Dean/ Sciences,

10. Prof. P. Abeynayake,
Dean/ Veterinary Medicine and Animal Science,

11. Prof. N. V. I. Ranatunga,
Senate Representative,

12. Prof. R.L. Wijeyeweera,
Senate Representative,

13. Prof. B. Hewavitarane,

14. Prof. A. D. P. Kalansooriya,

15. Prof. K. N. O. Dharmadasa,

16. Dr. Kapila Gunawardena,

17. Dr. Dushantha Medagedara,

18. Mr. W. M. Jayawardena,

19. Dr. P. Ramanujam,

20. Dr. S. B. Ekanayake,

21. Mr. D. Mathi Yugarajah,

22. Prof. K. Tennakoon,

23. Mr. W. L. L. Perera,

24. Mr. Lionel Ekanayake,

25. Mr. L. B. Samarakoon,

26. Mr. Mohan Samaranayake,

All of University of Peradeniya,
Peradeniya.

27. Mr. L. R. K. Perera,
Head of Department,
Department of Geology,
University of Peradeniya,
Peradeniya.

28. Mr. Dodanwela
Acting Registrar,
University of Peradeniya,
Peradeniya.

29. Prof. H. M. N. Bandara,
Faculty of Science,
University of Peradeniya,
Peradeniya.

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

RESPONDENTS

BEFORE: **ALUWIHARE, PC. J**
ABEYRATHNE, J
GOONARATNE, J

COUNSEL: Dr. Sunil Cooray for the Petitioner
Shaheeda. Barrie, SSC, for the Attorney General

ARGUED ON: 16.12.2015, 19,01,2016 and 16.02.2016.

DECIDED ON: 28. 11. 2016

ALUWIHARE, PC. J

When this matter was supported on 23rd March, 2010 leave to proceed was granted for alleged infringement of fundamental rights under Articles 12 (1) and 14 (1) g of the Constitution.

The background facts of this case are as follows:-

The Petitioner was attached to the 1st Respondent University (hereinafter referred to as the University) as a Trainee Technical Officer at the time relevant to the alleged infringement. The Petitioner asserts that having joined the University of Wayamba as a Grade 3 clerk in 2001, he was appointed as a Trainee Technical Officer with effect from 15th March, 2005.

It is the position of the Petitioner that he was successful in the examination conducted by the University for the selection of Technical Officers (Training) and was also successful at the interview and consequently was appointed to the said post. In terms of the letter of appointment (P3) the appointment is subject to a probation period of 3 years. He had been assigned to the Department of Geology and had worked under the supervision of the 9th and the 27th Respondents.

Although the Petitioner has asserted that (Paragraph 16 (d) of the petition) in terms of paragraph 3 of the letter of appointment the Petitioner is required to discharge his duties under a supervisor assigned to him by the University or by the 9th or the 27th Respondents, paragraph 3 of the letter of appointment only states that his appointment is subject to an evaluation, under and in terms of the rules applicable to Higher Education Institutes and University Grants Commission.

The Petitioner also asserts that in terms of paragraph 10 of the letter of appointment (P3) he was neither assigned to work under a Supervisor nor was he given a list of

duties to be performed. He further complains that as per the conditions of the letter of appointment there were no training programmes arranged for him.

It appears upon perusal of paragraph 10 of P3 that this assertion is a misconception as far as the Petitioner is concerned, in that the said paragraph only caste a duty upon the Petitioner to carry out duties assigned to him by an official to whom such authority is delegated by the Head of the Department.

The Petitioner's perception as to the conditions of the letter of appointment is significant in deciding the issues of this case. It appears that certain events as unfolded by the Petitioner have a direct bearing, on the perception of the aforesaid conditions in the mind of the Petitioner.

The gravamen of the Petitioner's complaint is that the 27th Respondent who was the head of the Department of Geology failed to provide him with a list of instructions or to provide him with an environment conducive to work.

The Petitioner complains that the 27th Respondent directed him to perform certain duties that are assigned to labourers, in addition to the laboratory work. In elaborating this, the Petitioner states that he was called upon to open and shut the doors and windows of the laboratories, and entrusted duties such as moving gas cylinders, photocopying administrative documents and delivering official letters within the campus, etc.

The Petitioner appears to have been distressed by this situation and had complained to the 27th Respondent that it was unfair to be assigned work that is performed by labourers and had requested that he be given a duty list. The Petitioner had stated that he refused and refrained from delivering letters within the campus when he was instructed to do so by the 27th Respondent.

The Petitioner, subsequent to these events had requested for a transfer to the faculty of medicine, but the transfer had not been approved by the 9th and the 27th Respondents on the ground that there was no replacement.

The Petitioner also alleges, that he along with another employee of the University were nominated for a computer training programme, but later the training was denied to him. The Petitioner further alleges that at one point several new appointments were made to the post of Technical Officer, yet the 27th Respondent refused to accept a new recruit to his department, which the Petitioner asserts would have enabled him in turn to get a transfer to the Faculty of Medicine.

Petitioner also alleges that his period of probation/training was extended by one year. By letter dated 12th February, 2007 the Deputy Registrar had informed the Petitioner that during the designated period, the degree of training he had is unsatisfactory and for that reason his training/probation period is being extended up to 15th March, 2008 (P8).

Subsequent to receiving the letter P8 the Petitioner had faced another written test with a view to getting him confirmed in his job. He states however that he was informed of the test only on the morning of the day the test was held. In an interview held subsequent to the written test, petitioner says he was informed by the 9th, 27th and the 29th Respondents that his public relations were not satisfactory.

Petitioner alleges that there is no provision to hold a written test in terms of the Scheme of Recruitment for the post of Technician that is the Commission Circular No. 622 of the University Grants Commission (P10), and according to the same, a recommendation for a permanent appointment shall be made after oral and or practical test by a committee. The Petitioner states that he brought this fact to the attention of the interview panel, but was of no avail.

On the 12th February, 2010 the Petitioner alleges that he was served with a letter dated 9th February, 2010 from the 28th Respondent, informing him that the Governing Council of the University had decided to terminate his services (as a Trainee Technician) and the Petitioner have to revert to his original post of Grade III Clerk (P12).

The Petitioner asserts that apart from the irregularities committed by the 9th and 27th Respondents and the failure on their part to follow the procedure laid down by the University Establishment Code, the decision of the University Governing Council that the Petitioner revert to the post of Clerk Grade III is unreasonable and capricious and was violative of the fundamental rights of the Petitioner guaranteed under Article 12 (1) and 14 (g) of the Constitution.

In response to the allegation referred to by the Petitioner, the 2nd Respondent Vice Chancellor (hereinafter referred to as the Vice Chancellor) refuting all allegations in general had taken up the position that due to the inability on the part of the Petitioner to demonstrate a basic level of competence to carry out his duties, it was not possible to confirm the Petitioner in the post of Technical Officer. The Vice Chancellor states that the decision to extend the probation period of the Petitioner was taken by members of the Selection Committee sequel to the evaluation of the Petitioners' performance at the interview and the written examination which is borne out by the report of the Selection Committee (2R7). The 9th Respondent, the Dean of the Faculty of Science, 27th Respondent, Head of Department of Geology and the 29th Respondent, Head of Department of Chemistry were the members of the selection committee.

The Vice Chancellor has taken up the position that 'trainees' are not given a list of duties and had stated that even the members of the staff open and close doors when the occasion so demands. The Vice Chancellor asserts that the Petitioners' request for transfer to the Faculty of Medicine could not be obtained as the Petitioner had

made the request on 28th April, 2005 (P5) and he had been appointed as a trainee only on 15th March, 2005, a period little over a month after assuming duties. The Vice Chancellor points out in his objections, that no special preference was given to Mr. Gamage over the Petitioner with regard to computer training. The reason he adduces for the selection of Mr. Gamage is that, Gamage was an officer confirmed in his post, and had worked in the Department of Geology since 2003 and Mr. Gamage was selected for computer training a considerable time after he was confirmed in the post.

The Vice Chancellor had also pointed out that the work of an officer on probation has to be evaluated during the period of probation on a continuing basis and effecting transfers during the period of training is not a practice that is encouraged by the University.

The Vice Chancellor asserts that even after the extended period of probation, the Petitioner's practical knowledge was assessed by P9, and to maintain fairness in the process of assessment each of the 11 questions on P9 were set and examined by different members of the relevant Departments, and the Petitioner failed to obtain satisfactory marks.

The Vice Chancellor had, in his affidavit stated that, when it comes to an internally recruited trainee, as per the provisions of circular No.622 of the University Grants Commission, if found unsatisfactory during the period of probation, the trainee has to revert to his previously held post, as happened in the case of the Petitioner.

The Petitioner had also complained that he was called upon to answer a 'question paper' in 2008 to be confirmed in the Post of Technical Officer Grade II B, and when he failed the test on the first occasion, he was afforded another opportunity to sit the examination again in 2009.

Before I deal with the specific allegations leveled by the Petitioner against some of the Respondents, I wish to note that this court would interfere only if the alleged executive and administrative action, (in the instant case the decisions) on the part of the Respondents are illegal and/or arbitrary and the burden of establishing that was so, is on the Petitioner. As held in the case of Dalpat Abasaheb v. B. S. Mahajan AIR 1990 SC 435 *" it is not the function of Court to hear appeals over the decision of the Selection Committees and to scrutinise the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proves mala fides affecting the selection etc."*

Apart from the many instances of friction over administrative issues, between the Petitioner and the 27th Respondent and some other members of the University staff, the only instance on which an irregularity is alleged is in regard to the methodology used to assess the competence of the Petitioner to be confirmed in his post.

The Petitioner alleges that he cannot be subjected to a 'written' test as per the terms of recruitment, but only to an oral/practical test. The Petitioner alleges that he was made to sit for a test where he was called upon to provide written answers to questions and it is not a "practical" test as contemplated in the Scheme of recruitment. Further the Petitioner alleges that he was called upon to answer the questions at short notice and he was unable to get ready.

The Petitioner has pointed out that, in terms of the Scheme of Recruitment for the post of Technical Officer, the recommendation for permanent appointment shall be made after oral/practical test by a Committee consisting of the Dean of the Faculty,

Head of the Department and one other Head of a Department nominated by the faculty.

Refuting the allegation referred to above, the 27th Respondent had stated that the examination was held on a date and a time that was mutually agreed upon by the Petitioner and the University officials, and the questions were based on practical aspects on which, the Petitioner was required to acquire knowledge. Upon perusal of the question papers marked and produced as P6 and P9 it is quite evident that the position taken up by the 2nd Respondent is correct.

The Professor of Geology and an employee attached to the Department of Geology have sworn affidavits (2R9 (b) and 2R9 (a) respectively) to the effect that the Petitioner was known to them as a Trainee Technical Officer attached to the Department of Geology and that the Petitioner had not shown any interest in learning the laboratory techniques and his conduct did not show any enthusiasm to learn the work of the Department of Geology.

The Petitioner had complained that he was called upon to photocopy administrative documents and deliver letters and had referred to such tasks as "work that was to be performed by the labourers".

The Petitioner was only a "Trainee" Technical Officer under probation and was going through a period of learning or acclimatising himself with the work of the relevant Department, and this does not appear to me, the correct spirit in which a trainee should attend to duties assigned, during the period of training.

The Petitioner also complains that he was not given a "List of duties" to be performed during the probationary period. Here again I do not think a "trainee" can demand that he be given a list of duties and it would not be practically possible

to have an exhaustive list of such duties which the Petitioner is required to be acclimatised to.

I have considered the numerous documents filed on behalf of the Petitioner as well as the documents filed on behalf of the Respondents. Reference, however, to each and every document does not seem necessary in this judgment considering the triviality of their relevance. Suffice it to state, that it is apparent from the facts placed before court that the working relationship between the staff of the University and the Petitioner however had reached a low ebb. The document filed by the Petitioner marked X7 amply reflects that situation. For a seat of higher learning such as a university, its smooth functioning is of paramount importance and the academic and the administrative staff are the best judges of how that could be achieved. .

Although it may seem unjust to impose an undue burden upon a Petitioner where an infringement of fundamental right is alleged, in proof of the same, the Court necessarily must evaluate the material placed before it, with caution, to determine, whether the facts alleged have been established with a fair degree of probability.

At its best, the series of events narrated by both the Petitioner and the Respondents are allegations and counter allegations without sufficient proof to come to a firm finding.

In the circumstances, I hold that none of the alleged violations of fundamental rights have been proved as against any of the Respondents, and I dismiss this application.

In the course of the hearing it was submitted that the 1st Respondent University is prepared to let the Petitioner revert to his former post.

Dismissal of the instant application of the Petitioner should not be considered as an impediment or a fetter on the part of the 1st Respondent University in the exercise of its discretion

In the circumstances of this case I make no order as to costs.

JUDGE OF THE SUPREME COURT

JUSTICE UPALY ABEYRATHNE

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ANIL GOONERATNE

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under and in terms of Articles 17 and 12 of the Constitution of Democratic Socialist Republic of Sri Lanka.

SC. FR. Case No. REF 219/15

1. Lanksakara Kulathunga Mudiyanse Ralahamillage Mohan Anuruddha Bandara Alawala
   No.117/A, Colombo Road,
   Wanduragala,
   Kurunegala.

2. Mohammed Shiffan Ibrahim
   No.282/01,
   Modara Road, Egoda Uyana,
   Moratuwa.

3. Janaka Sampath Kaluarachchi
   No.50C/2, Vije Mangalarama Road,
   Kohuwala.

4. Dewarahandi Leel Chanaka De Silva
   Palathottawatta Main Road,
   Palathittawatta,
   Palathotta.

5. Makawita Appuhamlaiye Chathura Kanishka Makawita
   No.128/91 near to the Medankara Vidyalaya,
   Horana.

6. Malgalla Liyanage Sajith Dilushan
   No.72/91, Aleswatta,
   Kirimatimulla,

Thelijjiwila.

7. Diggaha Ranawaka Arachchige Chamila Maduranga Ranawaka
   Gothatuwa Watta, Baddegama.

8. Liyanage Nayana Dharshaka Molligoda
   No.130, Dholla Addarawatta,
   Manikgoda, Nawaththuduwa,
   Mathugama

9. Veemanage Harshana Gayan Perera
   No.4, Sisil Uyana,
   Etavila Road,
   Nagodawatta,
   Kaluthara South.

10. Koonthotagedara Ranjan Abeyawansha
    No.10/10, Dream View,
    Summerfield Land, Malpana,
    Kengalla,
    Kandy

11. Jayamaha Pathiranelage Chaminda Thushara Sampath Jayamaha
    Viharegama, Narammala.

12. Herath Mudiyanselage Vindika Anuranga
    No.303-B, Puwakgahawatta,
    Meegoda.

13. Mawadavilage Dhanushka Jeevantha
    No.557-D5, Dangettiyawatta,
    Kuda Arakgoda,
    Alubomulla,
    Panadura.

14. Ranjan Sujeewa Munasinghe
    Rangama, Wellawa,
    Kurunegala.

15. Pinnagoda Liyana Arachchige Don Tiran Ravindu Tilakarathne
Sinhalena Koralaeima,
Gonapola Junction,
Horana.

16. Demuni Indika Prasad
No.15/3B, Degaladoruwa,
Gunnapana.

17. Pilan Godakandage Milan Osanda
No.15/1, Maitipe,
3rd Lane,
Galle.

18. Suduhakure Gedara Chinthaka Pradeep Dissanayake
3rd Mile Post, Parappe,
Rambukkana.

19. Vithanage Sumeera Suranjaya Vithanage
No.311/01, 21st Lane,
Dikkenpura,
Horana.

Petitioners

Vs.

1. The Inspector General of Police
Police Headquarters,
Colombo1.

2. The Commander Special Task Force
Head Quarters
No.223, Baudhaloka Mawatha,
Colombo 7.

3. R.W.M.C. Ranawana
   Retired Deputy Inspector General of Police
   Commander of Special Task Force
   No.396/2/B, Hokandara South,
   Hokandara.

4. W.P.Wimalasena
   Senior Superintendent of Police,
   Office of Senior Superintendent of Police,
   Seethawaka,
   Avissawella.

5. Ms. W.P.G.D.J. Senanayake
   Assistant Secretary
   Ministry of Defence,
   Colombo 3.

6. D.D.K. Hettiarachchi
   Assistant Superintendent of Police
   Special Task Force Head Quarters,
   Gonahena,
   Kadawatta.

7. M.L.R. Chandrasiri
   Chief Inspector of Police,
   Officer in Charge,
   Special Task Force Head Quarters,
   Gonahena,
   Kadawatta.

8. B.S.H. Pieris
   Inspector of Police
   STF Head Quarters,
   No.223, Baudhaloka Mawatha,
   Colombo 7.

9. T.A.R Nimantha
   Inspector of Police
   STF Camp, Horana

10. S.P. Chaminda
Inspector of Police,
STF Camp,
Horana.

11. The Secretary
Ministry of Public Peace and Law and Order
Floor 13,
Sethsiripaya (Stage II),
Battaramulla.

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

Respondents

BEFORE: Chandra Ekanayake J
Buwaneka Aluwihare P.C.J
Upali Abeyrathne J

COUNSEL: E. Thambaiah with S. Srikandarajah for the Petitioners

Viveka Siriwardena Deputy Solicitor General for the 1st and the 12th Respondents

ARGUED ON: 9TH September 2015

WRITTEN SUBMISSIONS: 22~ September~2015

DECIDED ON: 15~02~2016

Buwaneka Aluwihare P.C.J

This is an application under Article 126 of the Constitution complaining of the violation of Article 12 (1) of the Constitution by reason of the Petitioners not being promoted to the rank of 'Inspector of Police' of the Special Task Force.

More specifically, the Petitioners are challenging the promotions granted to forty-seven officers of the Special Task Force from the rank of 'Sub-Inspector of Police' to 'Inspector of Police' based on 'seniority and merit', by the letter dated 15th March 2013 with effect from 7th November 2012.

The Petitioners claim that two interviews had been held in order to choose competent candidates for the above post.

1. First Interview- 6th and 7th of November 2012
2. Second Interview- 15th February 2013

The second interview was held for the candidates who were unable to attend for the first interview. But some candidates who attend the first interview were also interviewed for the second time on 15th February 2013. Thereafter forty seven candidates, including the candidates who were given a second opportunity to appear before the interview panel and by the letter dated 15th March 2013, had been granted promotions.

The Petitioners moreover complained that the marks were not allocated to the candidates in accordance with the marking scheme which was made public before the interviews.

Thus the Petitioners have alleged that the interview board had acted in contrary to the marking scheme and had unfairly and unduly favoured some candidates who had not fulfilled the required qualifications by 20th October 2013, which was the closing date of the applications for the aforesaid promotion.

Being aggrieved by the manner in which promotions were granted, the Petitioners lodged a complaint to the Human Rights Commission on 10th April 2013 alleging that the fundamental rights guaranteed under Article 12 (1) of the Constitution had been violated. The Human Rights Commission having inquired into this matter by its report dated 13th November 2014 held that the Petitioners' fundamental rights guaranteed under Article 12 (1) of the Constitution had been infringed. Accordingly, three recommendations were

made, to be implemented by the 1st and 2nd Respondents in the instant case, before 24th December 2014 in order to redress such grievances of the Petitioners.

Since these recommendations had not been implemented the Petitioners had come before this Court by way of a Fundamental Rights application.

When this application, was taken up for Support for Leave to proceed, on 9th September 2015, a preliminary objection with regard to the maintainability of this application was raised by the learned Deputy Solicitor General who appeared for the 1st and 12th Respondents. The objection so raised was on the basis that the application cannot be maintained by the Petitioners as the application is time barred.

The Court, having decided to treat the objection raised as a preliminary issue heard the submissions of the learned Deputy Solicitor General as well as the learned Counsel for the Petitioners. Thereafter the parties were granted permission to file written submissions on the preliminary issue.

For the purpose of dealing with the preliminary objection referred to above, it is important to determine the date on which the Petitioners first had knowledge of the alleged infringement.

Article 126 (2) of the Constitution stipulates that,

> "Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, **within one month thereof**, in accordance with such rules of the Court as may be in force, apply to the Supreme Court by way of a petition in writing addressed to such Court…" (emphasis added)

Thus, it is evident that the Petitioners should have invoked the jurisdiction of this court within one month from the letter dated 15th March 2013, by which

the appointment of forty seven officers to the post of 'Inspector of Police' was communicated.

An exception to this rule, however, is found in the Human Rights Commission of Sri Lanka, Act No.21 of 1996. This Act empowers the Human Rights Commission of Sri Lanka to entertain complaints in respect of violations of fundamental rights guaranteed by the Constitution.

Section 13 (1) of the Act reads as follows:

> "Where a complaint is made by an aggrieved party in terms of section 14 to the Commission, **within one month** of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, **the period within which the inquiry into such complaint is pending before the commission shall not be taken into account in computing the period of one month** within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution." (emphasis added)

In the light of this section it is evident that the Petitioners could avoid the time bar, if the application to the Human Rights Commission (hereinafter referred to as the Commission) was made within one month of the alleged infringement. By virtue of the aforesaid provision time would not run during the pendency of proceedings before the Commission. This view was fortified in the case of *Romesh Cooray vs. Jayalath, Sub-Inspector Of Police And Others, (2008) 2 SLR 43.*

Accordingly, the Petitioners have lodged a complaint to the Human Rights Commission, on 10th April 2013 ('P23'), which is well within one month of the impugned infringement of Article 12 (1).

Upon inquiry of the complaint so made by the Petitioners, the Human Rights Commission held that the fundamental rights guaranteed under Article 12 (1) of the Constitution had been infringed. Consequently, the Commission directed 1st and 11th Respondents to the instant application to implement three

recommendations before 24-12-2014, by its findings dated 13-11-2014. ('P24').

The Respondents, however, failed to implement those recommendations of the Human Rights Commission. Hence the Petitioners duly drew the attention of the Human Rights Commission by the letter dated 29-12-2014 with regard to the non-implementation. The Commission thereafter by letter dated 21-01-2015 granted further time till 12-02-2015 for the 1st and 11th Respondents to implement the recommendations.

As the recommendations were not implemented even within the extended time period, the Human Rights Commission summoned both the Petitioners and the Respondents to the Commission on 24th March 2015 for an inquiry regarding the non-implementation of the recommendations. At the inquiry an officer representing the Respondents requested for a further period of one month to consider granting redress to the Petitioners in accordance with the recommendations of the Commission.

Considering the sequence of events aforesaid, it is evident that the Petitioners were put on notice that the Respondents required a month's time from 24th March 2015 to implement the recommendations of the Human Rights Commission.

By a communication dated 17-04-2015 addressed to the Commission (marked and produced with the written submissions of the Petitioners as 'P41') the Respondents clearly stated that they are unable to implement the recommendations of the Human Rights Commission. Though technically the inquiry before the Human Rights Commission ended when the Commission pronounced its finding 13- 11 -2014, it would be reasonable to assume that the Petitioners had the expectation that the recommendations would be implemented. Hence, not invoking the jurisdiction of the Supreme Court within one month thereof could be justified to an extent. However the Petitioners were put on notice that the 1st and 11th Respondents were given a final date which was the 23rd April 2015 to implement the recommendations

and by their letter dated 14th April 2015 Respondents informed the Commission their inability to implement the same. Hence the Petitioners ought to have invoked the jurisdiction of this court in terms of Article 126(1) of the Constitution within one month of 23rd April 2015.

The Petitioners however, invoked the jurisdiction of this court on 5th June 2015 which is after a lapse of forty-two days, from the last date of the extended period of one month granted to the Respondents to implement the recommendations of the Human Rights Commission. i.e.

Last date of the extended period: 23rd April 2015

Application filed on : 5th June 2015

} 42 Days

Thus the Petitioners' application to this court is time-barred in terms of Article 126 (2) of the Constitution. The Petitioners were well aware that the Respondents at the inquiry held on 24th March 2015, had given an assurance that relief would be granted in accordance with the recommendations of the Human Rights Commission within one month from that day. Therefore, at the instance the Respondents failed to adhere to the assurance they had given, the Petitioners ought to have come before this court within one month from 23rd April 2015.

Even though the time limit of one month is mandatory in ordinary circumstances, in exceptional circumstances, the Court has discretion to entertain a fundamental rights application made out of time where the delay in invoking the jurisdiction of the Court under Article 126 is not due to a lapse on the part of the Petitioner.

At this point I wish to refer to the following decisions of this court with regard to Article 126 (2) of the Constitution.

In Gamaethige vs. Siriwardene (1988) 1 SLR 385, Fernando J. observed that;

> *"Three principles are discernible in regard to the operation of the time limits prescribed by Article 126 (2). Time begins to run when the*

infringement takes place; if knowledge on the part of the Petitioner is required, time begins to run only when both infringement and knowledge exists. The pursuit of other remedies judicial or administrative does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases on the application of the principle 'lex non cogit ad impossibilia', if there is no lapse, fault or delay on the part of the Petitioner, this court has a discretion to entertain an application made out of time"

Then in **Edirisuriya** vs. **Navaratnam** (1985) 1 SLR 100, the court held that the time limit of one month is mandatory, but that in a fit case the court would entertain an application made outside the time limit of one month provided an adequate excuse for the delay could be adduced.

The Petitioners before this court, in their written submissions dated 22-09-2015 have merely stated that they reliably understood that the Respondents have refused to implement the recommendation of the Commission only on 25-05-2015 which they have failed to substantiate.

Therefore, this court does not find any explanation by the Petitioners as to the reasons for the delay in filing this application. On the other hand, it is apparent that the Petitioners were well aware about the extension of the period of one month (till 23-04-2015) that was granted to the Respondents to implement the recommendations. I have considered the cases cited by the Petitioners, the case of Sriyani Silva (wife of Jagath Kumara) Vs. Iddamalgoda OIC Payagala 2003 1 SLR page 14 and Jayasinghe and Others Vs. R.S. Jayarathne and others 1999 2 SLR page 385 and is of the view that the rational of those two decisions would not be applicable to the instant case in view of the facts and circumstances peculiar to this case.

Thus, I am of the view that one month period starts to run with effect from 23-04-2015. Therefore, without offering a reasonable explanation as to the inordinate delay amounting to an approximate period of forty- two days, the Petitioners cannot invoke the fundamental rights jurisdiction of this court.

Accordingly, I am of the opinion that the preliminary objection raised on behalf of the 1st and 12th Respondents should be upheld as *'equity aids the vigilant, not those who slumber on their rights'*.

Considering the foregoing, I am of the view that, it has been established beyond doubt that the Petitioners have filed this application outside the time period of one month stipulated in Article 126 (2) of the Constitution. Thus, I uphold the preliminary objection raised on behalf of the 1st and 12th Respondents.

The application is dismissed in limine. I make no order as to costs.

JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE J.

JUDGE OF THE SUPREME COURT

UPALI ABEYRATHNE J.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under and in terms of Article 126 (2) of the Constitution of the Republic of Sri Lanka.

DON KARUNASENA ATHUKORALA
Batuwatte Mawatha,
Hapugala
Wakwella.

PETITIONER

S.C. F.R. No. 232/2012

VS.

1. H.M.GUNASEKERA
Secretary,
Ministry of Education,
Isurupaya, Batraramulla.

1A. W.M.BANDUSENA,
Secretary,
Ministry of Education,
Isurupaya, Battaramulla.

2. RADHA NANAYAKKARA,
Additional Secretary,
Ministry of Education,
Isurupaya, Battaramulla.

3. P.B.ABEYKOON
Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 7.

3A. J. DADALLAGE,
Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 7.

4. DAYASIRI FERNANDO
Chairman,

4A. DHARMASENA DISSANAYAKE
Chairman,

5. PALITHA M. KUMARASINGHE
Member,

5A. A.SALAM ABDUL WAID
Member,

6. S.C.MANNAMPERUMA
Member,

6A. MS. D.SHIRANTHA WIJEYATHILAKA
Member,

7. ANANDA SENEVIRATNE
Member,

7A. DR. PRADEEP RAMUNUGAM
Member,

8. N.H.PATHIRANA
Member,

8A. MRS. V. JEGARAJASINGHAM
Member,

9. S. THILLAI NADARAJA
Member,

9A. SANTI NIHAL SENEVIRATNE
Member,

10. M.D.W.ARIYAWANSHA
Member,

10A. S.RANNUGE
Member,

11. A.MOHAMED NAHIYA
Member,

11A. D.C.MENDIS
Member,

12. SIRIMAVO A.WIJERATNE
Member,

12A. SARATH JAYATHILAKA
Member,

The 3rd to 11th Respondents and presently, the 4A to 12A Respondents, all of
Public Service Commission
No. 177, Nawala Road,
Narahenpita,
Colombo 5.

13. T.M.L.C.SENEVIRATNE
Secretary,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 5.

13A. H.M.G.SENEVIRATNE
Secretary,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 5.

14. PROVINCIAL DIRECTOR OF EDUCATION, (Southern Province),
Provincial Educational
Department, Galle.

15. K.A.TILAKARATNE
Director General of Pensions,
Department of Pensions,
Maligawatte,

15A. S.S.HETTIARACHCHI

Director General of Pensions,
Department of Pensions,
Maligawatte,

16. HON. ATTORNEY GENERAL
Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE: B.P. Aluwihare, PC. J
Priyantha Jayawardena, PC.J
Prasanna Jayawardena, PC.J

COUNSEL: J.C. Weliamuna with Senura Abeywardena for the Petitioner
Rajitha Perera, SSC, for 1A, 2, 3A, 4A, 5A, 6A,7A, 8A, 9A, 10A,11A, 12A,13A,14,15A and 16th Respondents.

ARGUED ON: 05th July 2016.

WRITTEN SUBMISSIONS FILED: By Petitioner on 10th August 2016.
By Respondents on 08th August 2016.

DECIDED ON: 28th October 2016

Prasanna Jayawardena, PC, J.

The Petitioner joined the Public Service in 1969, as an Assistant Teacher. He first completed a Teacher Training Course at the Maharagama Teacher Training College and was then appointed to the 'Sri Lanka Education Service', which was later renamed the `Sri Lanka Educational Administrative Service'.

During his period of service, the Petitioner taught in 11 schools in different parts of the country and served in administrative capacities in the Zonal Educational Office in Kegalle and the Provincial Educational Department of the Southern Province. The

Petitioner steadily rose through the ranks of the Sri Lanka Educational Administrative Service. He reached the apex of his career in 1996, when he was appointed Principal of the prestigious Mahinda College, Galle which was founded in 1892 under the auspices of the Buddhist Theosophical Society, then led by Colonel Henry Steel Olcott.

About eight years into his tenure as Principal of this College, the Petitioner was arrested by the officers of the Commission to Investigate Allegations of Bribery or Corruption. The arrest was on 24th September 2004. He was suspected of acquiring wealth by corrupt means. A month later, the Petitioner was indicted in the High Court of Colombo under Section 23 A of the Bribery Act No. 8 of 1973. Section 23 A makes it an Offence to own or to have owned property which is deemed under the provisions of Section 23A of the Act, to be property acquired by bribery or to be property acquired by the conversion of property which was acquired by bribery.

At this point, it should be recorded that, at the end of the Trial in the High Court, on 30th September 2010, the Petitioner was acquitted when the learned High Court Judge held that, the Charge had not been proved beyond reasonable doubt. As will be evident later on in this Judgment, the acquittal has no bearing on the present Application. But, to be fair by the Petitioner, the fact of the acquittal must be stated here.

Inevitably, the arrest and indictment of the Petitioner, who was a public officer, resulted in Disciplinary Action being taken against him. This included placing the Petitioner on Compulsory Leave, later interdicting him, the issue of a Charge Sheet and Amended Charge Sheet and the holding of a Disciplinary Inquiry.

Being a public officer, the Petitioner was governed by the provisions of the Establishments Code. Chapter XLVIII of Vol. II of the Establishments Code sets out the Disciplinary Procedure which was applicable to the Petitioner. [All references to Sections in the Establishments Code from here onwards in this Judgment, are references to Sections within the said Chapter XLVIII of Vol. II of the Establishments Code.]

It should also be stated here that, as evident from Section 2:2 read with Section 1:1:1 of the Establishments Code, the `Disciplinary Authority' vested with the power of dismissal and disciplinary control of the Petitioner, was the Public Service Commission.

Following the arrest of the Petitioner, the Public Service Commission directed that, the Petitioner be placed on Compulsory Leave from 08th October 2004 onwards. Thereafter, following his indictment in the High Court, the Petitioner was interdicted on 08th February 2005, in terms of Section 31:1 read with Section 31:1:4 of the Establishments Code.

As evident from the facts stated above, the Trial in the High Court spanned more than five years. During the time the Trial was underway, the Petitioner reached his compulsory retirement age of 60 years, on 03rd October 2007. Therefore, on that day, the Petitioner retired from Service.

A few months before the Petitioner retired, the Petitioner was served a Charge Sheet dated 23rd February 2007 filed with the Petition marked **"P-9a"**, which was issued by the Public Service Commission. This was amended by an Amended Charge Sheet dated 24th August 2009 filed with the Petition marked **"P-9b"**, which was stated to be amended in terms of Section 14:6 of the Establishments Code. There were eighteen Charges which covered a gamut of acts of misconduct alleged to have been committed by the Petitioner during his tenure as Principal of Mahinda College.

Thus, at the time the Petitioner retired, disciplinary proceeding had commenced against him and he was under interdiction.

Section 36:2 of the Establishments Code stipulates that, in such circumstances, the Petitioner retired subject to the provisions of Section 12 of the Minutes on Pensions. In Paragraph [9] of his Petition, the Petitioner has admitted this and stated *"…. The Petitioner retired from Public Service, subject to Section 12 of the Minute on Pensions"*.

In Paragraph [11] of his Petition, the Petitioner states that, *"a formal disciplinary inquiry was conducted against him"*. In his Petition, the Petitioner has not complained regarding the manner in which the disciplinary inquiry was held. I also note that, Section 36:5 of the Establishments Code states that, although the Petitioner had retired by then, the Petitioner was *"bound to participate"* in this disciplinary inquiry. For these reasons, I am not inclined to take into account the Petitioners' submission, made for the first time in his written submissions tendered on 10th August 2016, that he was not given an opportunity to defend himself at the disciplinary inquiry or to cross examine the witnesses.

The disciplinary inquiry was concluded some years after the Petitioner has retired on 03rd October 2007. The Petitioner was found to be guilty of nine of the eighteen Charges.

The Petitioner states that, thereafter, he received a copy of a letter dated 16th November 2011 sent by the Public Service Commission to the 3rd Respondent [the Secretary, Ministry of Public Administration and Home Affairs], which is filed with the Petition marked **"P10"**. By this letter, the Public Service Commission had recommended to the 3rd Respondent that, in consequence of the Petitioner having been found guilty of nine Charges, a deduction of 25% of the Petitioner's Gratuity be made. The Public Service Commission goes on to state in this letter that, it is forwarding copies of the Charge

Sheet and Amended Charge Sheet, the Petitioner's reply thereto, the letter advising the Petitioner that he is deemed to have retired, the inquiring officer's Report and the recommendation made by the Ministry of Education. The Public Service Commission states that, these documents are being forwarded to enable the 3rd Respondent to take action under and in terms of Section 36:7 of the Establishments Code.

The Petitioner next states that, on or about 09th April 2012, he received a copy of a letter dated 30th March 2012 sent by the Additional Secretary, Ministry of Education to the Provincial Director of Education (Southern Province), which is filed with the Petition marked **"P11"**, stating that:

(i) The **3rd Respondent** had directed the imposition of a deduction of 25% in the gratuity payable to the Petitioner;

(ii) The **3rd Respondent** had directed the imposition of a deduction of 10% in the pension payable to the Petitioner;

(iii) The **Public Service Commission** had directed the payment of only half wages to the Petitioner in respect of the period from the date he was interdicted up to the date he was retired.

The Petitioner does not dispute the validity of the direction that a deduction of 25% be made on the gratuity payable to the Petitioner. In fact, in Paragraph 1.3 (a) of his Written Submissions, the Petitioner has expressly submitted that he accepted this deduction, which is set out in (i) above.

However, firstly, the Petitioner contends that, the 3rd Respondent had no lawful authority to impose a deduction of 10% in the pension payable to the Petitioner or to impose any deduction in excess of the deduction of 25% of the gratuity which was recommended by the Public Service Commission - *ie:* the Petitioner impugns (ii) above. He, secondly, contends that, the decision to pay only half wages to the Petitioner during the period of interdiction was contrary to the provisions of the Establishments Code and is illegal and unreasonable - *ie:* the Petitioner also impugns (iii) above.

By this Application, the Petitioner pleads that, the aforesaid two decisions are in excess of the powers of the 1st, 2nd and 3rd Respondents. The Petitioner states that, these two decisions are unfair, arbitrary, unreasonable, unlawful, excessive and disproportionate. On this basis, the Petitioner alleges that the two impugned decisions violate the fundamental rights of the Petitioner guaranteed under Article 12 (1) of the Constitution.

The Petitioner, prays, *inter alia*, for Orders from this Court directing that, he be paid his monthly pension without any deduction and that, he be paid full wages in respect of the period of interdiction.

On 22nd May 2012, this Court granted the Petitioner leave to proceed in respect of the alleged violation of Article 12 (1) of the Constitution.

The 3rd Respondent – namely, the Secretary, Ministry of Public Administration and Home Affairs – and the 4th Respondent –namely, the Chairman of the Public Service Commission – have filed Affidavits by way of their Objections to the Petitioner's Application.

The Respondents have taken up a preliminary objection basis that, the Petitioner's Application is time barred.

With regard to the merits of the Petitioner's Application, the Respondents state that, under and in terms of Section 12 (2) of the Minutes on Pensions, the Public Service Commission has no authority to make a decision with regard to the pension and gratuity payable to the Petitioner. The Respondents state that, the Public Service Commission may only make a recommendation to the 3rd Respondent who is vested with the authority to take a final decision with regard to the payment of a pension and gratuity to the Petitioner. In this connection, the Respondents also state that, while the `Disciplinary Authority' vested with the powers of dismissal and disciplinary control of the Petitioner is the Public Service Commission, a decision to withhold or reduce the payment of pension and gratuity under and in terms of Section 12.2 of the Minutes on Pensions is not a "Disciplinary Order' which falls within the province of the Public Service Commission.

The Respondents state that, accordingly, the Public Service Commission, by its letter marked **"P10"**, made its recommendation to the 3rd Respondent, under and in terms of Section 36:7 of the Establishments Code, that a deduction of 25% be imposed on the gratuity payable to the Petitioner. This recommendation was considered by a Committee appointed by the 3rd Respondent. This Committee had made the Report filed with the 3rd Respondent's Affidavit marked **"3R-2"**. By this Report, the Committee had recommended that, *in addition* to the deduction of 25% of gratuity recommended by the Public Service Commission a deduction of 10% be made in the pension payable to the Petitioner. The Committee has given reasons for its recommendation.

The 3rd Respondent has stated that he agreed with the recommendation of the Committee. Therefore, he had sent the letter dated 15th February 2012 filed with the 3rd Respondent's Affidavit marked **"3R-3"**, directing the Secretary, Ministry of Education to effect a deduction of 25% of the gratuity payable to the Petitioner (which had been

recommended by the Public Service Commission) and to *also* effect a deduction of 10% in the pension payable to the Petitioner. This letter bears a notation that a copy was to be sent to the Petitioner.

It is clear that, upon receipt of this letter marked **"3R-3"**, the Additional Secretary, Ministry of Education sent the aforesaid letter dated 30th March 2012 filed with the Petition marked **"P11"** to the Provincial Director of Education (Southern Province) setting out the aforesaid three decisions.

It should be mentioned that, this letter marked **"P11"** refers to a letter dated 15th March 2012 sent by the 3rd Respondent to the Ministry of Education. This date is a typographical error and should read "15th February 2012" – *ie:* the date of the aforesaid letter marked **"3R-3"**. This is confirmed by the fact that the Reference No. PH/P/2/1415 stated in the letter marked **"P11"** with regard to the letter received by the Ministry of Education, is the Reference Number of the aforesaid letter marked **"3R-3"**.

With regard to the payment of half wages to the Petitioner in respect of the period of interdiction, the Respondents state that, the decision to pay half wages was taken by the Public Service Commission on 06th February 2012. This decision had been communicated to the Secretary, Ministry of Education by the Public Service Commission's letter dated 06th January 2012 filed with Affidavit of the Chairman of the Public Service Commission, marked **"4R3"**. This letter also bears a notation that a copy was to be sent to the Petitioner.

I have set out the relevant facts and also, briefly, set out the positions taken by the Petitioner and the Respondents.

I will now consider the preliminary objection raised by the Respondents that, the Petitioner's Application is time barred.

As set out in paragraph [12] (a) of the Petition, the Petitioner states that, he first became aware of the impugned decisions only when he received a copy of the letter dated 30th March 2012 filed with the Petition marked **"P11"** which, *inter alia*, sets out these two decisions.

That copy appears to have been sent by ordinary post and was sent by the Ministry of Education, which has its Office in Battaramulla in the Colombo District. The Petitioner resides in Wakwella, which is in the Galle District. In these circumstances, it is entirely possible that, this letter which is dated 30th March 2012 and would have been posted thereafter, reached the Petitioner on or about 09th April 2012, as stated by the Petitioner. Accordingly, this Court has no reason to disbelieve the Petitioner's statement that he received the letter marked **"P11"** on or about 09th April 2012.

It is long established Law that, the time limit of one month granted by Article 126 (2) of the Constitution will begin to run only from the date the Petitioner became aware or reasonably should have been aware of the alleged violation of his fundamental rights – *vide:* **SIRIWARDENE vs. RODRIGO** [1986 1 SLR 384]. In this Application, on the strength of the averments in the Petition, that date would be 09th April 2012.

The Petitioner has filed this Application on 04th May 2012 and has, therefore, invoked the jurisdiction of this Court within the time limit of one month stipulated in Article 126 (2) of the Constitution.

However, the Respondents contend that, in fact, the Petitioner became aware of the decisions to pay him only half wages during the period of interdiction and to impose a deduction 10% of the pension payable to him, long before 09th April 2012. The Respondents state that the Petitioner had this knowledge from the time the Petitioner received copies of the letters dated 06th February 2012 and 15th February 2012 filed with the 3rd Respondent's Affidavit marked **"3R-4**" and **"3R-3"** respectively, which state these two decisions which are now impugned in the present Application.

If the Petitioner did receive copies of these two letters marked **"3R-4"** and **"3R-3"**, he would have been aware of the disputed decisions from the time of he received the copies of the letters. In view of the dates of these two letters, if the Petitioner did receive copies, it can be assumed that, this would have taken place sometime in the month of February 2012.

Therefore, if this Court is satisfied that, the Petitioner did receive copies of these two letters marked **"3R-4"** and **"3R-3"**, the Petitioner's Application filed on 04th May 2012 will be time barred and must be dismissed.

In paragraph [12] (b) of the Petition, the Petitioner has stated he did not receive a copy of the letter referred to in the letter marked **"P11"**. As I mentioned earlier, that is the letter marked **"3R-3"**. Therefore, the Petitioner has denied receiving a copy of the letter marked **"3R-3"**.

In his Affidavit, the 3rd Respondent, who wrote this letter marked **"3R-3"**, has only stated that this letter was copied to the Petitioner and that *"the Petitioner ought to have known of the decision on or around that date"*. The 3rd Respondent does not state that, he believes the Petitioner *did* receive a copy of the letter marked **"3R-3"**. The copy said to have been sent to the Petitioner has not been sent by Registered Post.

In these circumstances, this Court cannot be satisfied that, the Petitioner did receive a copy of the letter marked **"3R-3"**.

Next, the letter marked **"3R-4"** has been sent by the Public Service Commission. Although this letter bears a notation that a copy was to be sent to the Petitioner, the Affidavit of the Chairman of the Public Service Commission does not state that, a copy was sent to the Petitioner or that, the Chairman believes the Petitioner did receive a copy of the letter.

In these circumstances, this Court also cannot be satisfied that, the Petitioner did receive a copy of the letter marked **"3R-4"**.

Learned Senior State Counsel for the Respondents has submitted that, *"the non-filing of a Counter affidavit by the Petitioner would deem to be an admission of the facts set out in the Objections of the Respondents"* and constitutes an admission by the Petitioner that he has received copies of the two letters marked **"3R-4"** and **"3R-3"**.

However, in the absence of any provision in the Supreme Court Rules, 1990 which stipulates that, a failure on the part of a Petitioner in an Application under Article 126 of the Constitution to deny a statement in a Counter Affidavit that may be filed by the Respondent will amount to an admission of that statement, I do not consider that such a standard of strict pleadings, can be applied. In any event, as I mentioned earlier, the Petitioner has expressly denied having received the letter marked **"3R-3"** and the sender of the letter marked **"3R-4"** has not stated that a copy was sent to the Petitioner.

In these circumstances, I hold that, the Respondents have not established that, the Petitioner received copies of the two letters marked **"3R-4"** and **"3R-3"** or that, the Petitioner was aware the impugned decisions prior to the letter marked **"P11"** which the Petitioner admits having received on or about 09th April 2012.

Accordingly, the preliminary objection is overruled.

I will now consider the merits of the Petitioner's Application.

As mentioned earlier, the Petitioner claims that, the following two decisions violate his fundamental rights:

(i) The decision to pay only half wages to the Petitioner during the period of interdiction.

(ii) The decision to impose a deduction of 10% in the pension payable to the Petitioner;

I will first consider the Petitioner's contention that, the decision to pay only half wages to him during the period of interdiction violated his fundamental rights under Article 12 (1) of the Constitution.

In Paragraphs [13] (c), [14] (c) and 14 (d) of his Petition, the Petitioner states that, this decision to pay half wages to the Petitioner during the period of interdiction was contrary to the provisions of the Establishments Code and is illegal and unreasonable. The Petitioner does not dispute that the interdiction was justified. He only disputes the decision to pay half wages during his interdiction.

The payment of half wages related to the period of interdiction. That was during the period of the Petitioner's service as a public officer and prior to his retirement. As mentioned earlier, during the period of the Petitioner's service as a public officer, the Disciplinary Authority in respect of the Petitioner, was the Public Service Commission.

The letter marked **"3R-4"** written by the Public Service Commission makes it clear that, the aforesaid decision was taken by the Public Service Commission. The fact that, the Public Service Commission took this decision is also made clear by the letter marked **"P11"** which was produced by the Petitioner. Therefore, it is clear that, the decision to pay half wages was taken by the appropriate Disciplinary Authority.

The remaining questions are whether, in the circumstances of this case, the Public Service Commission (as the Disciplinary Authority) had the authority to decide to pay only half wages during the period of interdiction and, if so, whether such decision was reasonable.

The provisions applicable to the interdiction of a public officer are set out in Section 31:1 to Section 31:17 of the Establishments Code. In terms of Section 31:10, the Disciplinary Authority has the authority to decide to not pay a public officer who is under interdiction, any of the emoluments of his substantive post or to pay him one half of such emoluments during the period of interdiction. Section 31:11 read with Section 31:11:1 and Section 31:11:2 prohibits the payment of any emoluments to a public officer during the period of his interdiction if legal proceedings had been instituted against him for a terrorist offence or anti-government activities or a criminal offence or *"an offence of bribery or corruption or fraud"* or where misappropriation of a serious nature of public funds and property has been committed etc. Section 31:12 stipulates that, in other cases, the Disciplinary Authority may decide either to not pay the emoluments or to pay one-half of the emoluments in consideration of the seriousness of the charge, prior record of service of the officer, his financial needs etc.

Thus, it is very clear that, the Public Service Commission (as the Disciplinary Authority) had ample authority to decide to pay half wages during the period of interdiction of the Petitioner.

Further, it is evident that, the aforesaid Sections of the Establishments Code are to the effect that, when a public officer is interdicted, the Disciplinary Authority may *either* not

pay him any emoluments during the period of interdiction *or* pay him one-half of his emoluments during that period.

There does not seem to be any provision made in the Establishments Code for the Disciplinary Authority to decide to pay the full emoluments to a public officer who is under interdiction. This is presumably because a public officer who is under interdiction does no work for the State during that period. This thinking is reflected in Section 31:17 of the Establishments Code which warns that, since reinstatement of a public officer who has been interdicted without sufficient cause would result in him being paid his emoluments for the period of no work, the Disciplinary Authority should satisfy itself before a public officer is interdicted.

In view of the aforesaid, it is clear that, the Public Service Commission was acting entirely within the scope of its lawful authority and in pursuance of the applicable provisions of the Establishments Code when it decided to pay half wages during the period of interdiction of the Petitioner.

Next, it is also necessary to consider whether this decision of the Public Service Commission was reasonable.

In this regard, I note that, the eighteen Charges of misconduct against the Petitioner as set out in the Charge Sheet and Amended Charge Sheet (the Petitioner was later found to be guilty of nine Charges) were of a grave nature. The gravity of these Charges was heightened by the fact that, the alleged misconduct was committed during the course of the Petitioner's duties as Principal of a reputed and long established College. That was a position of trust and the Petitioner was required to conform to the highest standards of probity. He was duty bound to set an example to the students and protect the reputation of the College. Any failure to do so would, in itself, amount to misconduct of a grave nature. In these circumstances, it is patently clear that, the Public Service Commission acted reasonably and in terms of Section 31:12 of the Establishments Code when it decided to pay only half wages during the period the period of interdiction.

Further, as mentioned above, Section 31:11 read with Section 31:11:1 prohibits the payment of any emoluments to a public officer during the period of his interdiction if legal proceedings had been instituted against him for *"an offence of bribery or corruption or fraud"*. In this case, the Petitioner has been charged with an Offence under Section 23A of the Bribery Act No. 11 of 1954, as amended. Section 23A is in Part II of the Bribery Act which sets out the several *"OFFENCES OF BRIBERY"*.

In these circumstances, it seems to me that, the Public Service Commission should have acted in terms of the prohibition stipulated Section 31:11 read with Section 31:11:1

of the Establishments Code and not paid any emoluments to the Petitioner during the period of interdiction.

However, it appears that, the Public Service Commission has taken a lenient approach and decided to pay half wages to the Petitioner during the period of interdiction. Such leniency may have been misguided. But it is too late for anything to be done about it now.

In Paragraphs [13] (c) and 14 (d) of his Petition, the Petitioner has also urged that, he was entitled to be paid his full emoluments during the period of interdiction because the Charges of misconduct against him in the disciplinary proceedings are independent of and different to the Offence upon which he was indicted in the High Court. I do not agree with this contention since the aforesaid provisions of the Establishments Code make it clear that, when a public officer is interdicted, the Disciplinary Authority has to decide whether to not pay him any emoluments during the period of interdiction or whether to pay one-half of his emoluments during that period, based upon the Charges of misconduct against the public officer in the disciplinary proceedings. The nature of the Offence in the Indictment may have become relevant only if the Public Service Commission had decided to not pay the Petitioner any emoluments during the period of interdiction under and in terms of Section 31:11, Section 31:11:1 and Section 31:11:2. But, the Public Service Commission has not acted under these Sections. Instead, the Public Service Commission has acted in terms of Section 31:12 of the Establishments Code where it only the nature of the Charges of misconduct in the disciplinary proceedings which are relevant.

In the aforesaid circumstances, I am of the view that, the Public Service Commission acted both lawfully and reasonably when it decided to pay half wages to the Petitioner during the period of his interdiction.

For the aforesaid reasons, I see no merit in the Petitioner's claim that, the decision to pay half wages during the period of interdiction violated his fundamental rights under Article 12 (1) of the Constitution.

The remaining issue is the Petitioner's contention that, the decision to impose a deduction of 10% in the monthly pension payable to the Petitioner violated his fundamental rights under Article 12 (1) of the Constitution.

In Paragraphs [13] (a) and [13] (b) of his Petition, the Petitioner contends that, since the Public Service Commission was the Disciplinary Authority in respect of the Petitioner, the 3rd Respondent was required to abide by the recommendation made by the Public Service Commission, in its letter marked **"P10"**, to impose a deduction of 25% of the gratuity payable to the Petitioner. On this basis, the Petitioner states that, the 3rd

Respondent had no authority to go further and *additionally* impose a deduction of 10% in the pension payable to the Petitioner. The Petitioner's contention is that, the final decision lies with the Public Service Commission (as the Disciplinary Authority) and the role of the 3rd Respondent is limited to implementing the decision of the Public Service Commission.

At the outset, it is necessary to note that, the Public Service Commission has authority in respect of a public officer only during his period of service. This is evident from Article 55 (3) of the Constitution which states that, the Public Service Commission is vested with *"the appointment, promotion, transfer, disciplinary control and dismissal"* of public officers. These are all areas which relate and apply to the period of service of a public officer.

However, the payment of pension and gratuity to a public officer arises only *after* that public officer ceases to be in service – *ie:* upon retirement. Therefore, it is clear that, issues relating to the payment of pension and gratuity to a public officer do not fall within the province of the Public Service Commission.

The Regulations relating to the criteria governing the entitlement of public officers to payment of a pension etc are set out in the `Minutes on Pensions', which was first proclaimed in 1948 and has been since amended, from time to time. By operation of Section 2 (*kk*) of the Interpretation Ordinance No.12 of 1901, as amended, the Minutes on Pensions have the force of written Law.

A perusal of the Minutes on Pensions make it clear that, the authority vested with the power of making decisions under and in terms of the Minutes on Pensions is the 3rd Respondent [Secretary, Ministry of Public Administration and Home Affairs, which is presently named the 'Ministry of Public Administration and Management']. This is logically so since it is this Ministry which is responsible for the administration and payment of pensions. The Department of Pensions functions under the aegis of this Ministry.

Sections 12 (1), 12 (2) and 12 (3) of the Minutes on Pensions deal with deductions to be imposed on pensions paid to public officers against whom disciplinary proceedings are pending at the time of their retirement .

Section 12 (2) of the Minutes on Pension states:

> *"Where any inquiry pending at the time of retirement of an officer from the public service, and concluded after such retirement, discloses any negligence, irregularity or misconduct on his part during his period of service, and if the explanation tendered by him in respect of the findings of such inquiry is*

considered to be unsatisfactory by the competent authority or if no explanation is tendered by him in respect of these findings, the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs may either withhold or reduce any pension, gratuity or other allowance payable or awarded to such officer under these Minutes".

The present case squarely falls within the ambit of Section 12 (2) of the Minutes on Pensions which deals with situations where: (i) a disciplinary inquiry was pending against the public officer at the time of his retirement; (ii that disciplinary inquiry was concluded after the public officer retired' and (iii) the public officer was found to be guilty of misconduct at this disciplinary inquiry. As I mentioned earlier, the Petitioner admits that, Section 12 (2) of the Minutes on Pensions applies.

Section 12 (2) of the Minutes on Pensions clearly states that, in the aforesaid circumstances, the 3rd Respondent was vested with the lawful authority to *"withhold or reduce any pension, gratuity or allowance"* payable to the Petitioner under and in terms of the Minutes on Pensions.

Thus, it is evident that, the 3rd Respondent was vested with the lawful authority to decide that, the pension payable to the Petitioner should be withheld or reduced in addition to deciding to accept and direct the implementation of the recommendation made by the Public Service Commission to effect a deduction of 25% of the gratuity.

It should be noted that, since the Petitioner had retired and the matter of the payment of pension and gratuity was outside its area of authority, the Public Service Commission, (as the Disciplinary Authority which held the disciplinary inquiry) could only recommend the measures it thought were suitable with regard to the pension and gratuity payable to the Petitioner. Such a recommendation has to be made to the 3rd Respondent who, as set out above, was the authority vested with the power to take the final decision with regard to the payment of pension and gratuity to the Petitioner.

In fact, the above process is specifically laid down in Section 36:7 of the Establishments Code. Section 36:7 stipulates that, the Disciplinary Authority finds a public officer who has previously retired, guilty of misconduct after a disciplinary inquiry is held, the Disciplinary Authority should send its recommendation, to the 3rd Respondent, regarding whether the public officer should be deprived of his full pension and gratuity or only a percentage thereof, together with the Charge Sheet, report of the disciplinary inquiry and all other relevant documents. That is what the Public Service Commission did by its letter marked **"P10"**.

As stated above, on receipt of this recommendation made by the Public Service Commission in terms of Section 36:7 of the Establishments Code, the 3rd Respondent

was, by operation of Section 12 (2) of the Minutes on Pensions, vested with the lawful authority to decide whether to either accept, reject or vary this recommendation.

On the face of it, the 3rd Respondent appears to have exercised this lawful authority vested in him by Section 12 (2) of the Minutes on Pensions, when he decided to accept the recommendation made by the Public Service Commission to impose a deduction of 25% of the gratuity and, *in addition*, decided to direct the deduction of 10% of the pension payable to the Petitioner.

In these circumstances, the Petitioner's contention that, the 3rd Respondent did not have any authority to vary the recommendation of the Public Service Commission, has no legal basis.

But, the aforesaid decision of the 3rd Respondent to direct the deduction of 10% of the pension payable to the Petitioner is liable to be set aside for a different reason.

Section 12 (2) makes it clear that, 3rd Respondent was authorised to decide to *"withhold or reduce any pension, gratuity or allowance"* payable to the Petitioner only *after* the Public Service Commission [which is the *"competent authority"* referred to in Section 12 (2)] had considered the Petitioner's explanation regarding *"the findings"* of the disciplinary inquiry and found such explanation to be unsatisfactory or if the Petitioner did not tender an explanation regarding *"the findings"* of the disciplinary inquiry.

Thus, Section 12 (2) imposed a requirement on the Public Service Commission to call for an explanation from the Petitioner with regard to *"the findings"* of the disciplinary inquiry at which he had been found to be guilty of Charges of misconduct.

It is only *after* the Public Service Commission called for that explanation and considered it or the Petitioner failed to submit an explanation despite being called upon to do so, that, the 3rd Respondent was authorised to take a decision to *"withhold or reduce any pension, gratuity or allowance"* payable to that public officer.

Further, though not expressly stated in Section 12 (2) of the Minutes on Pensions, it is implicit in the above process that, the explanation submitted by the public officer with regard to *"the findings"* of the disciplinary inquiry would have to be submitted to the 3rd Respondent for his consideration *prior to* the 3rd Respondent taking a decision whether to *"withhold or reduce any pension, gratuity or allowance"* payable to that public officer. This is reflected in Section 12 (3) of the Minutes on Pensions which provides for the 3rd Respondent to request a public officer who has failed to submit his explanation regarding *"the findings"* of the Disciplinary Inquiry to submit his explanation directly to the 3rd Respondent.

It is clear to me that, there is good reason for the imposition of this requirement since it must be kept in mind that, a public officer who has spent decades in the public service prior to his retirement, has `earned' his pension. He has served in the expectation of receiving a pension (and, where applicable, a gratuity) from the time he retires. He has relied on this. His plans for his old age and meeting the needs of his family during that time, are based, to a considerable extent, on his expectation that he will receive a monthly pension during his lifetime.

In such circumstances, if a public officer who has retired is to be deprived of his pension (or the pension is to be reduced) as a result of an administrative decision taken by the 3rd Respondent in terms of Section 12 (2) of the Minute on Pensions, it is only fair and reasonable that, the public officer is given an opportunity to submit his explanation regarding *"the findings"* of the disciplinary inquiry and to have this explanation considered, before the 3rd Respondent takes a decision.

In the present case, the Petitioner was a public officer for 38 years and, as I recounted at the commencement of this Judgment, during this time, he served in 11 schools in different parts of Sri Lanka and also served in administrative capacities in regional Offices. The observations I made in the preceding two paragraphs, would surely apply to the Petitioner too.

However, the material before us makes it clear that, the Public Service Commission failed to call for and consider the Petitioner's explanation with regard to *"the findings"* of the disciplinary inquiry at which the Petitioner was found to be guilty of Charges of misconduct.

Instead, the Public Service Commission recommended the deduction of 25% of the gratuity and the 3rd Respondent has directed that, this recommendation be implemented and, in addition, directed the deduction of 10% of the pension payable to the Petitioner, without complying with the aforesaid requirement stipulated in Section 12 (2) of the Minutes.

I am of the view that, strict compliance with the provisions of Section 12 (2) is required prior to the 3rd Respondent taking a decision to *"withhold or reduce any pension, gratuity or allowance"* payable to a retired public officer. I am fortified in reaching this conclusion by the Judgments of Dr. Amerasinghe J. in GODAWELA vs. CHANDRADASA [*supra*] and Gooneratne J. in ISMAIL vs. MAJEED [*supra*] which show that, their Lordships were of the view that, the provisions of the Minutes on Pensions must be complied with.

In these circumstances, I hold that, the failure to call for and consider the Petitioner's explanation with regard to *"the findings"* of the disciplinary inquiry *before* the 3rd

Respondent directed the deduction of 10% of the pension payable to the Petitioner, results in that decision having been taken in violation of the requirements of Section 12 (2) of the Minutes on Pensions and arbitrarily. Consequently, that decision has denied the Petitioner the equal protection of the Law which is guaranteed by Article 12 (1) of the Constitution.

For purposes of record, I should mention that, a similar finding could have been made with regard to the decision of the 3rd Respondent to direct the imposition of a deduction of 25% of the gratuity. But, the Petitioner has accepted this deduction and, in any event, a challenge to that deduction in this Application, would be time barred since the Petitioner was aware of that deduction from the time he received the letter dated 16th November 2011 marked **"P10"**.

For the aforesaid reasons, I hold that, the 3rd Respondent has, by his decision to direct that 10% be deducted from the pension payable to the Petitioner, violated the Petitioner's fundamental rights under Article 12 (1) of the Constitution.

Accordingly, I make Order setting aside only the decision of the 3rd Respondent directing that 10% be deducted from the pension payable to the Petitioner. For purposes of clarity, that decision has been set out as "Item II" in the letter marked **"3R-3"** and is referred to as "Item II" in the letter marked **"P11"**.

The 1A Respondent, 3A Respondent and 15A Respondent are directed to ensure that, the Petitioner is paid his full monthly pension (without any deductions) with effect from the month of October 2016 onwards in accordance with the procedure set out in the Minutes on Pensions and other applicable regulations. The amount to be paid should take into account any increases in the rates of pensions which may have come into effect from the date the Petitioner retired on 30th October 2007.

Further, I direct that, the Petitioner is to be paid the aggregate amount that was deducted from the Petitioner's monthly pension in consequence of the aforesaid decision of the Secretary, Ministry of Public Administration and Home Affairs (which directed that 10% be deducted from the pension payable to the Petitioner). That payment should cover the period from the date of the Petitioner's retirement on 30th October 2007 up to 30th September 2016. The 1A Respondent, 3A Respondent and 15A Respondent are directed to ensure that this is done on or before 31st December 2016.

The Petitioner has urged that, the decision of the 3rd Respondent directing that 10% be deducted from the pension payable to the Petitioner was unreasonable, arbitrary,

excessive and disproportionate and that it lacked legal clarity. In view of my aforesaid determination, I do not need to consider these issues.

The State will pay the Petitioner a sum of Rs.25,000/- as Costs.

Judge of the Supreme Court

B.P. Aluwihare, PC. J

Judge of the Supreme Court

Priyantha Jayawardena, PC.J

Judge of the Supreme Court

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

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

Sehu Allaudeen Fathima Shanaz
No.12/16A George Mawatha
Keranga Pokuna, Mabola, Wattala
Petitioner

SC/FR 236/2011

Vs

1. University of Colombo
2. Prof. (Mrs.) Kanishka Hirimburegama
3. Dr. Tuder Weersainghe
4. Prof. Indralal de Silva
5. Prof. Maria E.S. Perera
6. Prof. N Selvakumaran
7. Prof. Harshalal Senevirathne
8. Dr. PSM Gunarathne
9. Prof. TR Ariyarathne
10. Prof. Sunil Chandrasiri
11. Prof. Nayani Malagoda
12. Prof. Rohan Jayasekara
13. Vidyanidhi NR de Silva
14. Ranjan Asirwardam
15. K. Kanag-Iswaran
16. Thilak Karunarathne
17. Chellaih Thangarajah
18. C. Maliyadda
19. Mahinda Rajapaksha
20. HWN Warakulle
21. PW Senevirathne
22. M Wckramasinghe
23. Leisha de Silva Chandrasena
24. Prof. J Thilakasiri
25. Dr. Cuda Witeratne

26.Prof. Sarath Wijesuriya
27.Rev. Agalakada Sirisumana
28.Dr. (Mrs.) Ajantha Hapuarchchi
29.TLR Silva
All are of
No.94,Cumarathunga Munidasa Mawatha
30.Hon Attorney General

Respondents

Before : Eva Wanasundera PC, J
Sisira J De Abrew J
Upaly Abeyratne J

Counsel : K G Jinasena for the Petitioner.
Viran Corea with Sarita de Fonseka for the 1st to 6th, 9th to 12th 14th,15th, 15th, 18th,20th, 21st, 23rd, 25th to 29th Respondents.
S Barrie SSC for the Attorney General.

Argued on : 20.11.2015

Written submission
Tendered on : 12.2.2013 by the Petitioner
28.11.2012 By the Respondent

Decided on : 24.2.2016

Sisira J De Abrew J.

The petitioner, by this application, inter alia seeks a direction that her fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the Respondents and a direction on the respondents to appoint the Petitioner to the post of lecturer (Probationary) of the Journalism Unit of the 1st Respondent University. This court, by its order dated 15.7.2011, granted

leave to proceed for the alleged violation of fundamental rights of the petitioner guaranteed under Article 12(1) of the Constitution. The Petitioner, in her petition, states the following facts:

The petitioner who is a citizen of Sri Lanka obtained her BA (Special) degree in Mass Communication with a second class (Upper Division) in 2006. The petitioner was appointed as Temporary Tutor of the Journalism Unit, Faculty of Arts of the University of Colombo with effect from 1.12.2008 for a period of six months. Her term of office of Temporary Tutor was extended for a period of six months with effect from 8.6.2009 to 7.12.2009. It was again extended for a period of six months with effect from 14.12.2009 to 13.6.2010. Subsequently by letter dated 17.6.2010 (P7D), she was appointed to the post of Temporary Assistant Lecturer in the Journalism Unit, faculty of Arts of University of Colombo from 21.6.2010 to 20.12.2010. She was reappointed to the same post from 27.12.2010 to 26.3.2011. Whilst functioning as an Assistant Lecturer, the petitioner, on an appointment made by the University of Colombo, functioned as a visiting lecturer of the Diploma in Journalism Programmes from 2009 to 2010 and from 2010 to 2011.

In February 2010, a notice was published in newspapers calling for applications for the post of lecturer (Probationary) of Journalism Unit of the University of Colombo. In response to the said advertisement, the petitioner submitted an application dated 2.3.2010. Thereafter the petitioner received a letter dated 27.1.2011 (P11) from the 29th Respondent requesting her to be present for an interview to be held on 10.2.2011. On 10.2.2011 the petitioner was interviewed by a selection committee comprising 2nd, 4th, 18th, 26th, 27th and 28th Respondents. On 11.2.2011, the petitioner has learnt from the 28th

Respondent that she has been selected to the post of lecturer (Probationary). The petitioner complains that although she was selected for the said post by the selection committee, she was not appointed for the said post by the Respondents. The petitioner further complains that her fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the Respondents.

The Respondents in their objections and written submissions have admitted the following facts. When the notice was published in the newspapers calling for applications for the post of Lecturer (Probationary) of the Journalism Unit of University of Colombo, Circular No.271 dated 21.11.1997 of the University Grants Commission (2R2) was in operation and according to that circular, there was a requirement of work experience of one year. However this requirement was removed by subsequent circular No.935 dated 25.10.2010 (2R3) of the University Grants Commission. The Respondents further state that due to the said requirement of work experience of one year, out of 26 applications, 23 applications had to be rejected. Among the said 23 applicants, there were seven (7) who had obtained First Class (Hons). Two applicants had been called for the interview and the petitioner was the only person who came for the interview. The members of the Selection Committee on 10.2.2011 (the date of interview) recommended the appointment of the petitioner to the post of Lecturer (Probationary) in the Journalism Unit. The decision of the Selection Committee is found in the document marked 2R5. The members of the Selection Committee on 15.2.2011, by document marked 2R1(b) communicated their recommendation to the Management Committee of the University of Colombo. But the

Management Committee decided to call for fresh applications for the post for which the Petitioner had already been selected. The Management Committee at a meeting held on 17.3.2011 took this decision on the basis that a selection could be made from a wider number of applicants. They in taking the said decision observed that the requirement of one year work experience had already been removed. The Respondents have produced the minutes of the meeting of Management Committee of the University of Colombo as 2R7. The Council of the University of Colombo, at a meeting held on 10.8.2011(2R10c), considering the recommendation of the Management Committee decided not to appoint the Petitioner on the basis that the Petitioner was the only applicant present at the interview and that several applicants with First Class degrees have been rejected due to lack of one year experience.

From the objection and the written submissions of the Respondents it is clear that the Petitioner has been selected by the Selection Committee but she was not appointed by the Council of the University of Colombo on the basis that the Petitioner was the only applicant present at the interview and that several applicants with First Class degrees could not be interviewed due to lack of one year experience. They have observed that requirement of one year work experience had been removed by circular No.935 dated 25.10.2010 (2R3). It is noted here that the requirement of one year work experience was removed by circular No. 935 dated **25.10.2010** (2R3) and the interviews were held on **10.2.2011**. Thus when the applications of the applicants were examined by the Selection Committee, the requirement of one year work experience had already been removed. It is to be further noted that when the

Selection Committee rejected the seven applicants who had obtained First Class degrees, the requirement of one year work experience had already been removed. Therefore when the Council of the University decided that the applicants with First Class degrees had been rejected due to lack of one year work experience, the said decision is wrong. The respondents in their written submissions admit that out of 26 applications received for the post, 23 applicants including those who had obtained First Class degrees have been rejected. Thus when the Selection Committee rejected the said 23 applications, the members of the Selection Committee were aware that the requirement of one year work experience had been removed. Thus when Selection Committee rejected the 23 applications it could not have been due to lack of one year work experience. It has to be noted here that when the requirement of one year work experience was removed on 25.10.2010, the members of the Management Committee and/or the University Council did not re-advertise the post. At this stage it is relevant to consider certain judicial decisions.

In Ratnadasa Vs Government Agent [SC FR (Spl) No.66/96-SC Minutes of 16.12.1997- Reported in book titled 'Fundamental Rights and Constitution-II by RKW Goonesekere page 68] five persons were recommended by the District Registrar after a written competitive examination for the post of Registrar of Births and Marriages in order of merit. The person who was placed 4th was selected by the Registrar-General on the basis of experience in an acting capacity. The person who was placed 3rd challenged the appointment of the person who was placed 4th in the list by way of a fundamental rights application. Bandaranayake J (with GPS De Silva CJ and

Ananda Coomaraswamy J agreeing) held that the appointment of the person who was placed 4th in the list is invalid.

In Leelananda Vs National Institute of Education SC FR 266/93SC Minutes of 2.3.1994 [reported in book titled 'Fundamental Rights and Constitution- II by RKW Goonesekere page 84] the petitioner who applied for the post of Director, Distance Education, was overlooked by an interview Board and another applicant (4th respondent) was appointed. For the petitioner it was contended that the 4th respondent was not eligible, that there was no 'structured interview', and a subjective assessment was made in favour of the 4th respondent who was not eligible without adequate supporting reasons. Fernando J (Goonewardena J and Wadugodapitiya J agreeing) held thus: "The appointment of the 4th respondent was plainly wrong. The appointment of an ineligible candidate, in preference to one or more qualified candidates, was in violation of Article 12(1) and must be quashed."

Considering the above legal literature and the aforementioned reasons, I hold the view that the members of the Management Committee and the University Council have deliberately withheld the appointment of the Petitioner who had been selected for the post of Lecturer (Probationary) of the Journalism Unit of the 1st Respondent university by the Selection Committee and she (the petitioner) has not got equal protection of law.

For the above reasons, I hold that the University of Colombo; the Management Committee of the University of Colombo; and the Council of the University of Colombo have violated the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution. I order the University of Colombo, The Management Committee of the University of

Colombo and Council of the University of Colombo to appoint the Petitioner to the post of Lecturer (Probationary) Journalism Unit of the 1st Respondent University within two months from the date of this judgment.The present members of the Council of the University of Colombo and the Management Committee of the University of Colombo should implement this order within two months from the date of this order. The Registrar of this Court is directed to send a copy of this order to all the Respondents forthwith.

Judge of the Supreme Court.

Eva Wanasundera PC, J

I agree.

Judge of the Supreme Court.

Upaly 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 and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

A.A. Dinesh Priyankara Perera
43/1, Shri Dharmananda Mawatha,
Gorakana, Keselwatta. Panadura.

Petitioner

SC FR 260/2011

~ v~

1. 6118, Police Constable
Police Station, Keselwatta, Panadura~North

2. Samaraweera, Police Constable 66940 Police Station, Keselwatta, Panadura~North

3. 77994, Police Constable Police Station, Keselwatta, Panadura~North

4. Rohana Kumara, Police Constable Police Station, Keselwatta, Panadura~North

5. Gomes, Police Officer Police Station, Keselwatta, Panadura~North

6. Withanage, Sub Inspector Police Station, Keselwatta, Panadura~North

7. Ramya de Silva Acting Officer in Charge, Police Station, Keselwatta, Panadura~North

8. Ranjith de Silva, Assistant Superintendent of Police Office of the Assistant Superintendent of Police Panadura Division, Panadura.

9. Edmond Mahendra Senior Superintendent of Police Office of the Superintendent of Police ~Panadura Division, Panadura

10. P.G. Danushka Udayanga 377/1, Ranuggawatte, Hondagoda, Akuressa.

11. W. Deeptha Kumarasinghe Chairman/ Chief Executive Officer Probuild Lanka Private Limited 80/21/1, Dewala Road, Nugegoda.

12. Pearl Chandraguptha Manager Supplies, 80/21/1, Dewala Road, Nugegoda.

13. Mahinda Balasuriya Inspector General Police (retired), Police Headquarters, Colombo 1.

14. N.K. Illangakoon Inspector General Police, Police Headquarters, Colombo 1.

15. 82722, Police Constable Police Station, Keselwatte. Panadura-North

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

Respondents

Before: Chandra Ekanayake J
Priyasath Dep P.C.J
Buwaneka Aluwihare P.C.J

Counsel: Ms. Saritha de Fonseka for the Petitioner
Dulinda Weerasuriya P.C, with Darshana Edirisuriya for the 1st -7th and the 15th Respondent
Faizer Marker for the 11th Respondent.
Indika Nelumini State counsel for the Attorney General

Argued on: 17-07-2014

Decided on: 01- 04-2016

Aluwihare PC J

The Petitioner moved this Court alleging that his fundamental rights enshrined in the Constitution had been infringed by the Respondents cited in this application and among other reliefs, sought a declaration from this court to the effect that the Respondents have infringed his Fundamental rights guaranteed under Articles 11, 12 (1), 13 (1) and 14 (1) g of the Constitution.

This court, on the 30th-08-2011, granted leave to proceed on the alleged violation of Articles 11, 12 (1) and 13 (1) of the Constitution by the 1st to the 7th and the 15th Respondents.

At the hearing of this application the learned Presidents's Counsel raised a preliminary objection that the instant application was out of time and moved court to dismiss it *in limine.*

Before I consider the merits of this application I wish to deal with the preliminary objection so raised on behalf of the Respondents.

The contention of the learned President's Counsel for the Respondents was that, the wife of the Petitioner complained to the Human Rights Commission on the 23rd of January 2011, the very day the Petitioner was taken into custody.

The learned President's Counsel pointed out that the instant application has been filed by the Petitioner only on the 27th of June 2011, well outside the 30 day period afforded, to invoke the jurisdiction of this court, in terms of article 126 (2) of the Constitution. It was also stressed that, the benefit of Section 13 of the Human Rights Act, as far as the computation of time is concerned, accrues only to "an aggrieved party" and the said section has no application in instances, where the complaint to the Human Rights Commission, is made by a person "on behalf of an aggrieved party". It was on this premise, the learned President's Counsel argued that the instant application is out of time.

For the purpose of dealing with the preliminary objection referred to above, it would be pertinent to consider the applicable provisions.

Article 126 (2) of the Constitution stipulates that,

> "Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, **within one month thereof**, in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of a petition in writing addressed to such Court…" (emphasis added)

An exception to this rule, however, exists in the Human Rights Commission of Sri Lanka, Act No.21 of 1996 (herein after sometimes referred to as the HRC Act). This Act empowers the Human Rights Commission of Sri Lanka to entertain complaints in respect of violations of fundamental rights guaranteed by the Constitution.

Section 13 (1) of the Act reads as follows:

> "Where a complaint is made by **an aggrieved party** in terms of section 14 to the Commission, **within one month** of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, **the period within which the inquiry into such complaint is pending before the commission shall not be taken into account in computing the period of one month** within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution." (emphasis added)

In the light of this section, it is evident that the Petitioner could avoid the lapse of the time bar if the application to the Human Rights Commission were made within one month of the alleged infringement. By virtue of the aforesaid provision, time would not run during the pendency of proceedings before that Commission. This view was supported by the judgement of this court in the

case of *Romesh Cooray vs. Jayalath, Sub-Inspector Of Police And Others, (2008) 2 SLR 43.*

Section 14 of the Human Rights Act stipulates as follows:

"The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or **a person acting on behalf of an aggrieved person** or a group of persons, investigate an allegation of the infringement or imminent infringement of a fundamental right of such person or group of persons caused-

(a) by executive or administrative action; or
(b) as a result of an act which constitutes and under the Prevention of Terrorism Act, No. 48 of 1979, committed by any person".

Although the two categories, namely "a person acting on behalf of an aggrieved person" or " a group of persons" are not referred to in section 13 (1) of the HRC Act, I propose to give a purposive interpretation. I am of the view that Section 13 (1) would be applicable, irrespective of whichever category complains to the HRC. Thus, I overrule the preliminary objection and proceed to consider the merits of this application.

The Petitioner has alleged that on the 23rd of January 2011, 1st, 2nd and the 3rd Respondent to this application had come to his residence and he had been told, that he was required to go to the Keselwatte police station, to have a statement recorded. The three Respondents referred to, however, appeared to have no knowledge as to why a statement was required from the Petitioner. The Petitioner accordingly had accompanied the 1st to the 3rd Respondents to the Keselwatte Police station.

Upon arrival at the Police station, he had been shepherded to the Crime Division and one of the officers there had demanded that he come out with

the truth. When the Petitioner responded expressing his ignorance as to any wrongdoing on his part, the 2nd Respondent had slapped him and the 3rd Respondent had held him by his neck and had yelled at him, stating that they had found out everything and demanded the Petitioner to come out with the truth.

Petitioner alleges that he pleaded with the officers that he has no knowledge of any incident, yet both the 2nd and 3rd Respondents had dealt several blows with fists.

Petitioner asserts that the 2nd and the 3rd Respondents persisted with their questioning regarding the loss of tiles belonging to a Deputy Inspector General (DIG) of Police.

The Petitioner having recollected that the 10th Respondent hired his three wheeler to transport some tiles a few months before, had indicated as such to the Police officers and had further stated that, that was all he knew of the matters in question. The Petitioner alleges that, the 2nd and the 3rd Respondents, however continued to assault him. Subsequent to these events the Petitioner had been taken to a location called Gorakana, by the 1st and the 6th Respondents in the company of some other police officers. The Petitioner states that he directed them to the location where the tiles were transported. The occupants of the house, had told the police officers that the Petitioner had only the transported the tiles. Thereafter the Tiles had been loaded into a lorry and brought to the Police station. Upon returning to the Police station one 'Chutta' who had apparently lodged the initial complaint as to the loss of tiles belonging to DIG Tissa Herath, had been shown the tiles and Chutta had responded by stating that those were not the tiles that were lost. In an affidavit Chutta had filed (R 15), he had denied having made any such utterance. The Petitioner has alleged that inspite of this disclosure, he was not released, but put back into the cell.

Later the Petitioner had been taken before the 7th Respondent, the OIC of the station. He had ordered the Petitioner to kneel down and had commenced questioning him as to the rest of the missing tiles and in the process the 7th Respondent had assaulted the Petitioner with fists and followed it by kicking him.

The Petitioner has further asserted that he was taken in a van by the 2nd and the 6th Respondent in search of the 10th Respondent and having located him, he too had been brought to the Police station. Back at the police station, the Petitioner alleges that he was assaulted again by the 1st, 2nd and the 4th Respondents. The 10th Respondent, according to the Petitioner, had taken up the position that it was the Petitioner who was responsible for the theft of Tiles.

The Petitioner alleges that his initial arrest was in connection with the loss of Tiles, belonging to the DIG but when it transpired that he had no involvement with regard to the said theft, the allegation against him shifted towards loss of Tiles belonging to a private establishment known as Pro-Build Lanka Pvt. Limited, the establishment to which 10th, 11th and the 12 Respondents were attached.

The Petitioner has further alleged that the 11th Respondent walked up to the cell and upon questioning the Petitioner slapped him and the impact caused his lip to split. According to the Petitioner, the 7th Respondent had gone out with the 11th Respondent and on his return again had assaulted him and the Petitioner had fallen prostrate. Both the 1st and the 7th Respondents had stood on his hands. The Petitioner thereafter had been put back into the cell. A while later the 4th Respondent had approached the cell and questioned the Petitioner as to why he was not coming out with the truth and had pinned him by holding his head against the bars of the cell. At this juncture 1st, 2nd and the 3rd Respondents had dealt several blows to his abdomen through the bars of the cell.

The following morning, the petitioner alleges that the 2nd and 4th Respondent made several threats to the effect that they will charge him for possession of drugs, by foisting the substance on him.The Petitioner had been produced before a magistrate on the 24th January, that is the day after his arrest and he had pleaded not guilty to the charge that was read over to him.The Petitioner had been enlarged on bail and the learned magistrate had ordered that the Petitioner be produced before a Judicial Medical Officer.Subsequent to this order the Petitioner had been admitted to the Base Hospital Panadura and had been examined by the Consultant Judicial Medical Officer Dr. Abeysinghe. The Petitioner has taken up the position that on the 29th January-2011 he made a Complaint to the Human Rights Commission (P10), in addition to the complaint made by his wife (P6a).

The Petitioner alleges that even subsequent to the impugned incident, he was subjected to various acts of ridicule on the part of the police officers attached to the Keselwatte police, in particular by the 15th Respondent. Petitioner further states that he consulted Dr. Nevile Fernanado consultant Psychiatrist and the doctor's report is marked and produced in these proceedings. (P18a and P18b)

Doctor Abeysinghe Consultant JMO had examined the Petitioner on 25th January around 11.00 a.m., which was approximately about 48 hours after the arrest. The history given to the doctor by the Petitioner is produced in the Medico-legal- report (X). Although the Petitioner had alleged that he was assaulted by the Officer in Charge and other police officers he had not referred to the Respondents specifically. His narration of the incident to the Consultant JMO which is recorded as the history by the doctor, varies to some extent vis a vis the facts stated in the Petition to this court.

The consultant JMO had observed two abrasions, one on the left upper arm and the other on the left knee joint. He is of the opinion that the abrasions are compatible with the history given. The Petitioner had been subjected to an ultrasound scan, which revealed no underlying injuries. The doctor has,

however, observed that the Petitioner was in pain and had difficulty in walking. He had also observed tenderness over the back of the head, back of the chest, above both shoulder blades. The Petitioner, according to Dr. Neil Fernando consultant Psychiatrist, is suffering from Post Traumatic Stress Disorder with co-morbid Depression episode, a mental and behavioural disorder (P18b).

It's pertinent to note that in support of this application the Petitioner has filed an affidavit sworn by a driver attached to the Pro-Build Lanka Pvt Ltd, who had driven the 11th Respondent to Keselwatte Police station on the fateful day. In his affidavit, so filed, Jayakody had averred that that he saw the Petitioner being beaten severely by the police officers inside the Crime Division (P7). Jayakody has said that the sight was repulsive for him to watch.

The 1st to 7th Respondents and the 15th Respondent have denied that they were responsible in any way, for the violation of any Fundamental Rights of the Petitioner. The Respondents have asserted that on 23-01-2011, a complaint was lodged by the 12th Respondent Piyal Chandraguptha, the supply manager of Pro-Build LankaPvt. Ltd to the effect that some Tiles and scaffolding had been stolen from one of their construction sites (R7). The investigation into the said complaint had led them to one Danushka Udayanga who had been an ex-employee of the 12th Respondent's Company as a labourer. According to the Respondent referred to above, the said Danushka Udayanga had implicated the Petitioner as the person responsible for the removal of the scaffolding and the Tiles from the construction site. According to Danushka, as per his statement to the police (R9), he had befriended the Petitioner and had even had shared liquor with him on a few occasions.

Danushka alleges that the Petitioner came to the building site and removed the tiles and the scaffolding in his three wheeler and had threatened him with death, in the event of disclosure. Danushka alleges that the Petitioner did so on several occasions and goes on to say that he did not inform his employer due to his fear of the Petitioner. Respondents, in addition to the

statement of Danushka have also filed a copy of a statement made to the Police by one Tharangani Fernanado (R11).

Petitioner in his statement to the Police had admitted that he with the assistance of Danushka removed 175 tiles from the construction site and sold them to Tharangani Fernanado. She in turn had admitted that she bought the Tiles from the Petitioner and paid him for the tiles. In fact the Police, in the course of the investigations have recovered the tiles from the house of Tharangani Fernanado referred to above and the complainant had identified them as what they have lost from their construction site. Police also had recorded a statement from one Ajith Perera (R12), a building contractor. He had stated that it was he who acted as the middle man in disposing the tiles to Tharangani Fernanado, when the Petitioner approached him and offered the tiles for sale.

In terms of the notes of investigations made by the 6th Respondent (R10) the Petitioner had been arrested at 18.25 hrs (6,25 p.m.) on 23-01-2011, having explained the offence. Upon consideration of the material placed before this court relating this application by both the Petitioner and the Respondents, it would be reasonable to conclude that the complaint made relating to the loss of tiles and revelations made in the course of the investigation, warranted the 7th Respondent to act in terms of Section 109(5) of the Code of Criminal Procedure Act and I conclude that the arrest of the Petitioner and the subsequent steps taken with regard to the investigation are in accordance with the procedure established by law.

In view of the above, in my view, the Petitioner has failed to satisfy this court that his arrest has not taken place in accordance to the procedure established by law and as such I hold that the Respondents have not violated the Petitioner's Fundamental rights enshrined in Article 13 (1) of the Constitution.

The Petitioner has asserted that his ability to engage in his lawful occupation as a 'three wheel' driver was hampered and adversely affected and this

amounts to an infringement of his fundamental right under Article 14 (1) (g) which stems from his arrest and deprivation of his personal liberty. As I have referred to earlier, his arrest appears justified under the circumstances and consequences arising out of the arrest, which may technically impact on any fundamental right a person is entitled to enjoy, cannot be considered as a violation of such a right, unless that person is able to satisfy court that such a arrest could have been avoided; in the instant case that burden was on the Petitioner. I am of the view that the Petitioner has failed to satisfy this court that was so. Thus, I accordingly hold that the Petitioner has failed to establish that one or more of the Respondents are responsible for violation of his Fundamental Rights guaranteed under Article 14 (1) (g) of the Constitution.

It is to be noted that the alleged incident had taken place inside the police station and even the 11th Respondent a private citizen and who is not clothed with authority by the State had been permitted to slap the Petitioner. The assault on the Petitioner is supported by the affidavit of Jaykody and to an extent of the two reports, one by Consultant JMO Dr. Abeysinghe and Psychiatrist Dr. Nevile Fernanado. I also note that the physical violence perpetrated on the Petitioner as alleged by him is substantiated by the report of Dr Abeysinghe only to a lessor degree.

It's quite apparent that the Petitioner has suffered both physically and psychologically at the hands of the Respondents. In the case of W.M.K de Silva Vs. Chairman Ceylon Fertilizer Corporation, 1989 2 SLR 393, Justice Amerasinghe observed *"I am of the opinion that the torture or cruel, inhuman or degrading treatment or punishment contemplated in Article 11 of our Constitution is not confined to the realm of physical violence. It would embrace the sphere of the soul or mind as well".*

This court has held in innumerable number of cases, where its fundamental rights jurisdiction has been invoked, that torture is a non-derogable right and that even the worst criminal is entitled to freedom against torture.

For the foregoing reasons, I hold that the 1st to 4th and the 7th.Respondents have violated the Petitioner's Fundamental rights guaranteed under Article 11 and Article 12 (1) of the Constitution.

I direct the state to pay the Petitioner a sum of Rs. 20,000 as compensation and a sum of Rs.10, 000 as costs. I further direct the 7th Respondent to pay a sum of Rs. 15,000 as compensation to the Petitioner and 1st, 2nd, 3rd and the 4th Respondents to pay Rs.10, 000 each, as compensation to the Petitioner. All payments to be made within three months from today.

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

Dr. (Mrs.) Elizabeth Manel Dassanayake
No. 25/10, Thalapathpitiya Road,
Nugegoda.

Petitioner

S.C.FR. Application No. 267/2010

Vs.

1. K.E. Karunathilake
Secretary to the Ministry of Agricultural Development and Agrarian Services,
No. 80/5, Govijana Mandiraya,
Rajamalwatta Abvenue, Battaramulla.

1A. B. Wijayaratne
Secretary to the Ministry of Agriculture,
Ministry of Agriculture,
No. 80/5, Govijana Mandiraya,
Rajamalwatta Abvenue, Battaramulla.

2. Dr. (Mrs) Jinadari De Zoysa
Director General,
Department of Agriculture,
Peradeniya.

2A. K.N. Mankotte,
Director General,
Department of Agriculture,
Peradeniya.

2B. Dr. R. Wijekoon
Director General,
Department of Agriculture,
Peradeniya.

3. Prof. Buddhi Marabe
Department of Crop Science,
Faculty of Agriculture,
University of Peradeniya.

4. A. Coorey,
Secretary,
Public Service Commission,
No. 172, Nawala Road,
Narahenpita, Colombo 05.

4A. T.M.L.C. Senaratne
Secretary,
Public Service Commission,
No. 172, Nawala Road,
Narahenpita, Colombo 05.

4B. H.M.G. Senevirathne
Secretary,
Public Service Commission,
No. 172, Nawala Road,
Narahenpita, Colombo 05.

5. K.B. Wahundeniya
Acting Director, Horticulture,
Crop Research & Development Institute,
Gannoruwa.

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

Respondents

7. Vidyajothi Dr. Dayasiri Fernando,
7A. Justice Sathya Hettige PC, Chairman
7B. Dharmasena Dissanayaka, Chairman

8. S.C. Mannapperuma, Member
8A. A. Salam Abdul Waid, Member

9. Ananda Seneviratne, Member

9A. D. Shirantha Wijayatilaka, Member

10. N.H. Pathirana, Member
10A. Prathap Ramanujam, Member

11. Palitha M. Kumarasinghe, Member
11A. Kanthi Wijetunge, Member
11B. V. Jegarasasingam, Member

12. Sirimavo A. Wijeratne, Member
12A. Sunil S. Sirisena, Member
12B. Santi Nihal Seneviratne, Member

13. T. Nadaraja, Member
13A. S. Ranugge, Member

14. A. Mohemed Nahiya, Member
14A. D.L. Mendis, Member

15. M.D.W. Ariyawansa, Member
15A. I.M. Zoysa Gunasekara, Member
15B. Sarath Jayathilaka, Member

7th to 15B of Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05.

Added Respondents

* * * *

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

Sisira J.de Abrew, J. &

Upaly Abeyrathne, J.

COUNSEL : J.C. Weliamuna with Pasindu Silva for the Petitioner.

Yuresha de Silva SSC. for the Respondents except 5th Respondent.

ARGUED ON : **20.11.2015**

DECIDED ON : **09.02.2016**

*** * * * * ***

Eva Wanasundera, PC., J.

In this application the Petitioner was granted Leave to Proceed on 04.11.2010 under Article 12(1) of the Constitution.

The facts pertinent to this application are as follows:- The Petitioner and the 5th Respondent applied for the post of "Director- Horticulture, Crop Research and Development Institute, Gannoruwa", when they were working for the Department of Agriculture. Both of them had by then worked for the said Department for a long time. They were qualified to apply for the said post when it was advertised. Advertisement was dated 19.08.2009 and is marked and produced before this Court as Pg. (a) . The attachments referred to in the advertisement are marked as P9(b) and P9 (c). The contents of P9(b) is under the heading "Selection Criteria for Director, Additional Director". The contents of P9(c) is under the heading, "Upper Middle Level (Deputy Director) Posts- List of the names of the posts considered".

The Petitioner as well as the 5th Respondent, among others applied for the Director Post and interviews were held on 13.11.2009. The letter that invited the applicants to come for the interviews dated 28.10.2009 requested the applicants to submit a "self-assessment marks sheet". The Applicants calculate the said marks by themselves according to the selection criteria contained in P9(b) and P9(c) and submit the same.

The interview panel consisted of 3 persons, namely 1st to 3rd Respondents. On 13.11.2009 this panel firstly conducted interviews for the Post of "Director- Extension and Training Centre- Peradeniya", and thereafter conducted the interviews for the Post of "Director- Horticulture, Crop Research and Development Institute, Gannoruwa", on the same day, which is the subject matter of this application before this Court.

By a letter dated 01.02.2010 sent by the 2nd Respondent to the Petitioner, she was informed that the "interview conducted on 13.11.2009" was cancelled as per the instructions in a letter dated 25.01.2010 issued by the 1st Respondent. But the other

interview held on the same day regarding “Director- Extension and Training Centre- Peradeniya”, had not been cancelled. The reason for this cancellation of the interview, as per the 1st Respondent is that the marking scheme **was ambiguous** but it was a **marking scheme approved by the Public Service Commission** and the said marking scheme was **adopted on the same day for the other Director post which interview was not cancelled.**

I observe from the documents filed by parties before this Court that the 5th Respondent had complained to the authorities that he believes that his experience as a “Unit Head” (අංශ ප්‍රධානී) was not considered at the interview and that it is a matter which should have been considered. After cancelling the interview by letter dated 01.02.2010 as aforementioned, by letter dated 05.02.2010 marked as P23, the 1st and 2nd Respondents had ordered the relevant heads of the institutes to submit a managerial unit list of their respective institutes **in order to amend the present list of management units** which are reflected in the approved scheme of Recruitment of the Public Service Commission.

I observe that the Document R5G which was the 5th Respondent’s self assessment sheet at page 2 under “Category E- Heading, Managerial Experience”, he has calculated 26.75 marks for having worked as “Unit Head” for 8years 11 months and 4 days. The Petitioner, on the other hand, whilst putting down in her self assessment sheet marked as P12, the fact that she had also worked as “Unit Head” for 16 years 11 months and 21days, **had not attributed any marks for herself for that and placed zero marks under that fact solely because attributing marks for Unit Head was not in conformity with the marking scheme** contained in the annexures to the advertisement which was the basis for applying for the contested post , namely documents P9(b) and P9(c). If she had added marks for having worked as Unit Head like the 5th Respondent did, she would have enhanced her self assessment marks by about double of 26.75 because she had worked in Unit Head position for a period as double the time the 5th Respondent had worked, i.e. 16years.

In this case the contested subject is only the marks coming under the “Category E

Management Experience in the Provincial Council or in the Department of Agriculture". The 2nd Respondent has filed the marks sheet at the interview as 2R1, in which the marks given to the Petitioner and the 5th Respondent can be seen. Under this category, the marks for the Petitioner is 32 and the marks for the 5th Respondent is 43.

The marks in the self assessment sheet of the 5th Respondent being 44.25 as revealed by R5G is approximately the same mark as 43 given to him by the interview panel. The marks in the self assessment sheet of the Petitioner is 40.33 as revealed by P12 but the interview panel had given her only **32 marks. It is 8.33 marks less than the self assessment.** If marks were given to her under Unit Head, her marks would have got elevated to 85 { 32 +53(26.75 x 2) = 85}. Then, the 5th Respondent would have got 265.5, according to 2R1 {174 +43+33.5+5+10 =265.5} and the Petitioner would have got 298 marks, according to 2R1, {162.5+85+35.5+5+10 = 298}. Then the Petitioner would have been the person who gets the higher mark and she would have become the Director. This calculation done by me, however, is on the wrong basis going against the marking scheme approved by the Public Service Commission but going according to the marking scheme that the 5th Respondent claimed was right and the interview panel has gone along with him and wrongly granted marks to the 5th Respondent.

Let me do the calculation on the correct basis going along with the marking scheme approved by the Public Service Commission. The Interview panel gave the Petitioner 32 marks which could not have included any marks under Unit Head because it is less than what the Petitioner had assessed for herself giving zero marks for Unit Head as she assessed the same on the PSC approved marking scheme. The Interview Panel gave the 5th Respondent 43 marks which was almost the same as the self assessment of his, in which he gave himself 26.75 marks for having worked as Unit Head. According to the marking scheme approved by the PSC, the 5th Respondent could not have given himself these marks. So he should have assessed himself for 43 – 26.75 marks, i.e.16.25 marks only. Therefore, his proper marks according to the PSC approved marking scheme should have been 16.25. Then, the total proper marks which the interview panel should have given the 5th Respondent, is 238.75. {174+16.25+33.5+5+10 =238.75}. The Petitioner actually got 245 marks,

{162.5+32+35.5+5+10 = 245} from the Interview panel. Then also, the Petitioner would have been the person who gets the higher mark and she would have become the Director.

As demonstrated above, according to the proper marking scheme approved by the PSC or according to the wrong way of calculating by giving marks for the number of years of work experience as a Unit Head, either way, the Petitioner gets the higher marks and therefore without any doubt, the Petitioner should have been given the Director post.

The Petitioner complained about this injustice to the Auditor General, to the President of this country, and even to the first Respondent. Some of the letters are marked as P24(a), P25and P26. The Petitioner had complained to the Commission to Investigate Allegations of Bribery and Corruption by P22(a). Inspite of the Petitioner's letters to all the authorities the Petitioner came to know that at the Directorate meeting held on 17.03.2010 presided by the 2nd Respondent, it was decided to appoint a committee to prepare a list in order to amend the Managerial Unit List of the Department of Agriculture. It was done so, the Petitioner complained, to give more marks to the 5th Respondent who had agitated to include Unit Heads as a Managerial Unit in the list in the PSC approved marking scheme under which applications were called for the Director post.

Petitioner came to court at this juncture before the appointment of the 5th Respondent to the post of Director but this Court did not grant her interim relief as prayed for. It is clear that the Petitioner should have been the one with the highest total marks. She should have been appointed as "Director- Horticulture, Crop Research and Development Institute, Gannoruwa" at the end of the interview held on 13.11.2009.

After this Application was filed by the Petitioner, the 5th Respondent had been appointed as " Acting Director– Horticulture, Crop Research and Development Institute, Gannoruwa" , by the authorities and in some documents I observe that even though the appointment was an acting appointment, he had used his seal as Director thus holding out as proper Director, whereas he was only acting in that post. Later on

the Petitioner allegedly being so very disappointed had retired early. As at present we know that the Petitioner and the 5th Respondent both have retired.

I observe from the many documents filed by the parties that the 1st , 2nd and 3rd Respondents have acted wrongly in not having given the right concern to the matters relevant even when pointed out by the Petitioner in numerous ways. She had not been treated equal before the law. She is entitled to the equal protection of the law. I observe Article 12(1) has been infringed. I hold that there is an infringement of Art. 12(1) of the Constitution by the 1st, 2nd and 3rd Respondents.

In the circumstances I direct that the Petitioner be promoted to the Post of "Director- Horticulture, Crop Research and Development Institute, Gannoruwa" w.e.f. 14.11.2009,(on which day the appointments were given to the other Director post for which interviews were held on the same day under the same marking scheme as advertised and which interview was not cancelled, i.e. the post of "Director- Extension and Training Centre- Peradeniya") and I further direct that, all other benefits arising from that appointment be granted to the Petitioner accordingly.

In addition I grant the Petitioner compensation of Rs.600,000/- to be paid by the Ministry of Agricultural Development and Agrarian Services for the infringement of Article 12(1) of the Constitution. Application is allowed with costs.

Judge of the Supreme Court

Sisira J.de Abrew, 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 the Democratic Socialist Republic of Sri Lanka.

1. Ameer Ismail,
   37B,Boswell Place,
   Colombo 06.

2. Punyadasa Edussuriya,
   18/225, Dabare Mawatha,
   Colombo 05.

3. Indra De Silva, *(Expired on 31st December 2015)*
   398/B Eksath Mawatha,
   Kalapaluwawa,
   Rajagiriya.

Petitioners

SC FR Application No.277/2010 Vs.

1. Mrs. Luckshmi Jayawickrama,
   Former Director-General,
   Commission to Investigate Allegations of Bribery or Corruption,
   36, Malalasekara Mawatha,
   Colombo 07.

1A Ganesh Rajendra Dharmawardana,
Director General,
Commission to Investigate Allegations of Bribery or Corruption,
36, Malalasekara Mawatha,
Colombo 07.

Added 1AA Mrs. Dilrukshi Dias Wickramasinghe, P.C.
Director General,
Commission to Investigate Allegations of Bribery or Corruption,
36, Malalasekara Mawatha,
Colombo 07.

2. Ms. E.D. Kumudu,
   Deputy Director General,
   Commission to Investigate Allegations of Bribery or Corruption,
   36, Malalasekara Mawatha,
   Colombo 07.

3. Lalith Weerathunga,
Secretary to H.E. the President,
Presidential Secretariat,
Colombo 01 .

ADDED (3A) P.B. Abeykoon,
Secretary to H.E. the President,
Presidential Secretariat,
Colombo 01.

4. Ms. Sudharma Karunarathne
Former Director General (Budget)
Department of National Budget, Ministry of
Finance and Planning,
Colombo 01.

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

6. Ms. Chandra Ekanayaka
Director General (Budget),
Department of National Budget,
Ministry of Finance and Planning,
Colombo 01.

Respondents

BEFORE **:** K**.** Sripavan, C.J.
Upaly Abeyrathne, J.,
Anil Gooneratne, J.

COUNSEL First Petitioner in person

Faisz Musthapa P.C. with Riad Ameen with Maduka Perera for the 2nd Petitioner.

Dr. Avanti Perera Senior State Counsel for the 3A Respondent.

Disna Gurusinghe for the 1AA Respondent

Kalinga Indatissa P.C. with Mahesh Senaratne for the 1st and 2nd Respondents.

ARGUED ON : 03.06.2016

WRITTEN SUBMISSIONS

FILED ON : 20.06.2016 by the Petitioner
24.06.2016 by the Respondents

DECIDED ON : **07.09.2016**

K. SRIPAVAN, C.J.,

The First Petitioner served as the Chairman and the Second and Third Petitioners as Members of the "Commission to Investigate Allegations of Bribery or Corruption." The Petitioners assumed Office as Chairman and Members of the Commission on 29.03.2005 and served for a full term of office until 28.03.2010. The Petitioners state that the subject matter of this application relates to:-

*(a) Non-payment of the benefit of the fuel allowance of 250 Litres per month as per the Presidential directive **dated 24.01.2001** from February 2009 until 28.03.2010; and*

*(b) Non-payment of arrears of the increase in salary from 01.01.2006 up to the end of January 2009 pursuant to the **Parliamentary determination** of 29.01.2009 (emphasis added)*

The Petitioners therefore sought, inter alia,

(a) a declaration that the Petitioners are entitled to have their arrears of salary from 01.01.2006 up to the end of January 2009 computed and paid without taking into account the special allowances and the rent allowances.

(b) a declaration that the Petitioners are entitled to the payment of arrears of increased salary in terms of the Parliamentary determination of 29.01.2009 for the period of 01.01.2006 to the end of January 2009 amounting to Rs. 1,268,545/= in respect of the First Petitioner and Rs. 1,301,845/= in respect of the Second and the Third Petitioners.

On 13.07.2010, the Petitioners filed an amended Petition dated 08.07.2010. This Court on 27.07.2010 granted leave to proceed for the violation of the Petitioners' fundamental rights guaranteed by Article 12(1) of the Constitution. In his Written Submissions filed on 20.06.2016 the First Petitioner states as follows :-

*"The non-payment of the fuel allowance of 250 Litres per month as per the Presidential directive **P4** dated 24.01.2001 from February 2009 until 28.03.2010 was settled in Court on 08.12.2010."*

Thus, as averred in paragraph 23 of the amended Petition dated 08.07.2010, the only matters to be considered by Court are as follows:-

(a) *the non-payment of the aforesaid monthly allowances payable to the Chairman and Members of all the Commissions referred to in Article 41B of the Constitution in terms of the determination marked **P3** from February 2009 until 28.03.2010; and*

(b) *the non-payment of arrears of the increase in salary from January 2006 up to the end of January 2009 pursuant to the aforesaid Parliamentary determination dated 29.01.2009 (**(P5)**;*

The Resolution moved in Parliament by Hon. Ranil Wickramasinghe and marked '**P3'** dated 04.06.2002 reads thus:-

"*That this Parliament hereby determines that a monthly allowance of Rs. 25,000/= each be paid to Chairman of Commissions referred to in Article 41B of the Constitution of the Democratic Socialist Republic of Sri Lanka.*

That this Parliament hereby determines that a monthly allowance of Rs. 20,000/= each be paid to the Members of the Commissions referred to in Article 41B of the Constitution of the Democratic Socialist Republic of Sri Lanka."

Article 41B of the Constitution, as at the date of the said Resolution marked **P3** referred to the following Commissions :

(a) Human Rights Commission

(b) Commission to Investigate Allegations of Bribery or Corruption

(c) Police Commission

(d) Public Service Commission; and

(e) Administrative Appeals Tribunal.

Accordingly, when the Petitioners assumed office on 29.03.2005, they became entitled to the following salary and allowances as per paragraph 12 of the written submissions of the 3A, 5th and 6th Respondents

		Chairman	Members
(i)	Salary	Rs. 31,715/=	Rs. 29,815/=
(ii)	Fuel Allowance (Cash equivalent to 250 Litres)	Rs. 20,000/=	Rs. 20,000/=
	Rent Allowance	Rs. 4,000/=	Rs. 4,000/=
	Monthly Allowance	Rs. 25,000/=	Rs. 20,000/=
	Total	Rs. 80,715/= =========	Rs. 73,815/= =========

However, on 29.01.2009 the Parliament, acting under Section 2(7) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (the English Version of the said Parliamentary determination is marked (**P5C)**) **resolved as follows :-**

> ***"…. t****hat the* ***salaries and allowances payable to the Chairman and the Members of the Commission*** *to Investigate Allegations of Bribery or Corruption shall be as follows* ***with effect from 01.01.2006.*** (emphasis added)

		Chairman(Full time)	Members
(i)	Salary	Rs. 66,000/=	Rs. 65,000/=
(ii)	Fuel Allowance	Rs. 14,400/=	Rs. 12,000/=
	Total	Rs. 80,400/= =========	Rs. 77,000/= =========

The Parliament further resolved that 50% of the increased salary (excluding allowances) should be paid with effect from 01.01.2006 and the full salary inclusive of the balance 50% with effect from 01.01.2007 and that the salaries and allowances to be determined by Parliament by this resolution **should be substituted for the salaries and allowances determined by Resolutions previously passed in Parliament in respect of Chairman and Members of the Commission to Investigate Allegations of Bribery or Corruption."** (emphasis added).

It is a cardinal principle of interpretation, that the words must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless there is something in the object to suggest to the contrary. It is said that the words themselves best declare the intention of the law giver. The Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by Parliament and not to ignore them. Bearing in mind, the aforesaid principle of construction, the expression "**should be substituted for the salaries and allowances determined by resolutions previously passed in Parliament in respect of Chairman and Members of the Commission"** must be given a purposive interpretation.

The Petitioners at paragraph 11 of the amended Petition states that salaries and other allowances determined by Parliament before the Petitioners assumed office on 29.03.2005 were as follows:-

		Chairman	Members
(i)	Salary	Rs. 31,715/=	Rs. 29,815/=
(ii)	Fuel Allowance	Rs. 7,000/=	Rs. 7,000/=
(iii)	Rent Allowance	Rs. 4,000/=	Rs. 4,000/=
(iv)	Monthly Allowance	Rs. 25,000/=	Rs. 20,000/=
(v)	Total	Rs. 67,715/= =========	Rs. 60,815/= =========

Thus, the Petitioners do not become entitled to receive the Rent Allowance and Monthly Allowance referred to above in view of the Resolution marked **P5C**, with effect from 01.01.2006. The Fuel Allowance was increased to Rs. 14,400/= and Rs. 12,000/= to the Chairman and the Members respectively.

It is thus observed that the Gross Payment per month is increased from Rs. 67,715/= to Rs. 80,400/= to the Chairman; and the other two Members from Rs. 60,815/= to Rs. 77,000/=. The words used in the Parliamentary Determination at **P5C** are "**full salary inclusive of the balance 50% "** and not **"the full salary in addition to the balance 50%"** (emphasis added).

The Petitioners thus become entitled only to the 50% of the increased salary with effect from 01.01.2006 and not to any other allowances they drew previously, except the Fuel Allowance.

I would like to mention that in terms of Section 2(7) of the Commission to Investigation Allegation of Bribery or Corruption Act No. 19 of 1944, the Salaries of the Commission Members cannot be diminished during their term of office. The said Act does not speak of granting of any allowances to the Petitioners. Hence, the Petitioners cannot claim as of right any other allowances other than the Fuel Allowance as determined by Parliament and evidenced by **P5C .** The Parliament in its wisdom thought it fit to do away with the payment of Rent Allowance and Monthly Allowance with effect from 01.01.2006 but increased the Fuel Allowance to Rs. 14,400/= for the Chairman and to the other members to Rs. 12,000/= respectively. It is no part of the duty of the Court to describe it in a different way and give any other interpretation to the words "substituted for the salaries and allowances".

The allowances payable to the Chairman and the Members of the Commission with effect from 01.01.2006 is restricted to only one allowance, namely the "Fuel Allowance". The Petitioners are not entitled to claim any other allowances with effect from 01.01.2006 other than "Fuel Allowance".

The Parliament draws a distinction between the salary and the allowance. According to P5C, 50% of the salary increase was to be paid with effect from 01.01.2006 and the balance 50% of the salary was to be paid with effect from 01.01.2007. The Chairman's salary increase is from Rs. 31,715/= to Rs. 66,000/=. The salary difference is Rs. 34,285/= and 50% of the said amount of Rs. 34,285/= is Rs. 17,142/50.

In the same way, the salary increase of the other two Members was from Rs. 29,815/= to Rs. 65,000/=. The salary difference is Rs. 35,185/= and 50% of the said amount is Rs. 17,592.50.

Thus, the salaries of the Chairman and Members are as follows :

	With effect from 01.01.06	With effect from 01.01.07
Chairman (Salary)	Rs. 31,715/=	Rs. 66,000/=
		=========
50% increase	Rs. 17,142.50	
Total	Rs. 48,857.50	
	==========	
Members	Rs. 29,815/=	Rs. 65,000/=
		=========
50% increase	Rs. 17.592.50	
Total	Rs. 47,407.50	
	==========	

Learned Senior State Counsel however, contended that even though the document P5C referred to the Fuel Allowance of the Chairman and the Members of the Commission as Rs. 14,400/= and Rs. 12,000/= respectively, the Petitioners were paid cash, equivalent to 250 Litres of fuel per month as shown in the Presidential directive marked **P4.** I agree with the submissions of the Learned Senior State Counsel that the Petitioners cannot get Fuel Allowance both from the Presidential directive and from the Parliamentary resolution.

Accordingly, the salary and the Allowance payable to the Chairman and the Members are as follows :-

With Effect From 01.01.2006

Salary

Chairman	Rs. 48,857.50	+	Cash equivalent of 250 Litres per month Instead of Rs. 14,400/= as Fuel Allowance
Members	Rs. 47,407.50	+	Cash equivalent of 250 Litres per month Instead of Rs. 12,000/= as Fuel Allowance

With Effect From 01.01.2007

Salary

Chairman	Rs. 66,000/=	+	Cash equivalent of 250 Litres per month Instead of Rs. 14,400/= Fuel Allowance
Members	Rs. 65,000/=	+	Cash equivalent of 250 Litres per month Instead of Rs. 12,000/= Fuel Allowance

Since the Fuel Allowance of 250 Litres per month as per the directive **P4** dated 24.01.2001 from February 2009 until the Petitioners ceased to hold office (i.e. 28.03.2010) has been paid, the Petitioners are not entitled for any cash allowance, in respect of fuel. I therefore

hold as follows:-

(i) The First Petitioner's salary with effect from January 2006 would be Rs. 31,715/= + Rs. 17,142/50 per month until December 2006.

The Second and the Third Petitioners' salary with effect from January 2006 would be Rs. 29,815/= + Rs. 17.592/50 per month until December 2006.

(ii) The First Petitioner's salary with effect from January 2007 would be Rs. 31,715/= + Rs. 34,285/= per month until December 2007.

The Second and the Third Petitioners' Salary with effect from January 2007 would be Rs. 29,815/= + Rs. 35,185/= per month until December 2007.

(iii) The First Petitioner's salary with effect from January 2008 until 28.03.2010 would be Rs. 66,000/= per month. The Second and the Third Petitioners' salary from January 2008 until 28.03.2010 would be Rs. 65,000/= per month.

(iv) The Petitioners are not entitled for any monthly allowances, other than the Fuel Allowance with effect from 01.01.2006 which has already been settled as per the Presidential directive **P4** dated 24.01.2001 from February 2009 until 28.03.2010.

Any non-payment of the Petitioners' salary as directed in (i), (ii), (iii) and (iv) referred to above violates the Petitioners' fundamental rights enshrined in Article 12(1) of the Constitution. The Court therefore directs the 1st to 4th and 6th Respondents to comply with the payment of the Petitioners' salary in the manner provided above within a period of three months. If any over payments were made to the Petitioners, such over payments may be recovered from the Petitioners.

CHIEF JUSTICE

UPALY ABEYRATHNE, 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 and in terms of Article 126 read with the Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. W.K. Samarakoon,
   316, Vidyala Mawatha,
   Kothalawala,
   Kaduwela.

2. K.S. Ranasinghe,
   85, Ihalaaluthela Road,
   Tholabogaswatta,
   Badulla.

3. N.W.P. Deshabandu,
   02, Kajugahawatta,
   Gotatuwa New Town.

4. K.A.P. Perera,
   No. 472/2, Bunt Road,
   Dutugemunu Mawatha,
   Thalangama North,
   Baththaramulla.

5. K.E.G.F. Kulasooriya,
   62, Goodshed Road,
   Aluthgama.

6. P. Abeyshantha,
   100/41, City Gate,
   Katana North,
   Katana.

7. R.M.C.N.K.Madawala,
   NWSDB Quarters,
   Water Supply Scheme,
   Ampitiya.

Petitioners

SC FR No.284/2013

Vs.

1. National Water Supply and Drainage Board,
   Galle Road,
   Rathmalana.

2. General Manager,
National Water Supply and Drainage Board,
Galle Road,
Rathmalana.

3. Additional General Manager,
(Human Resources and Industrial Relations),
National Water Supply and Drainage Board,
Galle Road,
Rathmalana.

4. Deputy General Manager,
(Human Resources),
National Water Supply and Drainage Board,
Galle Road,
Rathmalana.

5. K.L.L. Premanath,
No. 21,/3, P.B. Alwis Perera Mawatha,
Katubedda,
Moratuwa.

Formerly

General Manager,
National Water Supply and Drainage Board,
Galle Road,
Rathmalana.

6. H. Ariyasena,
"Senani", Jalthara,
Ranala.

Formerly

Deputy General Manager,
(Human Resources),
National Water Supply and Drainage Board,
Galle Road,
Rathmalana.

7. The Secretary,
Ministry of Water Supply and Drainage,
35, New Parliament Road,
Pelawatta,
Battaramulla.

8. Sarath Chandrasiri Vithana,
Additional Secretary
(Administration and Finance)

Ministry of Water Supply and Drainage,
35, New Parliament Road,
Pelawatta, Battaramulla.

9. Commissioner General of Labour,
Labour Secretariat,
Narahenpita.

10. D.A.Y. Wickramanayake,
Regional Support Centre, (Western-South)
of the National Water Supply & Drainage Board,
Galle Road, Mt. Lavinia.

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

Respondents

12. A.L.P. Mohomed,
No. 151, Allen Avenue,
Dehiwala,
NWS & DB Scheme,
Dehiwala.

13. D.A.D.V. Duwearachchi,
No. 83, Main Road,
Athurugiriya.

14. R.D. Gunapala,
"Pawan",
Goyambokka,
Tangalle.

15. S.U.K. Wijeweera,
No. 53/9,
Polgahawela Road,
Kegalle.

16. C.J. Gamage,
100/C,
Railway Avenue,
Diyathalawa.

17. U.L. Geeganage,
No. 52, Weda Mawatha,
Gorakana,
Keselwatta, Panadura.

18. P.P. Samarathunga,
No. 2/7/59, Shanthi Mawatha,

Bandarawatta,
Gampaha.

19. M.A.D. Gajanayake, "Gajamini",
Agarawela Junction,
Akuressa, Matara.

20. P. Gunasinghe,
No. 63,
Gemunu Mawatha,
Bangalawatta,
Kottawa, Pannipitiya.

21. H.E.A. Fernando,
No. 63/14,
Kadawatha Road, Ragama.
.

22. P.V.H. Suranga,
"Gunadam Sewana",
Siyambalagahawatta, Pepiliyawela.

23. U.W.S.K. Nawarthna, No. 29/1,
Aluwiharayagama Para,
Aluwiharaya, Matale.

24. C.U.A. Anthony,
No. 375, Hekitta Road,
Hekitta, Wattala.

Added Respondents

BEFORE **:** K**.** Sripavan, C.J.
E. Wanasundera, P.C., J.
Priyantha Jayawardene, P.C., J.

COUNSEL Saliya Pieris with Anjana Ratnasiri for Petitioners
Rajiv Goonethilake, SSC. for 1st, 2nd Respondents and Attorney General.
J.C. Weliamuna for 13th – 24th Added Respondents.

ARGUED ON : 10.06.2016

WRITTEN SUBMISSIONS FILED ON : 31.08.2016 by the Petitioners.
08.07.2016 by the Added Respondents

DECIDED ON **:** **23.09.2016**

K. SRIPAVAN, C.J.,

The Petitioners are presently functioning as the "Senior Engineering Assistants (Civil)" of the National Water Supply and Drainage Board (hereinafter referred to as the "Board"). The Petitioners state that in the year 2010, the First Respondent Board called for applications for

the post of “Engineer Class II (Civil)” from the Engineering Assistants Special (Civil). The Petitioners and the 10th Respondent were among the applicants and according to the mark sheet issued by the Board of Interview for the post of “Engineer Class II (Civil)” all of them secured 86 marks. Thus, the Petitioners and the 10th Respondent were placed in the merit order of 40. The Petitioners alleged that after the marks were released, the First Respondent decided to grant priority to candidates who had obtained a qualification in Government Technical Officers Third Examination and those candidates were given Five marks in addition and promoted to the post of “Engineer Class II (Civil)”. Some of the candidates who were promoted to Engineer Class II (Civil) were in fact obtained less marks than the Petitioners at the interview. The Petitioners at Paragraph 12 of the Petition state that all the candidates who were promoted in the first batch by 15.09.2011 were candidates who received five preferential marks in addition to the marks given by the Board of Interview. The Petitioners, however, did not challenge the promotion of the said candidates at the appropriate stage. On the same day, “Engineer Class II (Civil)” was abolished and replaced by the post of “Engineer Class I (Civil)”.

The Petitioners claim that a Second Batch of candidates were promoted in January 2012 based on the marks of the same interview. Thereafter, a Third Batch of candidates were promoted to the post of “Engineer Class I (Civil)” in March 2012 based on the marks of the same interview. Thus, pursuant to the interview held in December 2010/January 2011, three batches were promoted in September 2011, January 2012 and March 2012. The Petitioners did not make any complaints to Court regarding the promotions of these candidates on three different occasions.

The Petitioners contend in Paragraph 15 of the Petition that on 29.11.2012, the 10th Respondent and the Petitioners made a complaint to the Department of Labour regarding the grave injustice caused to them by the Second Respondent, depriving their promotions to the post of “Engineer Class I (Civil)”. However, on a previous occasion, the 10th Respondent had lodged a separate complaint to the Commission of Labour and based on the said complaint, it was recommended to the Second Respondent that the 10th Respondent should be promoted to the Rank of “Engineer Class I (Civil)”without causing any prejudice to her seniority.

The Second Respondent, in his affidavit dated 02.03.2015 states that the Commissioner of Labour having considered the fact that the 10th Respondent had covered up the position of "Engineer Class I (Civil)" for a period of three years made a recommendation dated 15.10.2012 to place the 10th Respondent in the post of "Engineer Class I (Civil)". Thus, the 10th Respondent was so placed on 10.07.2013 on the directive of the line Ministry and on the decision of the Board of Directors of the First Respondent based on the recommendation of the Commissioner of Labour.

It was thereafter, the Petitioners filed this application seeking a direction on the First to Fourth Respondents, to promote the Petitioners to the post of "Engineer Class I (Civil)" with effect from 10.07.2013 together with arrears of salary and other benefits with effect from 10.07.2013, on the basis that the Petitioners and the 10th Respondent obtained the same marks at the interview, namely 86 Marks, and placed at 40 in the Order of Merit.
Learned Counsel for the 13th -24th added Respondents as averred in Paragraph 20 of the affidavit of the 13th Respondent dated 06.11.2014 argued that the Petitioners cannot, seek promotions based on the applications called in 2010 and interviews held in 2011. The Circular No. 58/2001 dated 03.12.2001 marked as **13R(4)(a)** relating to the validity period of an interview/written test/trade test for recruitments/promotions has been repealed by Circular No. 12/2012 dated 10.14.2012marked as **13R(4)(b).**

Thereafter, the Board of Directors of the 1st Respondent has taken a decision to keep the waiting list for a period of one year with the date of approval obtained from the Secretary of the Ministry/Board of Directors or the Chairman of the Board. The said Board Paper and decision of the Board have been produced marked as **13R(4)(c**). The said Board decision confirms the decision contained in the said circular marked as **13R(4)(b).**

Counsel further submitted that the Petitioners were well aware of such one year validity period as borne out by Paragraph 5 of their document marked as **P16** and annexed to the Petition. It is on this basis, Counsel submitted that any promotions of the Petitioners to "Engineer Class I (Civil)" would violate the documents marked as **13R4(b), 13R4(c)** and **P16** and argued that any vacancies that may have arisen after the one year validity period be

filled holding fresh interviews. This averment of the 13th Respondent contained in Paragraph 20 of his Affidavit dated 06.11.2014 has been denied by the Petitioners in Paragraph 3 of their Counter Affidavit dated 27.04.2015. No satisfactory explanation has been offered by the Petitioners in respect of the several circulars issued by the Board and referred to in Paragraph 20. The Petitioners did not seek to set aside the promotion of the 10th Respondent.

While I agree that a Government Authority or a Statutory Board will have to deal with all persons with regard to their appointment, promotion, transfer or dismissal in conformity with the standard norms which are not arbitrary, irrational, capricious or unreasonable, it should not act illegally violating its own circulars in order to avoid discrimination.

If the Board has shown some favour to the 10th Respondent then, this Court cannot compel the Board to commit another illegality to show favour to the Petitioners in the same way on the ground that both the Petitioners and the 10th Respondent obtained same marks at the interview. This would amount to violating the Circulars of the Board restricting the validity period of results of an interview for a period of one year only. Considering the applicability of Article 14 of the Indian Constitution, which is corresponding to Article 12 of our Constitution, in the case of ***Ram Prasad* Vs. *Union of India AIR 1978 Raj 131,*** it was observed that "*the guarantee under Article 14 cannot be understood as requiring the authorities to act illegally in one case because they have acted illegally in other cases. No one can contest that a wrong must be extended to him as well in order to satisfy the provisions of Article 14".*

Sharvananda, C.J. considering the application of Article 12, in the case of *C.W. Mackie & Co. Ltd.* Vs. *Hugh Molagoda, Commissioner General of Inland Revenue and Others* (1986) 1 S.L.R. 300 held that Article 12 of the Constitution guarantees equal protection of the law and not equal violation of the law. Thus, the learned Chief Justice was of the view that :-

> *"The equal treatment guaranteed by Article 12, is equal treatment in the performance of a lawful act; via Article 12, one cannot seek the execution of an illegal act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law."*

An identical view was taken by G.P.S. de Silva, J. (as he then was) in *Jayasekera* Vs. *Wipulasena* (1988) 2 S.L.R. 237 that the authorities cannot act illegally in one case because they have acted illegally in other cases.

On a careful consideration of the material placed before this Court, it is apparent that the promotion of the 10th Respondent was made violating the Circulars issued by the Board that the validity period for purposes of promotion is limited for a period of one year. The Board cannot be compelled to act illegally and to promote the Petitioners violating the provisions of its own Circulars.

This application is accordingly dismissed in all the circumstances without costs.

CHIEF JUSTICE

E. WANASUNDERA, P.C.,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 in terms of Article 17 and Article 126 which should be read with Articles 13(1), 12(1) and 14(1)g of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR Application No. 350/2013

Amuhenkande Kankanamlage Jayasena,

Of No. 587, Lake Road,Borelesgamuwa
Now at

Colombo Remand Prison with

Remand No. 4116

Petitioner

Vs.

1. Kamal Perera
   Chief Inspector of Police,
   Officer in Charge
   Unit No 4 – Fraud Bureau Colombo,
   No. 5, Dharmarama Road,
   Wellawatta,
   Colombo 06.

2. Jayarathne,
   Police Constable 30602,
   Unit No 4 – Fraud Bureau Colombo,

No. 5, Dharmarama Road,
Wellawatta,
Colombo 06.

3. K.V.P. Fernando,
   Senior Superintendent of Police
   Director,
   Fraud Bureau Colombo,
   No. 5, Dharmarama Road,
   Wellawatta,
   Colombo 06.

4. S.A.D.S. Gunasekara
   Deputy Inspector General of Police
   Colombo
   DIG's Office,
   Colombo 11.

5. Anura Senanayake
   Senior Deputy Inspector General of Police,
   Colombo
   Police Headquarters,
   Colombo 01.

6. N. Illangakoon
   Inspector General of Police
   Police Headquarters,
   Colombo 01.

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

Respondents

Before : Sisira J De Abrew J
Priyantha Jayawardene PC J
K T Chitrasiri J

Counsel : MTB Ekanayake for the Petitioner
Anupa de Silva SSC for the Respondents

Argued on : 6.5.2016

Decided on : 3.10.2016

Sisira J De Abrew

The Petitioner, by his petition, seeks a declaration that his fundamental rights guaranteed by Article 12(1), 13(1) and 14(1)(g) of the Constitution have been violated by the Respondents. This court by its order dated 22.10.2013, granted leave to proceed for the alleged violation of Article 12(1) and 13(1) of the Constitution by the 1st, 2nd and 3rd Respondents. The Petitioner states the following facts.

The Petitioner entered into an agreement to sell his house to Priyantha Fernando and Surupeeka Peiris who are husband and wife to a sum of Rs 7.5Million. Both parties signed an agreement bearing No.3636 (P3) attested by DC Peiris Notary Public and Attorney-at-Law on 20.8.2011and the Petitioner accepted 2.5Million as an advance payment when he signed the said agreement P3 from Priyantha Fernando and Surupeeka Peiris. The Petitioner again accepted Rs.500,000/- as an advance payment from them on a subsequent occasion. He admits that he altogether accepted Rs 3.0Million from Priyantha

Fernando and Surupeeka Peiris as an advance payment to sell the house. He states that although the agreed amount to sell the house was Rs.7.5Million, the Notary Public in the deed marked P3 fraudulently stated that the agreed amount was 4.9Million. Although he states so, it has to be noted here that he signed the deed marked P3 (the agreement to sell bearing No 3636) dated 20.8.2011attested by DC Peiris Notary Public and Attorney-at-Law. The Petitioner, by the said deed, agreed to sell the house to Priyantha Fernando and Surupeeka Peiris within six months from 20.8.2011 upon accepting the balance amount. Thereafter on three occasions, by three deeds, parties agreed to extend this period up to 16.6.2013. The question that arises is that if the deed marked P3 was executed fraudulently with connivance of Priyantha Fernando and Surupeeka Peiris, as to why he signed subsequent three deeds on three occasions extending the time period specified in the deed marked P3. There is no answer to this question. Therefore the above allegation made by the Petitioner cannot be accepted. The Petitioner further states that Priyantha Fernando gave cheque No.072033 marked P4 for Rs 2.6Million to him but he did not deposit this cheque on the request of Priyantha Fernando. The Petitioner however tried to contend that the agreed amount was Rs.7.5Million. The question that arises is as to why Priyantha Fernando gave a cheque for Rs.2.6Million when he was only entitled to give Rs.2.4Million to the Petitioner. But Priyantha Fernando, in a subsequent statement marked P6 (produced by the Petitioner with his counter objections) has explained the handing over of the said cheque. According to Priyantha Fernando's statement, before the payment of 2nd advance (Rs.500,000/-), the petitioner had asked for a guarantee of the balance payment of Rs.2.4Million. Priyantha Fernando had

told him that if the house is handed over before the due date, he would pay Rs.200,000/-. This appears to be the reason for the additional payment of Rs0.2Million. This appears to be an additional payment. Therefore Priyantha Fernando gave a cheque for Rs.2.6Million (2.4Million-amount to be paid as per the agreement+0.2Million as an additional payment). As the petitioner did not sell the house as agreed, he (Priyantha Fernando) instructed the bank not to honour the cheque.

The petitioner says that he could not hand over the house as agreed since there were practical difficulties. Thereafter on a complaint made by Priyantha Fernando, the petitioner was arrested by the 1st Respondent. Paragraph 7 of P3 clearly stipulates how to deal with a situation if the seller fails to execute the deed of transfer. According to the said paragraph, if the seller does not fulfill his obligation, relief can be obtained through a court order. The Petitioner therefore contended that failure to perform his obligation was purely a civil transaction and as such the officers of the Fraud Bureau could not have arrested him and that the arrest and the filing of B Report against him violated his fundamental rights guaranteed under Article 12(1) and 13(1) of the Constitution.

This court on 19.9.2014 has observed that the Fraud Bureau has acted on a civil transaction and issued an interim order staying further proceedings in case No.7276/2013 in Court No.6 of the Magistrates Court, Colombo.

On the strength of the above material, the Petitioner contended that his failure to fulfill obligation under and in terms of P3 was a civil transaction and

that the officers of the Fraud Bureau could not have arrested and produced the Petitioner before the Magistrate as a suspect. The Magistrate remanded him.

Although one can contend that, on the strength of the above facts, the Petitioner's failure to fulfill obligation under and in terms of P3 was a civil transaction, court must consider whether there were reasonable grounds for the Police to arrest him. The 1st respondent, in his affidavit filed in this court, states that Priyantha Fernando made a complaint to the Fraud Bureau alleging that the Petitioner had defrauded him. The amount alleged was Rs.3Million. The Complaint of Priyantha Fernando made on 12.9.2013 has been produced as 1R1. After investigation, on 27.9.2013 the Petitioner was arrested. He was produced before the learned Magistrate on 28.9.2013. The Magistrate remanded him. Priyantha Fernando, in his statement marked 1R1, states that the agreement to sell bearing No.3636 attested by DC Peiris Notary Public and Attorney-at-Law was signed by both parties on 20.8.2011; that the Petitioner, by the said agreement, agreed to sell the house to him within six months upon the payment of balance amount; that the Petitioner, on 20.8.2011, accepted Rs.2.5Million from him; that as the Petitioner had a practical difficulty in handing over the vacant possession of the house, the period of six months was extended by deed No.3902 up to 20.5.2012; that even on 20.5.2012 the Petitioner could not hand over the vacant possession of the house due to his daughter's wedding and the time period was again extended up to 20.12.2012 by deed No.4011 attested by DC Peiris Notary Public and Attorney-at Law; that even on 20.12.2012 as the Petitioner could not hand over the vacant possession of the house, the time period was again extended up to 16.6.2013 by deed No. 4138 attested by DC Peiris Notary Public and Attorney-at Law; that

on 7.5.2013 on the request of the Petitioner, he paid further sum of Rs.500,000/- to the Petitioner; that even on 16.6.2013 the Petitioner did not hand over the vacant possession of the house; that the Petitioner did not respond to his telegram; that the Petitioner avoided answering the telephone; that although they (Fernando and Peiris) were waiting for the Petitioner at the lawyer's office, he did not turn up; that later the Petitioner told him that he would not sell the house and threatened him not to trouble him (the Petitioner); that he, on several occasions, told the Petitioner that the balance was ready and to finalize the transaction; and that he felt that the Petitioner had cheated him.

As I pointed put earlier, the Petitioner too admits that he accepted Rs.3Million as an advance from Priyantha Fernando and Surupeeka Peiris to sell the house but he did not execute the transfer deed.

The main complaint of the petitioner to this Court is that the arrest of the Petitioner by the Police was unjustified and wrong.

In this connection it is relevant to consider Section 32 (1) of the Code of Criminal Procedure Act which reads as follows:

> "Any peace officer may without an order from a Magistrate and without a warrant arrest any person…..
>
> a) who in his presence commits any breach of the peace;
> b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;
> c) omitted.

d) omitted.

e) omitted.

f) omitted.

g) omitted.

h) omitted.

i) omitted."

When a police officer decides to arrest a person on a complaint, he is not, at the time of the arrest, required to decide that the alleged offence is proved or can be proved beyond reasonable doubt. What is necessary is that, at the time of the arrest, there were reasonable grounds for him to believe that an offence had been committed or that he had reasonable grounds to act under Section 32(1) of the Code of Criminal Procedure Act.

In such a situation the police officer cannot be found fault with for arresting the alleged offender. This view is supported by the judgment of Wanasundera, J. in the case of Joseph alias Bruten Perera Vs. The Attorney General [1992] 1 SLR page 99 wherein His Lordship remarked thus; "The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand for an arrest, a mere reasonable suspicion or a reasonable complaint of the commission of an offence suffices."

In this connection I would like to consider the judicial decision in the case of Roopechand and another Vs The State [1966] Cri.L.J 1367 (Vol.72, C.N.411) at page 1368 wherein it was held: "The argument that the breach of agreement committed by the accused gave rise only to a civil liability and the complainant should have taken recourse to civil proceedings to enforce his

right is, in my opinion, wholly misconceived. Money obtained by a person through deception may give rise to civil liability, but that does not and cannot mean he is immune from a criminal charge even if the prosecution succeeds in proving that he intended to dishonestly obtain money by misappropriation."

It is undisputed in this case that the Petitioner signed the agreement to sell the house to Priyantha Fernando and Surupeeka Peiris; that the Petitioner accepted Rs.3.0Million as an advance; that the Petitioner did not return Rs.3.0Million to Priyantha Fernando and Surupeeka Peiris; and that he (the Petitioner) did not execute the deed of transfer. Priyantha Fernando was ready with the balance amount and requested the Petitioner to execute the deed of transfer. If the Petitioner did not have a dishonest intention, he would have and should have, by now, returned Rs.3.0Million to Priyantha Fernando and Surupeeka Peiris or he should have agreed to return Rs.3Million. At this stage one should not forget what the Petitioner told Priyantha Fernando when the request was made to finalize the transaction. The petitioner told Priyantha Fernando that he would not sell the house. The Petitioner even threatened Priyantha Fernando not to trouble him. However it is matter for the Magistrate, after hearing evidence, to decide whether or not the Petitioner entertained dishonest intention. I am making this observation as a case has been filed against the Petitioner in The Magistrate's Court by the Fraud Bureau. When I consider the facts of this case and the above legal literature, I hold that there were reasonable grounds for the Police to believe that the Petitioner had cheated Priyantha Fernando and Surupeeka Peiris and thereby committed a criminal offence. In my view, in a case of breach of agreement by one party, although the party affected has recourse to civil remedy, if the police have

reasonable grounds to believe that the violating party in violating the contract had entertained dishonest intention, the Police, on a complaint made by the affected party, has the right to take legal action against the violating party under and in terms of the Criminal Procedure Code including the arrest and producing the violating party in the Magistrate court. Later it becomes the duty of the learned Magistrate to decide whether or not the charge is proved beyond reasonable doubt. In such a situation Police cannot be found fault with for arresting and producing the violating party in court.

I have earlier held that there were reasonable grounds for the Police to believe that the Petitioner had cheated Priyantha Fernando and Surupeeka Peiris and committed a criminal offence. If a Police officer has reasonable grounds to believe that a criminal offence had been committed by a person, he has a right under the Criminal Procedure Code to arrest the offender. In such a situation the arrest of the offender is justified. For the above reasons, I hold that that the Police Officers of the Fraud Bureau had reasonable grounds to arrest and produce the Petitioner before the Magistrate Court and that the contention of the petitioner that his arrest was wrong and unjustified cannot be accepted.

For the aforementioned reasons, I hold that the 1st to 6th Respondents have not violated the fundamental rights of the Petitioner guaranteed by Article 12(1) and 13 (1) of the Constitution.

I therefore dismiss the petition of the Petitioner. I therefore vacate the interim order of this court dated 19.9.2014 staying further proceedings in case No.7276/6/2013 in court No.6 of the Magistrate's Court of Colombo and direct the learned Magistrate to expeditiously conclude the said case. The Registrar of

this Court is directed to forward a certified copy of this judgment to the Magistrate of Colombo drawing his attention to the vacation of the said interim order.

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

Petition dismissed

Judge of the Supreme Court.

Priyantha Jayawardene PC J

I agree.

Judge of the Supreme Court.

KT Chitrasiri J

I agree.

Judge of the Supreme Court.

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution.

S.C. (F.R.) Application No.368/2012

1. Mananadewage Shifani,
   No.34/1, Kolamunna,
   Piliyandala.

2. Nazreen Nazar,

3. Hazna Nazar,

Both minor children presently believed to be residing at No.10, Horton Place, Colombo 07, and appearing by their mother, Custodian and/or Next Friend, Mananadewage Shifani (the 1st Petitioner above-named), of No. 34/1, Kolamunna, Piliyandala.

Petitioners

Vs.

1. W.A. Somaratne Wijayamuni,
   Officer-in-Charge,
   Police Station,
   Piliyandala.

2. Samanthi Gunasekara,
   Police Officer (WPC),
   Women and Children's Division,

Police Station,
Piliyandala.

3. Kattadige Dayananda,
Police Officer (PC No.22039),
Police Station,
Piliyandala.

4. Ellagodage Thushara Rukshan,
Police Officer (PC No.72753),
Police Station,
Piliyandala.

5. Kadiragamar,
Officer attached to the Special
Police Investigations Unit,
National Child Protection
Authority,

6. Buddhika Prasad Balachandra,
Officer-in-Charge,
Special Police Investigations
Unit,
National Child Protection
Authority,

7. R.M.R. Rathnayaka,
Officer attached to the Special
Police Investigations Unit,
National Child Protection
Authority,

8. Sarath Kariyapperuma,
Officer attached to the Special
Police Investigations Unit,
National Child Protection
Authority,

All of the National Child

Protection Authority of
No.330,
Thalawathugoda Road,
Madiwela.

9. Ravi Wijayagunawardena,
Deputy Inspector General-
Crimes and Operations,
Sri Lanka Police,
Police Headquarters,
Colombo 01.

10. P. Jayasundera,
Inspector General of Police,
Sri Lanka Police,
Police Headquarters,
Colombo 01.

11. National Child Protection
Authority,
No.330,
Thalawathugoda Road,
Madiwela.

12. Natasha Balendra,
Chairperson,
National Child Protection
Authority,
No.330,
Thalawathugoda Road,
Madiwela.

13. J.L.P. Wilson,
Registrar,
District Court of Colombo,
Registry of the District Court
of Colombo,
Hulftsdorp Street,
Colombo 12.

14. H.V. Sarath,
Probation Officer,
Probation Office (Colombo),
No. 375, Dam Street,
Colombo 12.

15. Yamuna Perera,
Commissioner,
Department of Probation and
Child Care Services,
No.150A, L.H.P. Building,
Nawala Road,
Nugegoda.

16. Mohamed Ismail Mohamed
Nazar,
No.10, Horton Place,
Colombo 07.

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

Respondents

BEFORE : K. SRIPAVAN, CHIEF JUSTICE,
B.P. ALUWIHARE, PC, J.
SISIRA J. DE ABREW, J.

COUSNEL : Nilshantha Sirimanne for the Petitioner.

Parinda Ranasinghe Senior DSG for all the Respondents except the 16th Respondent.

A.L.M.K. Arulanandan PC with Anoj Hettiarachchi for the 16th Respondent.

ARGUED ON : 23.05.2016.

DECIDED ON : 28.07.2016

SISIRA J. DE ABREW, J.

The petitioners, by this petition, seek a declaration that their fundamental rights guaranteed by Articles 11, 12(1), 13(1) and 13(2) of the Constitution have been violated by the respondents.

This Court, by its order dated 15.12.2012, granted leave to proceed for alleged violation of the fundamental rights guaranteed under Articles 12(1), 13(1) and 13(2) of the Constitution.

The 16th respondent and the 1st petitioner are husband and wife. The 2nd and the 3rd petitioners are the two daughters of the 1st petitioner and the 16th respondent. As there was a dispute relating to the affairs of the matrimonial house, the 16th respondent filed a case in the District Court of Colombo requesting the custody of the two daughters. The case was taken up, but it was an ex-parte trial as the 1st petitioner had failed to take the necessary steps in the District Court. The learned District Judge, by her order dated 13.01.2012, decided that the 16th respondent (the father of the children) was entitled to the physical and legal custody of the two daughters. The learned District

Judge on 31.05.2012 directed that her order be implemented through the National Child Protection Authority (NCPA). But the Registrar of the District Court signed the said order only on 6.06.2012. The Officer-in-Charge of the NCPA received the said order on 10.06.2012.

On 20.06.2012 the Officer-in-Charge of the NCPA (the 6th respondent) requested the Officer-in-Charge of the Piliyandala Police Station (the 1st respondent) to take the 2nd and the 3rd petitioners to custody of the police as there was an order by the District Court to hand them over to the 16th respondent. On 21.06.2012 around 4.45 p.m. WPC 4574 Samanthi attached to Pililyandala Police Station took the 2nd and the 3rd petitioners into her custody and brought them to the Piliyandala Police Station around 5.15 p.m. (vide document marked Y1 by the 1st respondent). The officers of the NCPA around 7.15 p.m. on 21.06.2012 took the custody of the 2nd and the 3rd petitioners from the Piliyandala Police Station, brought them to the NCPA and handed them over to the 16th respondent around 8.45 p.m. on 21.06.2012 (vide document marked R2 by the 6th respondent). The 6th respondent by letter dated 22.06.2012, reported to the District Court of Colombo that he implemented the order of the District Court.

The above facts are admitted by both parties.

Learned Counsel for the petitioners submitted that the Civil Appellate High Court, in an application for revision filed by the 1st petitioner, issued a stay order suspending the implementation of the order of the District Court and any further proceedings of the District Court. Learned Counsel further submitted that the issue of the said stay order was brought to the notice of the 6th respondent by Mr. Punithasegaran, Attorney-at-Law who represented the 1st petitioner at the NCPA. But the 6th respondent did not heed to the said information. Learned Counsel for the petitioner further submitted that the operation of the said stay order was even brought to the notice of the officers of the Piliyandala Police Station by the relatives of the 1st petitioner, but the officers attached to the Piliyandala Police Station did not pay any attention to the said information.

Learned Counsel contended that it was wrong for the 1st respondent and the 6th respondent to have taken the 2nd and the 3rd petitioners into their custody and to have them handed over to the 16th respondent when there was a stay order issued by the Civil Appellate High Court. I now advert to the above contention. Although the Civil Appellate High Court issued the stay order on 19.06.2012, was it produced before the 1st respondent and/or the 6th respondent on 21.06.2012? The answer is in the negative. Did the 1st petitioner or the relatives of the 1st petitioner or the Attorney-at-Law who represented the

1st petitioner at the NCPA produce a copy of the said stay order before the 1st respondent and/or the 6th respondent? The answer is in the negative. Learned Counsel for the petitioners at the hearing before us, admitted that the District Court received the said stay order issued by the Civil Appellate High Court only on 22.06.2012. Under these circumstances, can the 1st respondent and/or the 6th respondent be found fault with for implementing the order of the District Court? The answer is and should be in the negative. On 21.06.2012 (the day that the 2nd and the 3rd petitioners were taken into custody) the 1st respondent was having a valid order issued by the District Court. Then can any police officer be found fault with for implementing the said order of the District Court? The answer is in the negative.

Can the 1st respondent or the 6th respondent be found fault with for not placing reliance on the information furnished by Mr. Punithasegaran, Attorney-at-Law and the relatives of the 1st petitioner that a stay order had been issued by the Civil Appellate High Court? Was this information passed by an official source? The answer is in the negative. Had the Registrar of the Civil Appellate High Court in an official way communicated this information to the 1st respondent and/or the 6th respondent, it should have been considered as an official information. In my view the information given by Mr.Punithasegaran, Attorney-at-Law is not an official communication and the 1st and the 6th

respondents cannot be found fault with for not placing reliance on the said information. When I consider the above matters, I am unable to agree with the said contention of the learned Counsel for the petitioners and therefore reject it. Learned Counsel for the petitioners next contended that the Officer-in-Charge, Piliyandala Police Station the 1st respondent had no legal authority to implement the order of the District Court and he had no authority or legal duty to arrest the 2nd and 3rd petitioners. He contended that if at all it was the 6th respondent who should have implemented the said order. He therefore contended that the fundamental rights of the petitioners have been violated by the 1st respondent. I now advert to this contention. In considering the said contention, I would like to consider a hypothetical example. If the Magistrate, Mt. Lavinia issues a warrant to arrest a person residing in Jaffna, should the Officer-in-Charge of the Mt. Lavinia Police Station proceed to Jaffna all the way from Mt. Lavinia to arrest the man in Jaffna . The answer for obvious reasons is in the negative. The Officer-in-Charge, Mt. Lavinia would request the Officer-in-Charge , Jaffna Police Station to implement the Court order and the Officer-in-Charge, Jaffna Police Station is duty bond to arrest him. This procedure is lawful under Section 56 of the Police Ordinance which reads as follows:–

> "Every police officer shall for all purposes in this Ordinance contained be considered to be always on duty, and shall have the powers of a police officer in every part of Sri Lanka."
> It shall be his duty-

(a) to use his best endeavours and ability to prevent all crimes, offences and public nuisances;
(b) to preserve the peace;
(c) to apprehend disorderly and suspicious characters;
(d) to detect and bring offenders to justice;
(e) to collect and communicate intelligence affecting the public peace; and
(f) promptly to obey and execute all orders and warrants lawfully issued and directed to him by any competent authority."

Under Section 56 (f) of the Police Ordinance, it shall be the duty of a police officer promptly to obey and exercise all orders and warrants issued and directed to him by any competent authority. Thus, in the earlier example when the warrant is issued by the Mt. Lavinia Magistrate and the same is directed by the Officer-in-Charge, Mt. Lavinia to Officer-in-Charge, Jaffna, he (the Officer-in-Charge, Jaffna), under Section 56 of the Police Ordinance, has the power to execute the warrant. In the same manner, if the District Judge of Colombo issues an order to hand over the custody of the 2nd and the 3rd petitioners to the 16th respondent and the same to be implemented through the Officer-In-Charge of the NCPA, the Officer-in-Charge of Piliyandala Police Station, in terms of Section 56 of the Police Ordinance, has the power to implement the said order when the Officer-In-Charge, NCPA makes a request to that effect. When Section 56 of the Police Ordinance is considered, it is clear that a police officer is always on duty and shall have the power of a police officer in any part of the country. Thus, when a police officer sees an offence being committed, whether he is attached to the NCPA or the Piliyandala Police

Station or any other branch of the Police Department, he (the police officer) is empowered under Section 56 of the Police Ordinance to act according to the law including the arrest of the offender and producing him in court. Thus, when the Officer-in-Charge of the NCPA requested the Officer-in-Charge of Piliyandala Police Station to take the 2nd and the 3rd petitioners into custody in order to implement the order of the District Court, he (the Officer-in-Charge, Piliyandala Police Station) has, under Section 56 of the Police Ordinance, a duty to accede to the request and he, in implementing the said request, has not violated any legal provisions as he has acted within Section 56 of the Police Ordinance.

It has to be noted here that the Officer-in-Charge of the NCPA, the 6th respondent, before requesting the Officer-in-Charge, Piliyandala Police Station, the 1st respondent, to take the 2nd and the 3rd petitioners into custody, had taken reasonable steps to get down the 1st petitioner. He has, by way of a police message sent through the Piliyandala Police, requested the 1st petitioner to bring the 2nd and the 3rd petitioners to the NCPA on 13.06.2012. This message had been sent on 10.06.2012. As the 1st petitioner did not respond to the said message, the 6th respondent again on 20.06.2012 sent another message to the 1st petitioner, but she again failed to respond to the said message (Vide document marked R1a, the 6th respondent has filed along with his affidavit). The 6th respondent has, on several occasions, sent officers to

meet the 1st petitioner but the said officers could not meet her, (Vide document marked X1 by the 1st respondent along with his affidavit). It has to be noted here that when WPC 4574 Samanthi took the 2nd and the 3rd petitioners into the custody, the 1st petitioner was not present and they were taken into custody from a house in the neighbourhood (Vide document marked Y by the 1st respondent along with his affidavit). It has to be stated here that the intention of the police officer attached to the NCPA and the Piliyandala Police Station was to implement the order of the District Court.

When I consider all the above matters, I am unable to agree with the above contention of learned Counsel for the petitioner and reject the same. I further hold that the respondents have not violated the fundamental rights of the petitioners when they were taken into custody. I further hold that taking the 2nd and the 3rd petitioners into custody is lawful as it was done in order to implement the order of the District Court.

Learned Counsel for the petitioners submitted that taking of the 2nd and the 3rd petitioners into custody by the Piliyandala Police Station amounted to an arrest. He attempted to strengthen his contention on the basis of the document marked 'X1' by the 1st respondent along with his affidavit. He submitted that the main function

of the NCPA is to protect children and that the actions of the police officers who arrested the 2nd and the 3rd petitioners amounted to violation of the main purpose of the NCPA. I now advert to this contention. 'X1' is a message sent by the 6th respondent to Piliyandala Police Station. The heading of the document marked 'X1' reads as follows:-

"Take steps to arrest".

Although the heading states the above words, the message in the said document requests the Officer-in-Charge, Piliyandala Police Station to take the 2nd and the 3rd petitioners into custody in order to implement the order of the District Court. Therefore, the words 'arrest' in my view, in the head note of the said message cannot be interpreted to say that the message was a request to arrest the 2nd and the 3rd petitioners.

Learned Counsel for the petitioners relied on the judgment in the case of ***Namasivayam v. Gunaratne*** *1989 1SLR page 394.* Facts of the said case are as follows:-

> "The petitioner was travelling in a bus at Nawalapitiya when he was arrested by the 3rd respondent. He was not informed the reason for his arrest. He was taken to a security personnel camp and kept there and repeatedly assaulted by the 3rd respondent and other security personnel. He was forced to make a statement on the lines suggested by the 3rd respondent. He was not released

after his statement as promised but continued to be kept in unlawful detention.

The respondent said the petitioner was arrested because he was stated to be acquainted with the facts of a case of robbery of a gun from Rozella Farm which was being investigated. He wanted the petitioner to accompany him to the Ginigathhena Police Station."

Sharvananda CJ at page401 observed thus –

"The petitioner states that he was arrested on 28.07.1986 when he was travelling in a bus by the 3rd respondent and that he was not informed of the reason of the arrest. The 3rd respondent in his affidavit admitted the incident but stated that he did not arrest the petitioner. According to him he only required the petitioner to accompany him to the Ginigathhena Police Station for questioning and released him after recording the statement at the station. If his action constituted an arrest in the legal sense, implicit in the 3rd respondent's explanation is the admission that he did not give any reason to the petitioner for his arrest. In my view when the 3rd respondent required petitioner to accompany him to the police station and took him to the police station, the petitioner was in law arrested by the 3rd respondent. The petitioner was prevented by

the action of the 3rd respondent from proceeding with his journey in the bus. The petitioner was deprived of his liberty to go where he pleased."

The facts of the above case are quite different from the facts of the present case. Therefore the decision in Namasivayam's case has no application to the present case. Did the police officer attached to the Piliyandala Police Station and the NCPA have any intention to arrest the 2nd and the 3rd petitioners? In this regard, it must be remembered that the District Judge of Colombo had directed the NCPA to implement the order of the District Court. The 6th respondent received the order of the District Court marked 'R1' on 10.06.2012. On receipt of the said order what did the 6th respondent do? He, on the same day, sent a police message to the 1st petitioner asking her to be present at 10.30 a.m. on 13.06.2012 at the NCPA in order to implement the order of the District Court. But the 1st petitioner failed to appear at the NCPA. On 11.06.2012 the 6th respondent sent the police message to the 16th respondent asking him to be present at 10.00 a.m. on 13.06.2012 at the NCPA. The 16th respondent complied with the said order but the order of the District Court of Colombo could not be implemented as the 1st petitioner failed to appear at the NCPA. Thereafter the 6th respondent sent his officers to the house of the 1st petitioner on several occasions, but the officers could not meet her as she was not at home (vide

document marked 'R1a' and 'X1'). Thereafter the 6th respondent, on 20.06.2012, sought the assistance of the 1st respondent to take the 2nd and the 3rd petitioners into custody in order to implement the order of the District Court. The 6th respondent informed the 1st respondent the existence of an order made by the District Court. When WPC 4574 Samanthi went to the house of the 1st petitioner she noticed that the house had been closed. WPC 4574 Samanthi later made inquiries from the neighbourhood and found the 2nd and the 3rd petitioners hiding under a bed in a neighbouring house. The 1st petitioner however appeared at the NCPA on 21.06.2012 when the 2nd and the 3rd petitioners were being handed over to the 16th respondent. The police officers attached to the NCPA had informed the parties that they were only implementing the order of the District Court of Colombo and if the High Court later directs the NCPA to hand over the 2nd and the 3rd petitioners to the 1st petitioner, they would take steps to hand over the 2nd and the 3rd petitioners to the 1st petitioner. Police officers attached to the NCPA after informing the above matters, requested both parties to sign the police book, but the 1st petitioner refused to sign the book. The above behaviour of the 1st petitioner clearly demonstrates that she did not honour the order of the District Court also had acted in defiance of the implementation of the order of the District Court. It is an unwritten rule that the parties to an action must comply with orders of court and the relevant officers (authorities) must and should implement such

orders. If this rule is not implemented, the country cannot function and the law and order cannot be implemented in this country. As I observed earlier the implementation of the order of court has to be done by the police officers when they are directed by Court. When I consider the above facts, I am of the opinion that the police officers attached to the NCPA and the Piliyandala Police Station have only implemented the order of the District Court, but have not arrested the 2nd and the 3rd petitioners and the police officers cannot be found fault with for taking the 2nd and the 3rd petitioners into their custody. For the above reasons, I reject the contention of learned Counsel for petitioners.

Learned Counsel for the petitioners further submitted that when the police officers went to the house of the 1st petitioner, they were carrying weapons and that it was wrong for them to have carried weapons. When the police officers set off for implementation of certain duties they can expect resistance. Therefore one cannot say that it is illegal for the police officers to carry weapons when they go to perform their duties. It is lawful for the police officers to carry lawful weapons issued by the police station when they set out on a journey to do their lawful duties. Therefore no one can find fault with the police officers when they took weapons to take the 2nd and the 3rd petitioners into custody. For the above reasons, I reject the above contention of learned Counsel for the petitioners.

Learned Counsel for the petitioners further contended that keeping the 2nd and the 3rd petitioners at the Piliyandala Police Station for two hours and fifteen minutes after taking them into custody is wrong and that the said act by the police officers has violated the fundamental rights of the petitioners. I now advert to this contention. I have earlier held that the taking of the 2nd and the 3rd petitioners into custody by the police officers attached to the Piliyandala Police Station was lawful and their intention was to implement the order of the District Court. If this was the situation, the Officer-in-Charge, Piliyandala Police Station (the 1st respondent) has to hand over the 2nd and the 3rd petitioners to the Officer-in-Charge of the NCPA. The 1st respondent, in his affidavit, states that upon the 2nd and the 3rd petitioners being brought to the Piliyandala Police Station, he immediately notified the 6th respondent that the 2nd and the 3rd petitioners were in his custody and the 6th respondent sent his officers attached to the NCPA to the Piliyandala Police Station. Thereafter around 7.15 p.m. he handed over the 2nd and the 3rd petitioners to the IP Ratnayake attached to the NCPA. The period that the 2nd and the 3rd petitioners were kept at the Piliyandala Police Station was from 5.00 p.m. to 7.15 p.m. The officers of the NCPA had to travel to Piliyandala from Madiwela. When I consider the above facts, I take the view that the 2nd and the 3rd petitioners were handed over to the NCPA within a reasonable time period and that there was no delay in handing

them over to the NCPA. When I consider all these matters, I am unable to find fault with the procedure adopted by the police officers attached to the Piliyandala Police Station and the NCPA. For the above reasons, I am unable to agree with the above contention of learned Counsel for the petitioners. I further hold that the police officers attached to the both Piliyandala Police Station and the NCPA have not violated the fundamental rights of the 2nd and the 3rd petitioners when they were kept at the Piliyandala Police Station.

Learned Counsel for the petitioners also contended that the police officers attached to the NCPA took the 2nd and the 3rd petitioners who were female children without the assistance of a WPC. It is correct that the 2nd and the 3rd petitioners have been taken to the NCPA from the Piliyandala Police Station without the assistance of a WPC. It would have been better if the female children were given the assistance of a WPC for the said purpose. Was there any opportunity for the police officers to cause any harm to the 2nd and the 3rd petitioners during the travel to NCPA from the Piliyandala Police Station? I now advert to this question. Mangalika the sister of the 1st petitioner, in her affidavit marked 'P12a', states that after the officers of the Piliyandala Police Station took the 2nd and the 3rd petitioners to their custody, she with her mother came to the Piliyandala Police Station and then saw the 2nd the 3rd petitioners seated in the police station. This suggests that Mangalika had not travelled to

the Piliyandala Police Station in the police vehicle with the 2nd and the 3rd petitioners. But WPC 4574 Samanthi who took the 2nd and the 3rd petitioners into custody states in her affidavit that when she was taking the 2nd and the 3rd petitioners to the Piliyandala Police Station, Mangalika too came in the police vehicle. The said averment is supported by her notes marked 'Y1'.

The 6th respondent in his affidavit states that his officers brought the 2nd and the 3rd petitioners from the Piliyandala Police Station to the NCPA with Mangalika. This averment is also supported by notes of IP Ratnayake marked 'R2'. IP Ratnayake is the officer who brought the 2nd and the 3rd petitioners to the NCPA with PS 50197 Sarath. After the said affidavit was filed by the respondent, Mangalika in a separate affidavit, did not counter the above facts. When I consider all the above matters, it is not possible for me to conclude that the 2nd and the 3rd petitioners were brought from Piliyandala Police Station to the NCPA without a female. When I consider the above matters, I hold the view that there was no opportunity for the police officers attached to the Piliyandala Police Station and the NCPA to cause any harm to the 2nd and the 3rd petitioners. For the above reasons, I am unable to agree with the above contention of learned Counsel for the petitioners and hold that there is no material to conclude that the officers attached to the NCPA have violated the fundamental rights of the petitioners. For the above

reasons, I hold that there is no merit in the petitioners' case and further hold that the respondents have not violated the fundamental rights of the petitioners.

For the aforementioned reasons, I dismiss the petition of the petitioners. In all the circumstances of this case I do not order costs.

Petition dismissed.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, CJ.
I agree.

CHIEF JUSTICE

B. P. ALUWIHARE, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

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

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

Noble Resources International Pte Limited,
No. 60, Anson Road, #19-01,
Maple Tree, Anson
Singapore 079914

Petitioner

SC FR No. 394/2015 Vs.

1. Hon. Ranjith Siyambalapitiya,
   Minister of Power and Renewable Energy,
   No. 72, Ananda Coomaraswamy Mawatha,
   Colombo 07.

2. Dr. B.M.S. Batagoda,
   Secretary , Ministry of Power and Energy,
   No. 72, Ananda Coomaraswamy Mawatha,
   Colombo 07
   (Also member of the Standing Cabinet Appointed Procurement Committee)

3. Lanka Coal Company Limited,
   No.51/3, Dutugemunu Street,
   Dehiwala.

4. Ceylon Shipping Corporation,
   MICH Building,
   No. 27, Sir Razik Fareed Mawatha,
   Colombo 01.

5. G.S. Withanage,
   Chairman,
   Standing Cabinet Appointed Procurement Committee,
   Secretary,
   Ministry of Foreign Employment.

6. M.C. Wickramasekara,
   General Manager,
   Ceylon Electricity Board.

7. A.K. Senevirathna,
   Addl. Director General, Dept. of Fiscal Policy

8. G.R.L. Wasantha,
   Director (Finance),
   Sri Lanka Air Force.

9. S.A.N. Saranatissa,
   Additional Secretary (Administration and Procurement) ,
   Ministry of Power and Energy,
   [5th Respondent being the Chairman and the 6th, 7th, 8th and 9th Respondents being the other members of the Standing Cabinet Appointed Procurement Committee SCAPC)]
   <u>All of</u>
   No. 72, Ananda Coomaraswamy Mawatha,
   Colombo 07.

10. D.K.B.S. Thilakasena,
    Chairman,
    Technical Evaluation Committee

    Additional General Manager (Corporate Strategy) Ceylon Electricity Board.

11. S.M.D.M. Dharmapriya,
    General Manager,
    Ceylon Shipping Corporation Ltd.

12. P.K.A. Sisara,
    Manager (Finance),
    Lanka Coal Company (Pvt) Ltd.

13. P.G.P. Indrasiri,
    DGM (LVPS)
    Ceylon Electricity Board.

14. S.M. Piyatissa,
    Addl. Director General,
    Department of National Budget.

15. Duminda Premarathna,
    Deputy Director,
    Board of Investment of Sri Lanka.

16. P.K.Kulatunga,
    AFM (Corporate),
    Ceylon Electricity Board.

17. M.G.A. Goonatileke, Director (Technical),
    Ministry of Power and Energy

18. S.A.R. Jayawardena,
    Manager (Procurement),
    Lanka Coal Company (Pvt) Limited.

    [10th Respondent being the Chairman and the 11th to 18th Respondents being members of the Technical Evaluation Committee (TEC)]

    No. 72, Ananda Coomaraswamy i Mawatha,
    Colombo 7.

19. Retd. Justice Hector Yapa

20. P.A. Prematilaka

21. C. Maliyadda

    [19th Respondent being the Chairman and the 20th and 21st Respondents being members of the Procurement Appeals Board (PAB)]

    All of
    Procurement Appeals Board ,
    Presidential Secretariat,
    Colombo 1.

22. Swiss Singapore Overseas Enterprises Pte Limited
    65 Chulia Street #48-05
    OCBC Centre
    Singapore 049513

23. SUEK AG
    Vadianstrasse 59
    9000, St. Gallen
    Switzerland

24. Trafigura Pte Limited
    10 Collyer Quay
    #29-00
    Ocean Financial Centre
    Singapore 049315

25. Adani Global Pte Limited
    80, Raffles Place
    #33-20
    UOB Plaza II
    Singapore 048624

26. Liberty Commodities Limited
    7, Hertford Street London WIJ 7RH
    United Kingdom

27. H E Maithripala Sirisena
    Minister of Defence and Mahaweli
    Development and Environment

28. Hon. Ranil Wickramasinghe,
    Minister of Policy Planning and Economic
    Affairs, Child, Youth and Cultural Affairs.

29. Hon. John Amarathunga,
    Minister of Tourism Development and
    Christian Religious Affairs

30. Hon. Gamini Jayawickrame Perera,
    Minister of Sustainable Development
    and Wild life,

31. Hon. Nimal Siripala de Silva,
    Minister of Transport

32. Hon. Mangala Samaraweera
    Minister of Foreign Affairs

33. Hon. S.B. Dissanayake,
    Minister of Social Empowerment
    and Welfare

34. Hon. W.D.J. Seneviratne
    Minister of Labour and Trade
    Union Relations

35. Hon. Lakshman Kiriella
    Minister of University
    Education and Highways

36. Hon. Rauff Hakeem
    Minister of City Planning and Water Supply

37. Hon. Anura Priyadharshana Yapa
    Minister of Disaster Management

38. Hon. Susil Premajayantha
    Minister of Science, Technology and Research

39. Hon. Thilak Marapana
    Minister of Law & Order and Prison Reforms

40. Hon. (Dr.) Rajitha Senaratne, Minister of Health, Nutrition and Indigenous Medicine

41. Hon. Ravi Karunanayake,
Minister of Finance

42. Hon. Mahinda Samarasinghe
Minister of Skills Development and Vocational Training

43. Hon. Vajira Abeywardena
Minister of Home Affairs

44. Hon. S.B. Navinne
Minister of Internal Affairs, Wayamba Development and Cultural Affairs

45. Hon. Rishad Bathiudeen
Minister of Industry and Commerce

46. Hon. Patali Champika Ranawaka
Minister of Megapolis and Western Development

47. Hon. Mahinda Amaraweera
Minister of Fisheries and Aquatic Resources Development

48. Hon. Navin Dissanayake
Minister of Plantation Industries

49. Hon. Duminda Dissanayake
Minister of Agriculture

50. Hon. Vijith Vijayamuni Zoysa
Minister of Irrigation and Water Resources Management

51. Hon. (Dr.) Wijayadasa Rajapaksa
Minister of Justice and Buddha Sasana

52. Hon. P. Harison
Minister of Rural Economy

53. Hon. Kabir Hashim
Minister of Public Enterprises Development

54. Hon. Ranjith Madduma Bandara
Minister of Public Administration and Management

55. Hon. Gayantha Karunathilaka
    Minister of Parliamentary Reforms and Mass Media

56. Hon. Sajith Premadasa
    Minister of Housing and Construction

57. Hon. Arjuna Ranatunga
    Minister of Ports and Shipping

58. Hon. M.K.A.D.S. Gunawardana
    Minister of Lands

59. Hon. U. Palani Digambaram
    Minister of Hill Country New Villages, Infrastructure and Community Development

60. Hon. (Mrs) Chandrani Bandara
    Minister of Women and Child Affairs

61. Hon. (Mrs) Thalatha Atukorala,
    Minister of Foreign Employment,

62. Hon. Akila Viraj Kariyawasam
    Minister of Education,

63. Hon. M.H.A. Haleem,
    Minister of Posts, Postal Services and Muslim Religious Affairs

64. Hon. Faizer Musthapha P.C.
    Minister of Provincial Councils and Local Government,

65. Hon. D.M.Swaminathan,
    Minister of Rehabilitation, Resettlement and Hindu Religious Affairs,

66. Hon. Chandima Weerakkody
    Minister of Petroleum Resources Development,

67. Hon. Dayasiri Jayasekara,
    Minister of Sports,

68. Hon. Sagala Ratnayake,
    Minister of Southern Development,

69. Hon. Harin Fernando,
    Minister of Telecommunication and Digital Infrastructure

70. Hon. Mano Ganesan
Minister of National Dialogue,

71. Hon. Daya Gamage
Minister of Primary Industries,

72. Hon. Malik Samarawickrema
Minister of Development Strategies and Internal Trade
[27th to 72nd Respondents being Members of the Cabinet of Ministers]

All of

Office of the Cabinet of Ministers
Republic Building
Sir Baron Jayatilake Mawatha,
Colombo 1.

73. Mr. Sumith Abeysinghe
Secretary to the Cabinet of Ministers
Office of the Cabinet of Ministers
Republic Building,
Sir Baron Jayatilaka Mawatha,
Colombo 1.

74. Ceylon Electricity Board,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 1.

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

Respondents

BEFORE : K**.** Sripavan, C.J.
P. Dep, P.C., J.
Upaly Abeyrathne, J.

COUNSEL Romesh de Silva P.C. with Maithree Wickramasinghe P.C., Sugath Caldera and Suren de Silva instructed by H. Chandrakumar de Silva for Petitioner

S. Rajaratnam P.C., Additional Solicitor General with Yuresha de Silva and Dr. Avanti Perera Senior State Counsel for the 1st, 2nd, 4th, 5th, 7th, 8th, 9th, 11th, 14th, 17th, 27th to 75th Respondents

Sanjeewa Jayawardena P.C. with Rajeev Amarasuriya and Charitha Rupasinghe for the 3rd Respondent.

Faisz Musthapha, P.C. with Faizer Makar and Ms. Thushani Machado for the 6th , 10th, 13th, 16th and 74th Respondents.

Ikram Mohamed P.C. with Roshan Hettiarachchi and Charith Jayawickrama for the 19th , 20th and 21st Respondents instructed by Mr. G.G. Arulpragasam.

R. Arsecularatne P.C. with Riad Ameen, Sasheen Arsecularatne, Pradeepa Balendran, Udara Muhandiramge, Thejitha Koralage,Nimeshika Patabendige and M. Perera for the 22nd Respondent.

Chandimal Mendis with Viraj Vithanage for the 26th Respondent.

ARGUED ON : 16.03.2016; 25.05.2026 and 02.06.2016

WRITTEN SUBMISSIONS FILED ON :
28.03.2016 - Petitioner
20.05.2016 - 1st , 2nd , 4th , 5th , 7th ,8th. 9th, 11th, 14th , 17th , 27th – 75th Respondents.
28.03.2016) - 6th, 10th, 13th, 16th & 74th
20.05.2016) Respondents.

28.03.2016) - 22nd Respondent
24.05.2016) -

DECIDED ON : **24. 06.2016**

K. SRIPAVAN, C.J.,

The Petitioner is a Company incorporated under the laws of Singapore and has its registered Office and /or principal place of business in Singapore. The Petitioner pleads that it has supplied coal to the Third Respondent since November 2010. The Petitioner further alleges that there has never been any complaint of the quality of the coal supplied and/or late delivery of coal to the Third Respondent.

In this backdrop, the Petitioner states that the Standing Cabinet Appointed Procurement Committee (hereinafter referred to as "SCAPC") extended an invitation on behalf of the Third Respondent to submit a bid for the supply of coal for the 900MW Puttalam Coal Power Plant (hereinafter referred to as the "Plant"). The Petitioner submitted its bid on 8th April 2015 in accordance with the provisions of the Bid documents together with the Bid security. The Petitioner claimed that its bid was the lowest and the tender be awarded in accordance with the evaluation procedure contained in the Bid document which the Technical Evaluation Committee (hereinafter referred to as the "TEC") and the SCAPC were required to follow. However, the Petitioner claims that the decision to award the tender not to the Petitioner but to the 22nd Respondent was ex-facie:-

(a) Unlawful;
(b) Unreasonable and irrational;
(c) Violative of the Petitioner's legitimate expectations;
(d) In gross violation of the tender procedures;
(e) Violative of the Petitioner's fundamental rights;
(f) Contrary to the terms and conditions of the Bid document; and
(g) the Procurement Guidelines and the Procurement Manual marked **X6** and **X6d** respectively.

On 02.11.2015 Court granted leave to proceed for the alleged violation of the Petitioner's fundamental rights guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution by the 1st to 21st and 27th to 74th Respondents. When the application was taken up for hearing on 16.03.2016, Mr. S. Rajaratnam , Additional Solicitor General, raised the following two preliminary objections on the ground that the Petitioner does not have locus standi to invoke the jurisdiction of this Court under Article 126 of the Constitution :

(1) That the Petitioner is a Company registered under the laws of Singapore has invoked the jurisdiction of this Court all by itself without a local agent, representative or an Attorney at Law enjoining him as a Petitioner.
(2) That the affidavit submitted in support of the Petition is from a Director of the Petitioner Company who has affirmed or sworn the affidavit in Hong Kong before the Justice of Peace based in Hong Kong for the said affidavit to be accepted as a

testimony before this Court without recourse to the mechanism set out in the Consular Functions Act No. 04 of 1981.

The Parties filed their written submissions on the Preliminary Objections raised. While I must acknowledge with gratitude my indebtedness to the learned Counsel for the great assistance rendered, the Court has to examine the arguments objectively and dispassionately. The Court is mindful that the fundamental rights provisions in the Constitution must be interpreted having regard to the constitutional objectives and goals and in the light of the action taken by the Governmental Authority at a given point of time. As it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it in accordance with the provisions of the Constitution and the law, the Court cannot close its eyes and allow the actions of the State or the Public Authority go unchecked in its operations, in the public interest. If the Petitioner with a good case is turned away, merely because he is not sufficiently affected or the Petitioner has no "locus standi" to maintain this application, that means that some Government Agency is left free to violate the law and this is not only contrary to the public interest but also violate the Rule of Law, the object of which is to protect the citizens from unlawful governmental actions. It will be a travesty of justice if, having found as a fact that a fundamental right has been infringed or is threatened to be infringed, the Court yet dismisses the application on a preliminary objection raised by the Respondents. This Court has been given power to grant relief as it may deem just and equitable. The Court therefore decided to go into the merits of the case as some of the events that took place, in the award of the tender to the 22nd Respondent shocks the conscience of the Court, especially when the awarding of the tender involves "public funds".

The Government Procurement Guidelines – 2006 (**X6)** under the heading "Detailed Bid Evaluation" in Clause 7.9.10 states thus :-

> "7.9.10- Bids shall be first evaluated strictly according to the criteria and methodology specified in the bidding documents and such evaluated Bids shall be compared to determine the lowest evaluated substantially responsive Bid."

The TEC had recommended to SCAPC "The lowest Evaluated Delivered Price per MT (at the jetty of the Plant) has been made by NOBLE RESOURCES INTERNATIONAL PTE LTD," as evidenced by the document marked **X7(b)**. Out of the nine Members of the TEC, eight Members have signed the said document **X7(b).**

Thereafter, on 15.06.2015, the SCAPC held a meeting at which the Members of TEC decided to invite Noble Resources International Pte Ltd. for a clarification on "parcel size" (Vide **X7A**). At the subsequent meeting with the Petitioner, on 17.06.2015 the SCAPC requested the Petitioner to submit further discounts on the pricing. On 18.06.2015, Petitioner wrote a letter to the Third Respondent regretting that no further discounts would be offered on the price. (Vide **X8).** The Petitioner states that having confirmed to the Petitioner at the Meeting held on 17.06.2015, that the Petitioner was the party that had submitted the responsive lowest bid, the Petitioner received a letter dated 06.07.2015 informing that the SCAPC has recommended that the Bid be awarded to the 22nd Respondent (Vide **X9**).

The Petitioner claims that minutes of the SCAPC Meeting held on 29.06.2015 (**X10**) shows that SCAPC received a letter dated 29.06.2015 from the 22nd Respondent and a Meeting of SCAPC was convened on the same day and directed the TEC to re-evaluate the Bids ignoring steps 1.3 and 1.4 of the Evaluation Procedure contained in Clause 5.4 of "Instructions to Bidders (ITB)" and to report back to the SCAPC.

Learned President's Counsel for the Petitioner drew the attention of Court to the Bidding Document for the supply of coal for Lakvijaya Power Plant marked **X2.** Clause 2.3 of **X2** which deals with the "Amendment of Bid Documents" reads thus :-

> ***"At any time prior to the deadline for submission of Bids,*** *LCC may, for any reason, whether at its own initiative or in response to a clarification requested by a prospective Bidder, amend the Bid Documents by issuing an Addendum. Notice of any amendments will be made available in writing and electronically by email (confirmed by telefax) or telefax to all prospective Bidders who have purchased the Bid Documents and will be binding on them. Bidders are required to immediately acknowledge receipt using the Addendum Receipt provided in Annex A 6 for any such amendment. It will be assumed that the information contained therein will have*

been taken into account by the Bidder in the Bid.

In order to afford prospective Bidders reasonable time in which to take the amendment into account in preparing their Bid, LCC may, at its discretion, extend the deadline for the submission of Bids to provide at least a period of two (2) weeks from the date of last amendment if required." (emphasis added)

Counsel also drew the attention of Court the "Evaluation Criteria" referred to in Clause 5.3.20 of the Government Procurement Guidelines – 2006 (**X6)**. The said Clause is reproduced below for convenience

"5.3.20 *(a) If Bids based on alternative designs, materials, completion schedules, payment terms, etc., are permitted, conditions for their acceptability and the method of their evaluation shall be expressly stated.*

(b) ***The disclosed criteria shall not be modified or additional criteria shall not be introduced during evaluation."*** (emphasis added)

These Clauses which have been brought in, in the Bid Document and the Government Procurement Guidelines in order to provide safeguards to all Bidders and to ensure transparency, justice and equality of treatment in evaluating Bids have to be strictly observed by the SCAPC. It postulates that **no one**, neither the State nor the SCAPC shall act contrary to the Bid Documents and the Government Procurement Guidelines. It is of utmost importance that all the necessary safeguards laid down therein should be complied with fully and strictly and any departure from them make the evaluation process void. Procedural safeguards which are so often imposed for the benefit of persons affected by the exercise of administrative powers are normally regarded as mandatory so that it is fatal to disregard them.

Fernando J. in the case of *Jayawickrama* Vs. *Prof. W.D. Lakshman, Vice Chancellor, University of Colombo and Others* (1998) 2 S.L.R. 235 at 249, while making an order against the

Postgraduate Institute of Medicine noted as follows:-

> *"As of now, this Court must proceed on the basis that the purpose of regulations 5.3(b) was to enable aspiring Consultants to acquire some knowledge, skill or experience which local training could not provide. …*
> *It is true that the regulations can be amended. But even the authority which made the regulations is bound by them, unless and until they are duly amended; and* ***disregarding its own regulations is not a method by which that authority can amend them."*** (emphasis added)

Thus, it is the duty of the SCAPC to comply with the conditions and the Clauses referred to the Bid Documents and the Government Procurement Guidelines. The SCAPC cannot disregard Clause 2.3 of the Bid document, which specifically states that the amendments to the Bid document may be done at any time prior to the deadline for submission of Bids and not during the evaluation of the Bids. Even such an amendment had to be made by the Third Respondent and by nobody else. If SCAPC while exercising its power of evaluation of Bids exceeds its authority or if the power is exercised without authority the purported exercise of power may be pronounced invalid. The authority or power given to SCAPC must be exercised (i) in good faith (ii) for the purposes for which they are given and not for any extraneous purpose; and (iii) with due regard to relevant considerations and without being influenced by irrelevant considerations.

The SCAPC has failed to satisfy the aforesaid requirements as the SCAPC directed the TEC to re-evaluate the Bids ignoring steps 1.3 & 1.4 of the Evaluation Procedure and I have no alternative but to declare the decision of the SCAPC to award the tender to the 22nd Respondent cannot stand valid in the eye of the law.

Mr. Romesh de Silva, P.C. brought to the notice of Court to Clause 5.5 of the Bidding document (ITB) marked **X3** which reads as follows:-

> "*Subject to Clause 5.2 no Bidder shall contact LCC or* ***any other person or organization involved on any matter relating to its Bid,*** *from the time of the opening*

of Bids to the time the Contract is awarded.

Any effort by a Bidder to influence LCC in LCC's Bid evaluation, Bid comparison or Contract Award decisions may result in rejection of the Bid." (emphasis added)

The document **X10** indicates that SCAPC received a letter dated 29.06.2015 from the 22nd Respondent. This shows that the 22nd Respondent has contacted the SCAPC after the opening of the Bids. The Chairman and Managing Director of the 3rd Respondent by his Affidavit dated 24th November 2015 states that he received a letter dated 30.06.2015 **(3R5)** issued on behalf of the 2nd Respondent forwarding a copy of the minutes of the SCAPC whereby a decision was taken by SCAPC to direct the TEC to re-evaluate the bids received. When the said letter was issued to the 3rd Respondent for his information and necessary action by letter dated 02.07.2015 marked **3R6,** he responded as follows:-

3R6

"TOP URGENT (PRIVATE & CONFIDENTIAL)

My No. LCC/MD/15/078
July 02nd, 2015
Secretary
Ministry of Power & Energy
No. 80, Sir Ernest de Silva Mw
Colombo-07.

Dear Sir,

Sub: Procurement of Coal for Lakvijaya Power Plant (900MW) – Puttalam

I am in receipt of your letter No: PE/TEN/SCAPC/SS/2014/38 dated 30.06.2015, and have drawn my attention to 1st para of main observations made in the said letter.

I am shocked that the SCAPCwhich has carefully scruitinized the LCC bid document [para 2 of "Main Observations Made" has not seen the Clause 5.5 of the LCC bid document (ITB Page – 19)]

5.5 – Contacts with LCC

"Subject to Clause 5.2, no Bidder shall contact LCC or any other person or organization involved on any matter relating to its Bid, from the time of the opening of Bids to the time the Contract is awarded.

Any effort by a Bidder to influence LCC in LCC's Bid evaluation, Bid comparison or Contract Award decision organization in any matter relating to its bids shall be rejected from the bid.

Accordingly, if one carefully reads the LCC bid document, any bidder who contacts LCC or any other person or organization in any matter relating to its bids shall be rejected from the bid."

Therefore, you are well aware that these matters may end-up before the Procurement Appeal Board (PAB) as per section 8.3 of the Procurement Guide Lines – 2006 in such event, these violations shall only strengthen the case of a prospective bidder.

The SCAPC is well aware that during this tender, LCC had already called for 02 Pre-Bid Meetings and the bidders submitted a considerable amount of queries which was replied by the TEC to the best of their ability.
As you are aware, LCC has done everything possible to conduct a very fair and transparent tender. This has been commended by one of the bidders as a very transparent tender.

Accordingly, at meeting No. 12 of the SCAPC, and the observations made in para 02 & 03 of the said observations clearly indicated that the financial proposals were opened on the 11th of June, 2015 and the TEC expeditiously submitted its final report on 13th June 2015 . This was mainly done due to the urgent need of the procurement, as we have been already indicated that there is a possibility of a short fall of coal by mid of September.
Further, I wish to bring to your kind attention that the Non-interpretation of the tender Documents will bring disrepute to the SCAPC and the Minister of Power & Energy.
On the 16th of June, 2015, Hon. Udahya Gamanpila had made a false accusation regarding the present procurement. We were able to answer the said allegations on the instructions of the Hon. Minister as we had followed a very transparent process. Herewith I annexed the said articles and my reply. (sic)
Therefore, I kindly urge you to take all the above matters into serious consideration, when evaluating this tender. **As any deviation will bring serious allegation** to the MOPE and the Minister at this crucial stage. (emphasis added)

Thanking you,
Yours faithfully,
LANKA COAL COMPANY 9PVT0 LTD.

Sgd. Maithri Gunaratne,
Chairman/Managing Director

Copies to Mrs Indrani Vithanage, SAS(Tenders) – MOPE
Mr. G.S. Withanage, Secretary- Ministry of Foreign Employment
Dr. B.m.s. Batagoda, Secretary – MOPE
Mr. A.K. Senevirathne, Addl. Director General – Dept. of Fiscal Policy
Mr. M.C. Wickremasekara, General Manager – CEB
Mr. S.A.N. Saranatissa, Addl. Secretary (Admin & Proc.) – MOPE
Mr. D.KB.S. Thilakasena, AGM (Corporate Strategy) – CEB
Mr. S.A.R. Jayawardene, Manager (Procurement) – LCC "

The SCAPC if at all, should have proceeded to reject the bid of the 22nd Respondent for violating Clause 5.5 of ITB. Instead, it evaluated the Bids, based on the recommendation of the TEC taking into consideration the letter sent by the 22nd Respondent. When the act of

SCAPC was in excess or abuse of the power granted to it, it has made an obvious and palpable error which makes its determination as one made without jurisdiction. I would like to re-iterate the observations made by Sharvananda J. in the case of *Sirisena & Others* Vs. *Kobbekaduwa,* Minister of Agriculture and Lands 80 N.L.R. page 1 at page 169.

> *"Rule of law is the very foundation of our Constitution and the right of access to the Courts has always been jealously guarded. Rule of Law depends on the provision of adequate safeguards against abuse of power by the executive. Our Constitution promises to usher in a welfare state for our country. In such a state, the Legislature has necessarily to create innumerable administrative bodies and entrust them with multifarious functions. They will have power to interfere with every aspect of human activity. If their existence is necessary for the progress and development of the country the abuse of power by them,* ***if unchecked, may defeat the legislative scheme and bring about an authoritarian or totalitarian state. The existence of the power of judicial review and the exercise of same effectively is a necessary safeguard against such abuse of power."*** (emphasis added)

Having given my anxious consideration to the contentions raised on behalf of the parties, I consider the act or decision made by the SCAPC was outside its jurisdiction and therefore becomes null and void for all purposes

The Petitioner preferred an appeal dated 10th July 2015 (X**12)** to the Procurement Appeal Board (hereinafter referred to as the PAB) in terms of Clause 8.3 of the Procurement Guidelines – 2006 **(X6)**, against the recommendation of SCAPC, inter alia, stated as follows:-

> *"Any changes to the Bid Document (including amending any part of ITB Clause 5.4 of the Bid Document and/or amending or dispensing with any part of the Evaluation Procedure contained in Clause 5.4 of the ITB of the Bid document or any other part of the Bid Document) after the deadline of the submission of Bids (i.e., after April 8, 2014) would be :-*
>
> *(a) a violation of the Fundamental Right of Equality of Law enshrined in Article 12(1) of the Constitution available to every Bidder;*
>
> *(b) a breach of ITB Clause 2.3 of the Bid Document;*
>
> *(c) a breach of ITB Clause 5.4 of the Bid Document; and ……"*

Even though the PAB invited the Petitioner to be present for a hearing before the PAB on 3rd August 2015 **(X16)**, it did not hear the Petitioner in view of certain allegations set out in a newspaper as to the integrity and impartiality of the Members of the PAB. However, the Ministry of Power and Energy responded to the said newspaper article and claimed that the said allegations were not made by the Second Respondent. The Petitioner by letter dated 7th September 2015 marked **X23** wrote to the Chairman and Members of the PAB as follows:-

> *"This is with reference to our above captioned appeal dated 10th July 2015 and the hearing which was to be held at 1 P.M. on 3rd August 2015 before the Procurement Appeals Board at the Presidential Secretariat.*
>
> *We were present at the said hearing at 1 P.M. on 3rd August 2015 along with our legal Counsel. However, no hearing was held and we were informed by the Procurement Appeals Board at the Presidential Secretariat that a communication on the matter would be sent to us.*
>
> *We have not yet received any such communication and would be grateful if we were informed as to the status* ***on the hearing of our appeal.***
>
> *Thanking you."* (emphasis added)

The Petitioner in the meantime received a letter dated 07th September 2015 marked **X24** requesting the Petitioner to extend the validity periods of the Bid Security up to 9th November 2015 and the Bid up to 9th October 2015. In compliance with the said letter sent by the Third Respondent, the Petitioner extended the validity periods as requested and as evidenced by the document marked **X25.**

Learned Counsel for the Petitioner contended that the PAB having provided an opportunity to the Petitioner to make representations coupled with a hearing in support of its appeal did not give that opportunity thereafter. The attention of Court was drawn to Clause 8.4.1(b) of the Government Procurement Guidelines -2006, which reads as follows:-

> *"After investigating into such representations, the Appeal Board shall submit its independent report to the Cabinet of Ministers, with copy to the Secretary of the Line Ministry and such report shall*
>
> *(i) provide their reasons for endorsement of the decision of the Cabinet Appointed Procurement Committee; or*

(ii) *for rejecting same together with their independent recommendation of contract award."*

It therefore postulates that an investigation into the representation of the Petitioner by the PAB is a condition precedent to a decision by the PAB. Having given an expectation that the Petitioner would be heard before the PAB, it would make it unfair or inconsistent with good administration to deny the Petitioner such a hearing. It also noted that no reply was sent to the letter marked **X23** informing the Petitioner that no hearing would be given as indicated in the letter marked **X16**. In exceptional cases of urgency and emergency where an immediate, prompt and preventive action is urgently required to be taken, the principles of natural justice need not be complied with. Thus, where a dangerous building is required to be demolished to save human lives or where a dangerous and desperate person is required to be detained, or where a Passport is required to be impounded in the public interest a pre-decisional hearing may not be necessary. In *Mohinder Singh Gill* Vs. *Chief Election Commissioner of India* [(1978) AIR SC 851 at 871, 872] the Election Commissioner, pursuant to the report submitted by the Returning Officer about violence at election, cancelled the poll in the exercise of his powers under Article 324 of the Constitution. Before the cancellation no hearing was given to the persons who were candidates at the election. The said action was challenged as being in violation of the rules of natural justice. Upholding the contention, Krishna Iyer, J. observed:-

> "*Once we understand the soul of the rule as fair play in action, we much hold that it extends to both the fields. After all, administrative power in a democratic set up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is flexible, pragmatic and a relative concept not a rigid, ritualistic and sophisticated abstraction. It is not a bull in a China shop, nor a bee in one's bonnet.* ***Its essence is good conscience in a given situation; nothing more but nothing less."*** (emphasis added)

The terms "fairness of procedure", "fair play in action", "duty to act fairly" are used as alternatives to "natural justice". But Prof. Paul Jackson [Natural Justice – 2nd Edition – page

11] points out that such phrases may sometimes be used to refer not to the obligation to observe the principles of natural justice, but on the contrary the standard of behavior the Courts are required to be followed even in circumstances where the duty to observe natural justice is inapplicable. Thus, the Courts apply the broader notion of "fairness" and "fair procedure" than the "duty to act judicially". In the leading case of *Kesava Mills Co.* Vs. *Union of India* [(1973) AIR SC 389] Mukherjea J. rightly stated that the administrative authority concerned should act fairly, impartially and reasonably. The legitimacy of an action/expectation can be inferred if it is founded on the sanction of law or custom or established practice or procedure in regular or natural sequence, otherwise, it would betray the expectation of the Petitioner to present his appeal before the PAB. Whilst the PAB had finally recommended to the Cabinet of Ministers to cancel the tender and to call for international bids again, I am of the view that the PAB was duty bound to act fairly and reasonably in dealing with the rights and/or interests of the people and in case of any breach thereof the Court should act upon in striking down, any order made by the PAB in the exercise of the Courts' jurisdiction and direct the concerned authorities to exercise its functions fairly, reasonably in compliance with the Guidelines, the established practice or procedure and in accordance with legal and constitutional provisions.

Hence, having given an expectation to the Petitioner, the failure on the part of the PAB to afford a hearing to the Petitioner is in violation of the principles of "natural justice". As I have observed above, if the PAB had considered the appeal of the Petitioner, without giving the Petitioner an opportunity of being heard, any decision taken by the PAB as evidenced by **X30** would be in violation of the *audi alteram partem* rule, which is the quest of justice under the rule of law and has been considered a universally and most spontaneously acceptable principle, render the decision made by the PAB bad in law. Paragraph 3 of page number three of the Report of the PAB states that the decision not to inquire the appeals is due to a report published in a newspaper. This is not acceptable and it is not proper for not holding any inquiry as this is a tender of National importance. The Court is of the view that if the Appeal Board has given a chance to submit oral submissions to all the concerned parties a justifiable and correct decision could have been arrived at.

The First Respondent in its Cabinet Memorandum dated 16th September 2015 **(X26),** inter alia, states at paragraph 4 as follows:-

> *"As per the provisions under Section 8.3 of the Procurement Guidelines, the unsuccessful bidders were allowed to appeal against the decision taken by the Board with respect to this tender. The Appeal Board after consideration of these appeals has recommended to the Cabinet of Ministers* ***to cancel the tender*** *and request international bids again to select a suitable bidder."*

It would appear from the Cabinet Memorandum **X26** which is also marked as **5R1**, approval of the Cabinet of Ministers was sought to award the tender to the lowest evaluated responsive bid submitted by M/s. Swiss Singapore International Company Ltd. (22nd Respondent), One does not known whether after the removal of the two evaluation criteria, namely, step 1.3 and step 1.4 contained in Clause 5.4 of ITB, the 22nd Respondent becomes the lowest evaluated responsive bidder. I have already held that those two steps referred to in Clause 5.4 of ITB should not have been ignored after the opening of the Bids violating Clause 5.3.20 of the Government Procurement Guidelines – 2006. The Cabinet of Ministers without knowing that the evaluation criteria has been modified by the SCAPC after the opening of the bids, directed the Secretary, Ministry of Power and Renewable Energy to take action to enter into a contract for a quantity of Coal required for one year with the Bidder recommended by the SCAPC.

The Cabinet Memorandum marked **5R1** filed along with the Affidavit of the 5th Respondent dated 30th October 2015 inter alia, states thus:-

> *"In this context, the SCAPC before taking a decision in this instance has taken a policy approval from the Cabinet of Ministers, a recommendation from the Hon. Attorney-General on legal issues and has done a careful technical study on scientific matters before arriving at a decision.*
>
> *In spite of this, it appears that the Procurement Appeal Board has not considered any of these facts which has been carefully submitted by the TEC and the* SCAPC. In

addition, the Appeal Board **has not given any opportunity to submit any scientific and technical clarifications when considering the appeals to any party.** In this instance also the Appeal Board has recommended to cancel the tender.

……

The Procurement Appeal Board has stated that the SCAPC has changed the conditions of the tender as the second reason which is not correct. ***The SCAPC has only interpreted the conditions stated in the bid bond without changing any of the tender conditions."*** (emphasis added)

Thus, the Cabinet Memorandum too found fault with the PAB for not affording an opportunity of hearing to the parties concerned. Learned President's Counsel for the 22nd Respondent also submitted that the failure to give a hearing violated the principles of natural justice.

This Cabinet Memorandum misled the Cabinet of Ministers where in fact the SCAPC at its Meeting held on 29.06.2015 directed the TEC to re-evaluate the tenders without taking into consideration steps 1.3 and 1.4 for the evaluation of bids. A direction by the SCAPC to TEC to drop Steps 1.3 and 1.4 cannot by any means equated to interpretation of the conditions stated in the bid bond. Thus, the Cabinet decision taken on the Memorandum marked **5R1** was obtained by misleading the Cabinet of Ministers. The decision taken by the Cabinet of Ministers on 22.09.2015 marked **5R2** cannot be considered as a valid decision, in so far as it relates to the entering into a contract for one year with the bidder recommended by the SCAPC.

When specific provisions are laid down in the Government Procurement Guidelines – 2006 and in the Bid Documents, the rule of law will imply that the requirements of those provisions are not violated. The power of the State is conferred on the Members of the SCAPC and the PAB to be held in trust for the benefit of the public. The Supreme Court being the protector and guarantor of the fundamental rights cannot refuse to entertain an application seeking protection against infringement of such rights. The Court must regard it as its solemn duty to protect the fundamental rights jealously and vigilantly. It has an important role to play not only preventing or remedying the wrong or illegal exercise of

power by the authority but has a duty to protect the nation in directing it to act within the framework of the law and the Constitution.

Preliminary Objection raised by the State

The first Preliminary Objection of the learned Additional Solicitor General was that the Petitioner Company has no locus standi to have and maintain this application in as much as the Petitioner Company is incorporated in Singapore has invoked the jurisdiction of this Court by itself without a local agent, representative or an Attorney-at-Law.

In the case of *Environmental Foundation Ltd.* Vs. *Urban Development Authority* (2009) 1 S.L.R. 123, an objection was raised on the ground that as the Petitioner was an incorporated Company it was not entitled to the protection afforded under Article 12 as it was available on to persons and Article 14 was available only to citizens. S.N.Silva, C.J. observed that "persons" as appearing in Article 12(1) should not be restricted to "natural" persons but extended to all entities having legal personality. The Court further held "although Counsel contended that Article 14(1) should be read differently in view of the reference to a "citizen" that distinction does not carry with it a difference which would **enable a Company incorporated in Sri Lanka** to vindicate an infringement under Article 12(1) and disqualify it from doing so in respect of an infringement under Article 14(1)". Thus Mr. Faisz Musthapha argued that the Court extended the protection afforded under Articles 12(1) and 14(1) only to incorporated companies in Sri Lanka. (emphasis added). I am in agreement with his submissions.

Dr. Amerasinghe, J. in the case of *Pamkaya (M) SND BHD(appearing by its Attorney, Hemachandra and another) Vs. Liyanarachchi, Secretary, Ministry of Transport and Highways and Another* (2001) 1 S.L.R. 118 at 122 noted as follows:-

> *"However, the third reason, namely the failure to submit the Certificate of Registration of the local agent was in my view, a valid ground for the rejection of the Bid of General & Railway Supplies (Pvt) Ltd, albeit not, as stated by the Committee under Clause 4, but in terms of Clause 29 of "Instruction to Bidders". Clause 29 states that all persons who act as an agent or sub-agent, representative or nominee for or*

on behalf of any bidder are required to register themselves before submission of Bids with Registrar of Contracts, Sri Lanka as required by Public Contracts Act No. 3 of 1987. The Certificate of Registration should be submitted with the Bid. The Bids of Bidders who fail to submit this Certificate shall be rejected."

The underlying principle is that the Award of the tender must be based on compliance with the terms and conditions of the tender documents on the date and at the time specified for the closing of the tender. An offer that does not comply with the terms, conditions and specifications at that time and date must be rejected in the same way as a later offer. It must be noted that the 2nd Petitioner in this case was a Company registered in Sri Lanka and the first Petitioner was registered as the Agent, Sub-agent, representative or nominee of the Company in terms of the Public Contracts Act No. 3 of 1987.

The Bidding Document containing the Instructions to Bidders **(X3**) in Clause 1.1 specifically provides that the provisions of Public Contracts Act No. 3 of 1987 (hereinafter referred to as "PCA") is applicable to this procurement. In terms of Section 6 of the PCA the duties of the Registrar, inter alia, includes:-

(a) to register

(i) every tenderer or ever person who acts as an agent, sub-agent, representative or nominee for and on behalf of such tenderer;

(ii) every public contract

Clause 2(2) of the regulations framed under PCA reads thus:-

"Where :-

(a) any person is registered as an agent, sub-agent, representative or nominee for or on behalf of any tenderer; and

(b) a Public Contract is registered,

a Certificate of Registration, in such form as specified in Form PCA 3 and PCA 4 and set out in the First Schedule to these Regulations shall be issued by the Registrar.

Provided, however, the Certificate of Registration, to any person who is registered as an agent, sub-agent, representative or nominee for or on behalf of any tenderer, shall be issued by the Registrar, subject to the condition, that such person shall

apply for registration of the public contract in the performance in respect of which he was appointed as agent, Sub-agent, representative or nominee for or on behalf of the tenderer, within sixty days of the award of such public Contract to the tenderer. (emphasis added)

The proviso to Clause 2(2) necessarily implies as a pre-condition that unless there is an agent, sub-agent, representative or nominee for or on behalf of any tenderer and registered, he cannot subsequently apply for registration of the Public Contract within Sixty days of award of such Contract to the tenderer. Thus, it is mandatory that there has to be a registered agent or sub – agent or representative or nominee on behalf of a tenderer.

The Bid document presented by the Petitioner's Bid proposal marked **X5a** dated 2nd April 2015, was submitted by the Petitioner's authorized signatory, Mr. Manish Dahiya in his capacity as the Executive Director. His signature has been witnessed by two others, namely, Mr. Girish Koulgi, Vice President and Mr. Nikesh Pathak, Manager. Thus, the Petitioner Company has tendered its bid through an authorized signatory which would attract the provisions of the Public Contracts Act No. 3 of 1987 which makes it mandatory the registration of its agent, sub-agent, representative or nominee on behalf of the tenderer.

Section 9(2) of PCA provides that no person required to be registered under Section 8 shall have any dealing directly or indirectly, relating to a Public Contract with any Member of a Public Body, a Technical Committee, Tender Board or Evaluation Board without first producing a valid Certificate of Registration under PCA. For purposes of PCA "tenderer" means a Company of Firm incorporated or registered or has its principal place of business outside Sri Lanka. It is such a registered person as an Agent, sub-agent, representative or nominee for and on behalf of the Petitioner Company is entitled to institute action in terms of Article 126 of the Constitution, as the Petitioner Company is not incorporated in Sri Lanka. Therefore, the Petitioner Company per se which is incorporated in Singapore has no locus standi to invoke the jurisdiction of this Court, for the violation of its Fundamental Rights. As the First Preliminary Objection is entitled to succeed, I do not intend to consider the Second Preliminary Objection.

The application is therefore liable to be dismissed on the First Preliminary Objection subject, however, to the following direction issued by Court to the Third Respondent in terms of Article 126(4) of the Constitution.

It would be appropriate to quote the observation made by Wanasundera, J. in *Jayanetti* Vs. *The Land Reform Commission* (1984) 2 S.L.R. 172 at 179

> *"…. we are empowered after such inquiries, as we consider necessary to grant such relief or make such direction in the case as we may deem just and equitable. This is an extensive jurisdiction and it carries with it all implied powers that are necessary to give effect and expression to our jurisdiction. We would include within our jurisdiction, inter alia, the power to make interim orders and to add persons without whose presence questions in issue cannot be completely and effectually decided. In fact, our present decision in no way widens the ambit of Article 126 but seeks to articulate its real scope and to make the remedy more effective"*

In the words of Md Faizal Karim J, in the case of *SSA Bangladesh Lt*d. Vs. *Engineer, Mahmud – ul Islam* 9 BLC (AD)(2004), "*The judiciary has an important role to play not only preventing or remedying the wrong or illegal exercise of power by the authority but has a duty to guide the nation in shaping its destiny within the framework of the law and the Constitution. The Court of law would always jealously guard against any abuse or misuse of power/authority by the State functionary in dealing with the State property."*

As I observed in the case of *State Electricity Board Accountants' Association* Vs. *Hon. Patali Champika Ranawaka and Others*, in S.C. F.R. 18/15 (S.C. Minutes of 03.05.2016) that Constitutions do not change with the varying tides of public opinion and desire, the Courts should never allow a change in public sentiment to influence them in giving a construction not warranted by the intention of its founder. Thus, this application is dismissed in limine on the first preliminary objection raised by the Respondents. However, considering the procedural flaws, I have referred to above, the fact that the award of tender involved public funds, and the solemn duty of the Court to protect the Rule of Law embodied in the Constitution in order to ensure its credibility in the faith of the people, I consider it

appropriate to make the following directions:-

(a) The Third Respondent may terminate the contract entered into with the 22nd Respondent for the supply of Coal to the Lakvijaya Coal Power Plant after giving reasonable' notice to the said Respondent; and

(b) call for fresh bids in terms of the law, for the supply of Coal for the said power plant following competitive Bidding procedure.

Subject to the aforesaid, the application is dismissed. The parties are entitled to bear their own costs.

CHIEF JUSTICE.

P. DEP, 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 Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

U.W. Seneriratne, no. 48/7,
2nd Lane, Sunshine Gardens,
Karapitiya

PETITIONER

Vs.

S.C.F.R. No. 396/2010

1. Mahinda Balasooriya,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

1A. Pujith Jayasundera,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

2. Gotabhaya Rajapaksha,
   Secretary, Ministry of Defense,
   No. 15/5, BaladakshaMawatha,
   Colombo 03.

2A. Karunasena Hettiarachchi,
   Secretary, Ministry of Defense,
   No. 15/5, BaladakshaMawatha,
   Colombo 03.

3. K.C.Logeswaran,
   Secretary, National Police
   Commission, Rotunda Tower,
   Level 3,No. 109, Galle Road,
   Colombo 03

4.N. D. Daluwatta,
Deputy Inspector General of Police
Southern Province, (South),Tangalle
DIG's Office, Tangalle.

5.Daya Samaraweera,
Deputy Inspector General of Police
Southern Province – Galle,
DIG's Office, Galle.

6. A.D.J. Chandrakumara,
Superintendent of Police,
SP Office, Tangalle Division,
Tangalle.

7. Hon. Attorney General,
Attorney General's Office,
Colombo 12.

RESPONDENTS

8. Vidyajothi Dr. Dayasiri Fernando,
Chairman
8A Justice SathyaHettige PC,
Chairman
9.S.C.Mannapperuma, Member
10. AnandaSeneviratne, Member
11.N.H.Pathirana
12.Palitha M Kumarasinghe,Member
12A. KanthiWijetunge, Member
13.SirimavoA.Wijetatne,Member
13A Sunil S.Sirisena, Member
14. S.Thillanadarajah, Member
15.A.MohamedNahiya,Member
16.M.D.W.Ariyawansa, Member
16A I.M.ZoysaGunasekera,Member

8th to 16A All of Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05.

17. T.M.L.C.Senaratne, Secretary, Public Service Commission, No.177, Nawala Road, Narahenpita, Colombo 05.
18. N.K.Illangakoon, Inspector General of Police, Police Headquarters, Colombo 01.
19. Prof. SiriHettige, Chairman
20. P.H.Manatunga, Member
21. SavithreeWijesekera, Member
22. Y.L.M.Zawahir, Member
23. Anton Jeyanadan, Member
24. TilakCollure, Member
25. F. de Silva, Member
National Police Commission, Block No. 3, BMICH Premises, BauddhalokaMawatha, Colombo 07.

26. N.AriyadasaCooray, Secretary, National Police Commission, Block No. 3, BMICH Premises, Bauddhaloka Mawatha, Colombo 07.

ADDED RESPONDENTS

BEFORE: S. EVA WANASUNDERA PC.J.
UPALY ABEYRATHNE J. &
H.N.J. PERERA J.

COUNSEL: J. C. Weliamuna with Pasindu Silva for the Petitioner
Rajiv Goonetilleke, SSC for the 1st to 7th Respondents

ARGUED ON: 05.07.2016.

DECIDED ON: 30. 11. 2016.

S. EVA WANASUNDERA PC. J.

Petition was filed before this Court on the 9th of July, 2010. The Petitioner states in his Petition that he had joined the Sri Lanka Police on 05.05.1986 as a Sub Inspector. He was promoted to the post of Inspector of Police on 07.04.1995. By the date , 7th July,2000, he had been in the Katuwana Police Station as Officer in Charge of the Police Station. He had commenced as OIC in that Police Station in 1999.

On 07.09.2000 a person named Berti Mahesh Wickremaratne had lodged a complaint at the Katuwana Police Station that his motor bike had been stolen by two persons. The Police was unable to apprehend any suspects until 17.09.2000 but on that day, consequent to information received from a private informant two suspects were apprehended. Their names were Widanagamage Nalin Suranga and Jayawardena Dodampe Anura. The motor bicycle and some weapons were found with the suspects. The case regarding this theft was still pending in the High Court of Hambantota at the time of this Application.

On 18.09.2000, **the Petitioner was taken into custody** by the Officers of the Commission to Investigate Allegations of Bribery or Corruption on the purported allegation of accepting a bribe amounting to Rs. 50000/- from one Premawathie who claimed to be the mother of one of the aforementioned suspects, namely WidanagamageNalinSuranga. He was detained at the Cinnamon Gardens Police Station and on 19.09.2000 he was produced before the Magistrate of Colombo.He was **interdicted from service on 21.09.2000** on the charge of soliciting and accepting a bribe of Rs. 40,000/-. He was later indicted in the High Court of Colombo. On 09.10.2007 , at the end of the trial, **the Petitioner was acquitted** from all the charges by the learned High Court Judge.

He was **reinstated in service on 18.01.2008.** On the same day, **the 5th Respondent** had sent a message from Galle to Baddegama Police Station, informing that the Petitioner is posted to Thissamaharama Police Station but until the conclusion of a disciplinary inquiry, **his back wages should not be paid.**

The Petitioner states in his Petition that, by way of a letter addressed to the President of the National Police Commision dated **01.03.2008,** he **requested** the **Nationa Police Commission** to afford him with back wages with regard to the period of his interdiction and to promote him to the rank of Chief Inspector of Police, as by that time, His Excellency the President of Sri Lanka had ordered to promote all Inspectors of Police to the rank of Chief Inspector if they had completed four years of service in the Inspector of Police rank. The National Police Commission **had not considered his request.**

It is only on **17.12.2008 , that he was served with a charge sheet**, mainly, **relating to an alleged failure to maintain proper IB extracts in respect of the suspects** who were taken into custody with regard to the theft of a motor bicycle as aforementioned. This was the subject matter for the allegation of a bribe in which regard the Petitioner was interdicted and then thereafter indicted in the High Court and **by that time i.e. by the 17th of December, 2008 was acquitted and reinstated**. I observe that the charges have been leveled against the Petitioner **after 8 years and 3months** from the date that the Petitioner was arrested and interdicted. It is also to be noted that the charge sheet for the disciplinary inquiry had been served on him **one year after the reinstatement**.

The Petitioner had denied the charges on 21.01.2009. The inquiry had proceeded from 29.06.2009 to 25.08.2009. The inquiry officer was the 6th Respondent. After hearing 7 witnesses and the Petitioner giving evidence, **the Inquiry Officer had exonerated the Petitioner of all the charges.** The report exonerating the Petitioner had been duly sent to the 4th Respondent dated 03.03.2010. **The Petitioner had moved this Court to direct the Respondents to submit this report to Court** since the Petitioner had not been able to get a copy of the same. I now find that this **Court had not directed the Senior State Counsel** who appeared on behalf of the Respondents to submit to Court ,**the said Report.**

I am of the opinion that when the objections were filed by the State, the said Report should have been filed by the State but the Inspector General who filed his affidavit of objections **has not brought up that Report with the Objections** of the Respondents. The reasons for the same has not been submitted to Court either. Paragraph 15 of the Affidavit of Objections simply submits that **the 5th Respondent had not agreed with the findings of the inquiring officer**, the **6th Respondent**. I am of the opinion that the Respondents have suppressed the relevant material from this Court. It has been submitted by the State that because the 5th Respondent had not agreed with the 6th Respondent, he had imposed the punishments which he is entitled in law to do, which are minor in nature. The State pleaded in the submissions that this matter attracts 'de minimis' maxim.

The Charges against the Petitioner are also **related to the incident** which was the subject matter of the allegation against the Petitioner that he had taken a bribe from one of the suspects. They are as follows:

(i) Not entering the 'out' entry.
(ii) Not entering the rest time.
(iii) Not entering the suspect's hand productions in the information book.

These charges had been gone into by the inquiry officer. Many officers who had been in the Police Station had given evidence. The evidence was to the effect that as usual he had done so through the 'reserve police officer' at the station. The allegations **had not been proved at all**. The proceedings at the inquiry is not part of this brief but I have gone through the portions of answers given by the witnesses as quoted by the Petitioner in his submissions. The State has failed to make the proceedings available to this Court, even at the time of filing objections.

The document which has imposed punishments for the aforementioned alleged charges against the Petitioner is marked as P 11. At the bottom of the 1st page of P 11, the author of the document who is **the 5thRespondent specifically states that the inquiry officer, the 6th Respondent has exonerated the Petitioner of all the charges.**In the second page, the **5th Respondent states** that " Having gone through

the evidence before the inquiring officer, the written submissions filed by both parties etc. I observe that the charges have been proven beyond reasonable doubt against the suspect ". Thereafter the5th Respondent has specifically mentioned the charges and specifically mentioned that the Petitioner is found guilty of all the charges and then set down the punishments for each and every charge . **The reasons for not having gone by the recommendations of the inquiring officer**, to exonerate the Petitioner as he was not found guilty of any of the charges **, have not been mentioned in P 11 by the 5th Respondent**. In fact , how the 5th Respondent has acted in that manner towards the Petitioner is quite schocking. The 5th Respondent could have filed an Affidavit before this Court if he wanted **to explain why he did not give reasons as per P 11.** He could have filed the original order he made with the objections filed on behalf of the Respondents rather than commenting or accepting the document filed by the Petitioner as P11. **The 5th Respondent has not explained his action according to the provisions in the Establishments Code.**

I find that the punishments are namely " severe reprimand " , " staying the increment for one whole year ", and on top of these punishments, it was added that **" due to this disciplinary inquiry, it is decided that the back wages and other benefits should not be granted to the accused ".** The decision of the 5th Respondent **not to pay back wages of 9 years during which period the Petitioner was interdicted is not at all a small punishment**. It is definitely a severe punishment. The argument of the Senior State Counsel that the punishments given attract the legal maxim of 'de minimis' totally fails.

Such action of the 5th Respondent, is **against the provisions of the Establishments Code** regarding disciplinary proceedings.

Section 22.6 of the Establishments Code reads as follows:

" The Disciplinary Authority may accept or reject or revise any or some or all of the findings of the Tribunal in arriving at a decision in terms of 22:5:1 and 22:5:2.

Section 22.7 of the Establishments Code reads as follows:

" Where any or some or all of the findings of the **Tribunal are rejected** or revised in terms of sub section 22.6 above, the Disciplinary Authority should note clearly and specifically in the relevant disciplinary file **all the reasons on which such decision was based."**

I hold that such action of the 5th Respondent is a violation of the fundamental rights contained in Article 12(1) of the Constitution. The Superior State Officers have failed to correct the wrong action taken by the 5th Respondent and by having acted in that manner has condoned such action. The State has rather affirmed the order given by the 5th Respondent by not having given the promotions due to the Petitioner.

At this stage, I want to recognize the news paper ' Lankadeepa ', marked and produced with the Petition marked as P1, reporting "that the Public of the Katuwanaarea had voiced their displeasure in the State having taken the Petitioner into custody on allegations of bribery because by public protests, the Petitioner as OIC of the Police Station of Katuwana had been taking action against the criminals of the area. The public had voiced that this complaint of bribery had been made by a person claiming to be the mother of one of the suspects who had been the suspect of about 25 other thefts and robberies of the area." The suspects by having made false allegations have kept the Petitioner from serving the Police for over 9 years. The Petitioner had got acquitted of all the charges in the Criminal High Court as well as all the charges leveled against him at a highly unnecessary disciplinary inquiry which obviously was based on prior determination by the 5th Respondent to punish the Petitioner.

I hold that the 5th Respondent and the State Officials who have condoned the actions of the 5th Respondent, have violated the Petitioner's fundamental rights contained in Article 12(1) of the Constitution. I order the Respondents and the relevant authorities to release forthwith, to the Petitioner , his back wages , salary increments etc. and other legitimate entitlements such as legally entitled promotions due up to date.

I order the 5th Respondent to pay compensation of Rs. 300,000/- for the violation of the said fundamental rights of the Petitioner and the State to grant a further 200,000/- to the Petitioner together with legal costs incurred by him at all times prior to getting this order from this Court as well as costs of this Court.

Judge of the Supreme Court

Upaly Abeyrathne J.
I agree.

Judge of the Supreme Court

H.N.J. Perera 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.

Sandhya Ramani Vithana
Petitioner

SC/FR 523/2009

Vs

1. Sri Lanka Ports Authority
2. RM Priyantha Banadarawickrama
   Chairman, Sri Lanka Ports Authority
3. Nalin Aponso, Deputy General Manager
   Communication and Public Relations Department, Sri Lanka Ports Authority
4. S Sunanda Gunasekara
   Communication and Public Relations Assistant,
   Sri Lanka Ports Authority
5. HSF Farzana Media DivisionSri Lanka Ports Authority.

6. Hon. Attorney General

Respondents

Before : B P Aluwihare PC, J
Sisira J De Abrew J
Priyantha Jayawardene PC, J

Counsel : Saliya Pieris With Anjana Rathnasiri for the Petitioner.
Yuresha Fernando SSC for the 1st,2nd,3rdand 6th Respondents
4th and 5th Respondents were absent and unrepresented

Argued on : 15.10.2015

Written submission
Tendered on : By the Petitioners on 10.12.2014
By the 1st to 3rd Respondent on 19.12.2014
Decided on : 18.2.2016

Sisira J De Abrew J.

Notices have been sent by this court to the 1st to 6th Respondents on 24.7.2009, but the 4th and 5th Respondents have not responded to the said notices. The Petitioner is presently employed as a Special Grade clerk in the Finance Department of the 1st Respondent Authority. She states that she is an active member of the Jathika Sevaka Sangamaya and is a sectional organizer of the said Union.

The Petitioner received a letter from the Human Resources Department of the 1st Respondent Authority requesting her to be present on 30.3.2005 for an interview for the post of Communication and Media Assistant. The Petitioner who obtained 54 marks was placed 4th out of five applicants. The first two applicants who obtained 63 and 59 marks were recruited as Communication and Media Assistants. Later the 1st Respondent Authority obtained approval from the Ministry of Finance and Planning for recruitment of two more Communication and Media Assistants. VLD Jayasekara who was placed 3rd at the interview was appointed but the Petitioner was not appointed.This decision has been taken on the basis that one Communication and Media Assistant would be sufficient for the relevant Department. The 3rdRespondent, in his affidavit, states that he took the said decision in accordance with Rule 15 of the Manual of Administrative Procedure of theSri Lanka Ports Authority [SLPA] which is marked as 3R2.

As the Petitioner was not recruited, she made a complaint to the Human Rights Commission of Sri Lanka complaining that failure to appoint her to the post ofCommunication and Media Assistant was a violation of her fundamental rights. The 1st Respondent Authority, by its letter dated 24.2.2006 (P6), gave an undertaking to the Human Rights Commission to the effect that the petitioner who is in the waiting list would be appointed when a vacancy arises for the post of Communication and Media Assistant.

However the 3rdRespondent who is the head of the Communication and Public Relations Department on 9.5.2008 again advertised the post ofCommunication and Media Assistant. The Petitioner submitted an application and she went for an interview on 27.5.2009. The Petitioner states that at the interview the 3rd Respondent questioned her as to why she complained to the Human Rights Commission. The 3rd Respondent informed her that this time too she would not be appointed and that she would be at liberty to complain once again to the Human Rights Commission. On 10thof June 2009, the 4th Respondent who was a labourer attached to the Media Division of the 1st Respondent Authority was appointed to the post of Communication and Media Assistant. The Petitioner states that the 4th Respondent was given special preference on the basis that he was already serving in the Media Division of the 1st Respondent Authority. She states that such specialpreference is irrational and as the 4th Respondent served in the Media Division as a labourer and not in a professional capacity. The Petitioner states that giving special preference is contrary to the scheme set out in P10. The Petitioner further states that that the 4th Respondent had been charge sheeted in January 2009 on the following charges.

1. Defying the advice and directions of the Senior Management.

2. Disturbing the duties of the security service of the 1st Respondent Authority.

3. Being in possession of a key of an office room which had not been officially obtained by him.

4. Behaving and acting in a manner violating the discipline of the Sri Lanka Ports Authority.

The 3rd Respondent, on the said charges had issued a letter of warning to the 4th Respondent after considering his explanation. The relevant documents had been produced marked as P11, P11A and P11B. The Petitioner states that in the light of the said documents the appointment of the 4th Respondent is unsuitable. The Petitioner states that she who has an unblemished record was not appointed whilst the 4th Respondent who had been issued a letter of warning was appointed to the post of Communication and Media Assistant. The Petitioner on the above grounds contends that her fundamental rights guaranteed by Article 12(1) and 12(2) of the Constitution have been violated by the 1st, 2nd and 3rd Respondents. She inter alia moves to cancel the appointment of the 4th Respondent and to appoint her to the post ofCommunication and Media Assistant of the 1st Respondent Authority.

Learned SSC who appeared for 1st, 2nd, 3rd, and 6th respondents however contended that the appointment of the 4th Respondent had been correctly done.

According to circular No.17-2002 produced as P10 (Allocation of marks at interviews- Non executive Grade), 45% marks should be allocated for the performance at the interview and 55% should be allocated for the performance at the written/professional examination. According to Note 1 of the said circular if

there were less than five candidates, they need not face the written/professional examination. The 3rd Respondent, in his affidavit, admits that there were less than five candidates. Therefore allocation of 55 marks set out in P10 cannot be granted and the maximum amount of marks that a candidate could have got at this occasion would be only 45 marks. According to P10 distribution of marks at the interview should be done as follows.

Educational qualifications	15%
Service	10%
Experience	10%
Commendations	5%
Personality	5%
Total	45%

As I pointed out earlier 55% (55 marks) cannot be allocated in the present case as there were less than five candidates. But the interview panel in the present case however deviated from the scheme set out in P10 and adopted its own method which is set out below.

Educational	15%
Service	10%
Experience	10%
Commendation	5%
Personality	5%

Service in the Media Unit	10%
Interview	45%
Total	100

Circular marked P10 clearly states 45 marks should be allocated at the interview as per the structure set out therein. In the said circular there is no room for allocation of 45 marks under the category of 'interview' nor is there any room to allocate 10 marks for service in the 'Media Unit'. Therefore the decision of the Interview Panel to allocate 10 marks under the category of 'Service in the Media Unit' and 45 marks under the category of 'Interview' is wrong and invalid. The interview panel has allocated 8 marks to the 4th Respondent under the category 'service in the media unit'. Circular marked P10 does not permit interview panel to allocate 8 marks under the category of 'service in the media unit (vide document marked 3R6). For the above reasons I hold that allocation of eight (8) marks to the 4th the Respondent by the interview panel is illegal and arbitrary. Therefore I hold that the 4th Respondent is not entitled to receive the said eight (8) marks.

The next question that must be decided is whether the 4th Respondent is entitled to receive ten (10) marks under the category of experience. The interview panel has given him ten marks under the under the category of experience (vide document marked 3R6). P10 permits ten (10) marks to be allocated under the category of 'Experience'. According to P10 this experience should be in the Field and Grade/Position or Division. The 4thRespondent had served as a labourer in the Media Unit. Learned Senior State Counsel, on the strength of P8, tried to contend that the 4th Respondent was entitled to marks under the category of

'experience' as he had worked in the Media Unit. But it has to be stated here that P8 is only a notice calling for applications from suitable candidates which cannot override the directions set out in P10. According to P10 in order for a candidate to receive marks under the category of 'experience' such candidate should have worked in the relevant field and grade/position or division. The 4th Respondent has worked in the Media Unit of the Ports Authority only as a labourer. In my view working as labourer in the Media Unit of the Ports Authority cannot be construed as experience in the relevant field and grade/position or division. Further the 4th Respondent has failed to produce any service certificate from his Supervising Officer or the head of the Department certifying the type of work that he performed as a labourer in the Media Unit. Considering all these matters, I hold that the 4th Respondent was not entitled to receive ten marks under the category of 'experience.' For the above reasons I hold that allocation of ten (10) marks to the 4th Respondent by the interview panel is illegal and arbitrary. I have earlier held that the 4th Respondent was not entitled to receive eight (8) marks under the category of 'service' in the Media Unit. Thus altogether the 4th Respondent is not entitled to eighteen (18) marks from the amount of marks given at the interview.

As I pointed out earlier the interview panel had decided to give forty five (45) marks under the category of interview (vide document marked 3R6). P10 does not permit the interview panel to allocate 45 marks under the category of 'interview'. P10 only permits allocation of 45 marks as per structure set out therein. Then no candidate is entitled to receive marks under the category of interview. Therefore the petitioner is not entitled to receive 15 marks given to her under the category of 'interview' and the 4th Respondent too is not entitled to

receive 35 marks under the category of 'interview'. The interview panel has given the following marks to the 4th Respondent (vide document marked 3R6).

Education	06 marks
Service	04 marks
Experience	10 marks
Commendation	00 marks
Personality	04 marks
Service in the Media Unit	08 marks
Interview	35 marks
Total	67 marks

As I pointed out earlier the 4th Respondent was not entitled to receive ten (10) marks given under the category of 'experience', eight marks given under the category of 'service in the Media Unit' and thirty five (35) marks given under category of 'interview'. Thus he is not entitled to receive 53 marks from the total of marks given to him. Thus the amount of marks that he is entitled to is fourteen (14) marks (67-53).

The interview panel has given the following marks to the petitioner (vide document marked 3R6).

Education	06 marks
Service	10 marks
Experience	02 marks

Commendation	02 marks
Personality	02 marks
Service in the Media Unit	00 marks
Interview	15 marks
Total	37 marks

No one has challenged the marks given to the petitioner under the categories of 'education', 'service', 'experience', 'commendation' and 'personality'. I have earlier held that the petitioner is not entitled to fifteen (15) marks under the category of 'interview'. Therefore the total amount of marks that she is entitled to receive is (37-15) 22 marks.

I have earlier pointed out that the 4th Respondent is entitled to receive only fourteen (14) marks. He has obtained the said fourteen (14) marks out of 45 marks. The petitioner is entitled to receive twenty two (22) marks. She has received the said twenty two (22) marks out of 45 marks. It is therefore clear that the 4th Respondent who is entitled to fourteen (14) marks has been appointed over and above the petitioner who is entitled to twenty two marks.At this stage it is relevant to consider certain judicial decisions.

In Ratnadasa Vs Government Agent [SC FR (Spl) No.66/96-SC Minutes of 16.12.1997- Reported in book titled 'Fundamental Rights and Constitution- II by RKW Goonesekere page 68] five persons were recommended by the District Registrar after a written competitive examination for the post of Registrar of Births and Marriages in order of merit. The person who was placed 4th was selected by the Registrar-General on the basis of experience in an acting capacity.

The person who was placed 3rd challenged the appointment of the person who was placed 4th in the list by way of a fundamental rights application. Bandaranayake J (with GPS De Silva CJ and Ananda Coomaraswamy J agreeing) held that the appointment of the person who was placed 4th in the list is invalid.

In Leelananda Vs National Institute of Education SC FR 266/93SC Minutes of 2.3.1994 [reported in book titled 'Fundamental Rights and Constitution- II by RKW Goonesekere page 84] the petitioner who applied for the post of Director, Distance Education, was overlooked by an interviewBoard and another applicant (4th respondent) was appointed. For the petitioner it was contended that the 4th respondent was not eligible, that there was no 'structured interview', and a subjective assessment was made in favour of the 4th respondent who was not eligible without adequate supporting reasons. Fernando J (Goonewardena J and Wadugodapitiya J agreeing) held thus: "The appointment of the 4th respondent was plainly wrong. The appointment of an ineligible candidate, in preference to one or more qualified candidates, was in violation of Article 12(1) and must be quashed."

Considering the above legal literature and the aforementionedreasons, I hold that the 1st and 3rd Respondents (the 3rd Respondent was the chairman of the interview panel) have violated the fundamental rights of the petitioner guaranteed by Article 12 (1) of the Constitution. For the above reasons, I hold that the appointment of the 4th Respondent to the post of Communication and Media Assistant of the 1st Respondent Authority is illegal, arbitrary and capricious and cannot be permitted to stand. I therefore quash the appointment of 4th Respondent who was appointed to the post of Communication and Media Assistant of the 1st Respondent Authority.

I direct the 1st and the 3rd Respondents to appoint the petitioner to the post of Communication and Media Assistant of the 1st Respondent Authority with effect from 15.6.2009 which is the date of appointment of the 4th Respondent to the post of Communication and Media Assistant of the 1st Respondent Authority which appointment I have quashed in this judgment. The present holder of the office of the Chairman of the Sri Lanka Ports Authority and the present holder of the office of Deputy General Manager Communication and Public Relations Department of the Sri Lanka Ports Authority and the 1st Respondent should take steps to implement this order within two months from the date of this order. The petitioner is entitled to receive 300,000/- as compensation from the 1st and 3rd Respondents. I direct the 1st and 3rd Respondents to pay a total sum of Rs.300,000/- to the petitioner as compensation in equal shares.

Judge of the Supreme Court

B P Aluwihare 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

SC/FR No. 578/2011

In the matter of an application under and in terms of Articles 17 & 126 of the Constitution of the Republic of Sri Lanka

1. S. G. P. Dilshan Tilekeratne (minor)

   Appearing through his next friend

2. H. M. Y. Kumarihamy (mother)

   The Petitioners of No. 31,
   Urulewaththa, Yatawatta
   Matale.

PETITIONERS

Vs.

1. Sergeant Douglas Ellepola
2. Police Inspector Bandara
3. Hettiarachchi
4. R. Nishshanka, Officer-in-Charge

   The 1st to 4th Respondents of
   Police Station, Yatawatta.

5. Inspector General of Police,
   Police Headquarters,
   Colombo 1.
6. Hon. The Attorney General
   Attorney General's Department,
   Hultsdorp, Colombo 12.

RESPONDENTS

BEFORE: S. E. Wanasundera P.C.

Upaly Abeyratne J.

Anil Gooneratne J.

COUNSEL: Pulasthi Hewamanne for Petitioners
On behalf of Legal Aid Commission

Sandamal Rajapakshe for 1st to 4th Respondents

I. Punchihewa S.C. for the Attorney General

ARGUED ON: 13.10.2015

DECIDED ON: 14.01.2016

GOONERATNE J.

The 1st Petitioner was a minor 15 years of age and the 2nd Petitioner was his mother at the time of filing this Fundamental Rights Application. 1st Petitioner by his application complains of illegal arrest, detention and torture by the 1st to 4th Respondents all being Constables/Inspectors of Police station, Yatawatta. It is pleaded that on or about 25.06.2011 the 1st Petitioner was playing near his house and two other children Sahan and Chathura from the neighbor-hood had brought several items to the house of the Petitioner which includes a calculator, broken CDMA phone, torch, coconuts and toys which was stored inside the house. On the next date the said Sahan had come to the 1st Petitioner's house and given him three shopping bags. Petitioners state later on he became aware that these bags were hidden in the vicinity.

On or about 30.06.2011, it is stated by the Petitioner that a police party of six from the Yatawatta Police came to the Petitioner's house and had taken the 1st Petitioner to the police Station for investigations, in spite of the 2nd Petitioner's protest not to take him to the police. It is pleaded that the 1st Petitioner was threatened and assaulted at the police by the 1st & 2nd Respondents and

thereafter handcuffed to a chair (3.30 p.m). At about 8.00 p.m 1st Petitioner was detained inside the police cell and at that time the 2nd Petitioner, visited the police station. It is stated that 1st Petitioner was not provided with meals or water whilst in police custody. The facts pertaining to assault and torture of the 1st Petitioner and police investigations and subsequent torture of the 1st Petitioner is more fully described in paragraphs 7 to 20 of the Petitioner's petition. On 01.07.2011 police party had taken the 1st Petitioner to recover the stolen items accompanied by the 1st to 3rd Respondents. Several items inclusive of the CDMA phone, sim card, calculator etc. had been recovered. In the process police party seems to have continuously threatened the 1st Petitioner and warned him that he would be killed if incident of assault were divulged. It is pleaded that the police party had also taken the 1st Petitioner to his school as the police wanted to gather more information of theft and house breaking involving other students and the 1st Petitioner. In support of the 1st Petitioner's case Medico Legal Report P2, and Medical Report P4 are also produced, along with the Petition, of the Petitioners.

In the petition filed before this court the 1st Petitioner demonstrates that the police party had been threatening, humiliating and assaulting him in order to get more information of the alleged theft. It is also stated that the 1st Petitioner was abused in derogatory contumelious language whilst in police custody.

Emphasis is made in paragraph 15 of the petition relating to certain events that took place after being brought to the police station on 01.07.2011 at 11.00 a.m as follows:

(a) The 1st Petitioner was taken to the 4th Respondent OIC's room, and the several items 'recovered' by the police were then produced;

(b) The Petitioners state (on 01.07.2011), that the said Respondent O.I.C ., and the 1st and 2nd Respondents were present. Further, the owner of a grocery store, in the vicinity of the Petitioners' home was also present. The Petitioners are now aware, that Sahan had sold several plucked coconuts to the said owner;

(c) The 2nd Respondent then dragged the 1st Petitioner near the wall whilst kicking the said Petitioner several times on the back of his thighs continuously berating the said Petitioner for stealing. The 1st Petitioner states that the said assault caused a numbing sensation in his leg;

(d) Thereafter (on 01.07.2011), the 1st Petitioner's height, weight etc. were measured, and the said Petitioner was instructed to remove his shirt;

(e) On complying, the said Petitioner's body was checked for "identifying marks" at which point the 4th Respondent OIC, walked over to the said Petitioner and assaulted him several times on his back/shoulder area berating the said Petitioner for being involved in theft.

(f) The Officers present were laughing and ridiculing the 1st Petitioner during these events, causing the said Petitioner to feel a deep sense of shame/humiliation;

(g) Thereafter (on 01.07.2011), for the first time since being taken into custody, the 1st Petitioner was given a meal.

On 16.01.2012, Supreme Court granted leave to proceed for alleged violation of Article 11 of the Constitution. The material placed before this court indicates that the 1st Petitioner was on 01.07.2011 produced before the Matale Magistrate. Petitioner had been charged before the Magistrate's Court for committing theft in a dwelling house and for retention of stolen property. The 1st Petitioner was granted bail on the said day by the learned Magistrate. Attorney-at-Law who represented the 1st Petitioner had on 26.07.2011 informed the Magistrate of the 1st Petitioner being assaulted by the police whilst in police custody. In paragraph 18 of the petition it is pleaded that Magistrate called upon the J.M.O to submit a report.

The Medico Legal Report (P2) indicates that the 1st Petitioner shows features of Post Traumatic Stress Disorder. In the said paragraph it is also pleaded that the learned Magistrate directed the Legal Aid Commission to take steps to file

a Fundamental Rights Application (P3). The short history given by the patient demonstrates that the Respondents were responsible of ill treating the 1st Petitioner both physically and mentally, inclusive of causing harm to the genital region of the patient.

The Respondent vehemently deny all allegations of assault, harm and torture alleged to be caused to the 1st Petitioner, and also state that whatever statements made in this regard by the 1st Petitioner is misleading. It is pleaded in the objections of the 2nd and 3rd Respondents that consequent upon a complaint (1R2) lodged by one W. Gunatilleke (1R1) of loss of CDMA phone, calculator stolen from his house, investigations commenced (1R2). Police had also received information regarding the involvement of the 1st Petitioner. (1R3). Thereafter police party visited the house of the Petitioners on 30.06.3011 and had explained the reason for arrest of the 1st Petitioner and taken him to custody. It is pleaded that previously also the 1st Petitioner had stolen some items including toys (R4). Officer-in-Charge of the police station, Yatawatta police had instructed the other Respondents not to put the 1st Petitioner inside the cell. The mother of the 1st Petitioner who is the 2nd Petitioner was permitted to stay with the 1st Petitioner in the police station and was provided with food (1R5 & 1R6).

The 1st Petitioner was produced before the Magistrate and the 1st Petitioner pleaded guilty. Learned Magistrate had called for a probation report (1R11). Respondents state that 1st Petitioner never complained about alleged assault on 01.07.2011 when he was produced before the Magistrate, and after being produced before court the 1st Petitioner attended school (1R2). Respondents take up the position that 3rd parties with vested interest admitted the 1st Petitioner to the Matale hospital alleging he suffered severe pain due to alleged assault, and after three days he was discharged from the hospital. However when the case had been called on 26.07.2012 before the learned Magistrate 1st Petitioner had informed court that the 1st to 4th Respondents had assaulted him. 2nd Respondent states it was a fabricated blatant lie. Learned Magistrate called for a Medico Legal Report and a Report from the Assistant Superintendent of Police of the area.

Article 11 of the Constitution prohibits persons from inflicting torture, cruel or inhuman treatment on another. It is no doubt a right which is absolute without restrictions or limitations. The treatment contemplated under article 11 was not confined to the realm of physical violence. It could be pain or suffering, whether physical or mental. I do consider it relevant, also to keep in mind the case of Saman Vs. Leeladasa (1989) 1 SLR 1 at 12 prior to arriving at a conclusion as regards the case in hand. Fernando J. held that the Standard of proof in complaints

of violation of Article 11, is proof of preponderance of probability and that civil standard of preponderance applies.

The 1st Petitioner was a helpless young person at the time of the alleged torture. He was a minor, although found guilty of the offence of theft and retention of stolen property, the learned Magistrate very correctly brought him under a probation order. The offence he committed is separate to the allegation of torture. The Medico Legal Report (P2) support the 1st Petitioner's case to a very great extent. The learned Magistrate was informed of cruel treatment by the police and his reaction was to call for the Medico Legal Report from the J.M.O., at the very moment that application was made to the learned Magistrate. The learned Magistrate also called for a report from the Assistant Superintendent of Police of the area. The complaint to the Magistrate, though made somewhat belatedly the Medical Officer, though he could not detect any physical injury may be due to lapse of time, was able to record the case history and observed "Features of Post Traumatic Stress Disorder". Such a finding of the J.M.O could be explained in a variety of situations and an injury physical or mentally contemplated under Article 11 of the Constitution cannot be ruled out, in the case in hand.

Supreme Court of Sri Lanka has over and over again emphasized that even persons whose records are not 'particularly meritorious', per Collin Thome J.

in Senthilnayagam Vs. Seneviratne (1981) 2 SLR 187, 208 should enjoy the Constitutional guarantee of personal liberty and security and that even 'notorious' or 'hard core' criminal should not be subject to torture, inhuman or degrading treatment or punishment 1987(2) SLR 119; 1991(2) SLR 247

The 1st Petitioner no doubt did not complain to the authorities concerned at the first available opportunity. When he was initially produced before the Magistrate he could have done so about inhuman, degrading treatment he had to undergo at the hands of 1st to 4th Respondents. This court cannot consider such inability and be inclined to take the side of the Respondents. In fact this is what the police party attempt to urge before this court. I have considered the material contained in the counter affidavit of the 2nd Petitioner (mother) and the most relevant portion of same. I note the following in paragraph 12 of the counter affidavit of the 2nd Petitioner which explains his (1st Petitioner) position as regards above. (a) & (b) of paragraph 12 reads thus:

(a) Answering paragraph 9(a) I specifically state that the 1st Petitioner did not state the true version of events/contradict the Police, nor inform the learned Magistrate about the treatment suffered by him whilst in the custody of the police due to fear. Further I state that 1R12 has no bearing

on this application but in any event reflects that the 1st Petitioner preferred to spend time in isolation as set out in the Petition;

(b) I deny paragraph 9(b), and state that 1R11 clearly indicates that the 1st petitioner shows features of Post Traumatic Stress Disorder (hereinafter PTSD) related to the incident described in the Petition

In fact by motion dated 14.12.2011 document X1 was tendered to court under confidential cover. This document had been tendered to court prior to supporting this application for leave to proceed. Material contained in X1 is most revolting to one's sense of human decency and dignity. The third degree methods practiced by the police party to obtain information from a young boy of 15 years is totally unacceptable and unbecoming of law enforcement officers, in the police force.

I am mindful of the following decided case which need to be kept as a guide, at all times when cases involving inhuman treatment has to be considered by the Appex Court.

In his judgment in *Velmurugu v. A.G.,* (1981) 1 S.L.R 406, at 438 Sharvananda, J. referred to the following comment of the European Commission on Human Rights in the Greek case on the difficulties faced by litigants alleging that public officers had inflicted or instigated acts of

torture and observed that the comment should be borne in mind in investigating allegations of torture by the police or army.

"There are certain inherent difficulties in the proof of allegations of torture or ill-treatment. First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the police or armed services would be carried out, as far as possible, without witnesses and perhaps without the knowledge of higher authority. Thirdly, where allegations of torture or ill-treatment are made, the authorities, whether the police or armed services or the Ministries concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence, there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may, with lapse of time, become unrecognizable, even by medical experts, particularly where the form of torture itself leaves …. Few external marks". Vide Journal of Universal Human Rights, Vol. 1, No. 4 of Oct-Dec. 1979 at page 42.

It is well to bear the above comment in mind in investigating allegations of torture by the police or Army.

I am more than convinced, having examined all the material placed before court that the 1st Petitioner was subjected by the 1st to 4th Respondents to torture and cruel, inhuman, degrading treatment, in violation of Article 11 of the Constitution. I allow the Petitioner's application. He would be entitled to a declaration that his freedom from torture and cruel, inhuman and degrading treatment guaranteed to him under Article 11, has been violated by the above

Respondents. It is just and equitable that the State should pay fair compensation for humiliation and suffering undergone by the 1st Petitioner. The 2nd Petitioner being the mother of the 1st Petitioner would have suffered mental shock having being made aware of the suffering of her son. It is just and equitable that the State should pay fair compensation to the 1st Petitioner. I direct the Inspector General of Police to pay Rs. 50,000/- as compensation to the 1st Petitioner. I also direct that the Inspector General of Police take appropriate disciplinary action against the 1st to 4th Respondents for their acts of misconduct.

Application allowed.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyratne J.

I agree.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

W.N.L.K.Fernando
No.6, Kankale Watte
Pahala Mawila
Naaththandiya

Petitioner

S.C.F.R.Application No.612/09

Vs.

1. Police Inspector Ranjith
2. Police Sergeant Dissanayake (23311)
3. Sub Inspector Chamara P.Wijesinghe
4. A.M.Weerakkodi, Officer-In-Charge
   All of Police Station, Wennappuwa

5. S.Peters
   Proprietor
   Tata Global Engineering Pvt Ltd.
   Wennappuwa

6. Sunil Appuhamy, Watcher
   Tata Global Engineering Pvt.Ltd
   Wennappuwa

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

Respondents

BEFORE : PRIYASATH DEP PC, J.

K.T.CHITRASIRI, J.

PRASANNA JAYAWARDENA PC, J.

COUNSEL : J.C.Weliamuma with Pulasthi Hewamanne and Sulakshane Senanayake for the Petitioner

J.Joseph for the 1st to 4th Respondents

Madhawa Tennakoon SSC for the Attorney General

ARGUED ON : 04.07.2016

WRITTEN : 06.09.2016 by the Petitioner

SUBMISSIONS ON : Not filed by the Respondents

DECIDED ON : 21.09.2016

CHITRASIRI, J.

In this petition, the petitioner introduces himself, as a married person with 3 children. He further states that he being a businessman is the chairman of two companies registered under the Companies Act. Petitioner then states that he was assaulted, arrested and detained unlawfully by the 1st to 4th respondents. Accordingly, he alleges that his fundamental rights guaranteed under Articles 11, 12 (1), 13 (1) and 13 (2)

were violated by the 1st to 4th Respondents. However, having heard the parties, this Court on 09.09.2011 granted leave to proceed, only with the application for the alleged violation of the rights guaranteed in terms of Articles 11 and 13(1) of the Constitution.

1st to 4th respondents are police officers attached to the Wennappuwa Police Station while the 4th respondent is the Officer in Charge of that Police Station. According to the petitioner, 6th respondent is an employee of the 5th respondent. Petitioner states that he verily believes that the 5th and the 6th respondents were privy to the fundamental rights violation alleged by him. 6th respondent is the person who made the complaint to the police against the petitioner. It is pursuant to that complaint the petitioner was arrested, according to the 1st to 4th respondents.

The petitioner in his affidavit dated 11.08.2009 states that at or around 10.00 a.m. on 14.05.2009, 1st to 3rd and the 5th & 6th respondents have entered the premises belonging to him in Marawila having come in a double cab, at a time he was away from home. Upon being informed by his wife over the telephone, of the arrival of the police, he has returned home around 10.45 in the morning. He further states that the 1st and the 2nd respondents were in uniform and were armed with guns. 3rd respondent was in civilian clothes holding a gun. Petitioner then has identified the 5th respondent who was present there, as the person who had bought sand

from him on an earlier occasion and the 6th respondent as the watcher of the said 5th respondent.

Having stated so, the petitioner has mentioned that upon his arrival at his premises as mentioned before, the 1st respondent wanted him to get into the vehicle by which the police officers came, in order to record a statement from him. According to him, he and his wife were abused at that point of time, in derogatory language by the 1st to 3rd respondents who threatened him to get into the said vehicle in which the police came. Then the petitioner is supposed to have told the police that his premises where they were at that point of time, come under the purview of Marawila Police and not under Wennappuwa Police to which police station the officers were attached to. The 1st respondent then has grabbed him by his shirt. Petitioner further alleges that thereafter all the three officers began assaulting him repeatedly with hands and feet and rifle butts even after he fell on the ground as a result of the said assault. (Vide paragraph 5 (f) of the affidavit of the petitioner)

The petitioner then states that he was hand cuffed and dragged along the floor of the garden and put him into the said private vehicle. [double cab] The petitioner also states that several passersby on the road witnessed this incident. Thereafter the petitioner alleges that he was taken to the Wenappuwa Police Station along with the 5th and the 6th respondents. The petitioner further states that he was assaulted even

inside the said vehicle by the 1st to 3rd respondents whilst being taken to the police station. He alleges that he was also threatened with death if he contemplates complaining of the said assault. Accordingly, the petitioner states that he sustained several injuries to upper arms, chest, face and left thigh amongst other injuries as a result of the said assault. The petitioner further states that he fainted in the night on14.5.2009, at or around 9.00 p.m. whilst being detained at the police station, as a result of the injuries suffered by him. The petitioner further states that he vomited several times and also suffered a chest pain whilst being detained at the said police station.

The petitioner then states that he explained to the 4th respondent that the alleged complaint made against him by the 6th respondent that led for him been arrested, was a fabricated one and that the said complaint had been lodged for personal reasons, when he was produced before him at the Police Station. The petitioner then states that thereafter a statement was recorded from him and he was directed to sign the book in which the statement was written though he was unaware of the contents therein.

He then states that the 2nd respondent and two other police officers escorted the petitioner to the Lunuwila hospital on the following day namely on 15.05.2009. While he was taken to the hospital, his wife is also supposed to have accompanied him as she had come to the Police Station by then. However, the petitioner was not treated at the Lunuwila

hospital but was brought before the Negombo District Medical Officer for further steps and for treatment.

The 1st to 4th respondents have filed four separate affidavits which are dated 07.11.2009 explaining the position taken by them as to the alleged incident complained of by the petitioner. The defence of the police officers contained in all those 4 affidavits is almost similar in its facts. They all admit that they were on duty on 14.05.2009. According to them, the 1st to 3rd responds along with 5th and the 6th respondents have left the police station around 11.35 a.m. to an area coming under the purview of Marawila Police Division in a private vehicle in search of the petitioner against whom a complaint had been made by the 6th respondent on the same date, i e 14.05.2009. The complaint was regarding a theft of a rear bucket of a Backhoe loader which had been disconnected from the front section of the vehicle and also of two galvanized pipes valued at Rs.25,000/- alleged to have owned by the 5th respondent. They have come to the petitioner's house and have arrested him in respect of the complaint made by the 6th respondent. They admit that the 2nd respondent carried a fire arm.

In their affidavits, the first three respondents have stated that the petitioner resisted arrest and rolled on the ground. However, they further state that they were able to overpower him and to take him into their custody. Thereafter, having brought the petitioner to the Police

Station, he was handed over to Police Sergeant 37188 Fernando at the police station Wennappuwa. The police officers in their affidavits allege that the injuries found on the petitioner are superficial and those may have been caused due to the petitioner's violent behavior and for his own conduct when he resisted the arrest. They also have stated that injuries found on the petitioner may have been caused due to him rolling on the ground. Finally, they have denied the assault alleged by the petitioner.

Considering the material contained in the affidavits filed by both the parties, it is clear that the 1st to 3rd respondents have taken the petitioner into their custody at or about 10.45 a.m. on 14.05.2009 consequent upon a complaint made against the petitioner of a theft of a Backhoe loader and of two galvanized pipes. It is also not in dispute that the petitioner was produced before the Magistrate on the following day, on the instructions of the 4th respondent. He had been produced before the Marawila Magistrate on 15.05.2009 under the case bearing No.531/09.

In the circumstances, it is clear that there had been a valid reason for the Police to take the petitioner into their custody on that particular day. Therefore, I do not see anything wrong or illegal had taken place, as far as the arrest of the petitioner is concerned since it was an arrest made in the course of an investigation commenced, consequent

upon a serious complaint made by the 6th respondent to the Police. Therefore, the allegation by the petitioner as to the violation of Article 13(1) of the Constitution is not sustainable.

Remaining issue is the alleged violation of Article 11 of the Constitution. Hence, it is necessary to ascertain whether or not there had been any torture inflicted on the petitioner by the 1st to 4th respondents. 4th respondent is the Officer-In-Charge of the Police Station, Wennappuwa. No allegation of torture inflicted on the petitioner had been made against the 4th respondent. Neither is there any evidence as to any assault effected by the 4th respondent. Indeed, the evidence shows that he has taken steps to produce the petitioner before the Magistrate according to law. Therefore, I decide that the 4th respondent is not liable for infringement of fundamental rights of the petitioner guaranteed under Article 11 of the Constitution as well.

It is now necessary to examine whether the injuries found on the body of the petitioner were consequent to any assault been effected by the acts of the 1st to 3rd respondents, as alleged by the petitioner. Hence, I will now refer to the injuries found on the body of the petitioner as a result of the incident occurred on the 14th May 2009.

When the petitioner was produced before the learned Magistrate, he has made the following notes in the case record. It reads thus:

ඛ්. 531/09

2009.05.15

සැක./ ඩබ්. නොයෙල් ලාල් කෙනෙඩි ප්‍රනාන්දු සිටී.

චූදිත අසනීප තත්වයෙන් සිටින බව දන්වයි.

චූදිතගේ ශරීරයේ තැලීම් ඇති බව දන්වයි. එම තැලීම් චූදිතව අත්අඩංගුවට ගැනීමට යාමේදී ඇති වූ තැලීම් බව දන්වයි.

චූදිත ර.ඛ. ගත කරම්.

චූදිත රජයේ රෝහලකට ඉදිරිපත් කර වෛද්‍ය වාර්තා ඉදිරිපත් කිරීමටත්, අවශ්‍ය ප්‍රතිකාර බන්ධනාගාර අධිකාරී මගින් ලබා දීමට නියම කරම්.,

කැඳ. 20.05.09

අ.ක. / මහේ.

Upon a perusal of the above notes made by the learned Magistrate on 15.05.2009, it is seen that there were injuries on the body of the petitioner at the time he was produced before the Magistrate. The document P3 is the Medico Legal Report issued in respect of the petitioner by the Judicial Medical Officer, Dr.S.D.Channa Perera attached to the District Hospital, Negombo upon examining the petitioner on the 15-05-2009. In that report, he has stated that the petitioner has vomited once on the 15th May 2009. The petitioner has also complained to the Doctor of body ache, headache, shoulder pain, pain of hands. The history of the

incident as mentioned by the Doctor confirms the version given by the petitioner. He also has told the Doctor of an assault by a police officer named I.P. Ranjith along with other police officers. Said I.P. Ranjith is the 1st respondent in this case. In the cage meant to indicate conclusions and opinions of the doctor, he has stated that the petitioner is a 25-year-old person and there were several soft tissue injuries though no fractures were found on his body. Doctor has also stated that the injuries found on the body of the petitioner are consistent with the given history of the incident.

The Doctor has clearly identified four injuries on the body of the petitioner and those are as follows:

1. *There is a 5 x 5 cm recent contusion on the upper portion of the right biceps muscle area*
2. *There is a 6 x 5 cm abraded contusion on the left supra – spinatus area.*
3. *There are at least three 1 cm, 1.5 cm abrasions on the back of the upper chest on mid line.*
4. *There is tenderness of the following areas.*
   Both writs, back of left thigh, vertex, face, both shoulders

The explanation given by the 1st to 3rd respondents as to the injuries of the petitioner was that he had resisted the arrest. They state that they were using minimum force. When looking at the injuries above, it is difficult for a reasonable person to think that those injuries would

have been caused by rolling on the ground or even by trying to get away from the arrest, as stated by the respondents in their affidavits.

The doctor who examined the petitioner had stated that the injuries of the petitioner are consistent with the history given by him of the incident. He, in his report too, has mentioned exactly the story of the petitioner which the petitioner has stated in the affidavit filed with his petition. Manner in which the petitioner describes the injuries in his affidavit is consistent with the opinion of the doctor who examined him. Indeed, the story of the petitioner confirms by the Doctor's report.

Therefore, it is abundantly clear that the petitioner had serious injuries on his body as stated in his affidavit though those injuries do not fall within the category of grievous hurt referred to in the Penal Code. Also, it must be noted that there were five persons including 3 Police officers who have come in search of the petitioner. Under such circumstances, it is unlikely that there would be such a number of injuries when resisting the arrest unless there had been an assault as alleged by the petitioner.

Therefore, having considered the consistencies of the events connected with the incident complained of and all the probabilities thereto, I am inclined to accept the story of the petitioner and to reject the version

of the 1st to 3rd respondents. Therefore, it is clear that the aforesaid injuries found on the body of the petitioner have been caused by the acts of the 1st to 3rd respondents when they arrested the petitioner or during the period the petitioner was in the custody of the 1st to 3rd respondents. Therefore, I hold that the 1st to 3rd respondents are personally liable for the violation of the petitioner's fundamental rights guaranteed under Article 11 of the Constitution. Accordingly, I make order directing each of the three respondents, namely 1st, 2nd and the 3rd respondents to pay the Petitioner Rs.35,000/- separately, amounting it to become Rs.105,000/- out of their own funds.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP PC, J.

I agree

JUDGE OF THE SUPREME COURT

PRASANNA 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 under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Rajapaksha Pathirage Justin Rajapaksha
N.218/A/2, Hiripitiya, Pannipitiya

Petitioner

SC/FR 689/2012

Vs

1. Prasanna Rathnayake
   Inspector of Police,
   C/o, The Inspector General of Police
   Police Headquarters,
   Colombo1.
   Formerly Headquarters Inspector (HQI)
   Police Station, Homagama.
2. WPE Fernando
   Inspector of Police,
   Police Station Homagama,
   Homagama.
3. Asanka Nuwan Bandara
   Police Constable 77517,
   Police Station Homagama,
   Homagama.
4. Ranathunga
   Police Sergeant 22632,
   Police Station Homagama,
   Homagama.
5. Gunaratna,
   Police Constable 60641,
   Police Station Homagama,
   Homagama.
6. A.L.M Aseem
   Sub Inspector of Police,

Police Station Thalangama,
Thalangama.
And Now of:
204, Thettawaadi Road, Oluvil,
Akkaraipattu.
All c/o The Inspector General of Police
Police Headquarters,
Colombo1.

7. T Chandrasekara
Inspector of Police,
Officer-in-Charge of the Crimes Investigation Unit,
Police Station Homagama,
Homagama
8. NK Illangakoon
Inspector General of Police
Police Headquarters,
Colombo1.
9. Head Quarters Inspector
Police Station Homagama,
Homagama.
Homagama.
10. The Attorney General

Respondents

Before : Eva Wanasundera PC, J
B P Aluwihare PC J
Sisira J de Abrew J

Counsel : Nishantha Sirimanna for the Petitioner
Saliya Peiris with Yohan Peiris for the 2nd Respondent
Induni Punchihewa SC for the 8th and 9th Respondents

Argued on : 8.12.2015

Decided on : 28.3.2016

Sisira J De Abrew J.

The petitioner by this petition, inter alia, seeks a declaration to the effect that his fundamental rights guaranteed under Article 11,12,13(1) and 13(2) of the Constitution have been violated by the 1st to 5th and/or 6th and/or 8th Respondents. This court, by its order dated 12.2.2013, granted leave to proceed for alleged violations of Article 11 of the Constitution against 1st to 6th Respondents; for alleged violations of Article 13(1) and 13(2) of the Constitution against the 1st Respondent and for alleged violations of Article 12(1) of the Constitution against the Respondents. The order made by the court states as follows:

> "This Court grants leave to proceed for alleged violation of Article 11 of the Constitution against 1st to 6th Respondents. The court also grants leave to proceed for alleged violations of Article 13(1) and 13(2) of the Constitution against the 1st Respondent. The court also grants leave to proceed against the other Respondents under of Article 12(1) of the Constitution."

It can be contended that this order gives the impression that this court has not granted leave to proceed against the 1st Respondent for alleged violation of Article 12(1) of the Constitution. But such a contention has to be rejected when one considers the facts of this case. In my view the court has granted leave to proceed against the 1st Respondent as well for alleged violation of Article 12(1) of the constitution. The petitioner, in his petition alleges the following facts.

On 25.5.2012 when the petitioner was at his house with his wife, the 1st to 3rd Respondents (police officers attached Police Station Homagama) entered his house; 2nd Respondent dragged the petitioner from the kitchen to the sitting room; the 1st Respondent assaulted him with hand and legs; the 1st Respondent with the

assistance of the 2nd and 3rd Respondents took him near the police jeep which was parked near his house; and pushed him to the police jeep. The 4th Respondent was standing near the police jeep. The 1st to 3rd Respondents did not give any reasons for his arrest. On the way to the Police Station to Homagama, the 1st Respondent asked the petitioner whether he has any children who were going to Matthegoda Vidyadeepa MahaVidyalaya to which question the petitioner replied in the affirmative. Thereupon the 1st Respondent directed the driver of the police jeep to drive the vehicle to the said school. The 1st Respondent at the said school alighted from the police jeep and announced in a very loud voice that the man inside the police jeep was the biggest illicit liquor distiller in the area. The announcement was so loud that it could be heard by the people gathered near the office of the school. At this time a large crowd of people including school children, Principal and teachers of the school had gathered near the office of the school as there was a Dengu eradication campaign being carried out within the school premises. The 1st Respondent has been invited to deliver a special lecture at this campaign to the school children and the parents. The petitioner was kept locked inside the police jeep during the time that the 1st Respondent addressed the Dengu campaign. Thereafter the petitioner was taken to the Police Station Homagama around 10.30 a.m. and was assaulted by the 1st Respondent. Thereafter the petitioner was locked inside the remand cell of the Police Station Homagama. On 27.5.2012, he was produced before the learned Magistrate by the 6th Respondent on a charge that he was in possession of six packets of cannabis, each containing five (5) grams. The petitioner was discharged of all the charges by the learned Magistrate on 8.11.2012. The petitioner became aware of the purported reasons for his arrest and detention at Police Station Homagama only when he was produced before the learned Magistrate.

The allegations levelled by the petitioner have been denied by the 1st Respondent in his statement of objections. He states that he did not arrest the petitioner and the petitioner was arrested only on 26.5.2012 by 3rd, 4th, 5th, and 6th Respondents on an information that he was in possession of cannabis. According to him, even on 26.5.2012 he did not arrest the petitioner. The petitioner's version with regard to his arrest is corroborated by his wife's affidavit. She, in her affidavit, does not identify the 2nd and 3rd Respondents but identifies the 1st Respondent. She later complained to the Inspector General of Police's (IGP) Public and Relief Centre and the OIC of the said Centre by his letter dated 23.1.2013, has informed her that the Police Officer who took steps to remand her husband, has been interdicted.

Hemachandra Balasuriya, the Principal of Matthegoda Vidyadeepa MahaVidyalaya, in a statement made to the Police Station Homagama on 10.11.2012 has stated that on 25.5.2012 the 1st Respondent came to deliver a special lecture in the Dengu eradication campaign organized by the school and when the 1st Respondent came to the school, he announced that he got late as he had to arrest an illicit liquor dealer in the area. Later school children informed him that a father of a child in the school was in the police jeep. Pediris the watcher of the School in his statement made to Police Station Homagama states that on 25.5.2012 the 1st Respondent came to the school in a police jeep to attend a Dengu eradication campaign; that the petitioner without a shirt was in the police jeep; and that he is aware of the fact that the children of the petitioner are students of this school.

The 6th Respondent on 27.5.2012 filed a B report stating that he arrested the petitioner on 26.5.2012 for being in possession of cannabis. The Magistrate's

Court case No. is B 1475/12. He further stated in the B report that the 3rd,4th, and 5th Respondents participated in the raid in which the petitioner was arrested.

I now advert to the question whether the 1st Respondent arrested the petitioner on 25.5.2012. In deciding this questions the evidence given by the 6th Respondent before the learned Magistrate against the petitioner in case No B 1475/12 is very important. This was the case filed by the 6th Respondent against the petitioner for being in possession of cannabis. It is interesting to examine the evidence given by the 6th Respondent before the learned Magistrate. His evidence is completely against the stand that he took in his B report filed in the Magistrate's Court. The 6th Respondent, in his evidence before the learned Magistrate, surprisingly stated that he did not conduct a raid with the other police officers on 26.5.2012; that he neither arrested the petitioner nor did he find any cannabis in the possession of the petitioner; that on 26.5.2012 the 1st Respondent told him that he had arrested the petitioner on the previous day (25.5.2012); that the petitioner could not be released as he was a famous illicit liquor dealer in the area; that the 1st Respondent directed him to institute criminal proceedings in court against the petitioner for being in possession of cannabis; that he told the 1st Respondent that he could not write a B report in respect of an arrest which he did not do; that the 1st Respondent at this stage threatened him to the effect that he (the 1st Respondent) would take steps to cancel his appointment in the Police Department if he did not carry out the instructions given by the 1st Respondent; that he, in fear of losing his job, acceded to the instructions given by the 1st Respondent; that when he queried from the 1st Respondent as to how the said charge could be proved against the petitioner when no cannabis was found in the possession of the petitioner, the 1st Respondent took seven packets of cannabis which had been hidden in a shelf in his office and directed the 6th Respondent to state in the B report that one of the said

seven packets had been purchased from the petitioner and the balance six packets had been found in the possession of the petitioner; and that on the said instructions of the 1st Respondent, he having prepared the B report, produced the petitioner before the learned Magistrate on 27.5.2012.

It is clear from the said evidence of the 6th Respondent that what the 6th Respondent wrote in the B report is false.

The learned Magistrate after considering his evidence on 8.11.2012 discharged the petitioner of the charge. From the above evidence of the 6th Respondent it has been clearly established that the petitioner was not having cannabis in his possession; that the arrest of the petitioner was on 25.5.2012; the arrest and the detention of the petitioner were without any reasons; that a false charge had been fabricated against the petitioner by the 1st Respondent; and that his arrest and detention illegal.

I will now consider whether the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 11 of the Constitution. Article 11 of the Constitution reads as follows.

> "No Person shall be subjected to torture cruel, inhuman or degrading treatment or punishment."

From the affidavits of the petitioner and his wife, the statements of the Principal of the school and the watcher of the school, and the evidence of the 6th Respondent, it is very clear that the 1st Respondent arrested the petitioner on 25.5.2012 without any reasons; that the petitioner was taken to Matthegoda Vidyadeepa MahaVidyalaya on 25.5.2012; that the petitioner was kept locked inside the police jeep which was parked in the school premises; that the 1st

Respondent announced in the school where the petitioner's own children attend, that the petitioner was an illicit liquor (kassippu) dealer; that the petitioner was locked up in the remand cell of the Police Station on 25.5.2012 without any reasons; that he was in police remand cell from 25.5.2012 to 27.5.2012; and that the 1st Respondent fabricated a false case against the petitioner. When I consider the above facts, I hold the view that the position taken up by the 1st Respondent in his statement of objections is false.

If a person is arrested and kept in the police remand cell (police cell in the police station) without any reasons and later a false case is fabricated against him, his personal liberty is restricted and such a person undergoes physical and mental trauma. In such a situation it can be concluded that he was subjected to torture, cruel, inhuman and degrading treatment and or punishment. At this stage it is relevant to consider certain judicial decisions.

In Amal Sudath Silva Vs Kodituwakku Inspector of Police and others [1987] 2 SLR 119 at 126 Athukorale J (with whom Sharvananda CJ and LH de Alwis J agreeing) held as follows.

> "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."

The petitioner in his affidavit says that after his arrest, he was kept inside the police jeep and that jeep was taken to the premises of Matthegoda Vidyadeepa MahaVidyalaya which was the school of his children. The Principal and the watcher of the school, in their affidavits, state that that the 1st Respondent announced that he got late to come to the school as he had to arrest an illicit liquor dealer in the area and that the petitioner was, at this time, inside the police jeep without a shirt. In my view, even assuming the petitioner is a criminal, the police cannot subject him to this kind of treatment. When I consider the above facts, I hold the view that the petitioner had undergone psychological trauma and had been subject to inhuman and degrading treatment.

When a person is arrested without reasons by a police officer acting in the discharge of his official duties or under the colour of his office and later produced him as a suspect before the Magistrate on fabricated charges, such a person undergoes psychological trauma. In such a situation it can be concluded that such a person was subjected to cruel, inhuman and degrading treatment and he (the victim) has not received equal protection of law and that the police officer who

committed the above acts has violated the fundamental rights of the victim guaranteed by article 11 and 12(1) of the Constitution.

The petitioner in this case has suffered a worse situation than the situation discussed above. I would like to reiterate briefly the situation that he faced. When he was arrested he was assaulted by the 1st Respondent. He was taken to the school where his children attend and at the school premises, the 1st Respondent made an announcement whilst the petitioner was inside the police jeep that he got late to come because he had to arrest an illicit liquor dealer in the area. This reference was undoubtedly made to the petitioner because 1st Respondent said that the man inside the jeep was the biggest illicit liquor dealer in the area. During the period that the 1st Respondent delivered the lecture in the school, the petitioner without a shirt was locked inside the police jeep. I have observed, elsewhere, in this judgment that the arrest and detention of the petitioner were without reasons.

Article 11 of the Constitution prohibits any form of torture being caused to the people. In my view the torture in this Article covers both the physical and psychological torture. In this regard I would like to consider certain judicial decisions.

In Mrs WMK de Silva Vs Chairman Ceylon Fertilizer Corporation [1989] 2 SLR 393 at 405this Court held as follows.

> "In my view Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom shall refer to as 'the victim') by a public official acting in the discharge of his executive or administrative duties or under colour of office,

for such purposes as obtaining from the victim or a third person a confession or information, such information being actually or supposedly required for official purposes, imposing a penalty upon the victim for an offence or breach or a rule he or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person to do or refrain from doing something which the official concerned believes the victim or the third person ought to do or refrain from doing, as the case may be."

I would like to quote the following passage from the book titled "Fundamental Rights in Sri Lanka" 2nd edition by Dr. Jayampathy Wickramaratne pages 215 to 216.

"The petitioners in Adhikary Vs Amarasinghe [2003] 1 SLR 270 were husband and wife. The first petitioner was an Attorney-at-Law while the second petitioner was a teacher. They were travelling in their car with their infant child and close relatives. At a traffic jam, the respondents, all security officers of a Minister, prevented the vehicle from proceeding any further and the first and the second respondents punched the car with their fists. When the first petitioner questioned them as to why they were preventing petitioners from proceeding, the first and second petitioners abused and humiliated the petitioners and their family. The first petitioner was pulled out and slapped. The second petitioner, who came to the rescue of her husband with the child in her arms, was slapped and abused. The first and second respondents shouted, saying that they were security officers of a particular Minister and that they could shoot and kill the petitioners.

> Shirani Bandarnayake J, with Edussuriya and Yapa J agreeing, held that "the protection of Article 11 is not restricted to the physical harm caused to a victim, but would certainly extend to a situation where a person who has suffered psychologically due to such action. The learned Judge had no hesitation in holding that the ordeal faced by the petitioners was of an aggravated nature. The anguish faced by the wife was sufficient to prove the required level of severity needed for an act to be violative of Article 11. The psychological trauma faced by the innocent child added to the severity of the actions of the first and second respondents."

Considering the aforementioned observation made by me and the above legal literature, I hold that the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 11 of the Constitution.

I will now consider whether the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 13(1) of the Constitution which reads as follows: "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

After considering the above facts, I hold that the petitioner has been arrested by the 1st Respondent without any reasons; that he has been arrested not according to the procedure established by law; and that the arrest of the petitioner and the detention of the petitioner at the Police Station Homagama are illegal. For the aforementioned reasons, I hold that the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 13(1) of the Constitution.

I will now consider whether the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 13(2) of the Constitution which reads as follows: "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

The petitioner was arrested on 25.5.2012 and kept in the police cell till 27.5.2012 on false charges. He was thereafter produced before the learned Magistrate on 27.5.2012. The 1st Respondent in his statement of objections takes up the position that he did not arrest the petitioner. The 1st Respondent in his statement of objection however takes up the position that the petitioner's arrest took place on 26.5.2012 and the petitioner was produced before the magistrate within 24 hours from his arrest. I have earlier held that the position taken up by the 1st Respondent in his affidavit is false. When I consider the facts of this case, I hold that the petitioner was not produced before the learned Magistrate within 24 hours of his arrest. After considering the facts of this case I hold that the 1st respondent has violated the fundamental rights of the petitioner guaranteed by Article 13(2) of the Constitution.

I will now consider whether the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 12(1) of the Constitution which reads as follows: "All persons are equal before the law and are entitled to the equal protection of the law."

When the 1st Respondent arrested the petitioner without any reasons and fabricated a false charge against him, can it be said that he got equal protection of

law and that the 1st Respondent applied the principle that 'all persons are equal before the law' to the petitioner? This question has to be answered and is answered in the negative. It is now proved that the petitioner was arrested and detained in the police station without any reasons and the charge framed against him was a fabricated charge. Thus the principle that 'all persons are equal before the law and are entitled to the equal protection of law' has not been applied to the petitioner by the 1st Respondent. For the above reasons, I hold that the 1st Respondent has violated the fundamental rights of the petitioner guaranteed by Article 12(1) of the constitution.

I will now consider whether the 6th Respondent has violated the fundamental rights of the petitioner guaranteed by Article 12(1) of the Constitution. The 6th Respondent himself admitted before the learned Magistrate that on the instructions of the 1st Respondent and in fear of losing his employment, he submitted a false B report to the Magistrate. Thus the principle that 'all persons are equal before the law and are entitled to the equal protection of law' has not been applied to the petitioner by the 6th Respondent. For the above reasons, I hold that the 6th Respondent has violated the fundamental rights of the petitioner guaranteed by Article 12(1) of the constitution. However it must be appreciated that the 6th Respondent even at late stage having realized his mistake honestly told the learned Magistrate the circumstances under which he filed the B report and has told the truth before that Magistrate. As a result of his evidence the learned Magistrate discharged the petitioner. The evidence of SI Aseem (the 6th respondent) was to the effect that he never found ganja in the possession of the petitioner but he, on the instructions of the 1st Respondent (the Head Quarters Inspector of the Police Station), introduced ganja to the petitioner and that he produced the petitioner before the Magistrate on a charge of being in possession of

ganja. However SI Aseem (the 6th Respondent), at the initial stage, was successful in getting the petitioner remanded on false facts submitted to the Magistrate in the B report. If SI Aseem, in his evidence before the Magistrate, stuck to his version set out in the B report, his evidence would have been false. The incident that took place in this case is a good example for the trial judges to remember that the police sometimes arrest people without any reasons and later introduce contraband or similar illegal items to the person arrested to justify the arrest. When the story of the police is false, one police officer may sometimes contradict the other police officer. The trial judges must be extremely careful when they are called upon to act only on one police officer's evidence when the police claim that a team of police officers conducted a raid and found contraband in the possession of the suspect because there can always be an introduction as happened in this case. Therefore in cases where the police allege that they found contraband in possession of a suspect or suspects, it is safer not to act only on one police officer's evidence if more than one police officer have participated in the raid because if there is an introduction by the police officers as happened in this case, there may, sometimes, be contradictions among the evidence of police officers. In such situations, adjudication of issues in the case becomes easier to courts. I am mindful of the principles laid down in Section 134 of the Evidence Ordinance when I make the above observation. But however courts should not fall into the trap of convicting an innocent person by strictly following the principles laid down in section 134 of the Evidence Ordinance. The incident that had taken place in the present case is a classic example that courts should, in appropriate cases, relax the principles laid down in section 134 of the Evidence Ordinance. However if a police officer who was not assisted by any other police officer searches a person on suspicions and

finds contraband or any illegal items in the possession of the said person the situation discussed above may be different.

I will consider the said behaviour of the 6th Respondent when I consider granting compensation.

It was the position of the 6th Respondent that he did not arrest and detain the petitioner. It is the duty of the arresting officer to take steps to produce a person arrested before the learned Magistrate without delay. Thus in the present case the 6th Respondent has not violated Article 13(2) of the Constitution. There is no evidence against the 6th Respondent that he violated Article 11 and 13(1) of the Constitution. I therefore hold that the 6th Respondent has not violated Article 11 and 13(1) of the Constitution. As I pointed out earlier, the 6th Respondent has violated the fundamental rights of the petitioner guaranteed under Article 12(1) of the Constitution.

I will now consider the case against the 3rd Respondent. The 1st Respondent has annexed an affidavit of the 3rd Respondent. The 3rd Respondent, in his affidavit, says that the 1st Respondent who was with him went to Matthegoda Vidyadeepa MahaVidyalaya to attend a dengu campaign. The Principal and the watcher of the said school, in their affidavits, take up the position that the 1st Respondent came to the school on 25.5.2012. The watcher, in his affidavit, further says that the petitioner was inside the police jeep in which the 1st Respondent came. The petitioner, in his affidavit, says that the 1st to 3rd Respondent came to his house to arrest him. When I consider these matters especially the affidavit of the 3rd Respondent, it can be safely concluded that the 3rd Respondent too has gone with the 1st Respondent to arrest the petitioner. But the petitioner does not say that the 3rd Respondent assaulted him. The only act committed by the 3rd Respondent was

that he, on 25.5.2012 went with the 1st Respondent to arrest the petitioner. He being a police constable attached to the Police Station Homagama has no authority to refuse to accompany the 1st Respondent, the Officer-in-Charge of the Police Station when the 1st Respondent requests him to carry out an official duty and further he has no authority to decide whether the petitioner should or should not be put to the police jeep once the petitioner was arrested by his superior officer, the 1st Respondent. When I consider all these matters, I am unable to conclude that the 3rd Respondent has violated the fundamental rights of the petitioner guaranteed by the Constitution. I therefore hold that the 3rd Respondent has not violated the fundamental rights of the petitioner. There is no strong evidence against the 4th and 5th Respondents to conclude that they have violated the fundamental rights of the petitioner guaranteed of the Constitution. I therefore hold that the 4th and 5th respondents have not violated the fundamental rights of the petitioner guaranteed by the Constitution.

I will now consider the case against the 2nd Respondent. He takes up the position that he was the Station Duty Officer (SDO) of the Police Station Homagama on 25.5.2012. However learned counsel for the Petitioner relying on the document marked '2Ry' produced by the 2nd Respondent attempted to contend that that from 8.13 a.m. to 10.45 a.m. no entries exist to establish that he was at the police station. Is this evidence enough to conclude that he was away from the police station from 8.13 a.m.to 10.45 a.m.? Although the Petitioner states in his affidavit that the 2nd Respondent dragged him from the kitchen to the sitting room, the 2nd Respondent has established by 2R1, the Duty Register, that he was the SDO of the Police Station on 25.5.2012. When I consider all these matters, it is unsafe to conclude that the 2nd Respondent was involved in arresting the Petitioner. For the above reasons I am unable to conclude that the 2nd Respondent has violated the

fundamental rights of the Petitioner. I therefore hold that the 2nd Respondent has not violated the fundamental rights of the Petitioner.

I now consider the case against 8th Respondent. Learned Counsel for the Petitioner attempted to contend that there was inaction by the 8th Respondent with regard to the steps against the 1st Respondent. He submitted that there were shortcomings in the charge sheet filed against the 1st Respondent and 6th Respondent. I must state here that the 8th Respondent has taken steps to hold an inquiry against the 1st Respondent and the 6th Respondent. The charge sheet has been produced as 9R1. If there are shortcomings in the charge sheet, they can be attended to by the prosecuting officer. It is too early for this Court to comment on said the inquiry. For these reasons I hold that the Petitioner has not established any case against the 8th Respondent.

I have earlier held that the 1st Respondent has violated the fundamental rights of the Petitioner guaranteed by articles 11, 12 (1), 13(1) and 13(2) of the constitution. Considering all the facts of this Case, I direct the 1st Respondent to pay, from his personal funds, Rs.200,000/- to the Petitioner as compensation.

I have earlier held that the 6th Respondent has violated the fundamental rights of the Petitioner guaranteed by Article 12(1) of the constitution. I have observed in this judgment that the 6th Respondent honestly told the truth to the learned Magistrate and that his behaviour would be considered when granting compensation. I direct the 6th Respondent to pay Rs.10,000/= to the Petitioner.

The 1st and the 6th Respondents violated the fundamental rights of the Petitioner when they were functioning as Police Officers in the course of their official duties. I therefore hold that the State should also pay compensation. I order

that the State should pay Rs.25, 000/- to the Petitioner. I direct the IGP to take steps to ensure the payment of this amount to the Petitioner.

I have earlier in this judgment held that the arrest and detention of the Petitioner by the 1st Respondent are wrongful and illegal and that he has violated Article 11,12(1),13(1) and 13(2) of the Constitution. I therefore direct the IGP to conduct investigation under the guidance of the Attorney General against the 1st Respondent and consider instituting criminal proceedings against the 1st Respondent. I direct the Registrar of this Court to forward a copy of this judgment to the IGP and the Attorney General to take appropriate action.

Judge of the Supreme Court.

Eva Wanasundera PC, J

I agree.

Judge of the Supreme Court.

B P Aluwihare PC, J

I agree.

Judge of the Supreme Court.

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

In the matter of an application under Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Sithambiralage Martin Sebastian PremalalPerera, P.O. Box 14, Ja-ela.
2. ThelgeChithraratnePeris, 219, VenBaddegamaWimalawansaMawatha, Colombo 10.
3. WerakkodigeChandrasiriAlwis, 123, Wattegedera Road, Maharagama.
4. PinnawalaAppuhamilage Dias Karunaratne, Medical Clinic, Kandy Road, Imbulgoda.
5. NimalGaminiWijethunge, 45/10, Malwatta Road, Maharagama.
6. AlagapanneShantha Kumar, No. 480/151, Roxy Gardens, Colombo 06.

PETITIONER

S.C. F.R. Application No. 891/2009

Vs

1.Tissa Karalliyadda, Minister of Indigenous Medi cine , Old Kottawa Road, Nawinna , Maharagama.

2.Secretary, Ministry of Indigenous Medicine, Old Kottawa Road, Nawinna, Maharagama.

2a. Dr. D.M.R.B. Dissanayake, Secretary, Ministry of Health and Indigenous Medicine, No. 385, Ven.

BaddegamaWimalawansaTheroMawatha,
Colombo 10. **- Substituted 2a Respondent**

3. Homeopathic Council, No. 94, Shelton JayasingheMawatha, Welisara, Ragama.

4.G.G.A.Apponso, No. 82, Galle Road, Colombo 04.

5. K. P. Walisinghe, No. 62/60, Dabare Place, Mirihana, Nugegoda

6 L.M.S. Alagiyawanna, "Anoma", Meevitagammana, Urapola.

7. H.M.C.J.Herath, Jethawana Road, Colombo 14.
8. M.I. Latiff, No. 23A, 1/1, AmarasekeraMawatha, Colombo 05.
9. L.A. Madhupali, No. 3/1B, Peelipothagama Road, Badulla.
10. C. Weerasekera, No. 12, Braemore Gardens, Matale Road, Katugastota.
11. H.B.S. Keerthisena, No. 8, Hekitta Lane, Wattala.
12. Hon. Attorney General, Attorney General's Department, Colombo 12.

RESPONDENTS

13. SalindaDissanayake, Hon. Minister of Indigenous Medicine, Ministry of Indigenous Medicine, Ayurveda Hospital, Borella, Colombo 08. - **Added 13th Respondent**.

13.a .Dr. RajithaSenaratne, Hon. Minister of Health and Indigenous Medicine, Ministry of Health and Indigenous Medicine, No. 385, Ven, BaddegamaWimalawansaTheroMawatha, Colombo 10.
Substituted 13 a Respondent.

BEFORE: **S. EVA WANASUNDERA PC, J.**
B.P.ALUVIHARE PC, J.
K. T. CHITRASIRI J.

COUNSEL: J.C.Weliamuna with PulasthiHewamanne for the Petitioners.
Sanjay RajaratnamPC , Additional Solicitor General for the 2nd , 12th and 13A Respondents.

ARGUED ON: 08. 03. 2016.

DECIDED ON: 31.03.2016.

S. EVA WANASUNDERA PCJ.

This Court granted Leave to Proceed in this matter for the alleged violation of fundamental rights contained in Articles 12(1), 14(1)c and 14(1)g of the Constitution on the 1st of July, 2010.

On 10. 02. 2016, the counsel for the 3rd and 5th to 10th made an application to get them discharged from these proceedings as all of them have ceased to hold office in 2011. Since it was not objected to by the other parties, court allowed that application and heard only the submissions made by the counsel for the Petitioners and the counsel for the 2nd the 12th and 13A Respondents.

The facts pertinent to this matter are as follows: The Petitioners were the members of the Homeopathic Council established under the Homeopathic Act No. 7 of 1970. They were elected by the Homeopathic practitioners by secret ballot at an election held in terms of Sec. 3(3) of the said Act. The names of the 1st to 5th Petitioners as elected members were published in Gazette No. 1436 dated 10.03.2006. They were appointed for 5 years from that date. The name of the 6th Petitioner and the 11th Respondent were notified as members of the Homeopathic Council later on when two members appointed earlier passed away in 2008 and 2009.

It is to be noted that the said appointments were made as a result of a settlement reached by the parties in the Court of Appeal case No. C.A.Writ No. 492/05. In that case the 1st Petitioner and four others were the Petitioners who came before court to get a writs of Mandamus from the Court of Appeal to compel the 1st Respondent to hold an election to appoint members of the Homeopathic Counsel in compliance of Sec. 3(3) of the Homeopathy Act No. 7 of 1970. The 1st Petitioner was elected as the President of the Council.The Petitioners plead that due to this reason of having filed action against the 1st Respondent, there existed a continuation of the conflict between the Council and the Minister, the 1st Respondent. Once again, the Petitioners , the members of the Council went before the Court of Appeal seeking a writ of prohibition alleging that the Respondents were usurping their powers with regard to the activities concerning the Homeopathic Hospital at Welisara, against the 1st and the 2nd Respondents in case No. 596/2008/CA . This matter was argued and concluded and the

judgment was pending to be delivered on 27.11.2009. In the mean time, the 1st Respondent, the Minister removed all the Council Members and appointed new members to the Council by orders dated 20.10.2009 and 21.10.2009. which were published in Gazette Notification (Extraordinary Nos. 1624/12 and 1625/12 stating that he is acting in accordance with the powers granted to him by law under Secs. 11 and 10 of the Homeopathy Act.

Sec.11 reads:

11(1) The Minister may , without assigning any reason, remove from office, by Order published in the gazette, any appointed or elected member of the Council. In the exercise of his powers under the preceding provisions of this Section the Minister may act either on his own motion or on any recommending made to him by the Council under sub-section (2). Such Order shall take effect on the date of such publication.

(2) The Council may recommend to the Minister that any appointed or elected member of the Council shall be removed from office on any ground specified in sub-section (4).

(3) The Council may remove from office any elected member of the Council on any ground specified in sub-section (4). A written notice of the decision of the Council to remove such member shall be served on such member of the Council. No such decision shall take effect-

(a) where no appeal against the decision is preferred to the Minister under sub-section (5) within the period stated therein, until the expiry of that period; and

(b) where an appeal is so preferred, unless and until the decision is confirmed on such appeal.

(4) The Council may recommend to the Minister under sub-section (2) that any member of the Council shall be removed from office any elected member of the Council under sub-section (3) , on any of the following grounds:-

(a) that being an advocate or a proctor, he has appeared in any legal proceedings, whether civil or criminal, against the Council;

(b) that he has so abused his position as a member of the Council as to render his continuance in office detrimental to the interests of the Council.

(5) Any member of the Council who is aggrieved by the decision of the Council to remove him from office may, within a period of fourteen days after the service on him of the notice of such decision prefer a written appeal against such decision to the Minister. The Minister may on such appeal, **after giving both the Council and the appellant an opportunity of being heard,** make an order either confirming or rejecting such decision. The Minister shall cause a notice of his order on such appeal to be served on both the appellant and the Council.

Section 10 reads:

Any vacancy in the office of a member of the Council shall be filled by the appointment or election of a member, as the case may be, in accordance with the provisions of this Act. Any person who has vacated his office as a member, **otherwise than by removal by the**

Minister or the Council, shall be eligible for reappointment or re-election as a member, as the case may be.

I observe that when the Minister removes a member of the Council at any time, as has been in this case in hand, **he is debarred** from being reappointed or being re-elected during his life time in his profession. It is a very serious matter where the individual so removed is concerned. Such a provision is enacted by statute because a member who is removed is so removed for a seriously terrible act done on the part of that Council member. I observe that all the members of the Council , when they were removed by the Minister, did not know why they were removed as they were not notified of that fact at any time or they were not charge sheeted or they were not subject to any inquiry or nothing of the sort was done by the person in Authority who was the 1st Respondent, the Minister prior to them being removed by letters sent to them following the Gazette Notification published in the Gazette with the order of removal. The rule in Administrative Law of Audi Alteram Partem has not been complied with by the 1st and the 2nd Respondents.

In the case **of Douglas A. Nethsinghe Vs Ratnasuru Wickremanayake – SC Application 770/99, SC Minutes of 13.07.2001,** Justice Mark Fernando gave the judicial interpretation to the phrase, " without assigning any reason " and held that " such is subject to Article 12 of the Constitution ", and that the Petitioner in that case could not have been removed without assigning a reason. In earlier cases such **as Bandara Vs Premachandra 1994 1 SLR 301, De Silva Vs. Atukorale, Minister of Lands,Irrigation and Mahaweli Development and another 1993 1 SLR 283, and Premachandra Vs Major Montague Jayawickrema and another 1994 2 SLR 90** also it was held that the application of the pleasure principle included in many statutes, should be interpreted to mean that such provision made in the statute is subject to Article 12 of the Constitution. The said authorities have specifically rejected the notion of unfettered discretion given to those who are empowered to act in such capacity and held that discretions are conferred on public functionaries in trust for the public, to be used for the good of the public, and propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted. It is clear that the Supreme Court has held that the discretion should be exercised in conformity with the general tenor and policy of the statute and for proper purposes and that it should never be exercised unreasonably.

I am of the opinion that the Parliament when enacting this law would never have envisaged of all the members of the council being removed by the Minister at once for whatever reason. The normal course of removal, according to the provisions , seems to be that, if a member is corrupt to the limit of abusing his position in the Council, the Council firstly recommends to the Minister that such a person be removed and then such a member, who is aggrieved by that recommendation of the Council which should be notified to him by the Council, can make an appeal to the Minister who should then give an opportunity for the appellant and the Council to be heard by him, finally after hearing them should make an order of removal. The action taken by the Minister in this instance is on a decision taken on his own for reasons only known to him because it was not notified to any person, the reasons were not given or even entered in writing in any of the records of the Minister.

There is no evidence before this Court as to the reasons for him to have acted when all the members of the Council were removed. It is only when this case was filed that the 2nd Respondent, the Secretary to the Ministry had filed objections by way of an affidavit dated 18th March, 2010, wherein the ' reasons for removal done by the Minister ' has somewhat been explained, in paragraph 7 therof. In sub-paragraphs (a) to (o) of paragraph 7, the reasons given are quite general in nature and I observe that if those are the true allegations against the members of the Council, the 2nd Respondent could have easily called for explanation, issued charge sheets and held an inquiry, prior to removal. No action had been taken prior to removal of the Members of the Council as one whole group which is very surprising and which could never have been contemplated by the legislature at the time of enactment of this piece of law. The Homeopathy Act, I observe had been enacted with the intention of establishing of a Homeopathic Council which would be responsible for carrying out the objects specified in the preamble thereto. The objects were, the promotion and encouragement of the homeopathic system of medicine, the registration of homeopathic practitioners, the recognition of homeopathic institutions, the regulation and control of the importation, sale and dispensing of homeopathic medicines and drugs and other preparations and to provide for matters connected thereto. I also observe that the Homeopathic Council has a lot of powers to reach these goals and some of the reasons given by the 2nd Respondent against the Council members are actions performed within their powers given to them by law. If the members were acting in contravention of the provisions of law, the Ministry should have acted in accordance with the powers vested with them according to law.

I hold that the Minister has acted wrongly in thus removing the members of the Council arbitrarily, and capriciously as the Petitioners were not appraised of the accusations against them, and not heard them before such removal and thus the rule of natural justice , audi alteram partem was not adhered to.

Sec. 10 was used by the Minister to appoint a whole set of new members after the aforesaid act of removal of the elected members. According to the wording in this section, 'any vacancy in the office of a member of the council shall be filled by the appointement or election of a member, as the case may be in accordance with the provisions of the Act.' It does not say who should appoint or who should elect. But Sec. 6 states ; " If after having been given an opportunity to do so, there is **default on the part of registered homoepathic practitioners** in the election of a member of a Council**, then**, the Minister may, **in lieu of such election**, appoint a duly qualified person as such member: and the **member so appointed shall be deemed, for all the purposes of this Act, to be a member duly elected by such practitioners."**

Accordingly, the Minister on his own does not have a right to appoint members to the Council. Only if the practitioners fail to elect a member, then and only then , does the Minister get a chance to appoint such a member and that appointment is done 'in lieu of such election'. Then, it is deemed that ' such member is a duly elected member elected by the practitioners'. Sec. 3(3) provides for the practitioners to elect the members of the Council. In an analysis of Sections 10, 6 and 3(3) I find that there is no authority for the Minister to appoint members

all of a sudden the way he thinks fit because he is doing so only in lieu of an election when the practitioners fail to do so. In the case in hand there was neither an invitation given to the practioners to elect the new members or an attempt or an opportunity given to the practitioners to elect new members. I hold that the Minister has acted ultra vires his powers granted to him by the Act. He has abused the powers given by the Act in reaching the goals for which the Act was enacted.

I hold that the fundamental rights of the Petitioners enshrined in Articles 12, and 14(1)g have been infringed by the 1st and 2nd Respondents.

In the circumstances, I declare that the removal of the Petitioners from the membership of the Homeopathic Council is null and void. I hold that the appointments of the 4th to 10th Respondents as members of the Council are null and void. Therefore I make order to cancell the said appointments with effect from the date of appointment, even though they have all ceased to hold office by now.

I hold further that the Petitioners should be compensated for the said infringement by the State, at Rs. 250000/- (two hundred and fifty thousand) per person.

The Application is allowed with costs.

Judge of the Supreme Court

Justice B. P.Aluvihare PC
I agree.

Judge of the Supreme Court

Justice K. T. Chitrasiri
I agree.

Judge of the Supreme Court

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

S.C/ FR Application No. 573/2010

In the matter of an Application and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Asitha Nanayakkara Liyanage
No. 1, Iriyavetiya Junction,
Kandy Road,
Kiribathgoda.

PETITIONER

Vs.

1. Prasanna Ranaweera,
Chairman
Pradeshiya Sabha,
Kelaniya.

2. Hemapala Hettiarachchi
Secretary,
Pradeshiya Sabha
Kelaniya.

3. Commissioner of Local Government
Kachcheri Complex
Gampaha.

4. Chief Inspector of Police
Kiribathgoda Police Station
Kiribathgoda.

5. Hapuarachchige Dilan Lakshitha
No. 132/55, Nahena,
Hunupitiya, Wattala.

6. Wickramasinghe Arachchige
Don Palitha Wickramasinghe
No. 554/D, Iriyawetiya
Kelaniya.

7. Mervyn Silva
Deputy Minister,
Ministry of Highways and Road Development
9th Floor, Sethsiripaya,
Battaramulla.

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

RESPONDENTS

BEFORE: S.E. Wanasundara P.C., J.
Anil Gooneratne J. &
K. T. Chitrasiri J.

COUNSEL: Vishva Gunarathne with Sandeepani Wijesooriya
For the Petitioner

D.M.G. Dissanayake with Ms. L.M.C.D. Bandara
for 1st , 2nd, & 7th Respondents

Rajiv Goonathilake S.S.C. for 3rd, 4th, & 8th Respondents

Chathura Galhena with Ms. Manoja Gunawardene
For 5th & 6th Respondents

ARGUED ON: 14.06.2016

DECIDED ON: 28.11.2016

GOONERATNE J.

The Petitioner a resident of No. 1, Iriyawetiya Junction, Kandy Road, Kiribathgoda, complains against all Respondents in his Fundamental Rights Application to this court filed on 01.10.2010, of certain harassments and abuses caused to him and his family, which ultimately resulted in demolition and destruction caused to part of his residential house. It is averred inter alia in the petition filed in this court that on 18.09.2010 1st, 2nd, 4th, 5th, 6th and 7th Respondents had come with equipment and vehicles belonging to the Kelaniya Pradeshiya Sabha and destroyed the parapet wall bordering the Petitioner's property bordering the Kandy – Iriyawetiya Road and also destroyed two toilets and a wash room within the premises, owned by him.

In the body of the petition the Petitioner refers to submitting a building plan to 1st Respondent for approval and it was delayed for about five years and finally approved on March 2009. It is also stated in the said petition, in or around March 2008 a three wheeler stand, namely "Samagi Three Wheel Stand" which was run by the 5th and 6th Respondents commenced operating next to or adjacent to the Petitioner's land and 1st Respondent, erected bill boards. It is pleaded that the Petitioner complained about such a three wheeler stand to

the 1st and 2nd Respondents on numerous occasions but was informed by the 1st to 4th Respondents that it was only a temporary arrangement until another location could be found. In this background paragraph 15 of the petition refer to three incidents involving the 5th and 6th Respondents.

(a) Obstructing the entrance of the access to the Petitioner's house, by a three wheeler driver. Complaint lodged by the Petitioner's wife on 01.09.2008 with the relevant police.
(b) Indecent exposure by the 5th Respondent to the Petitioner's wife on 09.04.2009.
(c) Use of unacceptable language by the 7th Respondent against Petitioner's wife on 20.06.2010.

The complaints to police and response of 6th Respondent produced marked P6, P6(a) P6(b), P6(c), P6(d) and P6(e). However police initiated criminal proceedings against 5th & 6th Respondents but parties settled their disputes.

Petitioner had by letter P7 of 23.06.2010 complained to the 3rd Respondent about the inconvenience caused to him by the three wheeler stand and his complaints to the police. The 3rd Respondent by his letter of 21.07.2010 informed the Petitioner to seek legal advice. (P7a) However the position of the Petitioner is that the three wheeler stand is an unauthorised stand. Thereafter the Petitioner sent letters of demand marked P7(a) to P7(d) to 1st to 3rd Respondents and Secretary, Minister of Local Government (P7(e)) .

The more serious complaint of the Petitioner is contained in paragraphs 20 and 21 of the petition. It is pleaded that on 18.09.2010, a person who identified himself as Mervyn Silva (7th Respondent) had informed him over the mobile phone that within ½ hour he is coming to the Petitioner's house to destroy the parapet wall. Photographs annexed as P8.

In paragraph 21 (b) it is stated that the Petitioner is reliably made to understand, within one hour of the telephone call 1st, 2nd, 4th, 5th, 6th & 7th Respondents came with equipment, vehicles belonging to the Kelaniya Pradeshiya Sabha, and completely destroyed the parapet wall of the Petitioner. Petitioner annex 'P9' photographs to show the destruction. In paragraph 21(b) it is pleaded that the above Respondents also destroyed two toilets and a wash room within the premises. Petitioner lodged a complaint (P10) with the relevant police on the same day (18.09.2010). Documents P11, P11(a), P11(b) & P11(c) & P11(d) are complaints made in this regard to His Excellency the President, Secretary Defence and several other persons in authority during the relevant period. Letter P11 to P11d are dated 24.09.2010. The said letters clearly implicate the 7th Respondent, Kelaniya Pradeshiya Sabha, and the three wheeler drivers. There is a description of loss and damage caused to the Petitioner and he being informed about the incident by his employee who was present at the relevant time. It also describes the fears expressed by lawyers and their

reluctance to take over Petitioner's case due to 7th Respondent's involvement. It is a humble appeal, by P11 to P11d to consider Petitioner's plight. The said letters had been received and acknowledged by the recipients (vide letters B,C,D,E & F annexed to the counter affidavit of Petitioner). Complaint P10 along with documents P11 to P11d and B to F are all contemporaneous documents. It is no doubt in a way, solace sought by the Petitioner who was put into a state of fear of life and property.

The letter 'c' acknowledge Petitioner's letter of 24.09.2010 (P11) and the office of Secretary, Defence requesting the Petitioner to attend the Police Headquarters, Colombo 1 with all documents and make a complaint to I.G.P. Letter 'F' refer to Petitioner's letter of 24.09.2010 and a directive to Divisional Secretary, Kelaniya to make inquires and take suitable steps (copied to Petitioner by speaker's office). Letter 'B' makes no reference to Petitioner's letter. It is dated 23.09.2010 addressed to 7th Respondent to remove the three wheeler stand. Letter 'B' though no reference is made to letter of 24.09.2010, the writer hints at the problem Petitioner had with the three wheelers. Letter 'B' sent by the Presidential Secretariat. 'D' is from the Chief Secretariat Office to Commissioner of Local Government and Petitioner's lawyer, regarding the letter of demand. It is evident to court that Petitioner's complaint to the authorities concerned has been acknowledged by Secretary, Ministry of Defence and others

and recommends to the Petitioner and others in authority the course of action to be adopted. All those who received Petitioner's complaint as stated above, never rejected his complaints.

I would prefer at the outset, to consider the 1st complaint made to the relevant police by the Petitioner on the day of the incidents itself, marked and produced with the petition as P10. I note the following in statement P10 dated 18.09.2010.

(1) He left the premises in dispute on the morning of 18.09.2010, having locked his house and padlocked the gate. He left for his house at Kadawatha.

(2) At about 10.45 a.m Petitioner received a telephone call which was registered in his mobile phone, bearing No. 0722287210. The caller identified himself as Mervyn Silva. The caller told the Petitioner. "මම මර්වින් සිල්වා කතා කරන්නේ තව පැය ½ ක් ඇතුලත ඔයා මෙතනට එන්න නැතිනම් මේක කඩනවා කියලා". Thereafter Petitioner disconnected the call.

(3) Petitioner told an uncle of his to call the above number. His uncle did so and was told that Mervyn Silva is at a meeting.

(4) Petitioner's relatives prevented him leaving the house at Kadawatha.

(5) Therefore he sent another relative of his, to the premises in dispute.

(6) The person who went to the scene informed the Petitioner that the entire parapet wall was demolished, and that three toilets were also destroyed.

(7) Petitioner did not visit the scene of the incident.

(8) Petitioner observes that he had a suspicion that this was done by the three wheeler drivers. Petitioner did not see as to who damaged, and caused destruction.

(9) Unable to state whether it was due to any political pressure.

(10)Petitioner will provide further proof in due course. සාක්ෂි පසුව ඉදිරිපත් කරමි.

I observe that on a perusal of P10 consisting of (1) to (10) above, Petitioner, directly implicates in the way he could, the 7th Respondent and states further he is suspicious of the three wheeler drivers. Petition to this court was filed on 15.10.2010. A person in the position of the Petitioner certainly would have been in a very disturbed mental state of mind and would have also been in constant fear of his life and property and as well as his family. It is in fact far too much for a normal person to take up or bear up such a dreadful situation. I note that, by a gradual process the earlier incidents with the three wheeler drivers, for which police intervened, culminated in damage and destruction caused to house and property of the Petitioner.

This court on 22.11.2010 granted leave to proceed for alleged violations of Article 12(1) of the Constitution. On the said day Supreme Court granted 8 weeks-time for the Respondents to file objections and thereafter 3 weeks-time granted to file counter affidavit for the Petitioner. However for various reasons recorded, the objections of the Respondents were not filed on the due date, and on applications of parties to this application further time was

granted to file objections. The filing of pleadings were completed before this court only on or about 16.01.2013.

The 1st and 2nd Respondents, the Chairman and Secretary respectively, of the Kelaniya Pradeshiya Sabha denies allegations levelled against them by the Petitioner, in their objections and affidavit filed of record. As regards the approval granted by the Pradeshiya Sabha for Petitioner's building plans, it is pleaded that for the purpose of building, for a commercial purpose, plan was approved and delay to do so was because the plans submitted by the Petitioner had to be amended from time to time (1R1, 1RA). These two Respondents merely state that they are unaware of the allegations referred to in paragraphs 20, 20(a), 23 and 28 of the petition of the Petitioner. (The said paragraphs refer to the incident of causing damage and demolition of the premises of the Petitioner as stated above). They also deny that they acted in an arbitrary manner, and nor did they violate Petitioner's Fundamental Rights. These Respondents state that the Petitioner complained to the Human Rights Commission about the incident of demolition, and state an inquiry had been initiated by the Commission.

The 7th Respondent's statement of objections and affidavit is a bear denial of the allegations made against the 7th Respondent. Further it merely aver

that the 7th Respondent did not violate any fundamental rights of the Petitioner and that the application of the Petitioner is misconcieved in law.

The 3rd Respondent (Assistant Commissioner of Local Government) in his objection and affidavit aver inter alia and admit the receipt of document P7 regarding alleged inconvenience caused to the Petitioner by the location of a Three Wheeler Stand in the vicinity of the Petitioner's business premises. It is pleaded that there were no by-laws to establish a parking area for vehicles within the limits of the Kelaniya Pradeshiya Sabha and 3rd Respondent had informed the 2nd Respondent (Secretary to the Kelaniya Pradeshiya Sabha) to take steps to have by-laws enacted to regularise parking arears. All other allegations are denied by the 3rd Respondent. I cannot find any material to implicate the 3rd Respondent regarding the incident of causing destruction/damage and demolition to the premises of the Petitioner on the day of the incident (18.09.2010). 3rd Respondent was never factually associated with the above incident alleged by the Petitioner that violated his rights. Complaints of the Petitioner does not make any reference to the complicity of the 3rd Respondent with the alleged conduct of the 1st , 2nd, 5th, 6th, & 7th Respondents, and no nexus at all.

The 4th Respondent (not named in the petition) the Officer In Charge, Police Station, Kiribathgoda in his affidavit inter alia state complaints of

Petitioner's wife regarding the three wheelers causing obstruction to their access, indecent exposure, were investigated and statements recorded (P6a & P6b). 5th Respondent was arrested on 10.04.2009. However the complainant intimated to the police that the above acts which resulted in a complaint were settled between parties (4R1, 4R2 (A) and (B). Further the complaint made against the 6th Respondent (P6(e)) was recorded but subsequently parties settled their disputes. As such I observe the above complaints made to the police by the Petitioner and his wife involving the three wheeler park had been duly investigated and action was taken by the relevant police, until such time same were settled between parties.

The question is the more important incident that was reported to the relevant police station by the Petitioner which occurred on 18.09.2010. The Office-In-Charge of the Police Station, Kiribathgoda who has sworn an affidavit (as 4th Respondent) states he was not on duty during the period 18th to 22nd September 2010. He produced the leave register and the attendance sheet marked 4R3 and 4R3A to establish his absence on the day in question. In the affidavit it is pleaded that Inspector of Police, Piyal Padmasiri covered up duties as Officer- In-Charge at the Kiribathgoda Police Station during his absence. Further, complaint P10 lodged at the police station had been investigated into in accordance with the law. It is also averred that the Petitioner made a further

statement on 05.10.2010 (about 2 ½ weeks after the 1st complaint). It is marked 4R4 stating that the Petitioner proposed to institute legal action in his personal capacity and further steps by the police into the complaint were not required. This seems to be the method adopted by the 4th Respondent to absolve himself from required routine official functions and duties.

Even if some credit could be given to documents 4R3 and 4R3A it may only establish his absence on the particular day. 4R4 is referred to as a further statement from the Petitioner, in contrast to 4R2 (B) which states withdrawal of complaint by Petitioner's wife pertaining to earlier incident with the three wheeler drivers. I observe that 4R4 does not suggest a withdrawal of the complaint or any attempt to settle or requesting police to strop investigations. Petitioner merely notify the police that the Petitioner intends to seek legal intervention and as such he is taking necessary steps with a view of obtaining a court decision. There is no settlement suggested or a withdrawal of Petitioner's complaint P10. There is nothing to suggest in 4R4 that further steps by the police is not required. I wander as to why such a fact has been pleaded (paragraph 18 (b) of the Respondent's affidavit) before the Apex Court of this country by the particular affirmant?

To clarify further the relevant portion in 4R4 reads thus: "මාගේ නාප්පය කඩා දැමීම සම්බන්ධව මෙම ස්ථානයට පැමිණිල්ලක් කලා. නමුත් එම

පැමිණිල්ල සම්බන්ධන්ධ අධිකරණය නීතිමය පියවර උදෙසා කටයුතු කිරීමට අදහස් කරන අතර මේ සම්බන්ධව මම දැනට නීතිමය උපදෙස් ලබා ගනිමින් සිටිනවා. එම නිසා මේ සිද්ධිය සම්බන්ධව අධිකරණය තින්දුවක් ලබා ගැනිමට කටයුතු කරමි". I have to take a very serious view of the affidavit of the 4th Respondent, particularly paragraph 18(b). This is an attempt to mislead court and an indirect or direct ploy adopted to give a different complexion to the case in hand or support the case of one or more Respondents. Notwithstanding the so called absence of the 4th Respondent, what steps did the police take on the complaint of the Petitioner to the police by P10 dated 18.09.2010? This is a serious case of mischief, house breaking, criminal trespass etc. To make it very simple to be understood, the following few questions come to my mind:

(a) Did the police visit the premises in question on the day in question and record statement of persons in and around the scene of the crime?
(b) Any notes made by the police of the damage caused to the property of Petitioner in question?
(c) Were facts reported to the relevant Magistrate?
(d) What steps were taken by the police during the period 18th September to 5th October even to support the averment in paragraph 18 (b) of the 4th Respondent's affidavit?
(e) Any steps were taken by the police to trace and establish the telephone number referred to in Petitioner's complaint P10?

At this point of this Judgment prior to considering the involvement of the 5th to 7th Respondents, I wish to observe as follows. A court of law cannot be immune or ignorant to happenings around the country that affect human lives which cause tremendous loss or injury to such persons or individuals, inclusive of loss to property. If an illegal act or wrong has been caused to a citizen, who seeks legal remedy a court needs to engage itself in an all inclusive inquiry to ascertain circumstantial and direct evidence and try the case according to law. Fundamental rights jurisdiction hitherto vested in the Apex Court is wide enough to reach a genuine complaint of a citizen who has suffered as a result of executive or administrative actions. That is the reason for this court even in the past permitted litigants to submit their grievance even by post or post cards, and permit application to be entertained beyond the period ordinarily permitted by the basic law. The underline reason is that this court has wide jurisdiction to make just and equitable orders, in cases involving breach of fundamental rights. One also should keep in mind that in an environment of lawlessness the fears, difficulties and resistance a law abiding citizen has to undergo. In such circumstances naturally a law abiding citizen would encounter delays to obtain material to support his case, more particularly when a State Minister is involved and incriminated.

In our Constitution (Chapter VI) directive principles of State Policy and Fundamental duties are enacted and recognised to guide the executive and the legislature in enacting of laws and in the governance of the country. The limitation referred to in the said chapter, provides in Article 29 that such principles and duties are not justifiable. Nevertheless Article 27(1)(c) recognise an adequate standard of living for a citizen and their families including housing. Article 29(2) (12) recognises and protect the family as the basic unit of society. Article 28(e) imposes a duty to respect the rights and freedom of others.

I also observe that in an appropriate case this court need to consider decisions and Judgments delivered elsewhere. In the case of *Velmurugu (1981) 1 FRD 180 Wanasundera J*. quoted with approval the observations of the the European Commission on Inhuman Degrading Treatment. In *Wijenayake Vs. Chandrasiri and Others* SC Appl. 380/93 scm 22.03.95 *Kulatunge J*. relied on Thomas Vs. Jamaica on the question of failure to give medical treatment sustained as a result of brutal attack by the police. In *Malinda Channa Peiris case 1994(1) SLR 28* Supreme Court referred to several decisions of the European Court of Human Rights. There are numerous cases in which the Supreme Court has referred to the decisions of other Courts and Tribunals of foreign nations, in dealing with other fundamental rights.

In order to embrace and fortify my views on rights cases and more particularly to the case in hand I quote the following useful passage from the text – *Fundamental Rights in Sri Lanka – Justice S. Sharvananda pgs. 1 – 2.*

> "A Constitution and in particular, that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive Construction" , per Lord Diplock in *Gambia v. Momodu Fobe* (1984) A.C. 689 at 700; (1985) 1 A.E.R 864 at 873 P.C. Construing the fundamental rights and freedoms provisions of the Bermuda Constitution Lord Wilberforce said in *Minister of the Home Affairs v. Fisher* (1979) 3 A.E.R. 21, 25 P.C that "those provisions 'call for a generous interpretation avoiding what has been called the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms". This statement was quoted by the Privy Council in *Ongsh Chilan v. Public Prosecutor* (1981) A.C. 648 as expressing the relevant principle of construction of the fundamental rights provisions of the Constitution of the Republic of Singapore. This principle was again reaffirmed by the Privy Council in construing the Constitution (of Gambia and) of Mauritius-in *Societe United Dock v. Government of Mauritius* (1985) A.C. 585, 605 where Lord Templeman, delivering the judgment of the Privy Council, said that "A Constitution concerned to protect the fundamental rights and freedoms of the individual shall not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies". The Constitution is a living piece of legislation. Its provisions are not 'time-worn adages or hollow shibboleths - they are vital living principles" (Chief Justice Warren). The Constitution, in the eloquent prose of Justice Cardozo, contains 'not rules for the passing hour, but principles for an expanding future'.
>
> In *Maneka Gandhi v. India* A.I.R. (1978) S.C. 597 at 691-692, Bhagwati, J. unequivocally declared that "the role of the Court should be to expand the reach and ambit of fundamental rights 'rather than attenuate their meaning and content by a process of judicial construction".

The 5th and 6th Respondents in their objections dated 30.03.2012 state they are drivers of the three wheelers and it is parked at a three wheeler stand at the Iriyawetiya junction, and deny the allegation level against them. It is their position that complaints were made by the Petitioner against them merely to get the three wheeler park or stand, removed. Objections also state that in the complaint P10, Petitioner states he does not know who had broken the parapet wall, but only a suspicion, and no valid allegation against them. As such no direct involvement against them, regarding the incident of destruction caused to Petitioner's property. Therefore these Respondent's aver that Petitioner has failed to state any violation of a fundamental rights by the 5th and 6th Respondents. The objections of the 5th and 6th Respondents not filed on the due date as the Petitioner had not been able to issue notices on the 5th and 6th Respondents. In fact the Petitioner filed his counter objections based only on the objections of the other Respondents other than the 5th and 6th Respondents. Therefore court on 08.08.2012 for the reasons recorded therein granted further time for the Petitioner to reply objections of the 5th and 6th Respondents by way of a further counter affidavit and <u>further counter affidavit</u> of Petitioner was filed on 13.01.2013.

In the counter affidavit of the Petitioner, being presented to this court it is stated by the Petitioner, having perused the objections of 1st to 4th and 7th Respondents it is inter alia pleaded

(a) His wife settled the disputes with the 5th & 6th Respondents due to pressure from the 4th Respondent, and due to an appeal by the wife of 5th Respondent on sympathetic grounds.

(b) 4th Respondent was present at the place of destruction on the instructions of the 7th Respondent and 4th Respondent's plea of absence during the said period is a fabricated 'alibi'. The incident of destruction had the blessings of 4th Respondent since he provided security when parapet wall was destroyed.

(c) Failure of 4th Respondent to act with reasonable diligence and 4th Respondent verbally informed Petitioner that 7th Respondent over powering influence prevented from reporting facts to court or to investigate.

(d) No plausible action taken by 4th Respondent to launch a prosecution (25 days lapsed without any action)

(e) Demolition of parapet wall of Petitioner was done with vehicle and instruments of the Kelaniya Pradeshiya Sabha with the blessing of the 1st and 2nd Respondents and 4th Respondent deployed police personnel to provide security on the instructions of 7th Respondent.

(f) Overwhelming evidence suggest that 7th Respondent participated at the incident. However persons due to fear of their life were unwilling to testify but it is pleaded the person named in paragraph (4d) of the counter affidavit due to confidence placed in this court gave affidavits. The

affidavits produced and marked ‘A’, ‘A1’ and ‘A2’ with the counter affidavit, of the Petitioner.

(g) Immense pressure was brought about on Petitioner and his wife and other emissaries of 7th Respondent, conveyed to him not to proceed with this case.

(h) 7th Respondent thereafter made further threats.

(i) Loss to property estimated to Rs. 2.0 million supported with ‘H’, statement of accounts.

The affidavit ‘A’ is testified by an employee of the Petitioner, dated 25.11.2010. It is stated that he left the premises in question at 10.00 a.m on 18.09.2010. and returned at about 1.00 p.m. When he left at 10.00 a.m the building was in good condition but when he returned to the scene of incident, it was a total destruction. I note paragraphs 3 and 5 of the said affidavit, it reads thus:

03 වර්ෂ 2010-09-18 වන දින උදෑසන 10 ට පමණ මා එම ව්‍යාපාරික ස්ථානයෙන් පිටත්ව එළියට යන විට එකී ස්ථානය පරිපූර්ණ තත්ත්වයෙන් තිබූ අතර නැවත මා එම ස්ථානයට දහවල් 1ට පමණ පැමිණෙන විට එකී ස්ථානයට අයත් තාප්පය නවීන පන්නයට අයත් නාන කාමරය සහ වැසිකිලි දෙක අමානෝ ෂිට්ස් වලින් නිම කරන ලද යකඩ ගේට්ටු තුන සහ එකී ව්‍යාපාරික ස්ථානයට ඇතුළුවන තරප්පු පෙල සහ එය ආවරණය කර තිබූ අමෝනා ෂිට්ස් වලින් නිම කරන ලද වහලය යනාදි ස්ථානයන් කැළණිය ප්‍රාදේශිය සභාවට අයත් බැකෝ යන්ත්‍රයක් මගින් බිඳ දමා තිබූ අතර එකී සුන්බුන් එකී යන්ත්‍රය මගින්ම වත්ත තුළට දමන ආකාරය මා සියැසින් දුටු බව මින් ප්‍රකාෂ කර සිටිමි.

05 තවද එම ක්‍රියාව සිදු කලේ ත්‍රිරෝද රථ රියදුරන් එම වෘාපාරික ස්ථානයෙන් ඉවත් කිරීමට මාගේ වෘාපාර හිමිකරු විසින් ගන්නා ලද ප්‍රයත්නයන් වලට එරෙහිව දේශපාලන අතකොළුවක් බවට එකී ත්‍රිරෝද රථ රියදුරන් පත්වෙමින් සංවර්ධන කටයුත්තක මුවාවෙන් ගන්නා ලද ක්‍රියාවක බවද ප්‍රකාශ කර සිටිමි.

The affidavit 'A' is of one Ratnapala. He pleads that he saw the premises in question being damaged and destroyed on 18.09.2010. Person who took photographs were chased by the police. A 'backhoe' vehicle was being used to break the wall and police provided security.

In the Affidavit 'A2' sworn by one K.K.V. Perera states Mervyn Silva (7th Respondent) came to the place in question with some people and a 'backhoe' vehicle at 10.30 a.m. Among the crowd the 1st Respondent and a member called Osanda Nandasena was present. Backhoe belongs to the Kelaniya Pradeshiya Sabha. He heard 7th Respondent telling Osanda Nandasena to demolish the parapet wall and the buildings. He also states 7th Respondent directed the said Nandasena to wait and see the progress of the demolition until it is completed. Paragraphs 7 & 8 reads thus:

07. අමාත්‍ය මර්වින් සිල්වා ඉහත කී ඔසද නන්දසේන යන අයට පැමිණා කියා සිටියා මෙම තාප්පය සහ ඊට යාබද දේපළ සම්පූර්ණයෙන් කඩා ඉවත් කිරීමට ක්‍රියා කරන ලෙසත් ඇමතිවරයා එම ස්ථානයෙන් ඉවත්ව යන බැවින් සම්පුර්ණයෙන් කඩා දමන තුරු බලා කියා ගන්නා ලෙසට ඔසද නන්දසේන යන අයට උපදෙස් දුන්නා.

08 ඒ අනුව අමාත්‍ය මර්වින් සිල්වා සිටියදිම කැඩීම අරම්භ කල අතර අසළ ත්‍රි රෝද රථ නවත්වන ස්ථානයේ සිටින ත්‍රි රෝද රථ රියදුරු පාලිත යන අයට අවශ්‍ය ලෙසට කැඩීම කරන ලෙසට අමාත්‍යවරයා ඔසද නන්දසේන යන අයට වැඩි දුරටත් උපදෙස් දුන්නා.

In the further counter affidavit of Petitioner in answer to the objections of 5th & 6th Respondents it is inter alia pleaded that three eye witnesses have sworn affidavits suggesting or incriminating the above Respondent and involvement of the 5th & 6th Respondents in the demolition of the parapet wall and the premises of the Petitioner.

The material placed before this court by the Petitioner and all those who have sworn affidavits on behalf of the Petitioner no doubt suggest and demonstrate the colossal damage caused to his house and property on 18.09.2010. Even prior to such destruction there is ample proof of Petitioner and his family being harassed and abused by the 5th & 6th Respondents as stated above. The 7th Respondent's involvement is clearly apparent and demonstrated from the beginning with the statement P10 divulging his complicity in the incident of demolition could be safely established as the <u>starting point</u>. It appears to this court that from that point onwards certain amount of manipulation took place in order to conceal the truth. That was clearly shown by police inaction as stated above to perform their legitimate duties. The police

did so either deliberately or recklessly or willingly or unwillingly. Whatever it may be Petitioner was deprived of equal protection of the law.

The Petitioner having made a statement to the police (P10) thought it fit to address letters to persons in authority just six days after the incident, may be having realised the lapses of law enforcement agencies.

It is in a way laudable that Petitioner's appeals to persons in authority by P11, P11(a), P11(b), P11(c) and P11(d), were received and acknowledged by the recipients. It is not a mere acknowledgment but having realised the gravity of the problem the recipients of the above letters replied with instructions to Petitioner and some others having authority to assist the Petitioner or remedy the grievance of the Petitioner (I have already discussed this aspect). None of the recipients thought it fit to reject the plea of the Petitioner. I will desist any argument of the Respondents that it was not contemperaneous. What else can a man in the position of the Petitioner could do in that mental state, having lost his house and property by violent means.

The substance and material contained in affidavits A, A1 and A2 are of persons who directly saw the incident. Except for the fact that the three persons who have sworn affidavits were belated in coming forward. I see no reason even to hint that it is false testimony on their part. The role played by the 7th Respondent is established without a doubt. The instructions given by the 7th

Respondent to do the job of demolition to the satisfaction of 6th Respondent 'Palitha' a three wheeler driver is a strong item of evidence. Details provided by the persons who have sworn the affidavits provides proof of the incident as well as those involved and the position and details of the state of the house and property of Petitioner before and after. It also reveal the way in which the demolition was done. Damage caused by the use of Backhoe vehicles which are heavy vehicles and a team employed for the purpose, which had been organised and planned, by several wrong doers, and 7th Respondent being the leader of the team.

The three affidavits (A, A1 & A2) provides support and fortify the case of the Petitioner. Though somewhat belated and alleged not be contemporaneous, there is no prohibition in law to reject such statements contained in affidavits A, A1 & A2. Belated witnesses and evidence is nothing new in our legal system.

In *Sumanasena Vs. A.G – 1999 (3) SLR 137 FND Jayasuriya J*. In his Judgment followed and adopted the case of *Q Vs. Pauline De Croos 71 NLR 169* at pg. 180. I will for better understanding the point refer to that portion of the Judgment at pg. 140 which justify the reception of belated statement of witness and just like the case in hand considered the question of fears generated in the minds of the witnesses.

> It is manifest that this witness has come out with the version, that he later volunteered in the trial Court, to the Magistrate as well one month after the happening of the incident. Learned counsel laid stress on this fact and described the witness as a belated witness and that in the circumstances there was opportunity for fabrication and concoction. Justice *T.S. Fernando* in *Queen v. Pauline De Cross* at 180 had to consider a similar issue and his Lordship observed that "just because the witness is a belated witness the Court ought not to reject his testimony on that score alone and that a Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness. Witness Nandasena has stated before the trial Judge that he had known both accused before this incident. He has stated that they have known the accused and they had slept with Sumanasena on the verandah of several houses and he has also stated that the first accused who was alleged to have committed this offence with Haramanis Kuragama who was a powerful businessman described as Rajjuruwo in the village and who was feared by all. He has stated that in view of the fact they knew these persons and because of the fear generated in his mind he delayed to make his statement for a period of one month. Trial Judge looked into these reasons and has accepted the grounds adduced by the witness for the delay and decided to act on his testimony.

I have considered the oral and written submissions of the Respondents. The position of the 7th Respondent referred to in the submissions are without any merit. Only matter that concerns this court is that P10 complaint does not suggest any direct involvement. This court has arrived at a conclusion by considering the cumulative effect of all proof contained in pleadings and documents connected to the petition of the Petitioner and that of the counter affidavits of the Petitioner. There is overwhelming evidence and material to make the 7th Respondent liable for breach of fundamental rights of the

Petitioner. What has been discussed above need not be repeated over and over again. I place special emphasis on the statements contained in affidavits A, A1 & A2 along with P10, and all other documents produced on behalf of the Petitioner in these proceedings. Each of those items of evidence taken together is conclusive proof of damage caused to the Petitioner's property by the 7th Respondent and several others. The material placed before court also implicate the 5th and 6th Respondents. However the fundamental rights jurisdiction cannot be extended to them.

As regards the 3rd Respondent, I agree that the 3rd Respondent has no hand at all in this entire episode. (already discussed) So are the 1st & 2nd Respondents who were only the Chairman and Secretary of the Pradeshiya Sabha, though some material has surfaced, it is not sufficient to implicate both of them for breach of fundamental rights. However I am taking a very strong view of the Police Department. The 4th Respondent is not named but the affidavit sworn indicates that Edisooriya Patabendige Chaminda Edisooriya, Inspector of Police, Officer-In-Charge, Police Station, Kiribathgoda swear as the 4th Respondent. I have discussed the lapses of the police pertaining to the incident described as far as the case in hand is concerned. It is clear that 4th Respondent is responsible for dereliction of duties. His conduct is a slur to the good name of the Police Department. He was unable to provide and afford the

required equal protection of the law as regards the Petitioner, who had to undergo a threat to life and of property. Law does not permit any kind of manipulation of the 7th Respondent to cause damage to citizens and interfere with their basic rights.

I have already discussed above 4th Respondents absence of the relevant time and period regarding the acts of destruction caused to the Petitioner. The 4th Respondent being not named in the petition cannot be a bar to this court to proceed to hold that 4th Respondent is liable for breach of fundamental rights of the Petitioner. 4th Respondent on his own filed objections.

In *Ganeshananthan Vs. Vivienne Goonewardena and three others* 1984 (1) SLR 319 it is reported that the above named *Vivienne Goonewardena* a well known politician of that era filed a fundamental rights case bearing No. S.C. 20/83 alleging that the 1st Respondent one Hector Perera (Officer-In-Charge) of the Kollupitiya a police had illegally arrested her and subjected to cruel, inhuman and degrading treatment. A bench of three Judges of the Supreme Court heard the case and held Petitioner-Respondent had not established that she had been subjected to cruel, inhuman and degrading treatment by the 1st Respondent, and that the Petitioner-Respondent was arrested by the Petitioner (Ganeshananthan) and not by the 1st Respondent. Court further held that the arrest was unlawful and state liable in damages fixed at Rs. 2500/-.

In a subsequent proceeding (in *Ganeshananthan Vs. Vivienne Goonewardena* (cited above)) S.I. Ganeshanandan sought to have the order of the Supreme Court set aside on the ground that the Petitioner had not complained against him in her application, and that he had not been given an opportunity to defend himself. Dismissing this application the Supreme Court (Seven Judges) said that where violation of a fundamental right is alleged, Article 126(2) does not limit an inquiry to the person named in the petition and that court has power to grant relief when it is established that some other officer was responsible for the violation. The court held further that the Rule audi aulteram partem had been sufficiently observed.

In all the facts and circumstances of this Fundamental Rights Application, I state that Article 126 of the Constitution gives wide powers to the Supreme Court to make just and equitable orders for violations of Fundamental Rights. I hold and declare that for the reasons contained in this Judgment the 7th Respondent and 4th Respondents have infringed the Petitioner's fundamental rights guaranteed in terms and Article 12(1) of the Constitution. Both the above Respondents have wittingly breached the fundamental rights of the Petitioner. This court directs the 7th Respondent to pay a sum of Rs. 400,000/- (Four hundred Thousand) and the 4th Respondent a sum of Rs. 50,000/- personally as compensation to the Petitioner. At all times relevant to this application a

Minister of the State was involved and thus makes the State also liable. As such court directs the State to pay a sum of Rs. 100,000/- as compensation to the Petitioner.

This court further directs the Inspector General of Police to conduct investigations according to law and ascertain whether any other person is responsible for the destructions of Petitioner's property and in doing so whether instruments and machinery belonging to the State had been used and utilised, and take suitable action having consulted the Hon. Attorney General.

Application allowed as above with costs.

JUDGE OF THE SUPREME COURT

S. E. Wanasundara P.C., J

I agree.

JUDGE OF THE SUPREME COURT

K. T. Chitrasiri J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for leave to Appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC/ HCCA/LA/ 445/2014

WP/HCCA/GHP/123/2009/F

DC Attanagalla 328 / L

Kahatapitiya Pathirennahalage Edward Jayasinghe ,

Ihalagama,

Wevaldeniya.

Plaintiff

Vs.

Liyanage Sumudu Niroshan Siri Kumara,

No. 51/01, Pahalagama,

Wevaldeniya.

Defendants

AND

Liyanage Sumudu Niroshan Siri Kumara,

No. 51/01, Pahalagama,

Wevaldeniya.

Defendant Appellant

Kahatapitiya Pathirennahalage Edward Jayasinghe ,

Ihalagama,

Wevaldeniya.

Plaintiff Respondents

AND NOW BETWEEN

Liyanage Sumudu Niroshan Siri Kumara,

No. 51/01, Pahalagama,

Wevaldeniya.

Defendant Appellant Petitioner

Vs.

Kahatapitiya Pathirennahalage Edward Jayasinghe ,

Ihalagama,

Wevaldeniya.

Plaintiff Respondent- Respondent

BEFORE : CHANDRA EKANAYAKE A/CJ.

UPALY ABEYRATHNE, J.

ANIL GOONARATNE, J.

COUNSEL	:	Palitha Ranatunga instructed by Gayani Kasthuriarachchi for the Defendant Appellant Petitioner Vidura Gunarattne for the Plaintiff Respondent-Respondent
SUPPORTED ON	:	11.09.2015
WRITTEN SUBMISSION ON:		01.10.2015 (Defendant Appellant Petitioner) 01.10.2015 (Plaintiff Respondent Respondent)
DECIDED ON	:	29.03.2016

UPALY ABEYRATHNE, J.

The Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent) instituted an action against the Defendant Appellant Petitioner (hereinafter referred to as the Petitioner) in the District Court of Attanagalla seeking a declaration of title that the Plaintiff and the co-owners referred to in the plaint are the sole owners of the land described in the schedule to the plaint. After trial the learned District Judge has delivered a judgment in favour of the Respondent. Being aggrieved by the said judgment the Petitioner appealed to the High Court of Civil Appeal of the Western Province holden at Gampaha and after hearing of the said appeal the High Court of Civil Appeal, by its judgment, affirmed the said judgment of the learned District Judge dated 13.10.2009 and

dismissed the appeal of the Petitioner with costs. This Application for Leave to Appeal is from the said judgment of the High Court of Civil Appeal of the Western Province holden at Gampaha dated 23.07.2014.

When this Application was taken up for support the learned counsel for the Respondent took up a preliminary objection that this leave to appeal application is out of time as it has not been filed within the time frame prescribed by Rule 07 of the Supreme Court Rules.

Both Counsel have filed their written submissions. According to the minutes dated 11.09.2015, the Counsel for the Petitioner has been directed by this Court to furnish a copy of an affidavit of the registered Attorney of the Petitioner dated 04.09.2014. In his written submission the learned counsel for the petitioner has stated that he had furnished the said affidavit dated 04th September 2014 together with the motion filed with the application for leave to appeal.

I reproduce bellow the paragraphs 03 and 04 of the said affidavit of Kasthuriarachchilage Gayani Kasthuriarachchi, Attorney At Law.

> "03. I was sent the Petition, Affidavit and the annexure marked P1 together with, to be filed with my appointment as an instructing Attorney At Law on 03rd September 2014 in the Registry of Supreme Court.
>
> 04. I was handed over the said documents without the proxy by the Petitioner of the leave to Appeal Application at 2.50 p.m. on 03rd September 2014 at the entrance of Supreme Court premises. And I had to obtain the signature of the Petitioner in the proxy and I immediately went to the stamp counter at about 2.55 p.m. and I had been waiting in the queue and I submitted the documents by 3.00.p.m. at the said counter. But accepting the Application for Leave to Appeal

was refused by the Officer at the said counter stating that they are closing the counter sharp at 3.00 p.m.”

Although the facts contained in said two paragraphs are contradicting each other, paragraph 04 clearly demonstrates lapse on the part of the Petitioner and also the Petitioner’s failure to show due diligence in filing the application for leave to appeal in the Supreme Court within the prescribed period. It further demonstrates that said Attorney At Law was struggling at the last minute of the stipulated period of time granted for the filing of an application for leave to appeal in the Supreme Court, obtaining signatures, buying stamps and rushing to the stamp counter in order to line up in the queue at which time the counter was due to closed after day’s work. In his petition the petitioner has not averred any compelling reason which led him to last minute performance preventing him giving instructions to his Attorney At Law to lodge the application for leave to appeal in the Supreme Court within the stipulated period of time.

It must be placed on record that all most all the citizens living in this Country are aware that the revenue collecting counters in the Government sector have to be closed at a particular time in order to facilitate the officers who are discharging duties at the counters to finalize their work and to balance the collection of revenue for the day and to put it in safe custody. Hence no one can attribute responsibility to officers at such revenue collecting counters for closing them at the scheduled time as required by finance regulations.

The Petitioner has admitted that his Application for Leave to Appeal was not filed within time as required by Rule 07 of the Supreme Court Rules 1990. Said Rule 07 of the Supreme Court Rules stipulates that “Every such application shall be made within six weeks of the order, judgment, decree or sentence of the

Court of Appeal in respect of which special leave to appeal is sought". As it appears no doubt that compliance with the provisions contained in said Rule 07 is mandatory.

This court in several instances has expressed its firm view that an application for leave to appeal filed in the Supreme Court from an order or judgment of a High Court of the Province exercising civil jurisdiction has to be filed within six weeks of the pronouncement of the order or judgment appealed from. In the case of Jamburegoda Gamage Laksman Jinadasa Vs. Pilitthu Wasam Gallage Pathma Hemamali and Others SC/HC/CALA/99/2008 SC minutes dated 07.07.2011 Dr. Shirani A. Bandaranayake CJ observed that (P. A. Ratnayake, P.C.,J. and Chandra Ekanayake, J. agreed) "The language used in Rule 07, clearly shows that the provisions laid down in the said Rule are mandatory and that an Application for leave for this Court should be made within six weeks of the order, judgment, decree or sentence of the court below of which leave is sought from the Supreme Court. In such circumstances it is apparent that it is imperative that the Application should be filed within the specified period of six (6) weeks."

Following the dicta of the said case Saleem Marsoof, J. in Karunawathie Wickramasinghe Samaranayake Vs. Ranjani Warnakulasuriya SC/HC/CALA/137/10 SC minutes dated 04.10.2012, held that (N. G. Amaratunga, J. and C. Ekanayake, J. agreed) " An Application for leave to appeal filed in the Supreme Court from an order of a High Court of the Province exercising civil jurisdiction has to be filed within six (6) weeks of the pronouncement of the order or judgment from, irrespective of whether it is considered to fall within part 1A or part 1C of the Supreme Court Rules."

In the light of the said premise I have no hesitation in reaching to the conclusion that the Petitioner has failed to file the present application for leave to appeal within the stipulated period of time under Rule 07 of the Supreme Court Rules 1990 which is mandatory. For the foregoing reason I am not inclined to grant leave. I uphold the said preliminary objection raised by the Counsel for the Respondent and refuse granting leave to appeal and dismiss the said application for leave to appeal with costs.

Application for leave to appeal dismissed.

Judge of the Supreme Court

CHANDRA EKANAYAKE, 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 Application for Leave to Appeal in terms of Article 127,128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5 (c) of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006.

MUNASIGHE LEELA NANDA SILVA
Welpansala Road,
Kudawaskaduwa,
Waskaduwa.

17th DEFENDANT-APPELLANT-PETITIONER

S.C. H.C. C.A. L.A.
Application No.449 /2014 **VS.**
WP/HCCA/KAL/128/2007(F)
D.C. Kalutara Case No.6040/P

T.G.CHANDRAWATHIE WIJESEKERA
Waskadu Methsevena,
Waskaduwa.

PLAINTIF-RESPONDENT-RESPONDENT

1. **JAYALATHGE DON SARATH GUNASEKERA**
   No. 14, 23rd Lane,
   Colombo 03.

2. **WIMALAWATHIE DE SILVA**
   No.51/1, Borupana Road,Ratmalana.

3. **R.N.ZOYSA** C/O Munasinghe Leelawathie Silva, Kuleegoda, Ambalangoda

3A. ANIL GUNARATNA DE ZOYSA
Welibadda,Kuleegoda,Ambalangoda.

4. **MUNASINHGE SYRIL PIYARATNA SILVA**
   No.51/1, Borupana Road,Ratmalana.

4A.WALIMUNI DEWAGE LEELAWATHIE
No. 75/20, Kanatta Road, Mirihanan,
Nugegoda.

5. **MUNASINGHE ANULA DE SILVA**
   Pririvana Rathna Sri Road,
   Pinwatta,Panadura.

6. **PERCY KUMARA SILVA**
   Pririvana Road,Rathna Sri,
   Pinawatta, Panadura.

7. **MUNASINGHE SARATHCHANDRA,**
   Rathna Sri, Pririvana Road,
   Pinawatta, Panadura.

8. **M.D.MALALASEKERA**
   No. 513/1, Nalluruwa,Panadura.

9. **MUNASINGHE BOID KULASENA**
   Wellawatta, Kuleegoda, Ambalangoda.

10. **SRIYANANDA MUNASUNGHE**
    Madawela, Ulpotha, Matale,

11. **MUNASINGHE TICKMEN DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.
    .

12. **MUNASINGHE NANCY DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

13. **RANANALINA WICGKRAMATILLAKE**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

14. **MUNASINGHE DAYANANDA DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

15. **MUNASINGHE CHITHRA NANDA DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

16. **MUNASINGHE VIJITHA NANDA DE SILVA**
    Welpansala Road,Kudawaskaduwa,
    Waskaduwa.

18. **S. HARISON SILVA**
    “Shanthi, Peter Place, Leegamuwa.

19. **S. WILSON SILVA**
"Shanthi, Peter Place, Leegamuwa.

20. **F. EUGENE SILVA**
"Shanthi, Peter Place, Leegamuwa.

21. **VITHANAGE SUMANADASA**
Wellamawala, Uduwara,
Anuguruwathota.

22. **MESSIRI SEEDIN SILVA**
Welpansala Road,Kudawaskaduwa,
Waskaduwa.

23. **MASILIN SILVA**
Welpansala Road,Kudawaskaduwa,
Waskaduwa.

24. **MESSIRI ALJIN SILVA**
Bogasa Asala Nainaduwa,
Kudawaskaduwa,Waskaduwa.

25. **MESSIRI WEWLIN SILVA**
Sri Subuthi Mawatha, Kudawaskaduwa.

26. **CHANDRA PATHMINI DE SILVA**
Sri Subuthi Mawatha, Kudawaskaduwa.

27. **GUNEDRAWATHIE**
Sri Subuthi Mawatha, Kudawaskaduwa.

28. **RANASINGHE ARACHCHIGE ALPI NONA**
Sri Rahula Mawatha,Maho.

29. **GUNENDRA PRIYAWADA**
Sri Rahula Mawatha,Maho.

30. **GUNENTHTHI GAMINI**
Sri Rahula Mawatha,Maho.

31. **GUNENTHTHI SUSANTHA**
Sri Rahula Mawatha,Maho.

DEFENDANTS-RESPONDENTS-RESPONDENTS

SUPREME COURT
Sisira J. De Abrew J.
Nalin Perera J.
Prasanna Jayawardena, PC. J.

COUNSEL: Jagath Halpandeniya with Udara Suwandarachchi for the 17th Defendant-Appellant-Petitioner.
Sanjeewa Ranaweera for the Plaintiff-Respondent-Respondent. Charith Galhena for the 24th – 26th Defendants-Respondents-Respondents.

ARGUED ON:	12th July 2016
WRITTEN SUBMISSIONS:	17th Defendant-Appellant-Petitioner"s Written Submissions tendered on 26th July 2016. Plaintiff-Respondent-Respondent"s Written Submissions tendered on 26th July 2016.
DECIDED ON:	30th September 2016

Prasanna Jayawardena, PC, J

This Order is on a preliminary objection raised by learned Counsel for the Plaintiff-Respondent-Respondent ["Plaintiff"] who submits that, the present Application made by the 17th Defendant-Appellant-Petitioner ["17th Defendant"] violates Rule 28 (5) of the Supreme Court Rules, 1990 and that, therefore, the Application should be rejected.

The preliminary objection is on the ground that, 17th Defendant's Petition filed in this Court seeking Leave to Appeal from the Judgment of the High Court of Civil Appeal (Holden in Kalutara) does not name as a Respondent, the 1st Defendant in the original Action in the District Court of Kalutara who was also the 1st Defendant-Respondent in the Appeal made to the High Court.

Before examining whether this preliminary objection ought to be sustained, I should state the relevant facts.

The Plaintiff instituted this Action against the 1st Defendant named *"Munasingha Nilmini Renuka Wijesekera of Methsevana, Kuda Waskaduwa, Waskaduwa"* and 24 other Defendants seeking to partition an allotment of land situated in Waskaduwa. After the institution of the Action, 6 more Defendants were added. Thus, there were 31 Defendants when this Case went to Trial in the District Court.

The 1st Defendant filed a Statement of Claim stating that, the 1st Defendant is entitled to a 5130/17280th share of the land. The 1st Defendant also made claims in respect of the buildings and crops on the land. The Record of the Case in the District Court shows that, the 1st Defendant participated in and gave evidence at the Trial and that she was represented by Counsel who appeared for her throughout the Trial.

Several of the other Defendants including the 17th Defendant contested the Case claiming shares in the land. Some of these Defendants, including the 17th Defendant, gave evidence at the Trial and were represented by their Counsel.

The learned District Judge entered Judgment partitioning the land in the following manner: an undivided 7/12th share jointly to the Plaintiff and the 1st Defendant and the remaining undivided 5/12th share to the 22nd to 25th and 29th Defendants. It was also decreed that, the buildings and crops upon the land be allotted to the aforesaid parties according to their respective shares – *ie:* to the Plaintiff, 1st Defendant and 22nd to 25th and 29th Defendants.

The other Defendants, including the 17th Defendant, received no shares in the land.

Being dissatisfied with this Judgment, the 17th Defendant filed an Appeal in the High Court praying that, the Judgment of the District Court be set aside, that the Case be sent back to the District Court for Trial *de novo* and that, the 17th Defendant be awarded the rights she claimed in respect of the land.

The Caption of the 17th Defendant's Petition of Appeal to the High Court named only the Plaintiff and the 1st Defendant as Respondents and omitted to name the 2nd to 31st Defendants as Respondents.

When the Appeal was taken up for Argument before the High Court, learned Counsel appearing on that day for both the Plaintiff and the 1st Defendant raised a preliminary objection that, the Appeal could not be maintained and should be dismissed since the 17th Defendant had failed to name the 2nd to 31st Defendants as Respondents in the Petition of Appeal. This preliminary objection was upheld by the learned High Court Judge who dismissed the Appeal on that ground, by his Judgment dated 28th July 2014.

Thereupon, the 17th Defendant filed a Petition dated 05th September 2014 in this Court, seeking Leave to Appeal from the aforesaid Judgment of the High Court.

However, the 1st Defendant in the District Court - namely *"Munasingha Nilmini Renuka Wijesekera of Methsevana, Kuda Waskaduwa, Waskaduwa"* - who was also the 1st Defendant-Respondent in the Petition of Appeal filed in the High Court, was *not* named as the 1st Defendant-Respondent-Respondent in the 17th Defendant's aforesaid Petition filed in this Court.

Instead, the Caption to the 17th Defendant's Petition in this Court named one *"Jayalathge Don Sarath Gunasekera, No. 14, 23rd Land, Colombo 3."* as the 1st Defendant (in the District Court), the 1st Defendant-Respondent (in the High Court of Appeal) and the 1st Defendant-Respondent-Respondent (in this Court)- – *ie:* an entirely different person was named and an entirely different address was stated in all three places in the Caption where the 1st Defendant's name *should* have appeared.

This Application was first taken up for support in this Court on 24th November 2014. On that day, the 17th Defendant, the Plaintiff and the 23rd to 26th Defendants-Respondents-Respondents were represented by Counsel. However, the Application for Leave to Appeal was not supported on that day since the 23rd to 26th Defendants-Respondents-Respondents moved to have this matter re-fixed for Support as their Counsel was not able to be present in Court ion that day.

The Journal Entry of 24th November 2014 also records *"Counsel for the petitioner moves that he be granted leave to amend the caption. Application to amend the*

caption is allowed. Any amendments to the caption should be made within one month of today".

Thereafter, the 17th Defendant has filed an amended Caption on 22nd December 2014. This amended Caption cites the correct name of *: "Munasingha Nilmini Renuka Wijesekera of Methsevana, Kuda Waskaduwa, Waskaduwa"*, as the 1st Defendant (in the District Court), the 1st Defendant-Respondent (in the High Court of Appeal) and the 1st Defendant-Respondent-Respondent (in this Court).

However, there is no subsequent Order made by this Court accepting the amended Caption. The record also does not indicate that any of the Respondents were given Notice of the amended Caption which was filed on 22nd December 2014.

It is also evident from the record that, Notice to Munasingha Nilmini Renuka Wijesekera ["Nilmini Renuka"] was not tendered by the 17th Defendant after the amended Caption was filed on 22nd December 2014. Further, the 17th Defendant did not make an application for Notice to be sent to her. Thus, up to this date, Nilmini Renuka has not been given any Notice of this Application for Leave to Appeal.

When this Application for Leave to Appeal was taken up for Support on 30th September 2015, learned Counsel for the Plaintiff-Respondent raised the aforesaid preliminary objection that, the 17th Defendant-Petitioner's failure to cite the 1st Defendant as a Respondent in the Petition, constitutes a violation of Rule 28 (5) of the Supreme Court Rules, 1990.

Learned Counsel for the 17th Defendant replied submitting that, an application had been made to amend the Caption on 24th November 2014 and submitted that, the said application was allowed by the Court.

In these circumstances, the Inquiry into the aforesaid preliminary objection was fixed for 19th January 2016 and was, thereafter, taken up by us on 12th July 2016 and was reserved for Order on the preliminary objection. I will now make that Order.

Firstly, it is clear that, a need to examine whether the preliminary objection ought to be sustained will *not* arise if this Court is of the view that, prior to the preliminary objection being raised on 30th September 2015, Nilmini Renuka has been duly named and included as the 1st Defendant-Respondent-Respondent by reason of the amended Caption filed on 22nd December 2014 (which correctly names her).

In this regard, the simple fact of the matter is that, Nilmini Renuka was not named in the Petition dated 05th September 2014 and, therefore, she was *not* a party to this Application at the time it was filed in this Court. Needless to say, it is only the parties who are named in a Petition, who can be regarded as parties to the Application.

Notice of the Application was despatched to the Plaintiff on 02nd October 2014 who filed her Proxy and a Caveat on 16th October 2014 stating that she intended to object to the 17th Defendant's Application. Nilmini Renuka was not a party to this Application, at that time either.

Next, it is to be noted that, any Application seeking Leave to Appeal from a Judgment of the High Court in favour of Nilmini Renuka, would usually be time barred unless it is filed within 42 days of 28th July 2014, which is the date on which the Judgment of the High Court was delivered. This is established Law which does not need to be recounted here – *vide:* JINADASA vs. HEMAMALI [2011 1 SLR 337].

In the aforesaid circumstances, the subsequent insertion of the name of Nilmini Renuka as a Respondent to this Application will amount to an amendment of the Petition by the addition of a Party, which can be done only by an Order of Court specifically permitting the amendment of the Petition by the addition of Nilmini Renuka as a Respondent.

It is established law that, an Order of that nature can be made only after the opposing parties were given notice of the proposed amendment and were heard in opposition if they wished to oppose the amendment. This is particularly so, since the opposing parties may be entitled to object to the proposed amendment on the grounds of time bar if the amendment was sought after the expiry of 42 days from 28th July 2014.

In the aforesaid circumstances, the best and, in my view, proper course of action which the 17th Defendant should have followed, was to make an application, by way of a motion and affidavit, with due notice to the Respondents and Nilmini Renuka who was sought to be added, stating the nature of the amendment which the 17th Defendant wished to make and seeking the permission of Court to make the amendment.

However, the 17th Defendant did not do so.

Instead, the Journal Entry of 24th November 2014 is the only record we have as to what the 17th Defendant chose to do, which was to make an oral application when the Case came up in Court for support on that day.

At this point, it should be noted that, 24th November 2014 is long after the expiry of 42 days from the date on which the Judgment of the High Court was delivered. Therefore, any application to amend the Petition by *adding* Nilmini Renuka as a Respondent, was *prima facie* time barred by that time.

The Journal Entry of 24th November 2014 indicates that, when this Case came up for Support on that day, Counsel appearing for the 17th Defendant only stated that he moved that *"he be granted leave to amend the caption".* There is an absence of any detail and a lack of any explanation in this application, which does not help the 17th Defendant. The manner in which the application was couched could well suggest a need to correct only a minor and obvious typographical mistake.

I am of the considered view that, if the 17th Defendant wished to amend the Petition by the addition of Nilmini Renuka as a Respondent in the Caption and chose to leave this to be made by way of an oral application on 24th November 2014, then the very least that should have been done was for Counsel to clearly and frankly spell out the exact nature of the amendment which was sought to be made. The opposing parties would then have been advised of the proposed amendment and would have had an opportunity to respond by either agreeing to the amendment or opposing it. The permission of the Court for the proposed amendment should have been sought thereafter.

However, the Journal Entry indicates that, the nature of the proposed amendment was not disclosed to Court or to the opposing parties on 24th November 2014. The Journal Entry does not record any response by the opposing parties. The Journal Entry also establishes that, the consent of the opposing parties was not obtained.

I should mention that, the Journal Entry of 24th November 2014 is the only record we have of what transpired on that day and, therefore, I am obliged to go by what is contained in that Journal Entry.

In my view, the events as recorded in the Journal Entry of 24th November 2014 do not establish that, the 17th Defendant made a due and proper application to amend the Petition by the addition of Nilmini Renuka as a Respondent. Further, as I will explain in the next paragraph of this Order, I do not think the Journal Entry can be construed to mean that, on that day, the Court permitted the addition of Nilmini Renuka as a Respondent.

I am of the view that, in the aforesaid circumstances, the part of the Journal Entry which states *"Application to amend the caption is allowed. Any amendments to the caption should be made within one month of today"* can only mean that, the Court gave the 17th Defendant an opportunity to tender an amended Caption subject to the right of the opposing parties to object to any amendment which was sought to be made and for the Court to, thereafter, make an Order on whether or not the proposed amendment should be permitted.

The above interpretation of the Journal Entry is reinforced by my certainty that, if the Court had, on 24th November 2014, intended to permit the amending of the Petition by the addition of Nilmini Renuka as a Respondent, the Court would have immediately directed that she be given due Notice of the Leave to Appeal Application. The fact that no Order was made for Notice to issue to Nilmini Renuka indicates that, the Court only permitted the 17th Defendant to tender an amended Caption subject to the right of the opposing parties to object and for the Court to, thereafter, make an Order on the proposed amendment. The validity of this conclusion is further strengthened by the fact that, where a party seeks to amend a Petition, it is the usual practice to direct that party to tender the proposed

amendment so that it can considered after the opposing parties are given the opportunity of examining the proposed amendment and being heard in opposition if they wish to object and for the Court to, only thereafter, make an appropriate Order.

Finally, it seems to me that, the above interpretation is that which can be rightly and fairly accorded to the Journal Entry since the maxim *Actus Curiae Neminen Gravabit* - an act of the Court shall prejudice no man – will apply to prevent this Journal Entry being interpreted in a manner which will cause prejudice to the Respondents.

In these circumstances, I hold that, the amended Caption filed on 22nd December 2014 must be treated as having being tendered subject to the objections of the Respondents and that, since there has not been a subsequent Order of Court accepting the amended Caption, the 17th Defendant's Petition has not, up to now, been amended by the addition of Nilmini Renuka as a Respondent.

Accordingly, I hold that, at present, Nilmini Renuka is not named as a Respondent to the 17th Defendant's Application for Leave to Appeal.

It is evident from the position taken by learned Counsel for the Plaintiff that, the Plaintiff objects to the amendment of the Petition by the *addition* of Nilmini Renuka, as a Respondent. However, before this Court is required to consider whether or not the addition of a party should be permitted, the preliminary objection raised by the Plaintiff has to be decided since it may go to the very maintainability of this Petition.

Therefore, I will now proceed to consider whether the Plaintiff's preliminary objection should be sustained.

I wish to clarify at the outset that, the merits of the Judgment of the High Court do not come up for consideration when this Court is examining the aforesaid preliminary objection which is solely confined to and based upon the submission that, the 17th Defendant's Petition to this Court should be rejected on the ground that it violates Rule 28 (5) of the Supreme Court Rules, 1990.

The present Application is one praying for Leave to Appeal from the Judgment of a High Court of the Provinces established under Article 154P of the Constitution.

It is settled Law that, the Supreme Court Rules, 1990 apply to such Applications. As explained by Dr.Bandaranayake J (as she then was) in SUDATH ROHANA vs. MOHAMED ZEENA [2011 2 SLR 134], such Applications fall within the category of *"OTHER APPEALS"* referred to in Section C of Part I of the Supreme Court Rules, 1990.This has been also stated in JINADASA vs. HEMAMALI (*supra*) and several other Cases.

Rule 28 which is in Section C of Part I of the Supreme Court Rules, 1990 sets out the requirements and procedural steps that must be complied with when a Petition of Appeal which falls into the category of *"OTHER APPEALS"* in terms of the said Rules, is filed in the Supreme Court. It is to be noted that, in the case of a Petition seeking Leave to Appeal from a Judgment or Order of a High Court of the Provinces established under Article 154P of the Constitution, that Petition will be deemed to be the `Petition of Appeal' in the event this Court grants Leave to Appeal – *vide:* IBRAHIM vs. NADARAJAH [1999 1 SLR 131 at p.132] where Dr. Amerasinghe J explained that, in corresponding circumstances relating to Applications for Special Leave to Appeal, "*The application for leave to appeal is deemed to be the petition of appeal."*.

Rule 28 (5) the Supreme Court Rules, 1990 mandatorily requires that, in the 17th Defendant's Petition *"….. there **shall** be named as respondents, all parties in whose favour the judgment or order complained against was delivered, or adversely to whom such appeal is preferred, or whose interests may be adversely affected by the success of the appeal, and the names and present addresses of the appellant and the respondents shall be set out in full"*. (emphasis added). It is clear from the wording of Rule 28 (5) that, its requirements are mandatory.

Undoubtedly, the 1st Defendant was a party who had to be named as a Respondent by operation of Rule 28 (5) since the Judgments of both lower Courts were in favour of the 1st Defendant and the 1st Defendant would have been adversely affected if the 17th Defendant succeeded in this Court. The 1st Defendant was a `necessary party'.

Thus, the inescapable conclusion is that, the 17th Defendant has violated the mandatory requirements of Rule 28 (5) of the Supreme Court Rules, 1990 by the failure to name the 1st Defendant as a Respondent to the Petition. This fact is not disputed by learned Counsel for the 17th Defendant.

The next question then is, what the consequence of that violation are ?

The general principle which will apply under the provisions of Chapter LVIII of the Civil Procedure Code when there is a failure to name a Necessary Party as a Respondent to a Petition of Appeal, is set out in the leading Case of IBRAHIM vs. BEEBEE [19 NLR 289], which was a Full Bench decision.

In that Case, Wood Renton CJ held (at p.291) *"I have no doubt as to the power of the Supreme Court to dismiss an appeal, on the ground that it has not been properly constituted by the necessary parties being made respondents to it, and I am equally clear that that power should be exercised, unless the defect is not one of an obvious character, which could not reasonably have been foreseen and avoided."* Shaw J held (at p. 293) that, ….. *"it is necessary for the proper constitution of an appeal, that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties, and unless they are, the petition of appeal should be rejected."*

In SEELANANDA THERO vs. RAJAPAKSE [39 NLR 361] and in SUWARISHAMY vs. THELENIS [54 NLR 282] which were both Cases which considered the position under the provisions of Chapter LVIII of the Civil Procedure Code, the Supreme Court held that, where a necessary party had not been named as a Respondent to the Petition of Appeal, the Appeal should be rejected unless it was not clear from the Record that the said party would be affected by the Appeal or the necessity of naming him as a Respondent could not be reasonably foreseen.

Similarly, in GUNASEKERA vs. PERERA [74 NLR 163], which was a Partition Case, the District Court had held that, the Plaintiff and the 1st to 5th Defendants are entitled to shares in the land which was being partitioned and had rejected the claim of the 6th Defendant. The 6th Defendant appealed but named only the Plaintiff as a

Respondent to the Petition of Appeal. The Plaintiff raised a preliminary objection on the grounds of non-joinder of the 1st to 5th Defendants who were necessary parties since their interests would be adversely affected in the 6th Defendant's Appeal succeeded. Thus, the facts in GUNASEKERA vs. PERERA are similar to the facts in the present Case.

H.N.G.Fernando C.J. upheld the preliminary objection and rejected the Appeal stating (at p.164), *" In the present appeal the 6th defendant has joined only the plaintiff as a respondent, although it is manifest that if the appeal were to succeed the interests of the 1st to the 5th defendants would be completely affected. The failure to join the 1st to the 5th defendants as respondents is a defect of an obvious character which should have been foreseen."*.

The above Cases were all decided under the provisions of Chapter LVIII of the Civil Procedure Code.

On 01st November 1978, this Court made the Supreme Court Rules, 1978 in the exercise of the power conferred upon this Court by Article 136 of the Constitution which was promulgated on 31st August 1978. Thenceforth, it is the Supreme Court Rules, 1978 which applied in respect of the procedure which had to be followed in Applications for Special Leave to Appeal, Applications for Leave to Appeal and the several other areas which are set out in therein.

In the often cited Case of IBRAHIM vs. NADARAJAH (*supra*) which was decided under the Supreme Court Rules, 1978, the Substituted Defendant-Respondent-Appellant filed a Petition in the Supreme Court seeking Leave to Appeal from an Order of the Court of Appeal. Special Leave to Appeal was granted by the Supreme Court. When the Appeal was taken up for argument, President's Counsel appearing for the 1st Substituted Plaintiff-Appellant-Respondent submitted that, the Appeal should be dismissed since the Substituted Defendant-Respondent-Appellant had violated Rules 4 and 28 of the Supreme Court Rules, 1978 by the failure to make the 2nd Substituted Plaintiff-Appellant in the Court of Appeal, a Respondent in the Petition filed in the Supreme Court. It should be mentioned that, Rules 4 and 28 required that Applications of Special Leave to Appeal and Petitions of Appeal *"shall*"

name as Respondents all parties in whose favour the Judgment appealed against has been delivered or whose interests may be adversely affected by the success of the Appeal. This preliminary objection was upheld by the Supreme Court and the Appeal was rejected.

Dr.Amerasinghe J, with whom Dheeraratne J and Goonewardene J agreed, stated (at p. 133) that, *"…… a failure to comply with the requirements of Rules 4 and 28 of the Supreme Court is necessarily fatal. Those Rules are meant to ensure that all parties who may be prejudicially affected by the result of an appeal should be made parties. How else could justice between the parties be ensured ? It has always, therefore, been the law that that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected."*.

The aforesaid Supreme Court Rules, 1978 governing Applications for `Special Leave to Appeal', Applications for `Leave to Appeal' and some other specified areas were revoked when, on 25th September 1990, this Court made the Supreme Court Rules, 1990 also in the exercise of the power conferred upon it by Article 136 of the Constitution. Therefore, from 25th September 1990 onwards, it is the Supreme Court Rules, 1990 which specify the procedure which has to be followed in Applications for 'Special Leave to Appeal', Applications for 'Leave to Appeal' and `Other Appeals' and the several other areas which are set out in therein.

The wording of Rule 28 (5) of the Supreme Court Rules, 1990 is similar to the wording of the corresponding Rule in the Supreme Court Rules, 1978 in terms of which the Supreme Court decided IBRAHIM vs. NADARAJAH (*supra*).

In SENANAYAKE vs. AG [2010 1 SLR 149] which was decided under the Supreme Court Rules, 1990, Dr. Bandaranayake J (as she then was) held that both Rule 4 of the Supreme Court Rules, 1990 which applied to Applications for `Special Leave to Appeal' and Rule 28 (5) of the Supreme Court Rules, 1990 which applies to `Other Appeals' require that all persons who may be adversely affected by the Appeal should be made parties. Her Ladyship went on to refer to Dr.Amerasinghe J's

aforesaid statement in IBRAHIM vs. NADARAJAH and held (at p.161) that, *"The totality of the aforementioned Rules indicate the necessity for all parties who may be adversely affected by the success or failure of the appeal to be made parties to the appeal"* and that, *"In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties who may be adversely affected by the result of the appeal should be made parties"*.

Subsequently, in ILLANGAKOON vs. LENAWELA [SC HCCA LA 277/2011 (S.C. Minutes of 05th April 2013) Sripavan J (as His Lordship, the Chief Justice then was) referred to IBRAHIM vs. NADARAJAH (*supra)* and dismissed an Application for Leave to Appeal on the ground of non-compliance with Rule 28 (2) and Rule 28 (5) of the Supreme Court Rules, 1990.

His Lordship cited with approval, the words of Dr. Bandaranayake J (as she then was) in ATTANAYAKE vs. COMMISSIONER GENERAL OF ELECTIONS [2011 1 SLR 220] where Her Ladyship had explained (at p.233-234) ,*"Through a long line of cases decided by this Court, a clear principle has been enumerated that where there is non-compliance with a mandatory Rule, serious consideration should be given for such non-compliance as such non-compliance would lead to a serious erosion of well established Court procedure followed by our Courts throughout several decades."*.

In ATTANAYAKE vs. COMMISSIONER GENERAL OF ELECTIONS, Dr. Bandaranayake J (as she then was) has also stated (at p. 234), *"The Supreme Court Procedure laid down by way of Supreme Court Rules made under and in terms of the provisions of the Constitution cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court. When there are mandatory Rules that should be followed and when there are preliminary objections raised on non-compliance of such Rules, those objections cannot be taken as mere technical objections. As correctly referred to by Dr. Amerasinghe,J., in Fernando v Sybil Fernando and others, `Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly'. If*

a party so decides to act recklessly it is needless to say that such a party would have to face the consequences which would follow in terms of the relevant provisions".

SUDATH ROHANA vs. MOHAMED ZEENA (*supra)* is another recent decision where this Court reiterated the principle that, non-compliance with the mandatory requirements of the Supreme Court Rules, 1990 will usually render an Appeal liable to rejection. In that Case, Dr.Bandaranayake J (as she then was) rejected an Application on the grounds that, the Petitioner had violated Rule 28 (3) of the Supreme Court Rules which requires a Petitioner to tender Notices to the Registry of the Supreme Court with his Application for Leave to Appeal. Her Ladyship stated (at p.147) *"…… the failure to comply with Rule 28(3) of the Supreme Court Rules would necessarily be fatal".*

I have cited the above decisions, at some length, to illustrate the established rule that, all parties who may be adversely affected by an Appeal must be named as Respondents in the Petition of Appeal and be given due Notice in accordance with the Rules and that, a failure to do so, renders the Appeal liable to rejection.

To move to the present Case, it is clear from the above cited line of authority that, the 17th Defendant's violation of the mandatory requirements of Rule 28 (5) of the Supreme Court Rules, 1990 by the failure to name the 1st Defendant as a Respondent to the Petition, makes the 17th Defendant's Petition liable to rejection.

Learned Counsel for the 17th Defendant has urged that, this Court should grant its indulgence to the 17th Defendant and excuse the aforesaid violation of Rule 28 (5) of the Supreme Court Rules, since, learned Counsel submits, the 1st Defendant was not named as a Respondent due to an *"oversight"* and the *"the mistake was not deliberate"*. While that may well be the cause of the violation of the rule, I do not think it can take away the operation of Rule 28 (5) against the 17th Defendant. Due compliance with the Supreme Court Rules, 1990 cannot be excused on the grounds that the failure to comply was unintentional.

Learned Counsel for the 17th Defendant also cites Section 759 (2) of the Civil Procedure Code which confers a discretion on Court to grant relief in the case of any

mistake, omission or defect on the part of the appellant in complying with the requirements of the Civil Procedure Code with regard to the Petition of Appeal and Section 770 of the Civil Procedure Code which confers a discretion on Court to issue notice and add a party to the Action in the lower Court who has not been made a party to the Appeal. Counsel's submission is that, notwithstanding the failure to comply with Rule 28 (5) of the Supreme Court Rules, 1990, Sections 759 (2) and Section 770 of the Civil Procedure Code vest this Court with the discretion to now issue Notice to the 1st Defendant and add her as a Party.

While such a submission regarding the exercise of the discretion vested in an Appellate Court by Sections 759 (2) and Section 770 of the Civil Procedure Code may have been made in the High Court of Civil Appeal in the original Appeal which was heard under and in terms of the provisions of Chapter LVIII of the Civil Procedure Code, it is not relevant in the present matter in this Court, since the preliminary objection is centered upon non-compliance with Rule 28 (5) of the Supreme Court Rules, 1990, to which Section 759 (2) and Section 770 in Chapter LVIII of the Civil Procedure Code do not apply.

In this regard, I would also add that, the decisions of JAYASEKERA vs. LAKMINI [2010 1 SLR 41] and WILSON vs. KUSUMAWATHIE [2015 B.A.L.J. Vol. XXI p.49] cited by learned Counsel for the 17th Defendant in support of the aforesaid submission, deal with situations where the High Court of Civil Appeal applied Section 770 and Section 759 (2) of the Civil Procedure Code and not with situations where there was non-compliance, in this Court, with Rule 28 (5) of the Supreme Court Rules, 1990.

The decision of this Court in EDIRIWICKREMA vs. RATNASIRI [2013 B.A.L.J. Vol. XX p.4] which has also been cited by learned Counsel for the 17th Defendant, deals with the question of whether objections based on non-compliance with Supreme Court Rules, 1990 can be sustained where the objections are raised very belatedly – in that case eight years after Special Leave to Appeal had been granted. The issue of belatedness does not arise for consideration in the present Case and, therefore, EDIRIWICKREMA vs.RATNASIRI does not assist the 17th Defendant.

Learned Counsel for the 17th Defendant also submits that, since the 17th Defendant's Application for Leave to Appeal has not been supported as yet, there is *"sufficient time to rectify the mistake by sending notices"* to the 1st Defendant. Counsel's submission is, in effect, that, the non-compliance with the requirements of Rule 28 (5) should be overlooked and notice should be issued since there is sufficient time to do so.

In support of this contention, Counsel has cited the recent decisions of LEELAWATHIE MENIKE vs. BANDARA [2015 BLR 97] and ELIAS vs. CADER [2011 2 BLR 375] which took the view that, the raising of technical objections should be discouraged in the cause of the proper dispensation of justice and that, wherever possible, it is preferable to decide a Case on its merits rather than upon technicalities. The facts in these two decisions are entirely different to the facts in the present Case and no parallels can be drawn with the present Case.

In any event, I do not think that, in the light of the facts of the present Case, the preliminary objection raised by the Plaintiff can be properly regarded as being a mere `technical objection'.

In this regard, it has to be remembered that, the 1st Defendant was awarded substantial entitlements by the Judgments of the District Court and High Court which the 17th Defendant now seeks to set aside in her Application to this Court. If the 17th Defendant succeeds, the 1st Defendant will be substantially and irrevocably prejudiced. In these circumstances, it was necessary that, the 17th Defendant named the 1st Defendant as a Respondent to her Petition filed in this Court so that, the 1st Defendant will be given the opportunity to be heard in opposition to the 17th Defendant's Application.

This is what is mandatorily required by Rule 28 (5) of the Supreme Court Rules, 1990. This Rule places an imperative burden and responsibility upon an Appellant or Petitioner to ensure that his Petition is presented in a manner which will ensure that, all those parties in the lower Courts who may be prejudiced if he succeeds in this Court, are named as Respondents and, thereby, are given an opportunity to be heard in opposition to his Appeal or Application to this Court.

Thus, it is evident that, Rule 28 (5) of the Supreme Court Rules, 1990 is an important provision of procedural law designed to ensure the due and proper dispensation of justice by this Court.

It should be kept in mind that, as Dr. Amerasinghe J explained in FERNANDO vs. SYBIL FERNANDO [1997 3 SLR 1 at p. 13] *"There is the substantive law and there is the procedural law. Procedural law is not secondary: The two branches are complementary. The maxim ubi jus, ibi remedium reflects the complementary character of civil procedure law. The two branches are also interdependent. Halsbury (ibid.) points out that the interplay between the two branches often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives its remedy and effectiveness and brings it into being.".* More recently, in SUDATH ROHANA vs. MOHAMED ZEENA (*supra*) Dr, Bandaranayake J (as she then was) stated (at p.145) *"….. the procedural law breathes life into substantive law, sets it in motion, and functions side by side with substantive law".*

Rule 28 (5) of the Supreme Court Rules, 1990 is simply a crystallization into procedural law of the inviolable *audi alteram partem* requirement of the substantive law. Therefore, this rule must be complied with, must be enforced and violations of this rule will be liable to rigorous penalties.

It is for the above reasons that, our Courts have, for good reason as referred to above, regarded strict compliance with Rule 28 (5) and its equivalent in the Supreme Court Rules, 1978, as being mandatory and have rejected Appeals which do not comply with the Rule.

Thus, I am not inclined to accept the submission that, the preliminary objection raised by the Plaintiff is a mere `technical objection' which should be overlooked.

Before concluding, it is appropriate to briefly consider whether a failure to name a necessary party as a Respondent to a Petition of Appeal will always and invariably

result in the rejection of the Appeal due to non-compliance with Rule 28 (5) of the Supreme Court Rules, 1990.

In IBRAHIM vs. NADARAJAH (*supra)*, Dr.Amerasinghe J expressed his view (at p. 133) that, *"…… a failure to comply with the requirements of Rules 4 and 28 of the Supreme Court is necessarily fatal"* and later (at p.133-134) referred to the submission made by Counsel for the Petitioner that the Court should exercise its discretion and grant relief to the Petitioner under the provisions of Chapter LVIII of the Civil Procedure Code and set out the submission, in reply, of President's Counsel for the Respondent as: *"Mr. Samarasekera, P.C., however, submits that the Court no longer has that discretion under the prevailing laws and rules and that in any event there are no circumstances in this case warranting the granting of any indulgence."*. Dr. Amerasinghe J stated that, the Court agreed with aforesaid submission of President's Counsel for the Respondent. However, the Judgment does not state that, Dr. Amerasinghe J was of the view that this Court was bereft of jurisdiction to exercise discretion and grant relief even in an instance where it was established that, the non-compliance with the Rule was caused by exceptional circumstances and without any fault on the part of the Appellant.

It is evident that, in IBRAHIM vs. NADARAJAH, there were no exceptional circumstances which could have been considered by the Court as, in the words of Dr. Amerasinghe J, *"warranting the granting of any indulgence"* by the Court. Thus, Dr. Amerasinghe J does not appear to have considered the specific question of whether indulgence could be granted where the non-compliance with the Supreme Court Rules, 1978 was due to exceptional circumstances where no fault, negligence or lack of diligence could be attributed to the Petitioner or Appellant. The more recent decisions of this Court in SENANAYAKE vs. AG and ILLANGAKOON vs. LENAWELA cited above which deal with Rule 28 (5) of the Supreme Court Rules, 1990 also do not appear to consider this specific question.

I am of the view that, while Rule 28 (5) of the Supreme Court Rules, 1990 places a mandatory duty on a Petitioner or Appellant to name all necessary parties as Respondents to his Petition and the failure to duly comply with this requirement will ordinarily result in the rejection of the Application or Appeal, there could be

exceptional circumstances where this Court may consider it to be just and equitable to grant indulgence where it has been established that, the non-compliance was unavoidable or was caused by exceptional circumstances *and provided* there had been no fault, negligence or lack of diligence on the part of the Petitioner or Appellant or his Attorney-at-Law.

However, there is no need to further consider this aspect in the present Case since the 17th Defendant has adduced no excuse for the failure to name the 1st Defendant as a Respondent to the Petition other than to describe it as a mistake or oversight.

For the aforesaid reasons, I hold that, the 17th Defendant's Petition should be rejected for non-compliance with the requirements of Rule 28 (5) of the Supreme Court Rules due to the failure to name the 1st Defendant as a Respondent to the Petition.

The Application of the 17th Defendant-Appellant-Petitioner is rejected. In the circumstances of the Case, I do not make an Order for Costs.

Judge of the Supreme Court

Sisira J. De Abrew J.
I agree

Judge of the Supreme Court

Nalin Perera 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 substitution in accordance with Rule 38 of the Supreme Court Rules, 1990 in place of the now deceased AswaththalageDoisa the 6th Defendant-Respondent-Respondent.

LasanthaSamarasiriAnandaWickremasinghe
of Kurupetta, Ruwanwella

Intervenient-Petitioner

SC.HC CALA 73/2013
WP/HCCA/AV/852/2008(F)
Avissawella DC Case No. 19372/P

Vs.

1. ManikuwalageRosalin
2. RanjithAnandaWickremasinghe (Deceased)

2.ADharmasiriAnandaWickremasinghe
OfKurupetta ,Ruwanwella

Plaintiffs-Respondents-Petitioners-Respondents

7. AswaththalageJulis
11. ColalmbageDhanapala
12. GalaudageJelin
13. GalaudageGirigoris
14. GalaudageRosalin.

All of
Kurupetta, Ruwanwella

7th, 11th, 12th, 13th -14th Defendants-Appellants-Respondents-Respondents

1. AmbalanpitiyageBrampi (Deceased)
2. AmbalanpitiyageMarthelis
3. Ambalanpitiyage Simon
4. AmbalanpitiyageSelesthina
5. AmbalanpitiyageEmanis
6. AswaththalageDoisa (Deceased)
8. AmbalanpitiyageLeelawathie
9. AmbalanpitiyagePremawathie
10. AmbalanpitiyageSriyawathie

of
Kurupetta, Ruwanwella

1st to 6th and 8th to 10th Defendants-Respondents Respondents

1. AmbalanpitiyageWasanthiKalyani
2. AmbalanpitiyageRenukaUdayangani
3. Ambalanpitiyage Padma Irangani
4. AmbalanpitiyageManjulaLalithWijesinghe
5. AmbalanpitiyageThilakPushpakumaraWijesinghe
6. AmbalanpitiyageRanjithWarnakulasiriWijesinghe

All of
Kurupetta, Ruwanwella

Party sought to be substituted in place of the Deceased 6th Defendant-Respondent-Respondent

Before	:	Chandra Ekanayake, J . PriyasathDep, PC. J PriyanthaJayawardana, PC. J
Counsel	:	ThyshyWeragoda for the 11th Defendant-Appellant-Respondent-Petitioner. GaminiPremathilaka for the 2nd Plaintiff-Respondent-Petitioner- Respondent. Sunil Wanigatunga for the intervenient Petitioner.
Argued on	:	25.01.2016
Decided on	:	01.04.2016

Order

Priyasath Dep, PC. J

In this case 6th Defendant-Respondent-Respondent Aswattalage Doisa alias Doia had passed away whilst the appeal was pending in the High Court. However of consent parties agreed to effect substitution in this court.

The11th Defendant-Appellant-Respondent-Petitioner (hereinafter sometimes referred to as 'Petitioner') by hisPetition dated 7th May 2014 move to substitute parties referred to in the Petition as parties sought to be substituted in place of the deceased. The parties sought to be substituted are the heirs of the deceased 5th Defendant-Respondent-Respondent. They were substituted in place of the 5th Defendant-Respondent-Respondent as substituted 5A – F Defendant-Respondent-Respondents. Petitioner is seeking to substitute them on the basis that they are relatives of the deceased 6th Defendant-Respondent-Respondent.

The death certificateof the deceased 6th Defendant-Respondent-Respondentis marked as 6x1.The said deceased Aswaththalage Doisa was also known as Aswaththalage Doiya. She died intestate and issueless.This was confirmed by the Grama Niladari ,Kurupetta, Ruwanwella by his letter dated 03-07-2014 which is marked as 6x2.

The Petitioner pleaded that the Plaintiff in his Plaint disclosed inter alia that the said Aswaththalage Doisa was the daughter of Ambalanpitiyage Yaso. The Petitioner further submitted that in the Judgment of the Provincial High Court of the Western Province (exercising its Civil Appellate Jurisdiction) holden at Avissawella, Ambalanitiyage Yaso was identified as a co-owner of the land in suit and her rights were left unalloted.

The Petitioner further pleaded that the said mother of the deceased Aswaththalage Doisa , alias Doiya, namely Ambalanpitiyage Yaso had three siblings namely, Ambalanpitiyage Siyadoris, Ambalanpitiyage Diyonis alias Piyoris and Ambalanpitiyage Laisa.

The Petitioner further pleaded that Ambalanpitiyage Siyadoris died intestate leaving behind the 4th Defendant-Respondent-Respondent as his heir.

The Petitioner further pleaded that Ambalanpitiyage Diyonis alias Piyoris died intestate leaving behind the now deceased 5th Defendant-Respondent-Respondent. The Petitioner further submits that the Respondents named herein namely Ambalanpitiyage Wasanthi Kalyani, Ambalanpitiyage RenukaUdayangani,AmbalanpitiyagePathmaIrangani, AmbalanpitiyageManjulaLalithWijesinghe, AmbalanpitiyageThilakPushpakumaraWijesingheandAmbalanpitiyageRanjithWarnakulasiriWijesinghe are the children of the now deceased 5th Defendant-Respondent-Respondent.Birth certificates are marked as 6x3 (a)-(f). The pedigree submitted by the Intervenient Petitioner marked annexed IP 8C which is filed of record in DC Avissawella 472/ Partition confirm the above facts submitted by the Petitioner.

The Petitioner further stated that the learned HighCourt Judges in their Judgment held that Ambalanpitiyage Laisa was married in diga and she lost her rights to paternal inheritance. As the 6th Defendant-Respondent died unmarried, issueless and intestate, the above named substituted 5A- F Defendant-Respondents-Respondentscould be considered as close relatives amongst the living.

Intervenient Petitioner Lasantha Samarasiri Ananda Wikremasinghe by his Amended Petitiondated 6th May 2015 is seeking to intervenein this action and also to substitute him in place of the deceased 6th Defendant- Respondent-Respondent. He states that he is a grandson of the original owner Ambalanpitiyage Peththa, who was the owner of undivided half share of the property and a relation of the deceased 6th Defendant-Respondent-Respondent.The Intervenient Petitioner states that he looked after the deceased 6th Defendant-Respondent-Respondent and even in the death certificate his name was mentioned as a close relative. However according to the pedigree submitted by him his relationship to the deceased 6th Defendant –Respondent-Respondent is a distant relationship. Therefore his application for intervention and substitution is refused.

I am of the view that the substituted5A-5F Defendant-Respondent-Respondent are fit and proper persons to be substituted in place of the deceased 6th Defendant- Respondent-Respondent.

Therefore the application made by the 11th Defendant-Appellant-Respondent-Petitioner to substitute 5a-5f Defendant-Respondent-Respondent in place of the deceased 6th Defendant-Respondent-Respondent is allowed .They will be cited as Substituted 6A- 6F Defendant-Respondent- Respondents. Amended Caption to be filed within one month.

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

Namal Aracchige Namal
Thilakaratne
No.134/A
Matha Road, Manning Town,
Elvitigala Mawatha
Colombo 8

Plaintiff

SC Appeal No.49/2011 and
SC Appeal No 50/2011
SC/HCCA 282 & 283/2010 -Vs-
WP/HCCA/COL/282 and 283/2007(F)
DC Colombo Case Nos. 32097/MR and 35368/MR

1. W.V.R.Somaratne
   Walpola Junction
   Welagedara,
   Attanagalle

2. R.P.T.N.H.Ranasinghe
   Ranssinghe Construction
   No.15/8
   Veediyaratne Road
   Gampaha

Defandants

AND

1. W.V.R.Somaratne
   Walpola Junction
   Welagedara,
   Attanagalle

2. R.P.T.N.H.Ranasinghe
Ranssinghe Construction
No.15/8
Veediyaratne Road
Gampaha

Defendants-Appellants

Namal Aracchige Namal Thilakaratne
No.134/A
Malta Road, Manning Town,
Elvitigala Mawatha
Colombo 8

Plaintiff-Respondent

AND NOW BETWEEN

In the matter of an application for Leve to appeal in terms of section 5C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by Act no.54 of 2006.

1. W.V.R.Somaratne
Walpola Junction
Welagedara,
Attanagalle

2. R.P.T.N.H.Ranasinghe
Ranssinghe Construction
No.15/8
Veediyaratne Road
Gampaha
Presently at No.12, Church
Road, Gampaha.

Defendants-Appellants-Petitioners

-Vs-

Namal Aracchige Namal
Thilakaratne
No.134/A
Matha Road, Manning Town,
Elvitigala Mawatha
Colombo 8

Plaintiff-Respondent-Respondent

Before: Eva Wanasundera PC.J
Buwaneka Aluwihare PC.J
Sisira J. De Abrew J

COUNSEL: Nihal Fernando PC. With Viran Fernando for the Defendant-Appellant-Appellants.
Amrit Rajapakse for the Plaintiff-Respondent-Respondent

ARGUED ON: 08-12-2015

WRTTEN SUBMISSIONS ON: 18TH -12-2015

DECIDED ON: 15-11-2016

Aluwihare PC.J

When leave to appeal applications in SC.HC.CALA/282/2010 and SC HC/CALA 283/2010 were supported on 2nd October,2011 leave was granted on identical questions of law and the applications referred to above were assigned the numbers Appeal 49/2011 and Appeal 50/2011, respectively.

When these matters were taken up for hearing, parties agreed to have both appeals consolidated and invited court to decide the issues in both appeals in a single judgment. Similarly, the High Court of Civil Appeals also had consolidated the two appeals that came up before it from the decisions of the District Court and had pronounced one judgment.

Both these matters referred to above stem from the same incident, a tragic motor vehicle accident that resulted in the death of one Samantha Padmakeshi Senadheera.The deceased happened to be the husband of the Plaintiff-Respondent-Respondent in Appeal No. 49/2011 and the mother of the Plaintiff-Respondent-Respondent in Appeal No.50/2011.

The Plaintiff-Respondents (hereinafter referred to as Plaintiffs) initiated separate proceedings before the District Court of Colombo under case Nos. 32097/MR and 35368/MR.

In case No.32097/MR, by her judgment dated 26th July,2007, the Learned District Judge awarded the entirety of the damages claimed by the husband of the deceased and awarded him Rs.5 million as damages. The said amount is constituted of two components, that is Rs.3.00 million as pecuniary loss and Rs.2.00 million for loss of love and affection.

In the other case (i.e.. 35368/MR) the Learned District Judge awarded the daughter of the deceased, again the entire sum claimed by her as damages and

the amount so awarded was Rs.3.00 million. This amount also consists of pecuniary loss of Rs.1.5 million and Rs.1.5 million for loss of love and affection.

The defendants Appellant Petitioners(hereinafter referred to as Appellants) appealed against both these orders and as referred to earlier both appeals were consolidated and a single judgment was delivered by the High Court of Civil Appeals.The present appeal before this court impugnes the judgement delivered by the High Court of Civil Appeals.

Before I deal with the questions of law on which leave was granted it would be pertinent to place the issues that were raised.
It was the contention of the Appellant that the District Judge erred in law by misdirecting herself, in holding that plaintiffs suffered damages in a sum of Rs.2.00 million and 1.5 million, respectively for loss of "love and affection". The basis for this assertion is that, the aqulian action under Roman Dutch Law, permits granting only of damages for pecuniary loss and not for loss of love and affection.
In fact both in the High Court of Civil Appeals as well as before this Court the appellant did not contest their liability for pecuniary damages and in the course of the hearing the learned President's Counsel contended that his client is agreeable to pay the entirety of the damages awarded to both plaintiffs as pecuniary loss.

When the matter came up before the High Court of Civil Appeals, in the consolidated appeal judgment, the High Court brought down the aggregate damages from Rs.8.00 million to Rs.5.00 million in both cases.The judgement of the High Court however does not clearly state as to the basis for this reduction in the damages awarded. I shall, however, advert to the judgment of the High Court of Civil Appeals later in this judgment. It is significant to note that there

was no appeal by either of the Plaintiffs against the judgment of the High Court of Civil Appeals.

The Appellants had moved this court by way of leave to appeal and leave was granted by this Court on the questions of law referred to in sub paragraphs 1 to 4 of paragraph 16 of the Petition of the Petitioners dated 12th August,2010 which are reproduced below:

(1) Is the Plaintiff in an ***aquilian action*** for recovery of damages for death of his wife, entitled to recover damages for loss of comfort and protection from the said wife or *solatium* for "*loss of consortium*"?

(2) have the Learned High Court Judges erred in law, in granting damages for the "*loss of comfort and protection*" when there was no issue raised on the said category of damages by the Respondent?

(3) Is the method of calculation of future earning by the deceased adopted by the Learned Additional District Judge and/or the Learned High Court Judges, correct in law?

(4) Have the Learned High Court Judges erred in law, in awarding interest at the rate of 12% per annum contrary to provisions of section 192 of the Civil Procedure Code?

At the hearing of the appeal the learned counsel for the Respondents conceded that the plaintiffs would be entitled only to the applicable legal interest and not 12% percentum, as awarded by the High Court of Civil Appeals.

The Appellants at the stage of hearing did not challenge the determination of both courts with regard to awarding of damages for pecuniary loss. The main thrust of the argument on behalf of the Appellants was that the District Court could not have granted a *solatium* for loss of consortium as it is not permitted under the Roman Dutch Law, the law applicable to the instant case. It was the submission on behalf of the appellants that both the District Court as well as the High Court of Civil Appeals failed to consider the judgment of this court in the case of Prof. Priyani Soysa Vs. Rienzie Arsecularatne 2000 (2) SLR 283, which both courts were bound to follow along with other land mark cases, that have decided this issue. The Learned President Counsel sought for a judgment from this Court declaring that under the aquilian action for recovery of damages, plaintiffs are not entitled to damages for loss of consortium.

At the hearing of this appeal the learned counsel for the plaintiffs cited several judgments from other jurisdictions England, Ireland and Scotland relating to this issue where

Upon close scrutiny of the judgment of the HCCA the question arises whether this Court is required to answer questions of law 1 and 2 referred to above ,on which leave was granted.

As stated earlier the total damages awarded by the District Court to both plaintiffs was Rs.8.0 million. The breakdown of the damages so awarded is as follows: in the case of 32097/MR, the husband was granted 3.00 million as patrimonial damages and Rs.2.00 million for loss of love and affection resulting from the death of his wife: In the case of 35368/MR, the daughter was granted Rs.1.5 million as patrimonial damages and Rs.1.5 million for loss of love and affection, due to the loss of her mother.

By their judgment, however, the learned judges of the High Court Civil Appeals having consolidated the two cases awarded total damages in a sum of Rs.5.0 million in both cases.

The relevant portions of the judgment which is on pages 11, are reproduced below:

"Plaintiff-Respondent is entitled for a sum of Rupees Five million (Rs.50000,000) jointly and severally in both cases bearing Nos. WP/HCCA/Col 282/2007F and WP/HCCA/Col 282/2007/F from Defendant-Appellants together with interest at the rate of 12% per annum from 21.12.2001 till payment in full".

It must be noted, as stated earlier, that there is no appeal from this judgment of the High Court of Civil Appeals by the plaintiffs. To appreciate the judgment of the learned judges of the High Court it is necessary to consider the issues that were put in contention before that Court.

The main issues raised by the appellant before the High Court of Civil Appeals were two fold.

It was the position of the Defendants that the learned District Judge –

(a) Erred in law and misdirected herself by holding that the plaintiff suffered damages for loss of affection in as much as under Roman-Dutch Law, damages can be awarded only in respect of actual pecuniary loss suffered by the plaintiffs and loss, capable of being assessed pecuniarily.

(b) That the learned District Judge erred in law in assessing the quantum of financial loss,

The learned Judges of the High Court of Civil Appeals in the consolidated appeal considered both these issues.

As to the the issue of awarding damages for loss of "comfort and protection" the main argument on behalf of the defendants was that no issue was raised on the purported loss of comfort and protection nor was it claimed in terms of the plaint.

Upon a perusal of the plaint filed before that District Court, the husband of the deceased had pleaded in paragraph 7 of the plaint that he suffered " severe mental pain and shock" due to the death of his wife and his normal life was disrupted and as a result he suffered damages.

In the plaint filed by the daughter of the deceased at paragraph 10, she had pleaded that due to the loss of her mother she has lost "*the protection and assistance of her mother*".

It is correct that no specific issue had been raised in both plaints but an issue had been raised as to whether the plaintiff has suffered damages "as pleaded in the plaint".
The learned Judges of the High Court of Civil Appeals, having considered the submission on behalf of the defendants, at page 10 of the judgment states ***"On account of this, even if we disregard the claim of the Plaintiff-Respondent for compensation for loss of consortium of his wife as a result of her death, we cannot ignore that loss of financial support that the plaintiff would have received in the event she had lived beyond the age of her retirement."*** (emphasis added)

Having stated so the learned Judges of the High Court of Civil Appeals had gone on to assess the actual loss caused to the plaintiff(s) and had arrived at the figure

of Rupees five million (Rs.5000,000) jointly and severally in both cases. The High Court of Civil Appeals also had adjusted the rate of interest of 24% fixed by the District Court and had fixed the rate of interest at 12% per annum.

Upon a consideration of the reasoning given by the learned Judges of the High Court of Civil Appeals, the only conclusion that this court can arrive at is that the High Court disregarded the damages awarded for loss of consortium. Presumably the Hihg Court of Civil Appeals held with the Appellants, that the plaintiffs have not specifically claimed damages for loss of consortium. The High court only considered the calculable pecuniary loss caused to the plaintiffs in both cases.

As the High Court of Civil Appeals has not granted damages for loss of consortium, a pronouncement by this Court on issues (1) and (2) of paragraph 16 of the petition, in my view would not be necessary.

With regard to the 3rd issue, on the calculation of damages based on the earnings by the deceased, was not canvassed by the learned President Counsel for the defendants before this court. As such I have not considered the findings of the learned District Judge and the High Court of Civil Appeals on that aspect.As such answering the 3rd issue also does not arise.

Finally as regards the 4th issue on which leave was granted, it was submitted that in terms of Section 192 of the Civil procedure Code what Court can award is legal interest and the imposition of interest at the rate of 12% per centum is contrary to the said provision of the Code of Civil Procedure.

An amendment was brought in1980, by Act No.53 of 1980 and the rate of interest on money to be decreed, was fixed at 12 per centum per annum in the

absence of an agreement between the parties and the said section, for ease of reference, is reproduced below:

> "When the action is for a sum of money due to the plaintiff, the court may, in the decree order interest according to the rate agreed on between the parties by the instrument sued on, or in the absence of any such agreement **at the rate of twelve per centum per annum to be paid on the principal sum** adjudged from the date of the action to the date of the decree…" *(emphasis added)*

An amendment to Section 192 of the Civil Procedure Code however was brought in 1990 by Act No. 6 of 1990 by which Section 192 was repealed and substituted by a new section,and the amended section reads as follows:

> " When the action is for a sum of money due to the plaintiff, the court may, in the decree order interest according to the rate agreed on between the parties by the instrument sued on, **or in the absence of any such agreement at the legal rate, to be paid, on the principal sum** adjudged from the date of action to the date of the decree….," *(emphasis added)*

The learned counsel for the Plaintiffs conceded this fact and admitted that what the court could have granted was legal interest.In all probability the Judges of High court of Civil Appeals may have overlooked the fact that Section 192 had been subject of an amendment and a new section had been substituted in its place.

Accordingly judgment of the High Court of Civil Appeals is affirmed and I hold that the Plaintiff Respondent is entitled to the sum awarded by the High Court

together with legal interest, instead of interest at the rate of twelve (12) percentum, commencing from 21.12.2001 till the payment is made in full.

Subject to the variation of interest referred to above, both the appeals, i.e SC Appeal 49/2011 and SC Appeal No 50/2011are dismissed.
The plaintiff Respondent-Respondents in both cases are entitled for the costs of this court as well as the cost of courts below.

JUDGE OF THE SUPREME COURT

Justice Eva Wanasundera P.C

I agree

JUDGE OF THE SUPREME COURT

Justice Sisira J De Abrew

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal from the Judgement made by the Court of Appeal on the 25th day of March 2015 in the case No. CA(PHC) 37/2005 and under and in terms of Article 128(2) of the Constitution read together with Article 127 of the Constitution.

Muththusamy Balaganeshan
Of 65/138, Crow Island
Mattakkuliya
Colombo 15

Accused-Appellant-Petitioner

SC. SPL/LA No. 79/2015
CA (PHC) 37/2005
H.C.(Negombo) case No. 300/2003
MC (Negombo) case No. H 36051

Vs.

1. The Officer-in-Charge
   Police Station
   Seeduwa.

2. The Attorney General
   Colombo

Respondents-Respondents

Before	:	Dep PC, J Wanasundera PC,J Jayawardane, PC J
Counsel	:	S. Kumarasingham for the Accused-Appellant-Petitioner Madhawa Tennakoon, SSC for the Respondent-Respondent
Argued on	:	12.08.2015
Decided on	:	01.04.2016

Priyasath Dep, PC. J

The Accused –Appellant- Petitioner-(hereinafter referred to as 'Petitioner') was convicted in the Magistrate's Court of Negombo under Motor Traffic Act and was sentenced to one year's imprisonment with a fine of Rs. 3500/- and in the event of a default in payment of the fine a default sentence of six months imprisonment will be imposed.

The Petitioner being aggrieved by the said judgment appealed to the High Court of Negombo. The High Court of Negombo on 17.01.2005 having heard the submissions made on behalf of the Petitioner and the Respondents upheld, the conviction and sentence imposed by the Magistrate Court.

Aggrieved by the said judgment, the Petitioner appealed against the judgment to the Court of Appeal in terms of article 138(1) of the Constitution.

At the commencement of the hearing in the Court of this Appeal, a preliminary objection was raised by the learned Counsel for the Respondents stating that the Court of Appeal has no jurisdiction to entertain the appeal as the jurisdiction to hear such appeals is vested in the Supreme Court by virtue of section 9 of the High Court of the Provinces (Special Provisions Act) No. 19 of 1990.

The Court of Appeal having considered the oral and written submissions of both parties upheld the preliminary objection raised on behalf of the Respondents and dismissed the Appeal entering judgment accordingly on 25.03.2015.

The Petitioner filed a Special Leave to Appeal Application dated 06.05.2015 to this Court seeking to obtain leave to appeal from the said judgment of the Court of Appeal, on the following two questions of law referred to in (a) and (b) of paragraph 9 of the Petition dated 06.05.2015.

(a) Does the Court of Appeal have the jurisdiction, by virtue of article 138(1) of the Constitution and as provided for under article 154(P) 6 of the Constitution to hear an appeal against a decision of the High Court whether given by way of an Appeal or on Revision in the exercise of its jurisdiction under article 154 P (3) (b) of the Constitution.

(b) Could an ordinary law namely, the High Court of Provinces (Special Provisions) Act No. 19 of 1990 override a constitutional provision namely Article 138(1) and consequently deprive the Court of Appeal of its jurisdiction to hear an Appeal against a decision of the High Court whether given by way of an Appeal or on revision in the exercise of its jurisdiction under article 154 P (3)(b) of the Constitution.

As these two questions of law are the threshold issues pertaining to jurisdiction, this Court decided to consider these questions as preliminary issues and heard the oral submissions of the parties and directed the parties to file written submissions.

The learned Counsel for the Petitioner submitted that in terms of Article 138(1) read along with the provisions under article154 P(6) of the Constitution, the Court of Appeal has jurisdiction to hear an appeal against a decision of a High Court whether given by way of an Appeal or on Revision in the exercise of its jurisdiction in terms of article 154P(3)(b) of the Constitution.

Article 154 P(6) – reads as follows:-

> 'Subject to the provisions to the Constitution and **any law**, any person aggrieved by a final order, judgment or sentence of any such Court, in the exercise of its jurisdiction under paragraphs (3) (b) or (3) (c) or (4) may appeal there from to the Court of Appeal in accordance with Article 138.'

It is appropriate at this stage to refer to Article 138(1) which refer to the appellate jurisdiction of the Court of Appeal. Article 138(1) reads thus:

> 'The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of **any law**, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things [of which such High Court ,Court of First Instance] tribunal or other institution may have taken cognizance'

The Thirteenth Amendment to the Constitution under Article 154P. (1) established High Court of Provinces. The Jurisdiction is given under Article 154P. (3) which reads as follows.

154(P) (3) Every such High Court shall-

(a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;

(b) Notwithstanding anything in Article 138 and subject to **any law**, exercise appellate and revisionary jurisdiction in respect of convictions sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province ;

(c) exercise such other jurisdiction and powers as Parliament may, by law provide,

Under Article 154(P) (6) the appeal lay to the Court of Appeal when the High Court exercises its jurisdiction under 3 (b), 3 (c) and 4 of Article 154 (P) in accordance with Article 138 of the Constitution. Article 154(P) (6) reads thus:

> 'Subject to the provisions of the Constitution and **any Law**, any person aggrieved by a final order, judgment or sentence of any such court in the exercise of its jurisdiction under paragraphs (3) (b) or (3) (c) or 4 may appeal there from to the Court of Appeal in accordance with Article 138'.

When Articles 138, 154 (3) and 154(6) considered without reference to High Court (Special Provisions) Act No. 19of 1990 an appeal shall be filed in the Court of Appeal from the judgments of the High Court when it exercises appellate, revisionary and original jurisdiction. This situation has changed with the introduction of High Court (Special Provisions) Act no 19of 1990.

It should be noted that the jurisdiction conferred on the Court of Appeal under Article 138 and 154(P) (6) are subject to the provisions of the Constitution and **any Law.** It was held in a series of cases that Article 138 and 154(P) (6) are enabling articles subject to the provisions of the Constitution and **any Law**.

Therefore it is imperative to consider the provisions of High Court (Special Provisions) Act No 19of 1990. This act lays down the procedure in relation to exercising of power and jurisdiction conferred on High Court of Provinces under Article 154(P) of the Constitution. Section 9 of the High Court of Provinces(Special Provisions) Act 19 of 1990 reads thus:

Subject to the provisions of this Act or any other law, any person aggrieved by –

> (a) a final order, judgement, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings:

It is abundantly clear that the appeal against the judgment of the High Court when exercising the appellate jurisdiction should be filed in the Supreme Court.

The Learned Counsel for the Petitioner relied on the decision of the Supreme Court *in Abeygunasekera vs. Setunga and others* ([1997] Sri.L.R pp 61-69). It was held that:-

> ' The Appellate jurisdiction of the Court of Appeal under Article138(1) read with Article154P(6) of the Constitution is not limited to correcting errors committed

> by the High Court only in respect of Orders given by way of an appeal. The Court of Appeal has jurisdiction to hear an appeal against a decision of the High Court whether given by way of an Appeal or Revision'.

However in *Abeygunasekera vs.Ajith De Silva*([1998] 1 Sri.l.R p134 at p139) a bench consisingt of five judges of the Supreme Court did not follow the judgment in *Abeygunasekera vs. Setunga*(supra) when it held that :-

> 'The cumulative effect of the provisions of Articles 154 P (3) (b), 154 P (6) and section 9 of Act No. 19 of 1990 is that, while there is a right of appeal to the Supreme Court from the orders etc. of the High Court established under Article 154 (P) of the Constitution in the exercise of the appellate jurisdiction vested in it by article 154 (P) (3) (b) or section 3 of Act No. 19 of 1990 or any other Law, there is no right of appeal to the Supreme Court from the orders in the exercise of the revisionary jurisdiction. An Appeal from an order of the High Court in the exercise of its revisionary jurisdiction should be made to the Court of Appeal. An Appeal to the Supreme Court from the decision of the Court of Appeal would lie with leave.

In *Wickremasekera v. Officer in Charge Police Station Ampara* ,([2004] 1 Sri.LR 258, Shirani Bandaranayake, J (as she was then) held that:

> " The Court of Appeal does not have appellate jurisdiction in terms of Article 138(1) of the Constitution read with Article 154(6) in respect of decisions of the Provincial High Court made in the exercise of its appellate jurisdiction and it is the Supreme Court that has the jurisdiction in respect of appeals from the Provincial High Court as set out in section 9 of the High Court of the Provinces (Special Provisions) Act , No. 19 of 1990".

Therefore it is abundantly clear that when High Court exercises appellate jurisdiction an appeal lies to the Supreme Court after first having obtained leave.

When the Provincial High Court exercises appellate jurisdiction, it exercises appellate jurisdiction hitherto exclusively vested in the Court of Appeal. It exercises a parallel or concurrent jurisdiction with the Court of Appeal. The High Court when it exercises appellate jurisdiction it is not subordinate to the Court of Appeal. That is the basis for conferring jurisdiction on the Supreme Court under section 9 of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 to hear appeals from the judgments of the High Court when it exercises appellate jurisdiction.

I hold that the Accused Appellant –Petitioner should have filed a Special Leave to Appeal application against the judgment of the High Court exercising Appellate Jurisdiction to the Supreme Court in the first instance instead to the Court of Appeal. The Court of Appeal correctly upheld the preliminary objection and rejected the Appeal.
We see no reasons to interfere with the Judgment of the Court of Appeal Therefore we dismiss the Special Leave to Appeal application filed in this court.

No Costs.

Judge of the Supreme Court

Eva Wanasundara P.C.,J.
I agree.

Judge of 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 Spl. L.A 127/2015
C.A. No. 763/99 (F)
D.C. Gampola Case No. 2342/L

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

Kuda Banda Dunuwila
55/12, Bawwagama,
Nawalapitiya.

PLAINTIFF

Vs.

Menikrama Mudalige Sriya Malani Piyadasa
No. 1, Kumarapaya, Meepitiya,
Nawalapitiya.

DEFENDANT

AND BETWEEN

Menikrama Mudalige Sriya Malanim Piiyadasa
No. 1, Kumarapaya, Meepitiya,
Nawalapitiya.

DEFENDANT-APPELLANT

Vs.

Kuda Banda Dunuwila
55/12, Bawwagama,
Nawalapitiya.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Menikrama Mudalige Sriya Malanim Piiyadasa
No. 1, Kumarapaya, Meepitiya,
Nawalapitiya.

DEFENDANT-APPELLANT-PETITIONER

Vs.

Kuda Banda Dunuwila
55/12, Bawwagama,
Nawalapitiya.

PLAINTIFF-RESPONDENT-RESPONDENT

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

COUNSEL: J. C. Boange for the Defendant-Appellant-Petitioner

Upendra Walgampaya for the Plaintiff-Respondent-Respondent

ARGUED ON: 14.07.2016

DECIDED ON: 08.08.2016

GOONERATNE J.

This is a Special Leave to Appeal Application to set aside the Judgment of the Court of Appeal dated 10.06.2015 and the Judgment of the learned District Judge dated 17.05.1999. Petition dated 20.07.2015 has been

filed in this court along with an affidavit affirmed on the said date. The seal of the Supreme Court Registry placed on the petition and affidavit bears the same date. When this application was to be supported on 25.04.2016 the learned counsel for Plaintiff-Respondent-Respondent submitted to court that the affidavit required to be filed as per the Supreme Court Rules by the Petitioner had not been filed in compliance with Rule 2 read with Rule 6 of the Supreme Court Rules. Accordingly on that point court permitted parties to file written submissions.

It would be convenient for all if one notes the material submitted to this court by the Defendant-Appellant--Petitioner with his Special Leave to Appeal Application, prior to court being called upon to delve into the preliminary objection. The application consists of:

(a) Petition dated 20.07.2015 and an affidavit affirmed on the said date.
(b) Photo copy of plaint filed in the District Court – P1
(c) Photo copy of the Petition of Appeal filed in the Court of Appeal – P1A
(d) Photo copy of answer filed in the District Court – P2
(e) Photo copy of proceedings of the District Court marked – P3 & P3A (issues)
(f) Documents marked in the original court P3B & P3C (transfer Dead No. 13221)
(g) Judgment of the District Court P4
(h) Judgment of the Court of Appeal P5

Motion dated 09.12.2015 is also filed of record by which the Defendant-Appellant-Petitioner filed the full Judgment of the District Court according to a direction given by this court on 15.09.2015. The relevant rules relied upon by the Plaintiff-Respondent-Respondent reads thus:

Rule 2 of the Supreme Court Rules, 1990:-

> "2 Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the, Registry, together with affidavits and documents in support thereof as prescribed by rule 6, and certified copy, or uncertified photocopy, of the judgment or order in respect of which leave to appeal is sought. Three additional copies of such petition, affidavits documents, and judgment or order shall also be filed; Provided that if the petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this rule to be tendered with his petition he shall set out the circumstances in his petition, and shall pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same. If the Court is satisfied that the petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgement or order, and that the failure to tender the same was due to circumstances beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this rule.

Rule 6 in its entirety reads as follows:-

> "6 where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original court or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts. Every affidavit by a petitioner, his instructing attorney-at-law or his recognized agent, shall be

> confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to: provided that statements of such declarant's belief may also be admitted, if reasonable grounds for such belief be set forth in such affidavit."

The above Rules read together indicate that a petition need to be filed supported with an affidavit and supporting documents. In the instant case as referred to above [(a) to (h)] are produced which more or less contains the entirety of the record of the original court and the Court of Appeal, other than the Journal Entries. Rule 6 adds a further requirement in a situation where an allegation of fact cannot be verified by reference to the Judgment, of the two courts. In such a situation the petitioner shall annex in support of such allegation an affidavit or other document. Such an affidavit could be sworn or affirmed by the Petitioner himself or his registered Attorney-at-Law or his recognised agent, provided any one of them has personal knowledge of the alleged fact.

I would envisage a situation where either the Petitioner could as required by Rule 2 above include averments in his affidavit (submitted with the petition) which cannot be gathered from the record of the case or file an affidavit of his registered Attorney-at-Law or recognised agent etc. along with documents contemplated under Rule 6.

Affidavit means a solemn 'assurance of a fact known to the person who states it and sworn to as his statement before some person in authority such as a Justice of the Peace. Van Zyl. Judicial practice in South Africa 4th Ed.

393. It is confined to facts which the declarant can of his own knowledge and observations testify to. Exception is made in case of an interlocutory affidavit in which statement regarding his belief may be admitted (Section 181 of the C.P.C – 47 NLR 512). Petition cannot be converted to affidavit (Section 182 of the Code). Section 437 to 440 of the Civil Procedure Code also deals with affidavit.

It is apparent that the Rules require the averments in the petition to be supported by an affidavit. Evidence and proof before court is provided by an affidavit. Once an affidavit is sworn or affirmed it is deemed to have an evidentiary value, but it is not so where the petition and other documents are concerned. The affidavit filed before this court consists of a bear statement which affirm to the veracity of paragraph 1 to 9 of the petition. It is definitely inadequate for the purpose and in terms of the Supreme Court Rules. These Rules no doubt have to be strictly interpreted. The affidavit filed of record does not support the averments in the petition but merely suggests that the truth of the matters in paragraphs 1 to 9 are affirmed. It is certainly insufficient in an application seeking leave of the Supreme Court.

The affidavit filed in this application does not support the view that it is her own knowledge and statement/observation but mainly indicate that the truth of the averments in the petition are admitted. As such requirements as per the Supreme Court Rules are not adhered to by the Defendant-Appellant-

Petitioner. This court cannot at the earliest stage decide on questions of law even a pure question of law unless pleadings are in a proper acceptable order. It is also impossible and difficult for the authority administering the oath as part of the affidavit to read over and explain the statement of fact in the affidavit as it contains no statement of facts. Therefore I hold that there is no affidavit filed of record as required by the Supreme Court Rules and law. I uphold the preliminary objections raised by the Plaintiff-Respondent-Respondent and reject and dismiss the Defendant-Appellant-Petitioner's Special Leave to Appeal application with costs.

Application dismissed with costs.

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

Handun Harsha Prabath De Silva
43, Katana Road
Thimbirigaskatuwa
Negombo

S.C. [SPL] LA No.147/15 **Petitioner- Petitioner**
CA Writ Application No.293/2015

Vs.

Seylan Bank PLC
90, Galle Road
Colombo 03.

Respondent- Respondent

BEFORE : **B.P.ALUWIHARE, PC, J.**
PRIYANTHA JAYAWARDNE, PC,J.
K.T.CHITRASIRI,J.

COUNSEL : Faisz Musthapha, PC with Thushani Machado for the Petitioner-Petitioner

Palitha Kumarasinghe, PC with Priyantha Alagiyawanna for the Respondent-Respondent

ARGUED ON : **12.01.2016**

DECIDED ON : **23.02.2016**

CHITRASIRI, J.

When this matter was taken up for hearing to consider granting of special leave to proceed with the application, learned President's Counsel for the respondent submitted that the issuing of an interim order by this Court on 25.08.2015 is in violation of Rule 42 of the Supreme Court Rules.

In support of this view he submitted that the aforesaid Rule 42 of the Supreme Court Rules could not have invoked by this Court since it can only be used to obtain a stay order staying execution of a decree entered in an action. He further submitted that the relief prayed for in this application is to restrain the respondent Bank from auctioning the property of the petitioner and not to stay a decree being executed. Accordingly, he contended that the stay order issued on 25.08.2015 by this Court is contrary to the aforesaid Rule 42. Therefore, Mr.Kumarasinghe P.C. moved this court to vacate the said order dated 25.08.2015 since it is an order made without jurisdiction.

Rule 42 of the Supreme Court rules are to be read with Rule 43 thereto as both the Rules are connected to each other. Those Rules 42 and 43 of the Supreme Court Rules read thus:

Rule 42 -

> "*Where an application for special leave to appeal, or a notice of appeal, has been lodged with the registrar in compliance with the provisions of these rules, or special leave to appeal has been granted, and the petitioner or the appellant seeks to stay execution of the judgment in respect of which the application or appeal is made, the Registrar shall submit the application for the stay of execution of the judgment to a Judge of the Supreme Court"*

Rule 43 (1)*"The Judge to whom an application for the stay of execution of a judgment is submitted –*

> *(a)may order the stay of execution of such judgment till the determination of the application for special leave to appeal, or of the appeal, as the case may be;*
>
> *Provided that where such application has been made, or is supported, without notice to the adverse party, the Judge may order the stay of execution of the judgment if he is satisfied*

that the matter was of such urgency that the applicant could not reasonably have given such notice; in such event he may make an interim order for the stay of execution of the judgment for a limited period, not exceeding ten days, sufficient to enable the adverse party to be given notice of such application, and to be heard in opposition thereto, on a date to be then fixed, in Chambers, or in open Court, or

(b)may direct that the application be supported after notice to the adverse party, in Chambers or in open Court.

Upon sufficient cause being shown, any Judge of the Supreme Court may set aside any such interim order.

***(2)** Any order, or interim order, for the stay of execution of a judgment shall be forthwith communicated by the Registrar to the Court or tribunal concerned.*

***(3)** Where an order has been made for the stay of execution of judgment till the determination of an application for special leave to appeal –*

(a) if special leave to appeal is granted, the petitioner may make a further application for the stay of execution of judgment till the final determination of the appeal, and the Court may make such order thereon as it considers expedient; and

(b) if special leave to appeal is not granted, the Registrar shall forthwith notify the Court or tribunal concerned."

Plain reading of the aforesaid rules indicate that those could be invoked only to stay execution of a decree. Admittedly, there is no decree entered by a court of law in this instance to execute. Hence, on the face of it, the contention of Mr. Kumarasinghe P.C. seems to be correct.

However, it is the duty of this Court to ascertain the underline meaning of Rule 42 in order to give a purposive interpretation to it, upon considering

the intention of the creatures of the said Rules. There is no doubt as to the applicability of Rule 42 if there is a decree entered by a court. Such a mechanism is not available to a person who is to lose his property which is to be auctioned under the provisions contained in the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 even if there had been a violation of the provisions of the law referred to in the said Act No.4 of 1999. The petitioner in his application to the Court of Appeal alleges such an allegation. Therefore, it is the duty of the Court to ascertain a way out to remedy a situation where there is no clear rule to cater to such a situation, as alleged in this case.

When such silence in the law is found, the manner in which the court should act is referred to in **Maxwell on the Interpretation of Statues [12th Edition]** and in that it states thus:

> *"Question is whether the words of an Act do or do not apply to particular facts, "the court or tribunal may be assisted by legal principles or by so-called rules of construction, but these cannot solve the question".* [at page 39]

Moreover, **Maxwell** in the same 12th Edition states that a statute should not be construed as taking away the jurisdiction of Courts in the absence of clear and unambiguous language to that effect. [at page 153] The above authority permits Court to look for a remedial measure in order to find an answer to a grievance of a person who alleges a violation of the provisions of the aforesaid Act No.4 of 1999 and is in need for a stay order till the issue is finally decided.

Furthermore, the authorities in our jurisdiction also support the position referred to above. In **Jinadasa and another vs. Sam Silva and others [1994 (1) SLR at page 232]** it was held as follows:

> *"since there is no legislation governing the matter, the power to restore the application to re-list is in the exercise of the Court inherent jurisdiction."*

In **L.C.H.Peiris vs. The Commissioner of Inland Revenue [65 NLR 457] Sansoni,J** held thus:

> *"It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, …".*

As mentioned hereinbefore, no clear rule is found for the petitioner in this appeal to have an interim order in order to stay the auction being held until the matters complained of are looked into by the court. Therefore, having considered the authorities referred to above, I am of the view that this Court is empowered to fill the said lacuna by allowing the petitioner to make an application invoking jurisdiction under Rule 42 of the Supreme Court Rules by moving for an interim order until a decision is finally made in this appeal.

Moreover, the idea behind Rule 42 is to prevent execution of a decree entered in an action when there is an application pending in appellate courts to review a judgment delivered in an action in which the decree is to be executed. The application before the Court of Appeal in this case was to have a

Writ of Certiorari and a Writ of Prohibition issued to prevent the property owned by the petitioner being auctioned and not to challenge a judgment of an original court. Therefore, there is no decree as such to execute in this instance. Applications filed in this Court as well as in the Court of Appeal do not speak of a decree. Those are the circumstances under which this Court is invited to look at the issue at hand.

For clarity, I will now refer to the law relevant to the instant issue as well. Application to the Court of Appeal was to examine the validity of the decision of the Board of Directors of the respondent Bank that was made in terms of the provisions contained in the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990. The aforesaid Act empowers the Board of Directors of a Bank to take possession of a mortgaged property and to auction the same without having recourse to Courts. The extent to which such a process is lawful had been extensively discussed by S.N.Silva J (as he was then) in **Ramachandran and another Vs. Hatton National Bank Ltd [2006(1) SLR at 393]** It was also discussed **by Jayasinghe, J in the case of Hatton National Bank Ltd vs. Jayawardane and others. [2007 (1) SLR at 181]**

As mentioned hereinbefore in this judgment, the provisions contained in the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 do not provide any methodology to challenge in a court of law of the validity of auctioning the mortgaged property by a bank upon a resolution being passed by its Board of Directors. If such an opportunity is given to a party whose

property is to be auctioned, certainly then he will have a decision from a court to review. No such opportunity is available to the petitioner in this case.

At the same time it is to be noted that issuing a certificate of sale, consequent to an auction in terms of Section 15 of the aforesaid Act No.4 of 1999, would become a situation similar to a decree being executed in a civil suit as it has the same consequences. Said section 15 of the Act No.4 of 1999 reads thus:

> *"Upon issuing a certificate of sale all the right, title and interest of the borrower to, and in, the property shall vest in the purchaser; and thereafter, it shall not be competent to any person claiming through or under any disposition whatsoever of the right, title or interest subsequent to the date of the mortgage property to the Bank, in any Court to move or invalidate the sale for any, cause whatsoever, or to maintain any right, title or interest to, or in, the property as against the purchaser."*

Under the said Section 15 of the Act No.4 of 1990, the proprietary rights of the person, whose property is to be auctioned will come to an end. Accordingly, it seems that auctioning a property under the said Act No.4 of 1990 will have the same effect as of execution of a decree entered by Court. Therefore, it is not incorrect to allow the petitioner to invoke jurisdiction under Rule 42 of the Supreme Court Rules to move for an interim order particularly because no clear rule is found to cater to a situation as arisen in this instance.

Moreover, at the time the Supreme Court Rules were made, a situation similar to the circumstances of this case may not have foreseen by

its creatures. Therefore, it is necessary to consider whether such an instance too should be covered by Rule 42 to ensure achieving the ends of justice. In the event such a decision is not made, then the person who came to court by way of filing a writ application will be without a remedy, particularly when violation of the provisions contained in the Recovery of Loans by Bank (Special Provisions) Act No.4 of 1990 is found. Therefore, my opinion is that the law referred to in Rule 42 should be extended to obtain relief even to an application similar to the case before us.

Having considered all those matters referred to above, it is my opinion that a person who has a complain to make before the proper court by way of a writ application as to any violation of the provisions of the Act No.4 of 1999, he must be given the right to invoke jurisdiction under Rule 42 of the Supreme Court Rules to obtain an interim order until the matter is looked into by this Court. If no such decision is made then a person aggrieved by the procedure adopted in holding the auction will have no forum to complain. As a result such a person may even run the risk of losing his property despite the presence of irregularities as alleged in this instance.

In the circumstances, it is my opinion that the application to stay the proceedings referred to in Part II of the Supreme Court Rules of 1990 published in the Gazette [Extra Ordinary] No.665/32 dated 7th June 1991 shall apply to an application for special leave of this Court in a case filed by way of a writ in order to canvass a decision to sell the property mortgaged to a

Bank in terms of the provisions contained in the Recovery of Loans by Bank (Special Provisions) Act No.4 of 1990.

For the aforesaid reasons, I decide that the application made to this Court for an interim order is to be considered as an application made under Rule 42 of the Supreme Court Rules. Therefore, it is not an invalid application. Accordingly, the interim order made by this Court on 25.05.2015 is to be considered as a valid order.

In the circumstances, the application for Special Leave is to be considered by this Court now.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE PC, J.

I agree

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDNE PC, J.

I agree

JUDGE OF THE SUPREME COURT

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

S.C (Spl) L.A. No. 272/2013
C.A (Criminal) Appeal No. 182/2003
H.C Hambanthota Case No. 05/2006

In the matter of an Application for Special Leave to Appeal.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Lokugalappaththige Cyril
2. Dehiyagoda Pushpalatha Mangalika
3. Karunawathi Weerawarna Wickramatunga

All of Prasanna Tea Room Punchi
Akurugoda, Tissamaharama.

ACCUSED

AND BETWEEN

1. Lokugalappaththige Cyril
2. Dehiyagoda Pushpalatha Mangalika
3. Karunawathi Weerawarna Wickramatunga

All of Prasanna Tea Room Punchi
Akurugoda, Tissamaharama.

ACCUSED-APPELLANTS

Vs.

1. The Hon. Attorney General
   Attorney General's Department
   Colombo 12.

2. The Democratic Socialist Republic of
   Sri Lanka.

COMPLAINANT-RESPONDENTS

AND NOW BETWEEN

1. Lokugalappaththige Cyril
2. Dehiyagoda Pushpalatha Mangalika
3. Karunawathi Weerawarna Wickramatunga

All of Prasanna Tea Room Punchi
Akurugoda, Tissamaharama.

ACCUSED-APPELLANTS-PETITIONERS

Vs.

1. The Hon. Attorney General
   Attorney General's Department
   Colombo 12.

2. The Democratic Socialist Republic of
   Sri Lanka.

COMPLAINANT-RESPONDENTS-RESPONDENTS

BEFORE: B. P. Aluwihare J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: L.M.K. Arulananthan P.C. with
Devika Panagoda and Anoj Hettiarachchi
for the Accused-Appellant-Petitioners

Dappula de Livera P.C., A.S.G. for the
Complainant-Respondent-Respondent

ARGUED ON: 05.08.2015

DECIDED ON: 19.10.2016

GOONERATNE J.

This is a Special Leave to Appeal application from the judgment of the Court of Appeal delivered on or about 18.09.2013, dismissing the appeal of the Petitioners. When this application was to be supported on 19.3.2014, learned Additional Solicitor General informed court that a preliminary objection need to be raised based on noncompliance of the rules of the Supreme Court, more particularly rule Nos. 3, 6 and 10 of Supreme Court rules of 1990. However on 19.3.2014 this application could not be heard due to an application made on behalf of the learned President's Counsel for the Accused-Appellant-Petitioner for a postponement. Thereafter on 05.08.2016 learned Additional Solicitor General

who appeared on behalf of the Complainant-Respondent-Respondent raised the following objections, and recorded as follows:

1. That the Special Leave to Appeal application does not contain a plain and concise statement of all facts and material as are necessary to enable the Supreme Court to determine whether Special Leave to appeal should be granted including the questions of law in respect of which Special Leave to Appeal is sought and the circumstances rendering the case or matter fit for review by the Supreme Court.

2 That in terms of Rule 6, where any such application contains allegations of facts which cannot be verified by deference to the judgment or order of the Court of Appeal in respect of which Special Leave is sought, the Petitioner shall annex in support of such allegation an affidavit or the documents which has not been done in the present application.

3. That in terms of Rule 10, there is no disclosure of any reasonable cause for the appeal to lie

The Petition filed of record dated 17.10.2013 of the Accused-Appellants-Petitioners disclose the following:

(a) Accused-Appellants were indicted in the High Court of Hambantota under Section 296 of the Penal Code for the murder of J.M. Ariyaratne alias Ariyapala.

(b) All Accused-Petitioners pleaded not guilty.

(c) Prosecution led the evidence of witnesses named in para 3 of the petition. Defence led the evidence of witnesses named in para 4 of the petition.

(d) Learned High Court Judge after hearing submissions of either counsel found the Accused party not guilty of murder but found them guilty of culpable homicide not amounting to murder under Section 297 of the Penal Code. 1st Accused-Petitioner was sentenced to 5 years imprisonment and fined Rs. 7500/-. The 2nd & 3rd Accused were sentenced to 3 years imprisonment and fined Rs. 3000/-.

(e) Being aggrieved by the above judgment of the High Court all Accused appealed to the Court of Appeal. The Court of Appeal after hearing counsel on either side gave judgment on 18.9.2013 dismissing the appeal. The Court of Appeal brief and judgment are annexed marked 'A' & 'B' respectively.

The above are the matters urged by the Accused-Appellants-Petitioners. What remains to be stated in the petition are the grounds on which Special Leave to Appeal is sought and the questions of law for the determination of this application, and those matters are contained in paras 11 & 12 of the said petition.

I will refer to the main grounds of appeal. It is stated that the Court of Appeal has erred by not considering the totality of evidence led at the trial and

considered the available evidence piecemeal. It is further stated that the required standard of proof has not been considered by reference to the evidence. Failure to consider the evidence on the question of right of 'self defence'. It is stated that, the defence of self defence has not been considered. Further the question of deceased being the aggressor who attacked the Accused party, had also not been considered.

The questions of law are contained in para 12 of the petition, which flows from the grounds of appeal, referred to in para 11.

I wish to observe that there is an absence of the description of the incident itself in a concise manner. On a plain reading of the petition it is not possible to ascertain as to how the incident took place and its background. Attention of this court on the evidence relied upon by the defence had not been highlighted and pleaded. The relevant portions of evidence relied upon by the Accused party to demonstrate the defence of self defence is not contained in the body of the petition. This position may have to be ascertained by a perusal of the judgment of the Court of Appeal and proceedings at the trial court. As such on a plain reading of the petition it is obvious that there is an absence of a plain and concise statement of facts to draw the attention of this court to consider the

question of granting leave. There is absolutely no material referred to in the petition to ascertain whether the deceased party was the aggressor.

The Appellant's position of stating that the Court of Appeal had erred by not considering the totality of evidence is a mere statement. It should be demonstrated in the petition or by an affidavit attached to the petition based on any important items of evidence which had not been considered and the items of evidence on which the prosecution secured a conviction which was affirmed by the Court of Appeal. If the above contention be the position of the Appellant it may be useful to arrive at a decision by the Apex Court and to ascertain the evidence not relied upon by the Trial Court and the Court of Appeal. If it had not been done this court would have to await the submissions of learned counsel for the Appellant at the hearing of this application, and that too also by perusing the judgment of both courts and the evidence relied upon by the Appellants to establish the point that the Trial Court and Court of Appeal, considered evidence piecemeal. I would have to say the same as regard the defence of self defence and the point stressed, that the deceased party was the aggressor. Therefore it is apparent that the requirement contained in Rule Nos. 3 & 6 had not been duly complied with by the Accused-Appellant-Petitioners.

As regards the application of Rule No. 10, the grounds of appeal in a very concise form could be only identified as contained in sub paras (b), (c) (g) & (h) of para 11 of the petition. However it is unsupported with material in the other paragraphs of the petition. Merely because some facts could be verified by reference to the judgment of the Court of Appeal or proceedings, would not suffice where the above rules of court are concerned, as regards the case in hand.

It is the view of this court that the absence of relevant material referred to in the petition as regards the case in hand would amount to noncompliance of Rule Nos. 3, 6 and 10 of the Supreme Court rules and as such Special Leave to Appeal application has to be rejected and dismissed.

Our attention was also drawn to two decided cases viz. Ediriwickrema and another Vs. Ratnasiri and others (Bar Association Law Journal 2013 Vol. XX) and A.G Vs. Bandaranayake and others (reported in the same journal). Both these cases have no relevance at all to the case in hand, and I observe that matters concerning rules need to be decided on a case by case basis. The first one of the cases referred to above very plainly decide on question of belated objection to 'jurisdiction' and belated objections to noncompliance of

Supreme Court Rules. Supreme Court rejected such objections raised belatedly. In the case in hand, the learned Additional Solicitor General raised the objection at the first available opportunity and such an objection cannot be overruled on account of the learned Additional Solicitor General's failure to file written submissions.

In the other case A.G Vs. Bandaranayake preliminary objections were raised on the following (1) to (5)

1) The Petitioner-Appellant has failed to comply with Rule 8 of the Supreme Court Rules;
2) The Petitioner-Appellant cannot represent State interests and make an appeal against the judgment which the State has failed to comply with;
3) The Petitioner-Appellant is not entitled to seek to appeal against a judgment of the Court of Appeal in a case in which he was not a party and was invited by Court to assist court as amicus curiae;
4) The application of the Petitioner-Appellant is an abuse of the process of Court and is futile; and
5) The application of the Petitioner-Appellant has not been properly made as he has failed to file an affidavit in support of his petition filed in this case.

The matter highlighted in 1 to 5 does not touch upon the case in hand under any circumstances. As such I observe that the above authorities are not helpful at all to decide the case in hand. In a brief manner a fair and full disclosure of all material facts would be essential and should be pleaded in

applications to Superior Courts by parties aggrieved of orders and judgments of the lower courts. In the same manner a "plain and concise statements of all facts and material" would be mandatory for special leave to Appeal Applications to the Supreme Court. A material fact contained in a document which is not expressly stated in the body of the petition would amount to non-compliance of the rules even if the documents itself is filed along with the petition. There is a necessity to give a strict interpretation to Supreme Court Rules.

In the above circumstances the preliminary objection raised by the learned Additional Solicitor General could be maintained and should be up held accordingly. As such we reject the Petitioner's application for Special Leave to Appeal.

Application dismissed without costs.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare 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

Case No. S.C. (Writ) 01/2014

In the matter of an application for Orders in the nature of Writs of Certiorari and Prohibition under Article 140 of the Constitution read with Section 4(1) of the Urban Development Projects (Special Provisions) Act No. 2 of 1980 and Article 118(g) of the Constitution.

Balangoda Plantations PLC
110, Norris Canal Road,
Colombo 10.

PETITIONER

Vs.

1. Janaka Bandara Tennakoon
   Minister of Lands and Land Development,
   80/5, "Govijana Mandiraya"
   Rajamalwatta Mawatha,
   Battaramulla.

2. C.M. Kottewatte
   Divisional Secretary Ratnapura
   Ratnapura Divisional Secretariat Office
   Ratnapura.

3. H.W. Gunadasa
   Former District Secretary Ratnapura,
   District Secretariat,
   Ratnaprua.

4. Hon. W.D.J. Seneviratne
Minister of Public Administration and
Home Affairs,
Independence Square,
Colombo 7

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5. Hon. Mahinda Samarasinghe
Minister of Plantation Industries
Ministry of Plantation Industries
55/75, Vauxhall Lane,
Colombo 2.

6. Secretary
Ministry of Plantation Industries
55/75, Vauxhall Lane,
Colombo 2.

7. Sri Lanka State Plantations
Corporation,
No. 11, Duke Street,
Colombo 1.

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

RESPONDENTS

BEFORE: S. E. Wanasundera P.C., J
Anil Gooneratne J. &
K. T. Chitrasiri J.

COUNSEL: Maithree Wickramasinghe P.C. with Rakitha Jayatunga
For Petitioner instructed by K. U. Gunasekara

Viraj Dayaratne D.S.G for Attorney General

ARGUED ON: 25.02.2016

DECIDED ON: 28.07.2016

GOONERATNE J.

This was an application for Writ of Certiorari and Prohibition filed in this court on 30th June 2014, by the Balangoda Plantations PLC against Eight Respondents. The main relief sought as per the prayer to the petition and referred to in paragraph (b) of the prayer to petition are for Writ of Certiorari to quash:

(i) An order made under Section 38 proviso (a) of the Land Acquisition Act marked X14 dated 07.05.2014.

(ii) An order made under Section 2 of the Urban Development Projects (Special Provisions) Act No. 2 of 1980 marked X23 dated 22.01.2014.

It is also pleaded in paragraphs 14, 19 & 21 of the petition that the Petitioner also filed a writ application bearing No. 164/2014 in the Court of Appeal earlier to have the aforesaid order X14 quashed and when that application came up for hearing on 20.06.2014 in the Court of Appeal the learned State Counsel who appeared for the 5th Respondent in that case informed court that an order X 23 had been made by His Excellency the President under Section 2 of the Urban Development Project (Special Provisions) Act No. 2 of 1980. It was the position of the petitioner that the Petitioner

became aware of the said order X23 for the first time on 20th June 2014 as submitted by State Counsel, and a motion was filed on 25.06.2013 to withdraw the writ application filed in the Court of Appeal. Subsequently within about five days the present writ application was filed in the Supreme Court seeking inter alia the relief prayed for as above.

On the date of support (15th September 2014) before this court, three preliminary objections were raised by the learned Deputy Solicitor General as follows:

1. That the application filed in this Court is out of time in view of the provisions of Section 4(2) of the Urban Development Project (Special Provisions) Act No. 2 of 1980.
2. That necessary parties namely, Urban Development Authority and Secretary to the Ministry of Urban Development have not been cited as Respondents to the application;
3. The Petitioner does not have locus standi in view of the fact that he is only a lessee of land that is admittedly owned by the 7th Respondent.

I had the benefit of perusing the submissions of both parties to this Application. It would be convenient to all if these objections were considered in the order in which same was presented to this court.

(1) <u>Application filed in the Supreme Court is out of time</u>.

It is axiomatic that procedural safeguards which are so often imposed

for the benefit of persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is fatal to disregard them. On the other hand no universal rule can be laid down for the construction of statutes, as to whether mandatory enactment shall be considered directory only or obligatory with an implied nullification for disobedience – Liverpool Borough Bank Vs. Turner (1861) 2 De GF & J 1507 (Lord Campbell).

I will at this point, refer to Maxwell on Interpretation of Statutes – 12 Ed pg. 314/315.

> It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed" And Lord Penzance said: "I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provisions that has been disregarded, and the relation of that provisions to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or directory.

The statute in question the Urban Development Project (Special Provisions) Act No. 2 of 1980 in its title, in order to ascertain the general purpose of the statute states, an act to provide for the declaration of lands urgently required for the carrying out Urban Development Projects etc. The matters contained in the title of the Act are further amplified in Section 2 of the said Act which reads thus:

> Where the President, upon a recommendation made by the Minister in charge of the subject of urban development, is of opinion that any particular land is, or lands in any area are, urgently required for the purpose of carrying out an urban development project which would meet the just requirements of the general welfare of the People, the President may, by Order published in the *Gazette*, declare that such land is, or lands in such area as may be specified are, required for such purpose.

It is the Head of State the President of the country who form an opinion that lands are urgently required for an Urban Development Project to meet the just requirement of the general welfare of the people. Scope of the enactment indicates that it had been enacted for the benefit of the people or the public. The question of urgency is considered by the statute. The other important section is Section 3 which imposes certain restrictions on a litigant affected by a declaration made under the above Section 2 of the Act and limits his remedy for compensation and damages to be claimed in a Court of Law. It also curtail to an extent, jurisdiction of other courts other than the Supreme Court.

The Writ jurisdiction conferred in the Court of Appeal under Article 140 of the Constitution had been exclusively vested in the Apex Court, and the writ jurisdiction of the Court of Appeal had been ousted as referred to therein. (Section 4(1)) The urgency, the benefit to the public and its importance to the general purpose of the statute no doubt has been demonstrated in the above sections and the other provisions of the statute. In a gist the statute is enacted

for the welfare of the people which is considered as an urgent project, for which the President of the country forms an opinion.

Section 4 of the said Act reads thus:

> (1) The jurisdiction conferred on the Court of Appeal by Article 140 of the Constitution shall, in relation to any particular land or any land in any area in respect of which an Order under or purporting to be under section 2 of this Act has been made, be exercised by the Supreme Court and not by the Court of Appeal.
>
> (2) Every application invoking the jurisdiction referred to in subsection (1) shall be made within one month of the date of commission of the act in respect of which or in relation to which such application is made and the Supreme Court shall hear and finally dispose of such application within two months of the filing of such application.

The urgency that is contemplated by the statute and its importance to the general public and their welfare would be paramount to decide the question of mandatory or directory. One need to at this point also keep in mind that prerogative writs are not granted by courts as a matter of course. Inordinate delay in filing a writ application would disentitle a party for a remedy by way of Writ of Certiorari. Writs like other applications for review are discretionary remedies of court. Writs no doubt are issued as in article 140 of the Constitution subject to the Provisions of the Constitution. That does not mean that the discretionary nature of writs found on English Law could be ignored. I observe that basic principles that disentitle a party for a writ unless specifically dealt in the constitution cannot be said to offend the Constitution. In any event in the

context and circumstances of the case Petitioner has filed the application in the Supreme Court beyond the period permitted by Act No. 2 of 1980, and I hold that it is mandatory to comply with time limits specified by Act No. 2 of 1980, as regards filing a Writ Application in the Supreme Court.

I have considered all the reasons given by the Petitioner that the Petitioner was unaware of a publication of a Section 2 notice under Act No. 2 of 1980. The Section 2 notice was published in the Gazette on 22.01.2014. In Law Publication of a Gazette is no doubt notice to the public. As such it is unfortunate that explanation for delay in filing the application cannot be considered, as a strict interpretation need to be given having considered the importance of objects and functions of the Statute which is enacted for the welfare of the people. Nor could I see any impossibility of filing an application in the Supreme Court in the manner as urged by the Petitioner.

I agree that the observations by *M.D.H. Fernando J. in the case of K.T.D.S.N de Silva and others Vs. Salinda Dissanayake Minister of Land Development … (2003) 1 SLR 52* are very much helpful to consider the point of mandatory nature of time limits imposed by the statute to file a writ application in the Supreme Court. I note the following.

At pg. 59..

> The purpose of the UDP Act was to ensure that lands urgently required for urban development projects were obtained without the delays caused by (1) the

exercise of the writ jurisdiction, original and appellate, and (b) the exercise of the jurisdiction of the other courts. Accordingly, section 4 abolished the appellate jurisdiction, and transferred the original writ jurisdiction to the Supreme Court, with time limits, thereby considerably reducing delays attributable to the exercise of the writ jurisdiction; and section 3 prevented other courts granting injunctions and making orders which would stay, restrain or impede the acquisition of any land, the carrying out of work thereon, and the implementation of the project.

(2) Necessary Parties not before court

The Respondent urge that Section 2 notice issued under Act No. 2 of 1980 relate to an Urban Development Project and the involvement of the Ministry of Urban Development and the Urban Development Authority is apparent. As such Secretary to the Ministry of Urban Development and the Urban Development Authority are essential parties.

In this application I note that Gazette Notification under Section 2 of Act No. 2 of 1980 marked as X23 indicates that His Excellency the President was the Minister in charge of Urban Development. The Minister was the President and accordingly as per Article 35(3) of the Constitution Hon. Attorney General is a party and the 8th Respondent appears in a representative capacity for the President. Nor any allegations are made in the petition against any Ministry officials or the Urban Development Authority. Allegations are made in paragraph 23 of the petition against the 2nd, 3rd, & 4th Respondents to the effect that the President was misled by them, to make order X23.

It appears to this court that all necessary parties are before court. As such the objection raised by learned Deputy Solicitor General cannot be maintained. Accordingly the objection raised as regards necessary parties would be overruled.

(3) Locus Standi

The objection raised in this regard is based mainly on the position that 7th Respondent the State Plantation Corporation is the owner of the land in dispute and the Petitioner is only a lessee of the 7th Respondent. It is further stated that any action to be taken on behalf of the 7th Respondent should by under the name of the 7th Respondent. This is in a way an anomalous situation. The 7th Respondent being a State Corporation cannot agitate the matter against the President of the State as all Ministries are under the President and the Ministry of Plantation would have a role to play as regards the Petitioner notwithstanding the fact that the Petitioner is a separate legal entity.

The Petitioner Company by an indenture of lease marked X5 and X5A has been granted a lease for a period of 53 years. As such all attributes of ownership goes with it. In the body of the petition it is pleaded that the petitioner had developed the land in dispute by expending considerable amount of money. As such Petitioner no doubt would be a person affected by order X23. I also fortify my views that the Petitioner has locus standi by the dicta in

Bogawantalawa Plantations Ltd. Vs. Minister of Home affairs and Plantation Industries 2004 (2) SLR 329. This is no doubt a persuasive Judgment of Marsoof J. (delivered when he was the President of the Court of Appeal). It was held on locus standi as follows:

> In regard to the question of locus standi; learned Deputy Solicitor-General contends that the petitioner is not the legal owner of the lands in question and is therefore not a person interested in the said land. He relies for his submissions on the unreported judgment of this Court in Vayamba Plantation (Pvt) Ltd. v Hon. D.M. Jayaratne, Minister of Agriculture and Lands and four others. This Court finds that the petitioner, who is admittedly in possession of the lands in question and has expended enormous sums of money for the development of the estates, is a person affected by the Order P7, and is therefore entitled to seek redress from this Court by way of prerogative relief. The unreported decision cited by the learned Deputy Solicitor General has to be confined to the four corners of the Land Acquisition Act in the context of which it was made. The said decision relates to the definition of the phrase "person interested" in the Land Acquisition Act, and has no general application.

As such I hold that the Petitioner has sufficient locus standi to file this application. I overrule the objections raised on locus standi.

In all the above facts and circumstances I hold that it is <u>mandatory</u> as per Section 4 of Act No. 2 of 1980 to file a Writ Application in the Supreme Court <u>within one month</u> of the date of commission of the Act in respect of which or in relation to which an application is made to the Supreme Court. As such the Petitioner had filed this application outside the permitted time period contemplated by the relevant statute. Further I observe that Section 3 of Act No.

2 of 1980 does not affect the jurisdiction by Article 140 of the Constitution which in terms of Section 4(1) has been transferred to the Supreme Court. As such on the 1st preliminary objection raised by the State which I uphold, this application stands dismissed. However I am not inclined to hold in favour of the State on the other two preliminary objections regarding necessary parties and locus standi. In any event this application stands dismissed without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera P.C., J

I agree.

JUDGE OF THE SUPREME COURT

K. T. Chitrasiri 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.

SC FR Application No. 41/2016

1. J.R. Hettiarachci, 2/91A (584) Thanne Kumbura, Kandy.

2. K.H.M.A. Kehelella, 10/8, Hewahata Road, Thenne Kumbura, Kandy.

3. I.B.S.R. Chandrarathne, 55 (46), Pahala Thenne Kumbura, Kandy.

4. N.G. Thillakarathne, 4/35A, Thenne Kumbura, Kandy.

5. D.N.S. Hettiarachchi, 2/91A (584), Thenne Kumbura, Kandy.

6. K.H.M.M.S.I. Kehelella, 10/8, Hewahata Road, Thenne Kumbura, Kandy.

7. I.B.S.S. Chandrarathne, 55 (46), Pahala Thenne Kumbura, Kandy.

8. N.G.L.D. Thillakarathne, 4/36A, Thenne Kumbura, Kandy.

PETITIONERS

Vs

1. I. Vithanachchi
Principal,
K/Mahamaya Balika
Vidyalaya,
Kandy.

2. Hon. Akila Viraj Kariyawasam,
Hon. Minister of Education,
Ministry of Education, "Isurupaya"
Baththramulla.

3. P.N. Ailapperuma,
Director (National Schools),
National Schools Branch
Ministry of Education,
"Isurupaya" Baththaramulla.

4. W.M. Bandusena
Secretary,
Ministry of Education,
"Isurupaya" Baththaramulla.

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

6. H.S.P. Weerasekera
Assistant Principal,
K/Mahamaya Balika Vidyalaya,
Kandy.

7. R.A.T. Chandrakanthi,
Board Secretary-Assistant Teacher,
K/Mahamaya Balika Vidyalaya,
Kandy.

8. N.A.K. Wijekon, Member, Old
Girls'
Association,
K/Mahamaya Balika Vidyalaya,
Kandy.

9. D.M.M.K. Abesinghe, Member,
School Development

Society, K/Mahamaya Balika Vidyalaya,
Kandy.

10. P.P.S. Bandrara,
(Chairman of the Appeal Board)
Principal,
Kingswood College, Kandy.

11. R.A.T. Chandrakanthi (Secretary of the Board) Assistant Teacher,
Mahamaya Balika Vidyalaya,
Kandy.

12. P.K. Senevirathne, Assistant Teacher, Mahamaya Balika Vidyalaya,
Kandy.

13. N.M. Padmadevi
Member, Old Girls' Association,
K/ Mahamaya Balika Vidyalaya,
Kandy.

14. P. Basnayake
Member,School Development Society, K/Mahamaya Balika Vidyalaya,
Kandy.

RESPONDENTS

Before : Sisira J. De Abrew J.
Priyantha Jayawardena PCJ. &
Prasanna. S. Jayawardena PC J.

Counsel : Canishka G. Witharana with H.M. Thillakarathna for the Petitioners.
Suren Gnanaraj SC for the Respondents.

Argued on : 04.08.2016

Decided on : 2.11.2016

Sisira J De Abrew J.

The Petitioners in this petition seek a declaration that their fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the 1st to 4th and 6th to 14th Respondents. They also seek a direction on the 1st to 4th and /or 6th to 14th respondents to admit their children to Grade 1 of K/Mahamaya Balika Vidyalaya, Kandy for the year 2016.

The Petitioners submitted their applications to K/Mahamaya Balika Vidyalaya, Kandy to admit their children to Grade 1 of the said school. The children of the Petitioners obtained 81 marks. The cutoff point was also 81 marks. The names of the Petitioners' children were also published in the waiting list. But they were not admitted to the school. The Petitioners state that seven children who also obtained 81 marks were admitted to the said school. Thus the Petitioners state that their fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the Respondents.

The 1st Respondent, in her affidavit filed in this court, states that there were seventeen applicants who had received 81 marks under the residence category; that there were only seven vacancies remaining under the residence category; that she proceeded to rank the said applicants in the order of proximity to the school; that of the seventeen applicants seven applicants whose houses were, on the basis of distance, closer to the school than the others were admitted to the school. It appears from the affidavit of the 1st Respondent that the residences of the said seven applicants were closer to the school than the residences of the Petitioners. This was the basis of the selection. The 1st Respondent has based her decision on the basis of instructions given by the Secretary to the Ministry of Education (4th Respondent) at a meeting held on 10.8.2015. The report of the said meeting is marked as R1. It

appears that R1 contains some general instructions given to all the Principals of schools. According to R1, when applicants have obtained equal marks under the category of residence, they would be listed in accordance with the distance from the school to the residence. Thus according to R1, when there are several applicants who have obtained equal marks under the category of residence, the applicant whose house comes first on the basis of distance would be listed first in the residence category list and the applicant whose house comes last on the basis of distance would be listed last in the residence category list although both had obtained equal marks under the residence category. This procedure was adopted in respect of the applicants who had obtained equal marks on the basis of residence category. Further according to R1, if the above procedure is adopted, the distance between the school and the applicant's residence should be clearly displayed in the waiting list and the final list of admission. The 1st Respondent, in her affidavit filed in this court, states that seven applicants [students who were selected] referred to in paragraph 16 of the petition were the closest to the school as far as the distance is concerned; that therefore they were ranked higher than the petitioners' children; and that as a result of the said procedure being adopted, the said seven applicants were admitted to the school and the balance ten (including the petitioners' children) were not admitted to the school.

I have to note here that P3, the circular issued by the 4th Respondent, governs admission of children to Grade 1of Government schools. This is the circular that has to be followed by the Principals when admitting children to Grade 1of Government schools. The 1st Respondent takes up the position that she followed R1 when she refused to admit the Petitioners' children. Therefore the most important question that must be decided is whether the document marked R1 is a part of the circular marked P3. I now advert to this question. Learned SSC relying

on clause 11:10 and 18 of the circular P3 which was later amended on 18.6.2014 by P4A submitted that the Secretary to the Ministry of Education (4th Respondent) has the power to resolve any question that may arise in connection with admission to Grade 1 of Government Schools; that his decision should be final; and that the 1st Respondent has acted on the instructions of the 4th Respondent.

The complaint of the Petitioner in this case is that when they got equal marks with the other seven applicants referred to in paragraph 16 of the petition, the said seven children were selected but their children were not selected; that they have not got equal protection of the law; and that their fundamental rights guaranteed by Article 12(1) of the Constitution have been violated. I now advert to this contention. This can't be the first occasion that a problem of this nature arose. The fact that this type of problem had arisen in the past is evident by the issuance of R1. Therefore it is clear that this type of problem had arisen earlier. Then why didn't the 4th Respondent take steps to include the said instructions contained in R1 by amending the circular P3. It appears from P4A that the 4th Respondent on 18.6.2014 had taken steps to amend clause 18 of circular marked P3. But he had failed to take steps to amend the circular P3 to include instructions contained in R1.The problem that has arisen in this case appears to be a serious problem that the Principals of schools and officers of the Ministry of Education are facing when they take decisions with regard to admission to Grade 1 of Government schools on the basis of residence category. In these circumstances, if the procedure set out in R1 which had been followed by the 1st Respondent is a decision of the Secretary to the Ministry of Education who is the 4th Respondent, why didn't he take steps to include the instructions contained in R1 by amending the circular P3 which governs admission to Grade 1 of Government schools? The respondents cannot provide an answer to this question. The Document marked R1 is not a circular**.** It is

only a report of a meeting of all Principals. When R1 is examined, it appears that officers of the Ministry of Education including the Secretary to the Ministry had attended the said meeting. This meeting had been held on 10.8.2015. The above observation demonstrates that said procedure set out in R1 which had been followed by the 1st Respondent is not a part of the circular P3. If the 1st Respondent followed the circular P3, there were compellable reasons for her to admit children of the Petitioners to the school. For the above reasons, I hold that the 1st Respondent has failed to follow the circular P3 when she refused to admit the children of the Petitioners to Grade 1of Mahamaya Vidyalaya. Further the Petitioners were having legitimate expectations that their children would be admitted to the school as they have complied with the circular P3 which governs admission to Grade 1 of Government schools.

Learned SSC tried to contend that on the basis of P4B, the maximum number of students of a class cannot exceed 40 and that therefore the children of the Petitioners could not be admitted to the school. In this connection, I would like to consider a hypothetical situation. If two twin sisters have applied for admission of a school and one twin sister becomes the 40th applicant and the other twin sister becomes the 41st applicant, is it fair to reject the admission of the other twin sister on the basis of P4B? Further if two applicants who live in a twin house have applied for admission to a school and their distances from the twin house to the school are equal and they become 40th and 41st applicants on the residence category, can the 41st applicant be refused admission to the school on the basis of P4B? It can be contended that on one hand the 1st Respondent cannot violate the instructions in P4B and on the other hand the Petitioners cannot be penalized because of P4B when they have got equal marks with the students referred to in paragraph 16 of the Petition (students who obtained the same marks were admitted

to the school). In a situation of this nature, the officers of the Ministry of Education must take a decision in favour of the Petitioners as they are not guilty of violating any regulation or circular P3.

The 1st Respondent has interpreted the circular P3 based on R1 which is not a part of the circular P3 and the decision of the1st Respondent is not in favour of the Petitioners. In fact the decision of the 1st Respondent is against the Petitioners. It has to be noted here that the Petitioners have not violated the circular and they have fulfilled the requirements of the Circular P3. If not for the restrictions contained in P4B and if the 1st Respondent did not follow the document marked R1 which is not a part of the circular P3, the children of the Petitioners would have been admitted to the school (Mahamaya Vidyalaya). The Petitioners and their children are facing this predicament not due to their fault but due to the decision of 1st Respondent who followed the instructions in documents R1and P4B. In a situation of this nature, the interpretation of the circular P3 should be in favour of the children and such an interpretation should not be tainted with other documents such as R1. In my view, if the children of the Petitioners who have, on the basis of distance, obtained equal marks with the other seven students are refused admission to the school acting in terms P4B, they would not get equal protection of law and their fundamental rights guaranteed by Article 12(1) of the Constitution would be violated. For the above reasons, I am unable to agree with the contention of learned SSC.

Article 12(1) of the constitution is as follows: “All persons are equal before the law and are entitled to the equal protection.”

For the aforementioned reasons, I hold that the Petitioners have not got equal protection of the law and that the 1st Respondent has violated the fundamental

rights of the Petitioners guaranteed by Article 12(1) of the Constitution. I therefore direct the 1st Respondent, the Principal of K/Mahamaya Balika Vidyalaya, Kandy to admit the children of the Petitioners namely

1. Dinuri Nimthara Sithmi Hettiarachchi
2. Kehelelle Herath Mudiyanselage Minuli Suraktha Limali Kehelella
3. Imiya Bandarage Sayuri Sathsarani Chandrarathna
4. Mahapeligedera Lochana Dewmini Thillakarathne

to Grade 1 of K/Mahamaya Balika Vidyalaya, Kandy for the year 2016. The present holder of the Principal, K/Mahamaya Balika Vidyalaya, Kandy should implement this direction within three weeks from the date of this judgment. The Registrar of this court is directed to send a certified copy of this judgment to the 1st Respondent within three days of the date of this judgment.

Judge of the Supreme Court.

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court.

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

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

SC/FR/No. 76/2012

In the matter of an Application under Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

P.S Manohari Pelaketiya of
No. 49 Maho Road, Nikaweratiya.

PETITIONER

Vs.

1. H. M. Gunasekera,
   Secretatry, Ministry of Education,
   "Isurupaya", Sri Jayawardhanapura, Kotte,
   Battaramuulla.

1A. W. M. Bandusena
   Secretary, Ministry of Education,
   "Isurupaya", Sri Jayawardhanapura, Kotte,
   Battaramuulla.

2. Dr. Dayasiri Fernando, (Chairman)
2A. Dharmasena Dissanayake, Chairman

3. Palitha Kumarasinghe, Member
3A. A. Salam Abdul Waid, Member

4. Sirimavo A. Wijeratne, Member
4A. D. Shirantha Wijayatilaka, Member

5. S.C Mannapperuma, Member
5A. Prathap Ramanujam, Member

6. Ananada Seneviratne, Member
6A. V. Jegarasasingam, Member

7. N.H. Pathitana, Member
7A. Santi Nihal Seneviratne, Member

8. S. Thillanadarujah, Member
8A. S. Ranuhhe, Member

9. M.D.W. Ariyawansa, Member
9A. D.L. Mendis, Member

10. A. Mohamed Nahiya, Member
10A. Sarath Jayathilaka

2A – 10A Respondents
All of the Public Services Commission No. 177,
Nawala Road, Narahenpita, Colombo 5.

11. Premalal Kumarasiri, Principal,
Mahanama College, Colombo 3.

12. T.T. Malegoda,
Mahanama College, Colombo 3.

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

RESPONDENTS

BEFORE: K. Sripavan C.J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: J. C. Weliamuna with Senura Abeygunawardena for Petitioner
Rajiv Goonetilleke, S.S.C. for 1st – 10th & 13th Respondents

Chula Bandara for 11th Respondent
with S.L. Samarakoon

12th Respondent absent and unrepresented

ARGUED ON: 08.07.2016

DECIDED ON: 28.09.2016

GOONERATNE J.

The Petitioner is a Graduate Teacher, and she was serving as teacher 'Eastern Music' at Mahanama College, Colombo 3, at all relevant times to this Fundamental Rights Application. This is a case of sexual abuse and harassment caused to the Petitioner. This court on or about 25.04.2012 granted Leave to proceed for alleged violations of Articles 12(1) and 14(1)(a) of the Constitution. On the said date court also made an interim Order in terms of prayer (e) of petition suspending the operation of document marked P11 until the final determination of this application. By P11 the Secretary to the Ministry of Education interdicted the Petitioner. I have also noted the contents of paragraph 3(d) of the petition which refer to the 12th Respondent's alleged unwanted advances described in a confidential affidavit marked 'X'. However it is recorded in the Journal Entry of the said date that all confidential documents submitted by learned counsel for the Petitioner has not been perused by court and Petitioner to advice himself as to whether it would be filed at a later stage, and documents returned to Petitioner by court.

The Petitioner by letter P5 dated 31.07.2007, was transferred to Mahanama College, Colombo. Petitioner had met the 11th Respondent the

Principal of Mahanama College and informed about the transfer by letter P5 and she was requested to report for work on 7th August 2007, a day after, school vacation had been declared. As pleaded in paragraph 6 of the petition since the day she met the 11th Respondent she had been subject to various harassments. The case of the Petitioner as submitted in her oral and written submissions as well as the pleadings are that the 12th Respondent another male teacher who was a close associate of the 11th Respondent had on 04.01.20011 made several advances towards the Petitioner. Thereafter on 28.03.2011, the 12th Respondent made indecent advances of serious nature on the Petitioner which had been brought to the notice of the school authorities but no action was taken.

The material presented to this court by the Petitioner indicates that she was harassed by the 11th Respondent by refusing to approve her due salary increments for the year 2008 to 2010, without a basis, but subsequently approved by the Vice Principal Mr. Kalubowila. It is also stated that on 26.04.2011 the Petitioner was required to be present in the office of the 11th Respondent. When the Petitioner entered the office of 11th Respondent, she saw police officers and a woman Police Constable seated in the 11th Respondent's office. Police party was from the Kollupitiya police who came to record a statement from the Petitioner regarding an anonymous complaint

received by the Women and Children's Bureau of the Kollupitiya Police, regarding the incident stated above that took place on 28.03.2011 in the school premises. Accordingly a statement was recorded from the Petitioner.

It is also the case of the Petitioner that the 12th Respondent was temporarily transferred to Prince of Wales College, Moratuwa due to complaints made by the Old Boys' Association of Mahanama College. It is stated that the Education Authorities did not conduct a specific investigation to deal with the 11th & 12th Respondents based on Petitioner's complaints. The investigation report, it is stated was on multiple allegations made by the Old Boys' Association and had been given to the Education Ministry one day after Petitioner's interview was aired. It was argued on behalf of the Petitioner that no tangible and meaningful results were shown, in any of the investigations, and the Petitioner was subject to various pressures. It is pleaded in paragraph 14 of the petition that several journalists sought interviews from the Petitioner but she declined to be interviewed. It is the position of the Petitioner that since no justice was done to her she decided to openly speak which would get the authorities concerned to move swiftly, and she did so with the sole objective of preventing further recurrences and in the best interest of school administration. As such an interview was given by her to the programme called "Sirasa Vimarshana" on 27th November 2011. This interview was telecast on Television

Channel Sisara TV. Such an interview and telecast over the TV channel resulted in the Education Authorities recording Petitioner's statement. Consequently the Petitioner was interdicted by letter P11.

This court directed the Hon. Attorney General to file a copy of the statement made by the Petitioner at an inquiry held on 08.12.2011. The statement dated 08.12.2011 is filed of record. I note the following as recorded in the Petitioner's statement, indicative of alleged violations as suggested by the Petitioner.

1. Improper and undue suggestions made to Petitioner by 11th Respondent (Principal) and 11th Respondents attitude was to exert pressure on the Petitioner.
2. Due to Petitioner's 'beautiful smile' 11th Respondent desire to embrace and kiss the Petitioner, as stated by the 11th Respondent.... මගෙ සිනහවේ තිබෙන ලස්සන නිසා .....
3. Petitioner having resisted and rejected the above, as such the 11th Respondent continued to harass and bring pressure on the Petitioner.
4. Denial of salary increments of Petitioner from years 2007 to 2011.
5. Character assassination done to Petitioner by the 11th Respondent involving male teachers and students.
6. In the above circumstances Petitioner made a requests to be transferred from the school but the 11th Respondent refused and rejected to endorse her transfer applications.
7. Improper undue advances by 12th Respondent from the end of year 2010.

8. 12th Respondent's suggestion to Petitioner, of living together with him and he would purchase a separate house for such life. 11th Respondent was willing to purchase a house for Rupees eleven million.
9. Petitioner rejected (8) above and complained to another teacher in charge of discipline, namely Cyril Silva.
10. On 28.03.2011, the 12th Respondent came to the school music room and made the same suggestion to live together and requested the Petitioner to give in writing that Petitioner would remain single.
11. The above suggestion was rejected and the Petitioner reprimanded 12th Respondent. 12th Respondent left the music room and re-entered the room after a while and asked the Petitioner whether she is angry about such suggestion and kissed the Petitioner.
12. Petitioner did not complain about (10) & (11) above to 11th Respondent as it would be of no avail, but complained to the teacher in Charge of Discipline, Secretary to the Ministry of Education, Minister of Education and to His Excellency the President.
13. Informed about, above to the investigation officer on 11.05.2011.
14. Complained to police about 12th Respondent's conduct as stated above, and a case pending against 12th Respondent in the Fort Magistrate's Court.
15. Severe pressure brought upon the Petitioner by the 11th Respondent due to (10-14) above. 11th Respondent went to the extent of informing the Petitioner that he would influence the authorities to discontinue the Petitioner from service.
16. Informed the Teachers' Union about above.
17. Petitioner's view was that no justice was done.
18. Teachers' Union informed the 'Sirasa' TV about Petitioner's complaints.

19. The Teachers' Union requested Petitioner to be present at the Union Office and the statement Petitioner made was to the effect that, sexual harassment had taken place and it was investigated. However no report had been made available. As such Petitioner requests that wrong doers should be punished.
20. Statement was made by Petitioner to the Media since she was in a helpless state and narrated all her sufferings, she had to undergo.
21. Petitioner mentions that she did not criticise the School, Education Department or any official.
22. Petitioner underwent mental trauma
23. 12th Respondent continued to harass and abuse Petitioner. He boasted about his success in the Magistrate's Court case and threatened to file a defamation case,
24. Petitioner states that she is aware that permission should be obtained to make a statement to the Media, but in her case Petitioner states it was her sufferings that was told to the media. Petitioner was in a very weak mental state having suffered continuously and not in a suitable mental state to obtain permission from the authorities concerned.
25. The final remarks of the Petitioner are as follows:

මා විසින් සිරස රූපවාහිනියේ විමර්ෂන විශේෂාංගයට කල දුක්ගැනවිල්ල සිදු කලේ පාසල් භූමිය තුල නොවේ. ඊට පාසලේ කිසිදු ගුරුවරයෙක් හෝ ගුරුවිරියක් උදවු කලේ නැහැ. මාගේ දුක් ගැනවිල්ල ප්‍රචාරය වුනාට පසු ප්‍රේමලාල් කුමාරසිරි විදුහල්පතිතුමා මෙම පාසලේ මව්වරුන්ගේ සංගමය නැමැති සංගමයක ආධාරයෙන් තාමත් මට දිගින් දිගටම අපහසුතාවයට පත්කිරීම් අපහස කිරීම් සිදුකරනවා. මේ වන විටත් කොළඹ මහෙස්ත්‍රාත් අධිකරණයේ නඩුවක් විභාගවෙමින් පවතින නිසා මා මෙම විදුහලයෙන් ස්ථානමාරුවී යාමට අපෙක්ෂා කරන්නේ නැහැ. නමුත් නඩුව නිමාවුවාට පසු

මම ස්ථානමාරුව් යාටම අපේක්ෂා කරනවා. 2011 දෙසැම්බර් 01 වන දින ප්‍රේමලාල් කුමාරසිරි විදුහල්පතිතුමා පාසලේ රග ශාලාවේදී පවත්වන ලද රැස්වීමක දී කියා තියෙනවා අධ්‍යාපන ඇමතිතුමා ලවා අද දින ප ව 1.30 වන විට මගේ වැඩ තහනම් කරනවා කියලා.

The position of the 1st to 10th Respondents and the 13th Respondent is that there is no violation of Petitioner's Fundamental Rights as the Petitioner by giving an interview to the media and airing her views of an official inquiry contravenes Section 6:5 & 6:1:4 of Chapter XL VII of the Establishment Code. It is also the position of the said Respondents that relief sought by the Petitioners would set a precedent that disentitles Government Institutions from taking measures to prevent public officers from disclosing information on internal disciplinary matters when it is under consideration and no relief should be granted. The above sections of the Establishment Code Reads thus:

6:5 "An officer not specially authorized in that behalf, other the those referred to in Section 6.2, is forbidden to allow himself to be interviewed on, or communicate, either directly or indirectly, any information which he may have gained in the course of his official duties to any person, inclusive of mass media reporters who are not officially entitled to received such information".

6:1:4 "The Mass Media should not be used as a means of criticism of the Government or other Government Institutions or to ventilate departmental grievances".

On the same day the police recorded the statement of the Petitioner (26.04.2011) she wrote letter dated 26.04.2011 and informed the 1st Respondent of alleged sexual harassment and other forms of harassments

caused to her by the 11th & 12th Respondents. The 12th Respondent was thereafter transferred to Prince of Wales College, Moratuwa on the directive of the Ministry of Education and a formal inquiry against the 11th & 12th Respondents was commenced. Recording of statements were completed by September 2011. Petitioner was also required to make a statement for the purpose of this inquiry in May 2011.

The above Respondents state that the Petitioner disclosed governmental information through an unauthorised interview by using the mass media and criticised the Government and the Education Department of inaction. During the interview of the Petitioner to the journalist on the "Sirasa Vimarshana" Programme, Facts and Information Petitioner revealed being a part of the investigation against the 11th & 12th Respondents.

Learned Senior State Counsel submits that Petitioner unequivocally stated that "all allegations of corruption, fraud, and rape/sexual harassment of female staff members of the school were revealed" to the media which was elicited during the inquiry conducted against the 11th & 12th Respondents. Although the above allegations were raised by the Petitioner she states that the Ministry of Education has not taken measures to punish those responsible. Learned Senior State Counsel argues that such an expression by the Petitioner is strictly prohibited by the provisions of the Establishment Code and such

expressions would mislead the public that the Ministry of Education acquiesced to the misconduct of the 11th & 12th Respondents. Further it would embarrass and cause significant damage to the reputation of the Ministry of Education. Senior State Counsel also submits that the Petitioner's statement is highly misleading as by 16.11.2011 the investigating officers concluded the inquiry and recommended that 11th Respondent be compulsorily retired, and the interdiction of the 12th Respondent. A charge sheet against the 12th Respondent (R5) was issued, as recommended.

The 11th Respondent the Principal of the school was represented in the application before us. In the objections filed of record by the 11th Respondent it is pleaded inter alia that the Petitioner failed to make an application for payment of annual increments of salary but the Vice Principal however approved the increments of Petitioner with four others. 11th Respondent states that the Petitioner never made a complaint to him during the period mentioned in the Petition. It is also further pleaded that the 11th Respondent did not instigate the staff members and the Vice Principal to influence the Petitioner to withdraw the complaints made against the 12th Respondent. There is also an affidavit produced marked 11R1 of one Kalubowila, Deputy Principal and another marked 11R2 of Cyril Silva. 11R1 refer to the annual increments which had been subsequently approved by the Deputy

Principal. The affidavit 11R2 deals somewhat with the complaint of the Petitioner. There is no specific denial of the allegation made by the Petitioner, in 11R2. In fact the complaint made by the Petitioner to Cyril Silva is not denied. 11R2attempts to demonstrate that the matter in question was well known to the staff of Mahanama College and his role was to bring about an amicable settlement to avoid any outside influence which may tarnish the reputation of the School as well of the good will of the teaching staff. A meeting was arranged for this purpose and the Petitioner had agreed to attend the meeting on condition that there is participation of the office bearers of the Old Boys' Association. As the representatives of the Old Boys' Association were not present at the meeting Petitioner left the venue and the meeting was adjourned. 11R2 also demonstrate that the Petitioner never complained against the Principal, 11th Respondent about any indecent behaviour.

The material made available to this court by all parties to this application, although the official Respondents (excluding the school authorities) took another line of defence to resist the Petitioner's application having resorted to the Provisions of the Establishment Code, cannot deny the fact that the Petitioner was a victim of circumstances, more particularly a victim of continuous sexual harassment and abuse by the school authorities inclusive of the 11th & 12th Respondents. This court is more than convinced having regard to

all the facts placed before court that the intolerable and unacceptable conduct and behaviour of the 11th & 12th Respondents caused the Petitioner to express her sufferings and views quite freely in the hope of availing to herself the protection available under the law.

I observe that continuous abuse and sexual harassment over a period of time would cause physical and mental damage to any human being. It is not possible for a female to resist such abuses unless she is a strong personality who could react and retort to such abuses and harassment and make the abuser to shamelessly withdraw, being exposed to the public at large of his indecency. Continuous threats and abuses could also make a person unwell both physically and mentally. My views expressed on the aspect of abuses would be endorsed by any law abiding citizen, and it should be so. Therefore freedom of expression by the Petitioner of sufferings and the harm done to her by a few public servants is normal and natural even if she has made a mistake by acting contrary to the Establishment Code. Officials should understand that the Petitioner was made to suffer and accept the reality of the issue. This court is mindful that freedom of speech is not absolute or unrestricted, but when this court has to weigh all the facts and circumstances, the pros and cons it is my considered view that greater harm had been caused to the Petitioner by a few public servants. As such the

Petitioner need to be adequately compensated for the loss caused to her life and reputation.

Freedom of speech is essential for the proper functioning of the democratic process. Public opinion plays a crucial role in modern democracy and it is of great importance. The fundamental right to the freedom of speech and expressions enshrine in Article 14(a) of our Constitution is based on the provisions of Amendment 1 of the Constitution of the United States of America and of Article 19(1) of the Indian Constitution and it would be legitimate and proper to refer to decision of the Supreme Court of US and India on freedom of speech and expression - Fundamental Rights in Sri Lanka – Justice S. Sharvananda Pg. 212.

I note the following case law gathered from the above Text Book and from other authorities.

> Justice Brennan referred in New York Times Co. Vs. Sulliwin 376 US 254 (1964) to "a Profound Rational Commitment to the Principle that debates on public issues should be uninhibited, robust and wide open and it may well include vehement, caustic and sometimes unpleasantly sharp attack on government and public officials".
>
> "public opinion plays a crucial role in modern democracy. Freedom to form public opinion is of great importance. Public opinion, in order to meet such responsibilities demands the condition of virtually unobstructed access to and diffusion of ideas.

> The fundamental principle involved here is people's rights to know. The Freedom of speech guaranteed by the Constitutions embraced at least the liberty to discuss publicly all matters of public concern without previous restraint or fear of subsequent punishments". Thornhill Vs. State of Alabama 310 U.S. 88.
>
> "Criticism of public measures or comment on Government action however strongly worded is within reasonable limits and is consistent with the Fundamental Right of Freedom of Speech and Expression. This right is not confined to informed and responsible criticism but includes the freedom to speak foolishly and without moderation. So long as the means are peaceful, the communication need not meet 'standards of common acceptability' Austin Vs. Keele (1971) 402 U.S. 415, 419.

Sri Lanka boasts of both constitutional as well as international obligations to ensure equity and gender-neutral equality which this Court cannot simply ignore.

Article 12(2) declares that no citizen shall be discriminated against on the ground of sex and Article 12(4) of the Constitution emphasizes that nothing in Article 12 shall prevent special provisions being made by law, subordinate legislation or executive action for the advancement of women, children and disable person.

These constitutional provisions articulate the constitutional imperative of giving due recognition to womenfolk resulting in equality and non-

discrimination among sexes. These rights can only be restricted or limited by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedom of others, or meeting the just requirement of the general welfare of the democratic society-vide Article 15(7) of the Constitution.

Therefore this Court is of the view that sexual harassment or work place stress and strain occasioned by oppressive and burdensome conduct under colour of executive office would be an infringement of the fundamental rights of the Petitioner and clearly the fact that the Petitioner in this case snapped under the long and prolonged oppressive conduct directed towards her cannot be held against the petitioner in the advancement and enforcement of fundamental rights which this Court is perforce bound to promote and protect.

Sri Lanka has undertaken international obligations to eliminate all forms of discrimination against women by acceding to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 17.07.1998 and in pursuance of these international obligation Sri Lanka has also enacted several to give vent to these global rights in favour of women.

In the circumstances this Court holds that the regime of affirmative rights referred to above cannot be restricted or limited by the provisions of Establishment Code and we are also mindful of comparative jurisprudence such

as the House of Laws decision of *R v. Ireland and Barstow 1998 AC 147* where it was held that silent phone calls to a women amounted to an assault. But here in this instance we are confronted with a continuous course conduct which is quite offensive of Article 12 of the Constitution.

In all the above facts and circumstances of this application and upon a consideration of the acts of continued harassment of the Petitioner, I am of the view that the Petitioner's Fundamental Rights as per Articles 12(1) and 14(1)(a) of the Constitution has been violated. I am unable to accept the argument and position projected by learned Senior State Counsel that Petitioner by giving an interview to the media and airing her views of an official inquiry she acted contrary to the Establishment Code. I state it would not in the context of the case in hand as discussed above contravene Sections 6:5 and 6:1:4 of Chapter XLVII of the Establishment Code. The authorities failed to realise and understand the plight of the Petitioner in the hands and control of indecent public servants within the school premises. Such behaviour and conduct would be unacceptable to any decent society. Therefore this Court grants the declaration only against the 11th & 12th Respondents as prayed for in sub paragraph (b) of the prayer to the petition, and declare as per sub paragraph (c) of the prayer to petition, document P11 as null and void.

This Court directs the 11th and 12th Respondents to pay personally as compensation a sum of Rs. 100,000/- each to the Petitioner. This application is allowed as above with costs.

Application allowed.

JUDGE OF THE SUPREME COURT

K. Sripavan C.J.

I agree

CHIEF JUSTICE

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 read with Article 17 of the Constitution.

1. **HIKKADUWA LIYANAGE VINUSH LAKNIDU,**
   No 5/2,Heegalduwa Road,
   Wilegoda,
   Ambalangoda.

2. **LAKSHIKA SAMIDDHI GODELLAGE,**
   No 5/2,Heegalduwa Road,
   Wilegoda,
   Ambalangoda.

PETITIONERS

S.C. F.R. Application No: 136/2015

VS.

1. **SUMITH PARAKRAMAWANSA,**
   The Principal and a Member of the Interview Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda.

1A. **W.D. RAVINDRA PUSHPAKUMARA,**
   The Principal, Dharmashoka College, Ambalangoda.

2. **DIYAGUBANDUGE DAYARATHNE,**
   Member of the Interview Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda.

3. **NILENTHI SANTHAKA THAKSALA DE SILVA,**
(Representative of the School Development Board)
Member of the Interview Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda.

4. **MALLIYAWADU SHIRLY CHANDRASIRI,**
(Representative of the Past Pupils' Association)
Member of the Interview Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda.

5. **REKA NAYANI MALLAWARACHCHI,**
Secretary of the Interview and the Appeal and Objections Board to admit students
to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda.

6. **W.T.B. SARATH,**
Chairman of the Appeal and Objections Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda.

7. **K.P. RANJITH,**
Member of the Appeal and Objections Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda.

8. **JAGATH WELLAGE,**
(Representative of the Past Pupils' Association), Member of the Appeal and Objections Board to admit students to Grade -1, GA/Am/ Dharmashoka College, Ambalangoda.

9. **P.D. PATHIRATHNE,**
(Representative of the School Development Board), Member of the Appeal and Objections Board to admit students to Grade 1, GA/Am/ Dharmashoka College, Ambalangoda.

10. **DIRECTOR OF NATIONAL SCHOOLS,**
Ministry of Education, Isurupaya, Battaramulla.

11. **SECRETARY MINISTRY OF EDUCATION,**
Isurupaya, Battaramulla.

12. **R.M.K. DAMINDA,**
No:34/18, Manimulla, Ambalangoda.

13. **R.M.T. NIMSARA,**
No:34/18, Manimulla, Ambalangoda.

14. **M.G.I. NIRANJALA,**
No.132, D.Santin de Soyza Mawatha, Kuleegoda.

15. **K.A.M. PEIRIES,**
No.132, D.Santin de Soyza Mawatha,
Kuleegoda.

16. **R.M. MANORI,**
No. 15/3,
Paluwatte Road,
Poramba,
Ambalangoda.

17. **T.S. MIHISARA,**
No. 15/3,
Paluwatte Road,
Poramba,
Ambalangoda.

18. **N.H.T. YASANTHI,**
No: 43,
Pieris Weda Mawatha,
Kaluwadumulla,
Ambalangoda.

19. **W.A.M.D. WEERAKOON,**
No: 43,
Pieris Weda Mawatha,
Kaluwadumulla,
Ambalangoda.

20. **HONOURABLE ATTORNEY-GENERAL,**
Department of Attorney-General,
Colombo 12.

RESPONDENTS

BEFORE: K. Sripavan C.J.
Upaly Abeyrathne J.
Prasanna Jayawardena, PC. J

COUNSEL: Saliya Pieris with Thanuka Nandasiri for the Petitioners.
Rajitha Perera, Senior State Counsel for the Hon. Attorney General.

ARGUED ON:	08th September 2016
WRITTEN SUBMISSIONS FILED:	By the Petitioners on 27th September 2016 By the Respondents on 26th September 2016
DECIDED ON:	10th November 2016

Prasanna Jayawardena, PC, J.

The 1st Petitioner is a five-year-old boy. The 2nd Petitioner is his mother. In this application, the Petitioners allege that, the failure of the Respondents to admit the 1st Petitioner child to Grade 1 of Dharmashoka College, Ambalangoda in the year 2015, violated the Petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution. The Petitioners have made this application by way of their Petition dated 06th April 2015 which was later amended, with the permission of this Court, by the Amended Petition dated 30th August 2015.

The 1st Petitioner child lived with his parents in Wilegoda, Ambalangoda. The 1st Petitioner child became entitled to be admitted to a government school in 2015 when he had reached five years of age. His parents were anxious to admit their son to Dharmashoka College which is a leading school in Ambalangoda with a history of over a century and a good record in both the academic arena and the sports field.

The admission of children to Grade 1 of Government schools causes much anxiety and heartburn to parents throughout the island. Naturally, parents want their child to be admitted to the best possible school which is accessible to them This results in what Siva Selliah J described, in 1986, as a *"scramble for admission"* – *vide:* HULANGUMUWA vs. SIRIWARDENA, PRINCIPAL VISAKHA VIDYALAYA [1986 1 SLR 275 at p.281]. Three decades later, there continues to be much competition and scrabbling for the limited number of places available each year in government schools, particularly in the case of schools which are perceived as 'leading' or 'good' schools.

So as to bring about order, fairness and transparency in the process of selecting and admitting children to Grade 1 of government schools, the Ministry of Education has, for several years, formulated and laid down, *inter alia*: (*a*) the procedure to be followed when parents submit applications for the admission of their children to Grade 1 of government schools; (*b*) the procedure to be followed when evaluating and ranking these applications; (*c*) the selection criteria to be applied; (*d*) the marks which are to be awarded in respect of such selection criteria when evaluating and ranking the applications; (*e*) the procedure for notifying the selected applicants; (*f*) the procedure whereby applicants who have not been selected may appeal seeking a re-evaluation of their application and/or object to the selection of an applicant who they submit has been wrongly selected; (*g*) the consideration of such appeals and objections; and, finally, (*h*) after the appeals and objections have been considered, the determination of the Final List of applicants who have been selected for admission to Grade 1 and the publication of this Final List.

This is done by way of a Circular issued by the Ministry of Education which sets out, comprehensively and in considerable detail, the procedure, selection criteria and marking schemes to be followed and applied when admitting children to Grade 1 of government schools. This process often throws up unforeseen difficulties and new challenges. Therefore, the Ministry of Education has, from time to time, effected revisions in the contents of these Circulars and issued new Circulars which seek to rectify the shortcomings of the previous Circular.

At the time relevant to this application, Circular No. 23/2013 dated 23rd May 2013 issued by the Secretary, Ministry of Education was in force. The Circular is captioned, "පාසැල් වල පළමු වන ශ්‍රේණියට ළමයින් ඇතුළත් කිරීම." ["Admission of children to Grade 1 of schools"]. It is filed with the Amended Petition marked **"P-2"**.

It is common ground in this application that, the entire process of admission of children to Grade 1 of Dharmashoka College in the year 2015,was governed by the provisions of this Circular marked **"P-2"**.

Thus, the fate of this application will largely depend on whether or not the rejection of the Petitioners' application to admit the 1st Petitioner child to Dharmashoka College in 2015, was in compliance with the provisions of **"P-2"** and satisfies the tests of reasonableness, equality and other criteria required under the Law.

It is now necessary to set out the relevant facts relating to the Petitioners' application.

In the latter half of 2014, the Ministry of Education published notices calling for applications from parents for the admission of their children to government schools in 2015. Section 4.2 of **"P-2"** states that, all such applications must be in the specified format. Further, Section 4.3 of **"P-2"** makes it clear that, copies of the documents which an applicant relies upon to establish eligibility for admission to the school, should be annexed to the application.

The 2nd Petitioner submitted an application, together with supporting documents, for the admission of her son (the 1st Petitioner child) to Dharmashoka College. This application form, which has been produced by the Respondents marked **"1R3"**, states below its caption that, that the applicant must annex copies of the documents which he/she relies upon.

Section 3.1 of **"P-2"** states that, a total of 40 children are to be admitted to each Class in Grade 1 of a government school. The wording of Section 3.1 suggests that this is the maximum number. Section 3.1 goes on to state that, 30 of the children to be admitted to each Class, are to be selected through the 'interview process' set out in **"P-2"**. 03 more children are to be selected as a result of the 'appeals and objections process' set out in **"P-2"**. Thus, a total number of 33 children are to be selected for each Class through the 'interview process' and 'appeals and objections process' set out in **"P-2"**. In addition, 07 children of parents who are tri forces or police personnel who are in or have been in active service, are to be admitted upon the recommendations of Ministry of Defence. It is in this manner that, the final number of 40 children per Class in Grade 1 is to be reached.

Since there is a fixed number of Classes in Grade 1 in a school in a year, the result is that, there is a maximum number of children who can be admitted to Grade 1 of a particular school in that year. The Petitioners have stated that, the maximum number of children who were to be admitted to Grade 1 in Dharmashoka College in 2015, had

been fixed at 198. Although the Amended Petition does not state so, it is evident that, the Petitioners are referring to the total number of children to be selected through the 'interview process' and 'appeals and objections process'. The total number of 198 is not disputed by the Respondents. This establishes that, Dharmashoka College had six Classes in Grade 1 in 2015 [*ie:* 33 x 6 = 198]

Section 6 of **"P-2"** sets out the six different `Categories' under which children can admitted to Grade 1 together with the percentages out of the total number of admissions for the year,

which are accorded to each such Category. These six Categories and the percentages accorded to each Category are:

I.	Children of parents who reside close to the school.	- 50%
II.	Children of past pupils of the school.	- 25%
III.	Children with siblings who are students of the school at the time of the application.	- 15%
IV	Children of employees of institutions under the Ministry of Education which directly deal with education by State Schools.	- 05%
V	Children of parents who are public servants or employees of State Corporations, Statutory Boards State Banks and who have been transferred.	- 04%
VI	Children who have returned from abroad with their parents.	- 01%

The 2nd Petitioner is a past pupil of Dharmashoka College and the Petitioners' Application was submitted under Category II above – *ie:* children of past pupils of the school.

As set out above, **"P-2"** required that, 25% of the children admitted to Grade 1 of Dharmashoka College in 2015 through the 'interview process' and 'appeals and objections process', should be children whose admission had been sought under Category II stated above.

Since the maximum number of children who were to be admitted in 2015 through the 'interview process' and 'appeals and objections process' was 198, simple arithmetic shows that, 49 of them should be children whose admission had been sought under Category II stated above. [198 x 25% = 49]

By similar calculations, the number of children who were to be admitted for all the Categories stated above, according to the aforesaid percentages of the total number of 198, will be:

I.	Children of parents who reside close to the school.	- 99 (*ie:* 50%)
II.	Children of past pupils of the school.	- 49 (*ie:* 25%)
III.	Children with siblings who are students of the school at the time of the application.	- 30 (*ie:* 15%)

IV. Children of employees of institutions under the Ministry of Education which directly deal with education by State Schools. - 10 (*ie:* 05%)

V. Children of parents who are public servants or employees of State Corporations, Statutory Boards, State Banks and who have been transferred. - 08 (*ie:* 04%)

VI. Children who have returned from abroad with their parents. - 02 (*ie:* 01%)

The Petitioners and the Respondents are in agreement with regard to the aforesaid numbers and percentages.

The Interview Board which had been appointed to select the applicants who were to be admitted to Grade 1 of Dharmashoka College in 2015, had selected the Petitioners' application as one of the initial number which required to be further considered at an interview. Accordingly, the Petitioners were called for an interview to be held on 27th October 2014. These steps were taken in terms of the provisions of Section 5 and Section 8 of **"P-2"**.

The letter dated 26th September 2014 calling the Petitioners for this interview has been filed with the Amended Petition marked **"P-3B"**. This letter advised the Petitioners that the interview would be held in accordance with the provisions of **"P-2"**. **"P-3B"** also specifically instructed the Petitioners that, they were required to bring to the interview, originals of *all* the documents they relied on. Further, **"P-3B"** specifically advised the Petitioners that, documents submitted after the interview would *not* be accepted. [සම්මුඛ පරීක්ෂණය පැවැත්වෙන අවස්ථාවේදී සියලුම ලිපි ලේඛන (මුල් පිටපත් සමඟ) ඉදිරිපත් කළ යුතු අතර පසුව ඉදිරිපත් කරන ලේඛන භාරගනු නොලැබේ.]

The documents submitted by the Petitioners along with the application and at the interview, included some photographs. The Petitioners state that, these photographs establish that the 2nd Petitioner was a member of the Basketball Team of Dharmashoka College. Copies of these photographs have been filed with the Amended Petition marked **"P-5A"** and **"P-5B"**.

The Petitioners were interviewed by the Interview Board on 27th October 2014. The Interview Board accepted all the documents submitted by the Petitioners as being eligible for consideration when awarding marks other than the photographs marked **"P-5A"** and **"P-5B"**. The Interview Board declined to award any marks based on the photographs. The Petitioners have not disputed this decision of the Interview Board.

When the Provisional List of children to be admitted under the Category II – *ie:* children of past pupils of the school - was published on the school notice board, the 1st Petitioner's name was not on it. The 1st Petitioner's name was not on the Waiting List for that Category either. The Provisional List and Waiting List are prepared and published in terms of Section 8 of **"P-2"**

The Petitioners then submitted an *appeal* to the Board of Appeals and Objections which was constituted under and in terms of Section 9 of **"P-2"**. The 2nd Petitioner was advised by the Letter filed with the Amended Petition marked **"P8-C"** that, the appeal would be taken up for consideration by the Board on 15th January 2015.

It is to be noted that, this letter marked **"P8-C"** expressly stated that, no marks will be awarded during the appeal process on the basis of documents which had not been submitted at the interview. [සම්මුඛ පරීක්ෂණයේදී ඉදිරිපත් කරන ලද ලිපි හැර වෙනත් ලිපි සඳහා මෙහිදී ලකුණු ලබා දීමක් සිදු නොකෙරේ] It is also to be noted that, Section 10.7 of **"P-2"** states that, when hearing an appeal, the Board may only consider the documents submitted at the interview. [අභියාචනා විභාග කිරීමේ දී අභියාචනා ඉදිරිපත් කළ සියලු ම දෙනා කැඳවා සම්මුඛ පරීක්ෂණයට ඉදිරිපත් කළ ලිපි ලේඛන පමණක් නැවත වරක් විමර්ශනය කළ යුතුය.]

When the Board of Appeals and Objections took up the 2nd Petitioner's *appeal* for consideration on 15th January 2015, the 2nd Petitioner's husband (the 1st Petitioner child's father) appeared before the Board. He had sought to tender the Documents filed with the Amended Petition marked **"P-6A"** and **"P-6B"**. The Petitioners state that, **"P-6A"** is an affidavit by a sports teacher who served at Dharmashoka College from 1991 to 1996 and that, **"P-6B"** is a letter issued by the basketball coach of Dharmashoka College during the period 1991 to 1996.

However, the Board of Appeals and Objections declined to consider these two documents.

The Petitioners state that, although the Board of Appeals and Objections declined to consider the documents marked **"P-6A"** and **"P-6B"** tendered by the Petitioners at the hearing of the appeal, the Board had considered and awarded marks upon documents tendered by the 12th and 14th Respondents (parents of the 13th and 15th Respondent children) *during or after the appeal process* and upon documents tendered by the 16th and 18th Respondents (parents of the 17th and 19th Respondent children) *after they had been interviewed by the Interview Board*.

The Final List of students selected for admission to Grade 1 of Dharmashoka College in 2015 was published on the notice board on 27th February 2015 in terms of Section 11 of **"P-2"**. This Final List has been filed with the Amended Petition marked **"P-11"**. The 1st Petitioner's name was not on the Final List.

The last student named on the Final List of 49 students admitted under Category II - "Children of past pupils of the school" – had obtained 57.12 marks. Thus, the "cut off" for this Category of admission in 2015 was 57.12 marks.

The 1st Petitioner child had been awarded 53.71 marks. His name was the eighth on the Waiting List of 12 students which was published along with the Final List.

A few days after the Final List was published, the Petitioners had lodged a complaint with the Human Rights Commission challenging the marks awarded to them. The Petitioners state that this complaint was pending at the time they made the present application to this Court on 06th April 2015.

The Petitioners had also made written appeals to the Director of National Schools and to the Secretary, Ministry of Education complaining that they were not awarded the marks they were entitled to. These letters of appeal have been filed with the Amended Petition marked **"P-13A"**, **"P-13B"**, **"P-14"**. On 19th March 2015, the Petitioners' appeals were considered at an interview held at the Ministry of Education, which the 2nd Petitioner's husband attended. These appeals did not yield a result favourable to the Petitioners.

The Petitioners state that, *after* the aforesaid Final List and Waiting List were published and after the Petitioners made the aforesaid appeals to the Director of National Schools and to the Secretary, Ministry of Education, the Petitioners have become aware that, 15 more children have been admitted to Grade 1 of Dharmashoka College under Category IV above – *ie:* children of employees of institutions under the Ministry of Education which directly deal with education by State Schools. The Petitioners state that, in addition, a further 07 children have been admitted under Category I above – *ie:* children of parents who reside close to the school.

The Petitioners state that, these later admissions resulted in the total number of children admitted to Grade 1 of Dharmashoka College in 2015 increasing to 220. [*ie:* 198 + 15 + 07 = 220].

The Petitioners state that, as a result of the aforesaid later admissions, the actual number of children who have been admitted under all the aforesaid Categories and the percentages of admission *per* Category (based on the number of 220 children said to have been eventually admitted to Grade 1) now are (approximately):

1.	Children of parents who reside close to the school.	-	106 (48.18%)
2.	Children of past pupils of the school.	-	49 (22.27%)
3.	Children with siblings who are students of the school at the time of the application.	-	30 (13.63%)
4.	Children of employees of institutions under the Ministry of Education which directly deal with the education by State Schools.	-	25 (11.36%)
5.	Children of parents who are public servants or employees of State Corporations, Statutory Boards and State Banks and who have been transferred.	-	08 (3.63%)
6.	Children who have returned from abroad with their their parents.	-	02 (0.9%)

The Petitioners state that, as set out above, the number of children eventually admitted under Category IV above – *ie:* children of employees of institutions under the Ministry of Education which directly deal with education by State Schools – has increased from the 5% of the total admitted number permitted by the Circular marked **"P-2"**, to 11.36% of the total admitted number.

The Petitioners state that, if a similar increase had been made in the number of children eventually admitted under Category II above – *ie:* children of past pupils of the school – the 1st Petitioner child (whose name was on the Waiting List) would have been admitted to Grade 1 of Dharmashoka College in 2015.

In this regard, the Petitioners also state that, in the period of more than four months that had passed between the date they filed the original Petition and the date they filed the Amended Petition, the 1st Petitioner child's name had moved from eighth position to third position on the Waiting List since five children whose names were above his on the Waiting List, had been admitted to other schools.

The Petitioners claim that, on the following three grounds, the Respondents' failure to admit the 1st Petitioner child to Grade 1 of Dharmashoka College in 2015 was arbitrary, discriminatory and a violation of the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution:

(i) *Firstly*, they claim that, 04 marks (02 marks per year) should have been awarded on the account of the 2nd Petitioner having represented the school basketball team in 1992 and 1993.

In this connection, they claim that the documents marked **"P-6A"** and **"P-6B"** establish that, the 2nd Petitioner represented the school basketball team in 1992 and 1993. The Petitioners state that, the Board of Appeals and Objections *should not have* declined to consider these two documents. The Petitioners' position is that, **"P-6A"** and **"P-6B"** *should have been* accepted by the Board.

The Petitioners state that, if **"P-6A"** and **"P-6B"** had been accepted by the Board, the Petitioners would have been awarded 04 more marks.

The Petitioners also claim that, since the 1st Petitioner child's father (the 2nd Petitioner's husband) was a Committee Member of the Past Pupils' Association, a further 01 mark should have been awarded

The Petitioners state that, these 05 additional marks, (which they claim they were entitled to, but were not awarded) would have placed the Petitioners well over the "cut off" point of 57.12 marks (*ie:* 53.71 + 05 = 58.71), thereby, entitling the 1st Petitioner child to be admitted to Grade 1 of Dharmashoka College in 2015.

The Petitioners contend that, the failure to award them these additional 05 marks was in violation of the provisions of the Circular marked **"P-2"** and was arbitrary and a violation of the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution;

(ii) *Secondly*, the Petitioners complain that, although the Board of Appeals and Objections declined to consider the documents marked **"P-6A"** and **"P-6B"** submitted by the Petitioners at the hearing of their appeal, the Board had considered and awarded marks upon documents tendered by the 12th and 14th Respondents during or after the appeal process and upon documents tendered by the 16th and 18th Respondents after they had been interviewed by the Interview Board.

The Petitioners allege that, in these circumstances, they have been subject to discriminatory treatment which was a violation of the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution;

(iii) *Thirdly*, the Petitioners allege that, the failure to admit the 1st Petitioner child to Grade 1 of Dharmashoka College in 2015 despite the admission of 15 more children under Category IV and the admission of 07 more children under Category I *after* the aforesaid Final List and Waiting List was published, was in contravention of the Circular marked **"P-2"**, arbitrary and a violation of the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution;

On 19th November 2015, this Court granted the Petitioners leave to proceed under Article 12 of the Constitution.

The Principal of Dharmashoka College, who is the 1st Respondent, has submitted an Affidavit by way of his Objections to the Petitioners' Application.

The 1st Respondent states that, the Circular marked **"P-2"** prohibits the consideration of new documents at the stage of appeal. He states that, the 1st Petitioner child now stands seventh in the Waiting List. He also states that, any marks to which the 1st Petitioner child's father (the 2nd Petitioner's husband) may have been entitled to, cannot be taken into account when considering the application submitted by the 2nd Petitioner for the admission of the 1st Petitioner child to Dharmashoka College. In this connection, it should be mentioned that, the 1st Petitioner child's father (the 2nd Petitioner's husband) had submitted a separate application under Category I – *ie:* children of parents who reside close to the school - which had also been unsuccessful.

The 1st Respondent has denied the Petitioners' claims that, after the aforesaid Final List and Waiting List were published, 15 more children were admitted to Grade 1 of Dharmashoka College under Category IV and a further 07 children were admitted under Category I. He denies that the total number of children admitted to Grade 1 of Dharmashoka College in 2015 increased to 220. The 1st Respondent has also denied the resulting changes in the percentages in the Categories of admission, which were alleged by the Petitioners.

However, the 1st Respondent has stated that, the Secretary, Ministry of Education, who is the 11th Respondent, sent six letters dated 21st April 2015, a letter dated 30th April 2015 and a letter dated 18th June 2015 to the 1st Respondent, directing that, a total number of 08 children named in these letters, be admitted to Grade 1 of Dharmashoka College. These letters have been filed with the 1st Respondent's affidavit marked **"1R5a"** to **"1R5f"**, **"1R6"** and **"1R7"**. The 1st Respondent states that he acted on the directions of the 11th Respondent and admitted the 08 children named in these letters to Grade 1 – *ie: after* the aforesaid Final List and Waiting List were published.

The 1st Respondent has also stated that, the Secretary, Ministry of Education sent another letter dated 29th May 2015 to the 1st Respondent directing that, the 11 children named in this letter be admitted to *"different grades of Dharmashoka Vidyalaya"* in 2015. This letter has been filed with the 1st Respondent's affidavit marked **"1R8"**.

Although the 1st Respondent has not set out the contents of this letter marked **"1R8"** in his affidavit, a perusal of this letter reveals that it, *inter alia*, directs the 1st Respondent to admit, to Grade 1 of Dharmashoka College in 2015, 07 children of teachers and non-academic staff who were then attached to that school.

I have set out the facts relating to the application before us and the respective positions taken by the Petitioners and the Respondents. I will now consider whether the Petitioners are entitled to succeed in their application to this Court.

As set out above, the Petitioners' *first* contention is that, they were entitled to have been awarded a further 04 marks upon the documents marked **"P-6A"** and **"P-6B"** and that a further 01 mark should have been awarded on the ground that, the 1st Petitioner child's father (the 2nd Petitioner's husband) was a Committee Member of the Past Pupils' Association.

With regard to the 04 marks claimed upon the documents marked **"P-6A"** and **"P-6B**", it is an undisputed fact that, the Petitioners *first* tendered the documents marked **"P-6A"** and **"P-6B"** to the Board of Appeals and Objections at the stage of the hearing of the appeal. These documents were *not* tendered to the Interview Board during the interview stage. Therefore, as evident from the facts narrated earlier, these documents were tendered by the Petitioners *outside* the procedure set out in **"P-2"**.

As set out above, the Board of Appeal and Objections had declined to consider the documents marked **"P-6A"** and **"P-6B"**.

Consequently, the question that needs to be considered by this Court is whether the decision of the Board of Appeals and Objections declining to consider the documents marked **"P-6A"** and **"P-6B"** was in contravention of the provisions of the Circular marked **"P-2"** or arbitrary or unreasonable for some other reason.

In this regard, as set out above, the Petitioners had been specifically advised and should have been aware that, they were required to submit to the Interview Board, at the interview stage, all the documents they wished to rely on. Further, in terms of the Circular marked **"P-2"**, the Board of Appeals and Objections was precluded from considering documents tendered, for the first time, at the appeal stage - *vide:* Section 4.3, Section 8.2 and Section 10.7 of "**P-2"**, the Application Form marked **"1R3"** and the letters marked **"P3-B"** and **"P8-C"**.

Thus, it is evident that, the Board of Appeals and Objections acted in terms of and in pursuance of the provisions of the Circular marked **"P-2"** when the Board declined to consider the documents marked **"P-6A"** and **"P-6B"** and award marks upon these documents.

Further, it is equally evident that, in the background of the very large number applications received for admission to a limited number of places in Grade 1; and the imperative need to put in place an established, known and transparent procedure whereby *all* such applications can be evaluated and processed in a manner that is fair to *all* the applicants; there was very good reason for the aforesaid rules that, all documents must be tendered at the interview stage and that, the Board of Appeals and Objections was precluded from considering documents tendered, for the first time, at the appeal stage. Needless to say, if applicants are permitted to tender new documents at the appeal stage, the interview stage which had been laboriously completed prior to that, will be rendered inconclusive and substantial prejudice will be done to applicants who have complied with the rules and submitted all their documents at the interview stage. It is for these reasons that, in terms of **"P-2"**, the Board of Appeals and Objections has the limited function and scope of examining the marks awarded by the Interview Board upon the documents and material which was considered at the interview stage, and correcting any errors committed by the Interview Board.

Therefore, it is evident to me that, the decision of the Board of Appeals and Objections declining to consider the documents marked **"P-6A"** and **"P-6B"**, was not only in accordance with the provisions of the Circular marked **"P-2"**, but, was also eminently reasonable.

Next, with regard to the 01 mark claimed on the ground that, the 1st Petitioner child's father (the 2nd Petitioners' husband) was a Committee Member of the Past Pupils'

Association, the application which is relevant to this case was submitted by the 2nd Petitioner and not by her husband.

A perusal of the Circular marked **"P-2"**, the application form marked **"1R3"** and the Marking Scheme marked **"1R4"** makes it clear that, there was no provision for the 2nd Petitioner's application to be awarded marks on account of her husband being a Committee Member.

For the aforesaid reasons, I hold that, the Petitioners' first contention must fail.

The Petitioners' *second* contention is that, although the Board of Appeals and Objections declined to consider the documents marked **"P-6A"** and **"P-6B"** submitted by the Petitioners at the hearing of their appeal, the Board had considered and awarded marks upon documents tendered by the 12th and 14th Respondents during or after the appeal process and upon documents tendered by the 16th and 18th Respondents after they had been interviewed by the Interview Board.

The Petitioners have not adduced any material to support the aforesaid allegation with regard to the 12th, 14th and 16th Respondents. These allegations have not been admitted by the 1st Respondent. The Petitioners have not sought an Order from this Court directing the 1st Respondent to submit the documents and mark sheets relating to these Respondents even though the Petitioners stated, in their Petition, that they would seek such an Order from this Court.

In these circumstances, there is no material before this Court which substantiates the Petitioners' aforesaid allegation that, documents submitted by the 12th, 14th and 16th Respondents *after* the interview stage, had been considered.

With regard to documents said to have been submitted by the 18th Respondent, the Petitioners have annexed to their Amended Petition, the affidavits marked **"P-10A"** and **"P-16A"** by the 18th Respondent together with a certificate marked **"P-16B"**.

A perusal of the affidavits marked **"P-10A"** and **"P-16A"** makes it clear that, the documents referred to by the 18th Respondent in those two affidavits, including the certificate marked **"P-16B"**, were submitted during the interview stage. The two affidavits make it clear that, the Board of Appeals and Objections had only revised the marks awarded by the Interview Board in respect of these documents which had been placed before the Interview Board. Thus, it is evident that, the submission of documents by the 18th Respondent was *within* the ambit of the provisions of the Circular marked **"P-2"**.

Thus, the facts relating to the submission of documents by the 18th Respondent, particularly with regard to the time at which the 18th Respondent submitted the documents and the fact that she submitted the documents within the ambit of the provisions of **"P-2"**, are essentially *different* from the facts relating to the submission of **"P-6A"** and **"P-6B**" by the Petitioners. The two situations cannot be reasonably or properly classified together. The 18th Respondent and the Petitioners were *not* equally circumstanced.

In MACKIE & CO. LTD vs. MOLAGODA [1986 1 SLR 300 at p.308], Sharvananda CJ explained that, *"In order to sustain the plea of discrimination based on Article 12 (1), a party will have to satisfy the court about two things, namely (1) that he has been*

treated differently from others, and (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis".

As set out above, the Petitioners have failed to meet these criteria.

There is also no material before this Court to suggest that, the Respondents had acted arbitrarily or unreasonably when evaluating and selecting applicants during the interview process or appeal process.

Accordingly, I hold that, the Petitioners' second contention must also fail.

It remains for me to consider the Petitioners' third and *final* contention that, the admission of 15 more children under Category IV and the admission of 07 more children under Category I *after* the aforesaid Final List and Waiting List was published, was in contravention of the Circular marked **"P-2"**. The Petitioners' argument is that, the failure to admit the 1st Petitioner child when these later admissions increased the total number admitted to 220, was in contravention of the Circular marked **"P-2"**, arbitrary, discriminatory and a violation of the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution.

As set out above, the 1st Respondent denies the Petitioners' claim that, 15 children were admitted under Category IV and a further 07 children were admitted under Category I *after* the Final List and Waiting List was published.

But, the 1st Respondent has acknowledged that, *after* the Final List and Waiting List was published, he did admit a total of 08 children to Grade 1 of Dharmashoka College in 2015 upon the instructions set out in the letters marked **"1R5a"** to **"1R5f"**, **"1R6"** and **"1R7"** issued by the Secretary, Ministry of Education.

The letter marked **"1R7"** states that, the child named therein was to be admitted in pursuance of an Order made by this Court in S.C. F.R. Application No. 57/2015. Therefore, I do not need to further consider that particular admission.

However, a perusal of the other letters marked **"1R5a"** to **"1R5f"** and **"1R6"** establishes that, on 21st April 2015 and 30th April 2015, the Secretary, Ministry of Education has ordered that, the 07 children named in these letters be admitted to Grade 1 of Dharmashoka College without citing any provision of the Circular marked **"P-2"** in terms of which he makes his orders. The 07 children that, the Secretary has ordered be admitted, are not named on the Waiting List.

Thus, on the face of it, the 07 children named in these letters marked **"1R5a"** to **"1R5f"** and **"1R6"**, have been admitted to Grade 1 of Dharmashoka College *outside* the provisions of the Circular marked **"P-2"**.

Next, a perusal of the letter marked **"1R8"** makes it clear that, on 29th May 2015, the Secretary, Ministry of Education has ordered that, another 07 children named in this letter, who are children of teachers and non-academic staff attached to Dharmashoka College, be admitted to Grade 1.

This also has been done *outside* the terms of the Circular marked **"P-2"** which makes no separate provision whatsoever for the admission of children of staff attached to a school.

Thus it is clear that the aggregate number of 14 children named in the letters marked **"1R5a"** to "**1R5f", "1R6", "1R8"** have been admitted *outside* the process set up and implemented under and in terms of the Circular marked **"P-2".**

Learned Senior State Counsel submitted that, the letters marked **"1R5a"** to **"1R5f"**, and **"1R6"** by which the Secretary, Ministry of Education ordered that 07 children be admitted to Grade 1 of Dharmashoka College were issued after the Secretary considered appeals made to him by applicants who had been unsuccessful with their applications submitted under and in terms of the process set out in **"P-2"**. Learned Senior State Counsel submitted that, Section 11.10 and Section 18 of **"P-2"** which state "පළමු වන ශ්‍රේණියට ළමයින් ඇතුළත් කිරීම සම්බන්ධ ව අධීක්ෂණය කිරීමටත් යම් ගැටළුවක් ඇති වුවහොත් එය නිරාකරණය කිරීමට අදාළ තීරණ ගැනීමටත් අධ්‍යාපන අමාත්‍යාංශයේ ලේකම්ට අනුලංගනීය බලය පැවරේ."and "මෙම චක්‍රලේඛයේ පැන නගින ඕනෑම ගැටළුවක් සම්බන්ධයෙන් අධ්‍යාපන අමාත්‍යාංශ ලේකම්ගේ තීරණය අවසාන තීරණය වනු ඇත." vest the Secretary with the power to entertain such appeals and to order that children be admitted to Grade 1. Learned Senior State Counsel submitted that, the Petitioners themselves have recognized this power vested in the Secretary by addressing the appeals marked **"P-13A"**, **"P-13B"** and **"P-14"** to him. On this basis, learned Senior State Counsel submitted that, these 07 children had been duly admitted *within* the scope and ambit of **"P-2"**.

I cannot agree with this contention. The Circular marked "**P-2"** makes no provisions for any form of appeals other than appeals made to the Board of Appeals and Objections constituted under and in terms of Section 9 of **"P-2"**. There is certainly no provision in "**P-2"** for an appeal to be submitted to the Secretary, Ministry of Education. Further, it is clear that, Section 11.10 and Section 18 of **"P-2"** only state that, where a problem arises in the implementation of the provisions of **"P-2"**, the Secretary, Ministry of Education is empowered to resolve such problems. By no stretch of imagination can these two provisions be taken to create a separate 'appellate jurisdiction' vested in the Secretary, Ministry of Education to decree that children should be admitted to Grade 1 outside the process set out in **"P-2"**. The mere fact that, the 2nd Petitioner addressed appeals to the Secretary in her last-ditch efforts to get her son into Dharmashoka College, cannot confer a non–existent authority on the Secretary.

Learned Senior State Counsel also submitted that, the letter marked **"1R8"** by which the Secretary, Ministry of Education ordered that 07 children of teachers and other staff serving at Dharmashoka College be admitted to Grade 1, is a `*separate scheme'* with no connection to the process set out in **"P-2"**. On this basis, learned Senior State Counsel submitted that, the admission of these 07 children by the letter marked **"1R8",** did not contravene the provisions of **"P-2"** and was, therefore, not irregular.

I cannot agree with this contention either. As stated earlier, the Circular marked "**P-2"** is a comprehensive scheme which deals with all aspects of the admission of children to Grade 1 of government schools. It has been held out as such by the Ministry of Education.

In this regard, it is relevant to reiterate here that, the process set up by the Circular marked **"P-2"** was drawn up, published and implemented by the Ministry of Education so as to bring about order, fairness and transparency in the process of selecting and admitting children to Grade 1 of government schools.

The contents of the Circular are made known to the public. Parents who seek admission of their children to Grade 1 of government schools are required to submit their applications in terms of **"P-2"**. They are bound by decisions taken by the Interview Board, the Board of Appeals and Objections, the Principal of the school and the Secretary, Ministry of Education, under and in terms of the provisions of the Circular.

By the same token, parents who seek admission of their children to Grade 1 of government schools have a legitimate expectation that, the same authorities and the Secretary, Ministry of Education will act only under and in terms of and within the scope and ambit of the provisions of the Circular when admitting children to Grade 1 of government schools.

In these circumstances, the Secretary, Ministry of Education is bound and required to strictly adhere to the provisions of the Circular marked **"P-2"** in all matters relating to the admission of children to Grade 1 of government schools. He is not entitled to disregard the provisions of the Circular marked **"P-2"**. He is prohibited from acting outside them.

I would also add that, if the Secretary, Ministry of Education is of the view that, he must have the discretion to order that, specific children be admitted to Grade 1 of government schools or for him to have the discretion to order that, children of teachers and non-academic staff attached to a school be admitted to that school, the Circular marked **"P-2"** has to be amended first to provide for such admissions and such amendments must be made known to the public.

It is only after that is done, that, the Secretary can properly exercise such a discretion and order that children be admitted to Grade 1 of government schools within the scope of the provisions of an Amended Circular which may replace **"P-2"**.

Thus, in JAYAWICKREMA vs. PROF.W.D. LAKSHMAN, VICE CHANCELLOR, UNIVERSITY OF COLOMBO [1998 2 SLR 235] Mark Fernando J held that, where the Post Graduate Institute of Medicine had a set of published regulations relating to training programmes in Anaesthesia which led to Board certification as a Consultant Anaesthetist, the regulations must be followed by the Post Graduate Institute of Medicine. His Lordship stated [at p.250-251] *"It is true that regulations can be amended. But even the authority which made the regulations is bound by them, unless and until they are duly amended; and disregarding its own regulations is not a method by which that authority can amend them"* and *"On a matter of such importance – to patients, the profession and the nation – nothing short of an express amendment made after due consideration will suffice"*.

In this background, this Court has to now consider whether the admission of the 14 children named in letters marked **"1R5a"** to **"1R5f"**, **"1R6" "1R8"** and the resulting increase in the total number of children admitted to Grade 1 to 220, *outside* the provisions of the Circular marked **"P-2"**, will entitle the 1st Petitioner child to an Order from this Court directing that he too be admitted to Dharmashoka College.

When considering this issue, it is necessary to keep in mind that, the Petitioners' application had been correctly dealt with in terms of the Circular marked **"P-2"**. Thus, under and terms of **"P-2**, the 1st Petitioner child is *not* entitled to be admitted to Grade 1 of Dharmashoka College.

Next, this Court has to keep in mind the fact that, only a total number of 198 children could be properly admitted to Grade 1 of Dharmashoka College in 2015 under and in terms of and in compliance with the Circular marked **"P-2"**. This entire number of 198 have been admitted in 2015. Thus, the full number of children who may, lawfully and properly, be admitted under and in terms of **"P-2"**, have been admitted in 2015.

The Petitioners have not prayed for the setting aside of the admission of any of these children, which if ordered by this Court will create a `vacancy' in this permitted number of 198.

Therefore, if this Court now orders that, the 1st Petitioner child be admitted to Dharmashoka College, such an Order will result in the breach of the rule dictated in the Circular marked **"P-2"** that only a maximum number of 198 children should be admitted and that, thereby, each Class should not have more than 40 children. Further, such an Order would be in contravention of the provisions of **"P-2"** since the 1st Petitioner child is not entitled to be admitted under and in terms of **"P-2"**.

In this regard, the established principle is: the fact there had been a previous executive or administrative act which contravened a law or regulation to the benefit of a respondent or a third party, will not induce or justify a Court granting a petitioner Reliefs which themselves result in the contravention of that law or regulation. In other words, a Court will not order the commission of a wrongful or irregular act on the basis that a wrongful or irregular act has been previously committed. A Court will not compel equality by ordering illegality.

This principle was explained by Sharvananda CJ in MACKIE & CO. LTD vs. MOLAGODA [at p. 309], where His Lordship stated, *"But the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law."* and *"The inequality complained of by this petitioner in this case is only an inequality in the matter of illegal treatment. The Constitution only guarantees equal protection of the law and not equal violation of law. One illegality does not justify another illegality. In the exercise of its powers under Article 126(4) of the Constitution this court can issue a direction to a public authority or official commanding him to do his duty in accordance with the law. It cannot issue a direction to act contrary to the provisions of the law or to do something which in law, would be in excess of his powers.".*

In the same vein, Mark Fernando J stated in GAMAETHIGE vs. SIRIWARDENA [1988 4 SLR 384 at p.404], *"Here the petitioner's allegation that these persons were not on the waiting list and/or were not eligible for General Service Quarters amounts to an allegation that quarters were allocated in breach of the relevant rules. Two wrongs do not make a right, and on proof of the commission of one wrong, the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling the commission of a second wrong"*.

Similarly, in AMUNUPURA SEELAWANSA THERO vs. ADDITIONAL SECRETARY, PUBLIC SERVICE COMMISSION [2004 3 SLR 365 at p.373], Bandaranayake J, as Her Ladyship then was, stated, *" ….. an authority cannot be compelled to act illegally in a case for the mere reason that it has acted illegally in previous cases.".*

Upon an application of this principle to the present Case, I am compelled to conclude that, this Court cannot make an Order that, the 1st Petitioner child be admitted to Dharmashoka College in contravention of the provisions of the Circular marked **"P-2"** by using the admission of the 14 children *outside* the provisions of **"P-2"**, as a `justification' for such an Order.

Therefore, the Petitioners cannot get any Relief upon their third contention.

Before concluding, it should be mentioned that, the Petitioners have not sought any Orders from this Court setting aside the admission to Dharmashoka College of the 14 children named in letters marked **"1R5a"** to **"1R5f"**, **"1R6" "1R8"**. Further, these children are not parties to this application. In these circumstances, this Court is not called upon to make any Orders with regard to the admission of these children to Dharmashoka College.

For the aforesaid reasons, the Petitioners' application is dismissed. In the circumstances, of the Case, I make no Order with regard to costs.

Judge of the Supreme Court

K. Sripavan CJ.
I agree

Chief Justice

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 Article 126 of the Constitution of Sri Lanka.

SC. FR. 170/2008

01. M.M.I. Wilgamuwa,
    1038/72, Sri Sumangala Mawatha, Aluvihara,
    Matale.

02. I.M. Kanthilatha,
    266/55/K, 11th Lane,
    Jayamalapura, Gampola.

03. L.R. de Silva, Konpola,
    Doratiyawa, Kurunegala.

04. G.W.A.A. de Silva, 60/63,
    Galpoththa Road,
    Mihindupura, Athurugiriya.

05. K.D.L. Maheepala, Mihira,
    Miriswatta, Millawa.

06. R.M. Piyatissa, Upulvehera,
    Maneruwa, Negampaha.

07. W.A.C.P. Wijesinghe,
    Canada Mithra Mawatha,
    Anguruwelal, Ruwanwella.

08. P.H. Welamedage, 43,
    Janasavigama, Pallekelle,
    Kundasale.

09. T.M.L. Tennakoon, 395 A,
    Gohagoda, Katugastota.

10. D.K.S. Senaratne, 7/990,
    Sri Sumangala Mawatha,
    Aluvihare, Matale.

11. A.S.P. Jayatilaka, 175/19,
    Jayasuriya Watte,
    Horana.

12. V.O. Sirimanna, 24/A3/10,
    Siyane Uyana, Yakkala.

13. K.G.J. Priyadarshani, 3A,
    Watigama, Vitharandeniya.

14. G.A. Dissanayake,
    Deniyakantham Watte,
    Elahenpita, Thalpavila, Matara.

15. D.H.M.C. Udabage, 54/6A, Sri
    Dheerananda Mawatha, Maitipe,
    1st Lane, Karapitiya, Galle.

16. J.P.A.S. Seneviratne, 125, Isuru Place,
    Dambakanda Watte, Boyagane.

17. M.T. Olaboduwa, 186, Pannala Road,
    Dankotuwa.

18. K.H.C. Jayalath, Mahawela Road,
    Pallikkudawa, Tangalle.

19. L.N.A. Magammana, 87,
    Magammana, Homagama.

20. P. Chandika, Bogahamullawatta,
    Kiriwandeniya, Rabukkana.

21. E.A.D. Somawathie, 297/4,
    Kuda Pokuna Road, Thanthirimulla,
    Panadura.

22. T.P.S. Priayadarshanee, 1000/1,
    Thlangama (North), Malabe.

23. K.W.P.M. Thilakaratne, 18/4,
    Sri Gunaratne Road, Panadura.

24. R.W. Weragoda, 38, Sandun Uyana,
    Kalutara.

25. J. Weerasinghe, 5F/29,
    Jayawadanagama, Battaramulla.

26. O.D.G. Sunil, 5G/29,
    Jayawadanagama, Battaramulla.

27. A.P. Munasinghe, 314/4A,
    Degaha Watte, Wijemanna Mawatha,
    Kalutara (North).

28. K. Thanalojana, 34, 2nd Lane,
    Palaly Road, Jaffna.

29. S. Krupananden, 16/14, 2nd Lane,
    Sivan Kovil Road, Thirunelvely,
    Jaffna.

30. K.D. Gunawathie, 275,
    Dihenpura, 2nd Step, 25th Lane,
    Muagama, Horana.

31. Indrani Fernando, 17/1,
    Sri Rahula Mawatha, Katubedda,
    Ratmalana.

32. M.L.A..G. Fernando, 34, Fonseka Road,
    Kalutara North.

33. W. Seenipallage, 3-D-01,

Raddolugama, Seeduwa.

34. M.R. Dharmasena, 03,
Government Quarters, Stage 03,
Anuradhapura.

35. T.J.C. Perera, C/E-5/25,
Ranpokunagama, Nittambuwa.

36. T.J.C. Perera, , C/E-5/25,
Ranpokunagama, Nittambuwa.

37. T.A.R. Pushapalatha, 223/B/4,
Suripaluwa, Ganemulla.

38. D.G. Ranatunge, 278/A,
Gonawala (WP), Kelaniya.

39. P.G. Dayawathie, Madusara,
Pottewela, Hakmana.

40. S.P. Weliwita, Senasuma,
Okanduyaya, Thalagasyaya,
Akmeemana.

41. W.C. Kumari, 386, Pallealudeniya Road,
Karamada, Gelioya.

42. K. Ratnasiri, 55, Milagahawatte,
Palayandgoda, Payagala.

43. W.J.W. Dias, 33, Muwapura,
Housing Scheme, Dediyawala,
Kalutara.

44. W.A.N. Ratnayake, Ellapahala,
Paranathala, Algama.

45. W.W.T.N. Fernando, 28, Jaya Mawatha,
Wattalpola, Panadura.

46. J.A.W.K. Jayawardane, 326A,
    Charles Four Garden, Horagolla,
    Ganemulla.
47. H.M.S. Warnakulasuriya, 02,
    Silverdala, Thudugala,
    Didangoda.

48. W.A.K. Bandara, Kusum Sevana,
    Megoda, Eathanawatte,
    Dodangolla, Bibile.

49. N. Jeewamalar, 94, Adiyapotha Road,
    Thirunelvely (East) Jaffna.

50. M.C.M. Victoria, 74/56, Sinhala,
    D.S. Office Lane, Manna Road,
    Vavuniya.

51. M.D.A. Sudath, 404/1,
    Subadararama Road,
    Dippitigoda, Kelaniya.

52. E.W.P. Piyasena, 160/3,
    Hulangamuwa Road, Matale.

53. R.A.V.L. Ranasinghe, 64,
    Akuramboda Road, Matale.

54. A.H.K. Sirisena, 2/14, Nikawela Watte
    Road, Kirigalpotta,
    Palapathwela, Matale.

55. T.G.R. Pushpakumara, 90,
    Mapamadulla, Kulugammana.

56. M.W.S.S. Pieris, 240/7,
    Nikawewa Watte Road,
    Kirigalpotta, Palapathwela,
    Matale.

57. Robert Gamage, 92,
Shanthipura, Nuwara Eliya.

58. H.M.P. Herath, 31, Munamale,
Jambugaspitiya.

59. K.P.H.S. Karunasinghe,
163/13/02, Kalugalle Lane,
Kegalle.

60. G.L. Anil Priyantha, Pelpatha,
Molagoda, Kegalle.

61. B.A.T. Nandasiri, 68,
Manahagoda, Ihala Bomiriya,
Kaduwela.

62. H.A. Somalatha, Sewwandi, Sisil Sevana,
Elapola Watta, Gonapinuwala.

63. A. Kumarapperuma, Dewundara Watta,
Walgama, Matara.

64. K.A.N.P. Herath, Pathangi Watte,
Walgama, Yatagama, Rambukkana.

65. H.P.R. Karunatilaka, Odangapola,
Maharachchimula.

66. W.A.A. Abeysinghe,
Madakumburumulla,
Kuliyapitiya.

67. T.P. Mamamendra, 346,
Embaraluwa South, Weliweriya.

68. W.A. Weerasena, Nimasahan,
Galegedara, Kinchigune,
Medamulana.

69. B.L.P. Namali, Sirinada,
Polwathumodara, Mirissa.

70. N.A. Gunaratne, Meegahawatte,
Kiyanduwa, Akuressa.

71. S.N.S. Mallika, 185,
Bogahawatte, Kogala, Hakmana.

72. Y.W.N. Abeydeera,
Dodampahala, Dikwella.

73. R.W. Kusumalatha, Nelundeniya,
Dedigama.

74. P.R.U.S. Peramuna, 34, Kalawana
Aranayake.

75. H.A.B.N. Gunawardane, 256,
Ihala Bomiriya, Kaduwela.

76. W. Nimali, 857, Athurugiriya Road,
Homagama.

77. W.K.R. Weerasinghe, Chitra Wasa,
Thundeniya, Gampola.

78. T.M.T.J.S. Tennakoon, 61/B,
Dabahena Road, Maharagama.

79. K.K.G. Vajira Wasantha,
24/3/10, Siyane Uyana, Yakkala.

80. W.W.P.W.R.A.J. Gollawa, 60,
Cretain Village, Nuwara Eliya.

81. H.A.N. Kumara, 687/1/1, Punakahadeniya,
Dadigamuwa.
82. P.D.E. Perera, 256, Ihala Bomiriya,

Kaduwela.

83. M.S. Piyaseeli, 145,
Gunasinghegama, Magammana,
Homagama.

84. Wasantha Rubasinghe, 12/6A,
Bogahalanda Road,
Parakandeniya, Imbulgoda.

85. K.H. Nalni, Hatangala Handiya,
Nehinna, Dodangoda.

86. B.G. Wijepala, Tharindu,
Kandamala, Indurupolpeketiya,
Thalgaswala.

87. L.W.V. de Silva, 124,
Mihindupura, Meepilimana,
Nuwara Eliya.

88. N.H.C. Upaseeli, 38/8, Mosque Road,
Kandewatte, Galle.

89. T.M.K. Kusumalatha, 02,
Pinsirigama, Ganewatte,
Nikadalupotha.

90. M.M. Nandawathie, Pussella,
Pusselithenna.

91. W.D. Ranjanee, Senavi Sevana,
Palliyapitiya, Dunagaha.

92. W.D.B.R. Vithana, 89, Megalla,
Urapola.

93. R.P.K. Jayawardane, 07,
Raddalgoda, Kelaniya,

Meerigama.

94. N.M.G. Nawaratne, Mudaliwatte, Yatiwala, Mawathagama.

95. D.M.C.M. Dissanayake, Chitra Niwasa, Thundeniya, Gampola.

96. D.P.M. Liyanarachchi, 268 C, Narathaldeniya Road, Embilmeegama, Pilimatalawa.

97. L.G. Vajirakantha, 09, Janasavigama, Stadium Road, Pallekelle, Kundasale.

98. I. Manawadu, 346, Bolawatte, Ganemulla.

99. W.D.K. Priyanthi, Sethsiri, Udumulla, Padukka.

100. R.M.G. Ranayake, 203/1, Jayawardanagama, Battaramulla.

101. W.A.S.I. de Silva, B91/B, Soysapura, Moratuwa.

102. G.P.K. Perera, 278A, Gonawala (WP), Kelaniya.

103. W. Weerasinghe, 160B, Hendapola Road, Polhenawatta, Bataleeya, Pasyala.

104. G.S. Dahanayake, 8/B-68-7, Mattegoda Housing Scheme, Mattegoda.

105. D.E.S. Halahakoon, 33,
Nuwarapura, Dediyawala,
Kalutara.

106. P. Gunasena,
Kadahathawela,
Pihimbiyagollwewa,
Medawachchiya.

107. A.I. Gamage, 25, Arangalle,
Nattaranpotha.

108. K. Mahendran, School Lane,
Sandilipay Centre, Sandilipay.

109. R. Thirughamuthy, 65,
Serukkupulam Lane,
Potapthy Road, Kondavil East,
Kondavil.

110. L.P. Senadeera, 176, C1,
Ehalagama, Gampaha.

111. K.L.M. Walpola, 128,
Polhena, Madapatha.

112. W. Banduwathi,
Depalamulla, Balangoda.

113. W. Malani, 10B 104/2,
Maththegoda Housing Scheme,
Maththegoda.

114. H.D. Premadasa, Mada Niwasa,
Welisara, Welisara Netolpitiya.

115. B.A. Ananda Kusumsiri,
Polhengoda,
Madakumburumulla,

Kuliyapitiya.

116. S.T.M.R. Silva, Rosari, St. Vincent Road, Diyalagoda, Maggona.

117. O.N.N. Amarasinghe, F219, Stage 11, Ranpokunagama, Nittabuwa.

118. L.D.L. Ratnasekare, 80/L, Hokandara East, Hokandara.

119. M.J. Chandrasena, 217/25, Cyril Janze Mawatha, Panadura.

120. M.D.W.C. Basnayake, 68/10, Gamunu Mawatha, Colombo 14.

121. B. Chandrasekara, Sprin Watte, Kebillewa North, Bandarawela.

122. P.A. Ratnasena, Weda Niwasa, Dehigahalanda, Ambalantota.

123. S.A. Harischandra, 47, Silverdale, Thudugala, Dodangoda.

124. A.R.S. Jayawardane, 37, Sirimal Uyana, Godalsuwana Road, Piliyandala.

125. D.P.C. Pathmakanthi, 373, Samadana Mawatha, Makola North, Makola.

126. V. Velmurugu, 2, Housing Quarters, Chundukkuli.

127. W.P.I. Perera, 42, Asiri Mawatha,
Kalubowila, Dehiwala.

128. J.P.P.M. de Silva, 68,
Manimulla Road,
Ambalangoda.

129. S.M.H.J.M. Samarakoon,
Thammitagama,
Nagollagama.

130. D.H.V.H. Samarasinghe,
266/3, Gnanamoli Mawatha,
Makola North, Makola.

131. M. Ruwan Pathirana, 18/1,
E.M.W. Jayasuriya Mawatha,
Nupe, Matara.

132. M.M. Ananda Mapa, 16,
Thambugala Watte,
Dellandeniya, Maspotha.

133. A.M. de Zoysa, 14,
Bodhirukkarama Road,
Wellawatte, Colombo.

134. N.K.D. Keerthiratna, 199,
Dorape, Anuglugaha.

PETITIONERS

Vs.

1. Lionel Fernando – Co-Chairman

2. Saliya Mathew- Co-Chairman
of National Salaries & Cadres Commission
Room, No. 2G, 10, B.M.I.C.H.
Bauddaloka Mawatha,

Colombo 07.

3. K.L.L. Wijerathne, Secretary,
of National Salaries & Cadres Commission
Room, No. 2G, 10, B.M.I.C.H.
Bauddaloka Mawatha,
Colombo 07.

3(a). Don Herbert Neville

Piyadigama- Co-Chairman

3(b). Jayalath Anasinghe Vimalasena

Dissanayake, Co-Chairman

3(c). Gunesekara Liyanage

Wimaladasa Samarasinghe

3(d). Vijeyalakshmy Jegarasasingam

3(e). Ginigaddarage Piyasena

3(f). R.A. Dona Rupa Malini Peiris

3(g). Dyananda Widanagamachchi

3(h). Sembakuttige Swarnajothi

3(i). Benedict Karunajeewa Ulluwishewa

3(k). Sujeeva Rajapaksha

3(l). Prof. Sampath Amaratunga

3(m). Dr. Ravi Liyanage

3(n). W.K.Hemachandra Wegapitiya

3(o). Keerthi Kotagama

3(p). Reyaz Mihular

3(q). Priyantha Fernando

3(r). Leslie Shelton Devendra

3(s). Wijesinghe Wellappili Don Sumith Wijesinghe

3(t). Gampahalage Don Somaweera Chandrasiri

3(u). Walgama Hewamaluwage Piyadasa

3(a) to 3(u) Respondents: all of National Pay Commission Room No. 2-116, BMICH, Bauddhaloka Mawatha, Colombo 07.

4. National Housing Development Authority, 34, Sir Chittampalam A. Gardiner Mawatha, Colombo 2.

5. M.I. Mohamed Rafeek, Chairman, 34, Sir Chittampalam A. Gardiner Mawatha, Colombo 2.

6. W.L.G. Wasantha Wijeratne National Housing Development Authority, 34, Sir Chittampalam A. Gardiner Mawatha, Colombo 2.

7. W.B. Ganegala, Secretary, Ministry of Housing & Common Amenities, 6th & 9th Floor, Sethsiripaya, Battaramulla.

8. P.B. Jayasundera, Secretary, Treasury, Ministry of Finance, Colombo 1.

9. Hon. Attorney General, Attorney General's Department,

Colombo 12.
RESPONDENTS

Before : Sisira J. De AbrewJ.
Nalin Perera J &,
Prasanna S. Jayawardena PCJ

Counsel : J.C. Weliamuna with Pasindu Silva for the Petitioners.
Ms. S. Barrie, SSC. for the Respondents.

Argued on : 15.09.2016

Decided on : 2.11.2016

Sisira J De Abrew J

The Petitioners, by this petition, seek a declaration that their fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the Respondents. This court by its order dated 2.6.2008, granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

The Petitioners, by their petition, complain to this court that after the salary revision in 2006, the 1st to 50th Petitioners who were Grade 1V officers and Middle Managers were lowered to Junior Managers; that they were placed in a salary code known as JM; that the 51st to 134th Petitioners who were Grade V1 officers and Junior Managers were lowered to Management Assistant; that they were placed in a salary code known as MA; that JM and MA denote Junior Manager and

Management Assistant respectively; and that their salaries were also lowered after the said salary revision. The Petitioners advanced their argument that their salaries were lowered on the basis that the 1st to 50th Petitioners were lowered to the level of Junior Manager and the 51st to 134th Petitioners were lowered to the level of Management Assistant. When considering this argument the important question that arises for consideration is whether the 1st to 50th Petitioners were lowered to the level of Junior Manager and the 51st to 134th Petitioners were lowered to the level of Management Assistant. To prove this point the Petitioners heavily relied on documents marked P8(a) to P8(e) and P5. P5 is termed as follows:

"New Salary for Statutory Boards, Corporations and Fully Owned Government Companies

Alternative salary scales to be awarded on the basis of the existing salary scales."

P5 contains the following information.

Croup	Salary Code
Junior Manager C-1	JM 1-1-2006
Junior Manager C-2	JM 1-2-2006
Middle Manager C-1	MM 1-1-2006
Middle Manager C-2	MM 1-2-2006
Middle Manager C-3	MM 1-3-2006

Prior to salary revision what was the Grade of the 1st to 50th Petitioners? The Petitioners have produced letters of promotion relating to the 1st and the 2nd Petitioners as P2(a) and P2(b). The letters relating to the promotion of the other Petitioners or their letters of appointment have not been produced by the Petitioners. According to P2(a) and P2(b) the 1st and the 2nd Petitioners were

promoted to the Manager Grade V in 1999. Therefore the Petitioners contend that prior to the salary revision, the 1st to 50th Petitioners were in Grade V and the 51st to 134th Petitioners were in Grade VI. After the salary revision, the 1st to 50th Petitioners continued to remain in Grade V and the 51st to 134th Petitioners continued to remain in Grade VI. This is evident by documents marked P1 and P8(a) to P8(e) produced by the Petitioners. Thus it appears that after the salary revision the Petitioners' Grades have not been changed. It is important to note that according to P1(a) the grade of a Junior Manager is Grade VI. Therefore if the contention of the Petitioners that is to say that the 1st to 50th Petitioners' position were lowered to the level of a Junior Manager after the salary revision is correct, then their Grades too would have been lowered to Grade VI. But it has not taken place. The above observation demonstrates that the position of the 1st to 50th Petitioners have not been lowered to the level of a Junior Manager after the salary revision. The 51st to 134th Petitioners continued to remain in Grade VI after the salary revision.

When I consider the above facts the contention of the Petitioners that the 1st to 50th Petitioners were lowered to the level of a Junior Manager and that the 51st to 134th Petitioners were lowered to the level of a Management Assistant cannot be accepted and is hereby rejected. Further according to paragraph 13 of the affidavit of the 3(a) Respondent, prior to the salary revision the starting salary and the maximum salary of Grade VI officers were Rs.11,245/- and Rs.15,970/- respectively; after the salary revision their starting salary is Rs.17,695/- and the maximum salary is Rs.29,320/-. The salary details of officers of Grade V are as follows: Prior to the salary revision their starting salary was Rs.12,955 and maximum salary was Rs.20,625/- and after the salary revision their starting salary is Rs.20,490/- and the maximum salary is Rs.32,290/-.

When I consider the above matters, the contention of the Petitioners that their salaries were lowered after the salary revision cannot be accepted.

For the aforementioned reasons, I hold that there is no merit in the Petitioners' case and that Respondents have not violated the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution.

For the above reasons, I dismiss the petition of the Petitioners. In all the circumstances of this case, I do not make an order for costs.

Judge of the Supreme Court

Nalin Perera J

I agree.

Judge of the Supreme Court

Prasanna Jayawardena PC, J

I agree.

Judge of the Supreme Court

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

In the matter of an Application under and in terms of Article 126 read with the Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. (F/R) Application No.471/2011

1. Sevanagala Sugar Industries Limited,
   No.362, Colombo Road, Pepiliyana,
   Boralasgamuwa.

2. Alankarage Douglas Shanthanayaka,
   Wickremarathne,
   No.2/74, Jayapala, Udahamulla,
   Nugegoda.

3. Kumarasinghage Jayalath
   Samanthilaka,
   No.299, Mihindu Pura, Sevanagala.

4. Appuwahandi Gayan Dewapriya,
   G 02/55, Housing Scheme,
   Sevanagala.

5. Wasawita Gamage Sirisena,
   No.932, Mayuragama, Habaraluwewa,
   Sevanagala.

6. Abeywardena Jayasinhe Arachchilage
   Gunaratne Lal Kumara,
   No.68, Nawodagama, Sevanagala.

7. Kodikara Kankanamge Ranjith,
   No.206, Habaraluwewa, Sevanagala.

8. Ganthota Widanagamage Dilanka,
   No.11, Sevanagala-North, Sevanagala.

9. Pannila Mohottalalage Suranga,
   G/2-1, Housing Scheme, Division 01,
   Katupilagama, Sevanagala.

10. Kumarasinhage Vijitha,
    No.299, Mihindu Pura, Sevanagala.

Petitioners

Vs.

1. Inspector Abeysekara,
   Officer-in-Charge (Acting),
   Police Station,
   Sevanagala.

2. Police Sergeant 23882 Sepala,
   Police Station,
   Sevanagala.

3. Police Sergeant 23738 Edirisinghe,
   Police Station,
   Sevanagala.

4. Police Sergeant 59211 Amarasena,
   Police Station,
   Sevanagala.

5. Indika 81248, Civil Security Force,
   Police Station,
   Sevanagala.

6. Nilantha Bandara,
   Officer-in-Charge,
   Police Station,
   Sevanagala.

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

8. Durage Gnanawathie,
   No. 859, Sevanagala Gama,
   Sevanagala.

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

Respondents

BEFORE : B.P. Aluwihare, PC, J.
Sisira J. de Abrew, J.
Nalin Perera, J.

COUNSEL : Saliya Pieris with Anjana Ratnasiri for the 1st to 10th Petitioners.

Anoopa de Silva SSC for the Respondents.

ARGUED ON : 06.06.2016.

DECIDED ON : 5.10.2016

Sisira J. de Abrew, J.

The petitioners by this petition seek a declaration that their fundamental rights have been violated by the respondents. This Court, by its order dated 03.11.2011, granted leave to proceed for alleged violations of Articles 12 (1) and 13 (1) of the Constitution.

The 1st petitioner, a limited liability company, has been, inter alia, carrying on business of cultivating sugar cane and manufacturing sugar. The 2nd to 10th petitioners are the employees of the 1st petitioner. His Excellency the President of the Democratic Socialist Republic of Sri Lanka, by document marked 'P6' leased out a land the extent of which is about 8.276 hectares to the 1st petitioner. The 8th respondent entered into a contract with the 1st petitioner to cultivate sugar cane on a certain designated portion of the said land from 21.01.2003 to 21.01.2007. According to the said contract the 8th respondent should cultivate sugar cane in the said portion of the land and supply them to the 1st petitioner. Even after the said period the 8th respondent continued to cultivate sugar cane in the said portion of the land and supplied sugar cane to the 1st petitioner until the year 2011. On 11.08.2011 a field officer of the 1st petitioner informed the management of the 1st petitioner that the land allocated to the 8th respondent was being prepared for an unauthorized crop. Thereafter on 15.08.2011 the 8th respondent entered into a

fresh contract marked 'P12' with the 1st petitioner regarding the said land. According to the said contract the 8th respondent should cultivate sugar cane in the said land and the cultivation of any other thing other than sugar cane was prohibited. Both parties agreed that the said land will be prepared for cultivation of sugar cane by the company utilizing its machinery.

On 06.09.2011 the 1st petitioner took steps to prepare the said land for the cultivation of sugar cane. There is no dispute that the 2nd to 10th petitioners cleared the said land allocated to the 8th respondent. According to objection filed by the 1st respondent on 06.09.2011, the 8th respondent complained to the Sevanagala Police that the employees of the 1st petitioner had destroyed her banana plantation that was in the said land. The complaint of the 8th respondent has been produced as 1R1 by the 1st Respondent. Ajith Ratnayake the son of the 8th respondent too had complained to the police that the employees of the 1st petitioner destroyed 150 banana plants value of which was about Rs.107000/-. The petitioners admitted that they cleared the said land and as I pointed out earlier, there is no dispute that the 2nd to 10th petitioners engaged in clearing the said land. It appears that at the time of clearing the land there was a banana plantation in the said land. The petitioners take up the position that they were entitled to clear the land as per the contract marked 'P12'. The allegation of the Petitioners is that their arrest by Sevanagala Police was unjustified. Therefore the most important question

that must be decided is whether there were reasonable grounds for the police to arrest the 2nd to 10th petitioners. I now advert to this question. It appears that the 8th respondent had violated the contract marked 'P12'. If the 8th respondent had violated the contract marked 'P12', what is the remedy available to the 1st petitioner? The 1st petitioner then should file a civil case in the District Court and seek relief. The 1st petitioner and their employees cannot take the law into their hands and destroy the banana plantation in the land

The main complaint of the petitioners to this Court is that their arrest by the Sevanagala Police was unjustified and wrong. In this connection it is relevant to consider Section 32 (1) of the Code of Criminal Procedure Act which reads as follows:

> "Any peace officer may without an order from a Magistrate and without a warrant arrest any person.....
>
> a) who in his presence commits any breach of the peace;
> b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;
> c) omitted.
> d) omitted.
> e) omitted.
> f) omitted.
> g) omitted.
> h) omitted.
> i) omitted."

According to the Police, there was a complaint by the 8th respondent before the police to the effect that her banana plantation had been destroyed by the employees of the 1st petitioner. Police after investigation arrested the 2nd to 10th petitioners. When a police officer decides to arrest a person on a complaint, he is not, at the time of the arrest, required to decide that the alleged offence is proved or can be proved beyond reasonable doubt. What is necessary is that, at the time of the arrest, there were reasonable grounds for him to believe that an offence had been committed or that he had reasonable grounds to act under Section 32 (1) of the Code of Criminal Procedure Act.

In such a situation the police officer cannot be found fault with for arresting the alleged offender. This view is supported by the judgment of Wanasundera, J. in the case of ***Joseph alias Bruten Perera v. The Attorney General*** [1992] 1 SLR page 99 wherein His Lordship remarked thus;

> *"The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand for an arrest, a mere reasonable suspicion or a reasonable complaint of the commission of an offence suffices."*

When I consider all these matters, I am of the opinion that, on the complaint made by the 8th respondent, the Police officers attached to Sevanagala Police Station had reasonable grounds to believe that the 2ndto 10th petitioners have committed a criminal offence. Further I am of the opinion that

the Police had reasonable grounds to act under Section 32(1) of the Code of Criminal Procedure Act in respect of the 2nd to 10th petitioners. Police have produced the 2nd to 10th petitioners in the Magistrate's Court alleging that they committed offences under Sections 140, 146, 433 and 410 of the Penal Code.

For the above reasons, I hold that the respondents have not violated the fundamental rights of the petitioners guaranteed by Articles 12 (1) and 13 (1) of the Constitution and dismiss the petition of the petitioners. In all the circumstances of this case I do not make an order for cost.

Petition dismissed.

Judge of the Supreme Court

B.P. Aluwihare, PC, J.

I agree.

Judge of the Supreme Court

Nalin Perera, J.

I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF OF SRI LANKA

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

Gamlakshage Sunil Seneviratne
Dikhena,
Pitigala.

PETITIONER

S.C. F.R. Application No.
476/2012

Vs.

1. Shelton Gunasekera
   Assistant Investigation Officer
   Ceylon Electricity Board
   Head Office
   Colombo 02
2. H.A.A. Perera
   Electrician, Ceylon Electricity Board
   Head Office
   Colombo 02
3. Divisional Electrical Engineer,
   Ceylon electricity Board
   Ambalangoda
4. Electrical Engineer
   Ceylon electricity Board
   Piliyandala
5. Ceylon Electricity Board
   Piliyandala Branch
   Piliyandala
6. Ceylon Electricity Board
   Head Office
   Colombo 02
7. Inspector of Police Udayakumara
   Police Station
   Pitigala

8. Police Constable 12911 Jayalath
   Police Station
   Pitigala
9. Police Constable 20616 Ananda
   Police Station
   Pitigala
10. Sergeant 24672 Lal Ananda
    Police Station
    Pitigala
11. Deputy Inspector General of Police
    Southern Province
    Galle
12. Inspector General of Police
    Police Headquarters
    Colombo 01
13. Hon. Attorney General
    Attorney General's Department
    Colombo 12
14. Director General,.
    Public Utilities Commission
    06th Floor, B.O.C. Merchant Tower
    St. Michael's Road
    Colombo 03

RESPONDENTS

BEFORE: **BUWANEKA ALUWIHARE, PC, J**
SISIRA J DE ABREW, J
ANIL GOONERATNE, J

COUNSEL Harsha Fernando with Ruwan Weerasinghe
for the Petitioner instructed by K. V. Lal Shantha.
Varunika Hettige, Senior State Counsel for the Respondents.

ARGUED ON: 13.07.2015

WRITTEN SUBMISSIONS: 24.08.2015

DECIDED ON: 16.12. 2016

ALUWIHARE, PC, J.

The Petitioner in this case seeks a declaration that his fundamental rights guaranteed by Articles 12 (1), 13 (1) and 14 (1) (g) of the Constitution have been infringed by the Respondents. Supreme Court granted leave to proceed for the alleged infringement of the aforesaid Articles by the 1st and the 6th Respondents. In addition, this court proceeded to grant interim relief to the Petitioner by restoring the supply of electricity to the premises concerned.

The Petitioner, a businessman, at the time relevant to the present application was engaged in running a hotel under the name "Dickhena Hotel" and was also engaged in selling furniture, at an outlet under the name "Sujeewa Furniture Shop" in Pitigala.

He asserted that, he had obtained loans from commercial banks to infuse money into his business and had to make repayments on a monthly basis. The Petitioner had further asserted that being a father of three children, he had also to meet family commitments, as one of his daughters was studying medicine in Bangladesh and another child was studying for the Advanced Level examination.

On the 9th June, 2012, in the middle of the night the Petitioners building had caught fire and when he came out of the building he had seen some Police officers and several others, trying to douse the fire by attacking the flames with sand and wet sacks etc. As the Police officers warned the people, of the danger of using water to extinguish the fire in the event of an electricity leakage, the people gathered there had tried to sever the electricity connection by prising out

the 'cutout' next to the electricity meter with the aid of sticks. The Petitioner states that, even though they had managed to extinguish the fire, having battled to douse it for about 1 ½ hours, he had sustained damage amounting to about Rupees four hundred thousand.

The Petitioner, distressed by this incident, had informed the Electricity Board and according to his petition, he had told the official who answered the phone, about the destruction and damage caused to the electricity meter, and how the damage to the same had come about. He had also requested the Electricity Board to take steps to restore the supply of electricity.

The response he received from the official who answered the phone had been, to re-fix the "cut out" and use power, if electricity were available up to the Meter. Further the official had added, that their responsibility is only to supply electricity up to the Meter and they cannot respond as and when the Petitioner wanted them to come.

Consequent to the advice given by the official of the Electricity Board, the Petitioner says he re-fixed the 'cut out' and continued to use the power as he had to run his business. The Petitioner states, however, that the electricity meter, even at that time was dangling.

The Petitioner states that, in spite of informing the Electricity Board of the grave situation, there was no response by the Board. Petitioner had produced the call details (P5) and the same reflects that the Petitioner had called the Ceylon Electricity Board and the duration of the call had been approximately 4½ minutes. The Petitioner asserts that the Electricity Board took no interest or serious note of the predicament he was in, as the result of the fire. The Petitioner had also reported the fire to the Pitigala Police on the same day and had lodged a formal complaint.

Nine days after the fire, on the 18th of June, 2012, the 1st Respondent accompanied by two Police officers (8th and 9th Respondents) had visited him, and the 1st Respondent had wanted to check the premises alleging that they were tapping electricity illegally, to which the Petitioner responded, that he had only followed the instructions given by the Ceylon Electricity Board.

Having checked the premises, the 1st Respondent had questioned him as to why the Electricity meter was slanted and had warned him that it was a serious fault. In response, the Petitioner had told the 1st Respondent, that no one visited the scene after the fire, despite the fact that the Ceylon Electricity Board was informed on several occasions of the damage caused to the housing of the electricity meter. The Petitioner had vehemently denied that he tapped electricity, illegally and that there was no need for him to resort to such a conduct either.

The1st Respondent had then told the Petitioner that he was going to take the Petitioner into custody and that it was a non-bailable offence. He had told the Petitioner further that if he pleaded guilty to the charge he would ensure that the Petitioner got off, on payment of a nominal fine.

Then the 1st Respondent had also added that he would disconnect the other meters as well, but there were ways and means of avoiding such a situation. The words so used by the 1st Respondent in Sinhala according to the Petitioner were **" මම තමුසෙව දැන් අත් අඩංගුවට ගන්නවා" තමුසෙට ඇප ලැබෙන්නේ නැහැ" මේ මීටරයයි අනිත් මීටර සියල්ලම කපා දානවා" තමුසෙ නිවැරදි කාරයයි කිව්වොත් උසාවියේ නඩුව අවසන් වනතුරු තමුසෙට ඇප ලැබෙන්නේ නැහැ" වරද පිළිගත්තොත් සුට දඩයක් ගහලා ගෙදර යන විදිහට මම වැඩ සලස්වා දෙන්නම් දැන් අනිත් මීටර සියල්ලම කපනවා" ඒවා බේරාගන්න නම් ක්‍රම සහ විධි තිබෙනවා**

The Petitioner then had pleaded with the 1st Respondent not to place them in a difficult situation and told the 1st Respondent that he would abide by his wishes.

At this point the 1st Respondent had gone inside the shop with the Petitioner and had demanded one hundred thousand rupees from him. The 1st Respondent, according to the Petitioner had stated further that he would leave the other three meters intact, but if the payment of Rs.100, 000 were not made by the 1st of August, however, he would take steps to disconnect the other three meters as well.

The Petitioner had consented to plead guilty and also to pay the1st Respondent the amount demanded, by the 1st of August.

After the discussion referred to above the 1st Respondent had come out of the building and had disconnected and removed the meter that was dangling from the wall and had taken it along with him.

The Petitioner then had been placed under custody by the two Police officers (8th and 9th respondents) on the instructions of the 1st Respondent.

The Petitioner complains that he was not informed of the offence with which he was charged, at the point of arrest and was detained at the Pitigala Police Station overnight and produced before the Magistrate, Elpitiya on the following day.

The Petitioner had been charged in terms of Section 49 (1) of the Sri Lanka Electricity Act No.20 of 2009. The Charge Sheet (P7A) alleged that he had been consuming electricity fraudulently, by removing the meter from the wall and

positioning it at an angle, thereby preventing the correct amount of electricity consumed being recorded.

The Petitioner states, as agreed with the 1st Respondent, he pleaded guilty to The aforesaid charge and he was fined Rs.10, 000/- and was directed to pay a further sum of Rs.351,010/- as the loss caused to the state.

The Petitioner asserts that a certificate stating the damage caused to the State was not annexed to the charge sheet and as such the Petitioner's position is that there was no any proof of the damage caused to the State.

Proceedings of 19th July, 2012 in case No. 74738 (P7) in Magistrate's Court, Elpitiya, show that the Magistrate was informed of the loss caused to the State and the Magistrate has not referred to any document or a certificate containing the loss, nor is the alleged loss mentioned in the charge sheet.

Then on the 1st August, 2012, according to the Petitioner, the 1st Respondent had come to his business premises and had asked him whether the petitioner would pay the sum agreed upon, in Sinhala " මට අරක දෙන්න පුටිවන්ද" meaning,whether the Petitioner would agree to part with the money agreed upon.

The Petitioner had responded by asking him as to how, he could pay him a hundred thousand rupees, having already paid a fine of Rs.10, 000 and a further sum of Rs.351, 010. The Petitioner had also rebuked the 1st Respondent, for committing such dastardly acts, when he knew very well that, he (the Petitioner) had not done anything wrong.

The 1st Respondent then had left the premises without uttering a word according

to the Petitioner.

The 1st Respondent, however, had returned to the premises a few hours later accompanied again by two police officers, the 9th and 10th Respondents, and a few others from the Ceylon Electricity Board. The 1st Respondent had, intimated to the Petitioner that they had come to disconnect the other three meters as well, and had challenged the Petitioner to do whatever he could.

The Petitioner had then questioned the 1st Respondent as to what right he had to disconnect the electricity supply to another building. In spite of his protest, the 1st Respondent had disconnected the supply of electricity by severing the connection of the other three meters. The petitioner claims that he was not in arrears to the CEB as he had paid all his dues.

It was contended by the learned counsel for the Petitioner, that the act of disconnecting the supply of electricity was illegal and was done maliciously and for no other reason. It was submitted on behalf of the Petitioner, that the petitioner had to face numerous hardships due to the loss of power supply and the Petitioner had to engage a generator by paying Rs.15, 000/- per day, to carry on his business activities. The learned counsel on behalf of the Petitioner stressed that, had the 6th Respondent Board visited the premises soon after the fire, the Petitioner would not have been placed in this unfortunate situation. The Petitioner had lodged two complaints with the Pitigala Police with regard to the conduct of the 1st Respondent (P10 and P11).

Counsel also submitted the petitioner had pleaded guilty to the charges against him in the magistrates' court, under duress.

K. G. Sarath and S. K. Chandrarathna have sworn affidavits in support of the Petitioner's case (P13 and P14, respectively). Both of them had witnessed the fire that engulfed the business premises of the Petitioner. Both of them have

sworn to the fact that, the neighbours who helped to douse the fire, used sticks to poke at the electricity meters in order to disconnect the electricity and in their attempt to do so, the electricity meter came out of its housing and it was dangling from the wall.

The Petitioner had asserted that the 1st Respondent, an Assistant Investigation Officer of the Electricity Board was mainly responsible for acts which were illegal and capricious, in violation of his fundamental Rights. According to the Petitioner the 2nd Respondent was also an employee of the 6th Respondent Board and accompanied the 1st Respondent and was associated with the 1st Respondent in all his actions. The Petitioner alleges that the 3rd, 4th and 5th Respondents are collectively responsible for the violation of his fundamental rights. The 1st Respondent alone had filed a response to the Petitioner by way of an affidavit dated 18th July, 2014.

The 1st Respondent had annexed an affidavit of one Piyadasa, Electrical Superintendent attached to the Consumer Service Centre, and had stated that upon perusal of the "Electricity break down" Register, no person by the name of G. L. S. Seneviratne (the Petitioner) had reported a breakdown of the supply by a fire due to an electrical fault at "Dikhena Hotel", the business establishment of the Petitioner.

Let alone, recording a fault in the Register, when the Petitioner telephoned the Board regarding the fire the Petitioner was rudely told off by an official of the Ceylon Electricity Board that the Board cannot respond by calling over according to the whims and fancies of the Petitioner. The Petitioner by producing the detailed telephone records had demonstrated that he was connected through his phone with the Ceylon Electricity Board and the

connection had lasted 4½ minutes. In this context, I am of the view that no reliance can be placed on the affidavit filed by Piyadasa R1.

Ironically the 1st Respondent in his affidavit alleges that the Petitioner ought to have "informed the CEB properly" or "called over at CEB's premises to lodge the required complaint or made it in writing, explaining the incident". Here is a man whose business premises had been gutted and expecting a person in such a traumatic condition to make a written complaint, only shows the callous disregard by an official of the 6th Respondent Board, towards one of his customers. The discouraging response the Petitioner received from the Ceylon Electricity Board official who answered his telephone call, would have deterred the Petitioner from taking up the matter with the Ceylon Electricity Board again. I am of the view that the Ceylon Electricity Board owes a greater duty of care to its consumers as they have no one to turn to when it comes to the supply of electricity. The manner in which the consumer was treated in this instance is regrettable.

The 1st Respondent merely says that he went to inspect the premises of the Petitioner, as he received a "telephone call" to the effect that the Petitioner was misusing electricity by angling the meter. Apart from the bare assertion, however, the 1st Respondent had not filed any document or record to substantiate the receipt of that complaint. The 1st Respond had said that on the second occasion also he received another telephone call to the effect that the Petitioner was again misusing electricity. Here again apart from the 1st Respondent's assertion *ipse dixit*, he had failed to substantiate the receipt of the telephone call.

Going by the version of the 1st Respondent, the first detection had been made on the 18th July, 2012 and action had been instituted against the Petitioner before

the Magistrate's Court on 19th July, 2012 the day after, and the Petitioner had pleaded guilty as referred to earlier. The Petitioner in his counter affidavit filed on 16th September, 2014 had taken up the position that when the 1st Respondent visited his premises, he inspected all other meters fixed at the premises as well and did not find any fault with any of them other than, that the meter had got damaged by the fire. The second detection had been just 12 days after that, according to the 1st Respondent. If that assertion by the 1st Respondent were correct, then the Petitioner had tampered with the meters after the 1st detection, after he was fined by the Magistrate Rs.10, 000/- and after he had been ordered to pay a further sum of over three hundred and fifty thousand rupees as damages caused to the Electricity Board.

Regard being had to common cause of natural events and human conduct I am of the view that it would be reasonable to presume, that it was extremely unlikely that the Petitioner would have resorted to tampering with the electricity meters after such a stiff penalties had been imposed on him.

With regard to the case filed in the Magistrate's Court, the 1st Respondent states that the "damage" certificate was filed. The proceedings of that case filed by the Respondent, however, does not contain the "damage certificate" which supports the Petitioner's version that the "damage certificate" was not filed.

The 1st Respondent in his affidavit had made a general denial with regard to the other allegations made. In the face of the specific allegation made by the Petitioner regarding the solicitation of a bribe of Rs.100, 000, there is no specific denial of the said allegation by the 1st Respondent nor the allegation that he came back on 1st August to the Petitioner's business premises to demand, what was solicited.

As held in the case of Velmurugu,1981,1SLR 406, the degree of proof required in an allegation of violation of a fundamental right is the balance of probability. In this context when one considers the material placed before this court by the Petitioner, he had in my view established the alleged violation of Article 12 and 14 (1) (g).

Upon perusal of the proceedings before the Magistrate's Court it appears that the proceedings have been instituted by the Officer-in-Charge of Pitigala Police. It is not clear from the material placed before this court, whether the Petitioner was placed under arrest by the 1st Respondent or by the two police officers (8th and 9th Respondents) who accompanied him. As leave to proceed had been granted only against the 1st Respondent and the 6th Respondent Board, it would not be possible to make a specific finding on Article 13 (1) as against the other Respondents in respect of whom leave to proceed had been granted. However, it is evident that the Petitioner had been arrested by an organ of the state, and I hold the arrest is illegal and therefore was violative of Article 13 (1) of the Constitution.

As stated by Justice Wanasundera in the case of Jayanetti Vs. The Land Reform Commission and others 1984 2 SLR 172 at 184 *"Article 12 of our Constitution is similar in content to Article 14 of the Indian Constitution. The Indian Supreme Court has held that Article 14 combines the English Law doctrine of the rule of law with the equal protection clause of the 14th amendment to the US Constitution. We all know that the rule of law was a fundamental principle of English Constitutional Law and* ***it was a right of the subject to challenge acts of the state from whichever organ it emanated*** *and compel it to justify its legality. It was not confined only to Legislation, but intended to every class and category of acts done by or at the instance of the State. That concept is included and embodied in Article 12".*

In the instant case no material has been placed before the court on behalf of the 6th Respondent Board with regard to the allegation leveled against one of its employees namely the 1st Respondent whose conduct is impugned in these proceedings.

No doubt the 6th Respondent Board has every right to take action against illegal tapping of electricity or any other act obnoxious to the provisions of the relevant Act. I am of the view, however, it is the bounden duty of the 6th Respondent Board to put in place a mechanism so as to provide a smooth and efficient service wherein complaints are promptly attended to without discrimination and consumers who are not at fault are not harassed or subject to duress. The 6th Respondent Board is a state organ and a public utility that produces and supply electrical energy. Electrical energy in the present context, is indispensable for human life and the society would be put to severe hardships if these services are not made available. The large scale production of the said source of energy and the supply of the same is the virtual monopoly of the 6th Respondent Board save for the limited role played by LECO (Lanka Electricity Company). Any deficiency in service would lead to severe hardships on the society. To provide a service to all consumers without any discrimination and to provide safe and adequate service in a timely manner are the recognised duties of a public utility.

As Justice Sharvananda expresses the view that *"The powers of a public authority are essentially different from those of private persons. The whole conception of unfettered discretion, is inappropriate to a public authority, which is vested with powers solely in order that it may use them reasonably in the public interest"*. (Fundamental Rights In Sri Lanka A Commentry)

In the instant case, when the 1st Respondent was informed by the Petitioner of the fire that occurred at the premises and the damage to the electricity meter, he misused the discretion vested in him to the detriment of the Petitioner. He had

every opportunity of ascertaining the veracity of the Petitioner's version before taking any action. I can only conclude that rather than follow this basic procedure he chose to do otherwise to exploit the Petitioner's helpless position by demanding a bribe of Rs 100,000; greed before service.

Petitioner had averred in his Petition that one of his children were studying in the advanced level class. Depriving the Petitioner, of electricity would be disruptive of his family life, his personal life and his business.

It appears to me that it was for this reason that the Petitioner caved into the demands of the 1st Respondent.
Considering the above, I hold both the 1st and the 6th Respondent have violated the fundamental right of the Petitioner enshrined in Articles 12 (1) and 14 (1) (g) of the Constitution.

Although, Lord Diplock in the Privy Council decision in the case of *Maharaj* v. *The Attorney-General of Trinidad and Tobago,* No. 2 - [1979] A.C. 385, explained liability ***(contravention of constitutional rights)*** in the following words:

"This is not vicarious liability it is a liability of the State itself. It is not a liability in tort at all, it is a liability in the public law of the State which has been newly created"

I wish, however, to quote with approval the pronouncement made by Justice Fernando in *Saman v. Leeladasa and another 1989 1 SLR page 1.*

"The Constitution protects fundamental rights against infringements by all persons, and ***not only by the State,*** *I think that the question* ***whether such a right has been infringed by a Respondent, and if so, whether any other person is also***

liable in respect of such infringement, *must be determined by the same legal principles. The principles whereby an employer or a principal is to be made responsible for the act of an employee or agent have not been laid down in the Constitution, and hence must be determined by reference to other (statutory or common law) principles of our law those principles do not vary (except perhaps in terms of the State (Liability in Delict) Act). Questions relating to acts which are ultra vires or done in violation of prohibitions, do arise, but the common law principles are sufficiently virile and flexible to deal with these. I am conscious that the time limits fixed by Article 126 may create difficulties of proof of loss or damage, but the power of this Court under Article 126 (4) is extensive, and enables the Court to give appropriate directions (even after an infringement has been held to have been committed) to obtain the material necessary to quantify the loss or damage.A wrongful act - the invasion of a right, or the violation of a legally protected interest - causing pecuniary loss to the plaintiff, committed wilfully, is sufficient to establish liability in the Aquilian action ; in the modern law, patrimonial loss need not be proved where the object of the action is not to obtain compensation for harm done but to establish a right. An impairment of personality - the violation of those interests which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation, and whether it be a public or a private right - committed with wrongful intent establishes liability in the actio injuriarum ; patrimonial loss, as well as damages for mental pain, suffering and distress can be recovered (I). When the Constitution recognised the right set out in Article 11,* ***even if it was a totally new right, these principles of the common law applied, and the wrongdoer who violated that right became liable;*** *and his master, too, if the wrong was committed in the course of employment, (b) It was not necessary for a new delict to be created by statute or judicial decision.* ***The 1st Respondent is thus liable in respect of the infliction of cruel, inhuman and degrading treatment and punishment on the Petitioner, for which the State is also liable as it was inflicted***

in the course, and within the scope, of his employment under the State.(emphasis added)

I have already referred to some of the expenses the Petitioner had to bear due to the wrongful action of the 1st Respondent.

Justice Abdul Carder in the case of *Daramitipola RatnasaraThero v. Udugampola & Others* - (1983) 1 SR LR 461, 471 (with Justices,Wimalaratne, Ratwatte, Colin-Thome and Rodrigo, agreeing) held :

"In my view this is a serious violation of the fundamental rights of a citizen of this country which-calls for the award of substantial damages. A mere declaration without more in the form of some penalty . . . will not deter such future abuse of fundamental rights of citizens.This Court does have the power to grant such relief or make such directions as it may deem just and equitable in the circumstance in terms of Article 126 (4) of the Constitution".

All attendant facts and circumstances considered, I direct the 1st Respondent to pay personally, a sum of Rs.725,000 (seven hundred and twenty five thousand) and the 6th Respondent Board to pay a sum of Rs.400,000 (Four hundred thousand) as compensation to the Petitioner whilst the State is directed to pay a sum of Rs, 25,000/- to the Petitioner.

All payments to be made within four months of today.
I am also of the view that this is a fit instance where the 6th Respondent ought to have conducted an inquiry into this matter. We leave it open to the 6th Respondent Board to take whatever action necessary in accordance with the applicable rules and regulations as there is no material before this court to determine what they are.

Petitioner is entitled to the cost of this application.

JUDGE OF THE SUPREME COURT

JUSTICE SISIRA J DE ABREW

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ANIL GOONERATNE

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution

1. A.A. Sarath
   83/15, Wijithapura Mawatha,
   Mahakandara,
   Madapatha.

2. M.L.T. Ananda,
   Pettawatta,
   Korawela,
   Welipenna.

3. S.M.N.Kumarasinghe,
   13, Bulagala,
   Dambulla.

4. Y.A.A.C. Kumara,
   114/1, Madelgamuwa,
   Gampaha.

5. U.S. Liyanage,
   623/6/A, Jaya Mawatha,
   Hospital Garden,
   Homagama.

6. S.Siva Kumar,
   D7/6,
   Thannimale, Undugoda,
   Kegalle.

7. A.T. Jayantha Premakumara,
   174/1/E,
   Sri Dharmawansa Mawatha,
   Weragampita,
   Matara.

8. S.S.B.D.H. Jagath Jayawardana,
   2/20, Nagaha Landa,
   Baduragoda Road,
   Kurikotuwa, Veyangoda.

9. B.K. Gunarathne,
   21, Olugamthota,
   Balangoda.

10. A.R.M.Kiyasdeen,
    Common Road,
    Addalachanai.

11. H.M.A.S.B. Herath,
    'Chandana', Waduressa,
    Bandarakoswaththa.

12. U. Jayawardana,
    Madiliya,
    Udagama,
    Atabage.

13. H.C.S. Nishantha,
    203, Polwatta Road,
    Uduwawala,
    Polonnaruwa.

14. M.V.Shelton Ananda,
    276/2/B,
    Mount Paradise 2,
    Gurudeniya, Kandy.

15. B.W.A.J.B.M. Baranagala,
    A69, Baranagala,
    Moronthota.

16. P.H. Rathnasiri,
    152, Madawela,
    Harispaththuwa.

17. M.N. Mahayaya,
    43, Bohingamuwa,
    Kuliyapitiya.

18. D.D.U.S. De Alwis,
    61, Moragalla Road,
    Nugaliyadda,
    Thalathu-oya.

19. M.D.U.K. Wedanda,
    Kumarapaya,
    Wedanda,
    Demataluwa, Kurunegala.

20. L.R.W. Perera,
    76, Yasarathna Tennekoon Mawatha,
    Kandy.

21. E.G.I. Dharmapriya,
    125, Kannamgoda,
    Hikkaduwa.

22. K.W.K. Jayakody,
    'Sampatha',
    Kahatagahawatta,
    Godakanda, Galle.

23. R.M.S.S. Rathnayake,
    Siyambalangamuwa Watta, Gonagama Road, Siyambalangamuwa,
    Maspatha.

24. G.A.M.S. Wijekoon,
    472/2. Hokandara Road,
    Pannipitiya.

Petitioners

S.C. (F.R.) Application . 661/2012

Vs.

1. Commissioner General of Excise,
   Department of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

2. P.W. Rajapakshe,
   Commissioner of Excise,
   (Administration/Human Resources),
   Department of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

3. W. Withanage,
   Deputy Commissioner of Excise,
   (Administration),
   Department of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

4. Secretary,
   Ministry of Finance and Planning,

The Secretariat,
Colombo 1.

5. Secretary,
Ministry of Public Administration and
Home Affairs,
Independence Square,
Colombo 7.

6. Director-General
Establishments,
Ministry of Public Administration and
Home Affairs,
Independence Square,
Colombo 7.

7. Dr. Dayasiri Fernando,
Chairman,

7A. D.Dissanayake,
Chairman,

8. Palitha M. Kumarasinghe, P.C.,

8A. A.W.A. Salam

9. Sirimavo A. Wijeratne

9A. V.Jegarajasingham,

10. S.C. Manapperuma,

10A Nihal Seneviratne,

11 . Ananda Seneviratne,

11A. Dr. Prathap Ramanujam,

12. N.H. Pathirana

12A. S. Ranugge,

13. S. Thillanadarajah,

13A. D.L. Mendis,

14. M.D.W. Ariyawansa,

14A. Sarath Jayathilaka,

15. A. Mohamed Nahiya,

15A. Dhara Wijayatileke,

All Members of the
Public Service Commission,
No. 177, Nawala Road, Narahenpita,
Colombo 05.

16. H.M.G. Senevirathne,
    Secretary,
    Public Service Commission,
    No. 177, Nawala Road, Narahenpita,
    Colombo 05.
17. B.R.U. Jayalath,
18. W.R. Ranajeewa,
19. S.Yadavan,
20. R.A.N.T. Ramanayaka,
21. H.M.T.K.S. Bandara,
22. W. Dharmasiri Perera,
23. D.T.H.W.D. L. Bandara,
24. K.M.A.S. Kumarasinghe,
25. K.A.M.B. Divulkumbura,
26. G.H.M.C. Amaranayaka
27. W.A.D.A. Harshanath,
28. K.K.N. Ranjan,
29. G.R.S. Weerasinghe,
30. S.G.P. Nishantha,
31. W.A.P. W.K. Wickramarachchi
32. G.R.S. Ihalagama
33. S. Jananananda,
34. K.M. Nishantha,
35. H.L.K. Samantha,
36. W.M.R. Najith Singh,
37. A.G.W. Alwis,
38. K.P.J.S. Karunanayaka,
39. K.A.S. Kumarasiri,
40. N. Logalingam,
41. R.M.A.S. Rathnayaka,
42. V.D.M. Dilshan,
43. S. Yogaraja,
44. P. Sri Bawan,
45. K.H.A.K. Silva,
46. S. Naweswaran,
47. H.S.N. Munidasa,
48. M.D. Marasinghe,
49. H.J.B. Ekanayaka,
50. A.G.A. Rasik,
51. P.G.M. Gunasekara,
52. M.A.S. Sirithunga,
53. M.T.P. Cooray,

54. J.P. Surasena,
55. W.A.B. Lanka,
56. V.A.V.C. Hemapala,
57. P.G. Raveendra Kumara,
58. R.M. Vijaya Bandara,
59. C.P.S. Handavitharana,
60. C.M.S. I.A. Chandrasekara,
61. R.N.A.M.Y. S.B. Warakagoda
62. S.M.A.B. Samarakoon,
63. N.D.U. Gunasekara,
64. T.M.R. Tennakoon,
65. R.M.B. Ranasinghe,
66. T.U. Peiris,
67. K.B. Chandrasiri,
68. R. Nesakumar,
69. S.P. Wijerathne,
70. T. Weerathunga,
71. A.P. Kurukulasuriya,
72. A.M.D. Nilanthi,
73. V.Thiruchelvam,
74. G.W.M.S.B. Walisundara,
75. M.T. Abdeen,
76. M. Sathyaseelan,
77. K.A.D.S. Kothalawala,
78. S.R.L.A.S. Priyadarshani,
79. Y.C. Abeyrathna,
80. M.V. Nilmini,
81. U.B. Chandrasiri,
82. J.P.M. Sandaraj,

All C/o. The Department of Excise,
No. 34,W.A.D. Ramanayake Mawatha,
Colombo 02.

83. The Attorney General,
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.

Respondents

BEFORE **:** K. SRIPAVAN,C.J.
S.E. WANASUNDERA, P.C., J.,
P. JAYAWARDENA, PC.,J.

COUNSEL : Sanjeewa Jayawardena, PC. with Nilshantha Sirimanne and Ms. Lakmini Warusawithana instructed by Amarasuriya Associates for the Petitioners.

Rajitha Perera, SSC for the 1st – 6th, 7a – 15a and 83rd Respondents. Mahendra Kumarasinghe for the 17th – 67th, 69th, 71st, 72nd, 74th – 77th and 79th – 82nd Respondents.

ARGUED ON : 30/03/2016

WRITTEN SUBMISSIONS FILED ON : 29/04/2016 by the Petitioners
28/04/2016 by the 1st Respondent
29/04/2016 by 17th -67th , 71st , 72nd , 74th – 77th and 79th – 82nd Respondents

DECIDED ON : **14.07.2016**

K. SRIPAVAN, C.J.,

The 1st and 2nd Petitioners were employed as "Excise Guards" in the Department of Excise in 1991 and were promoted to the post of "Excise Corporal" in 1996. The 3rd to 17th Petitioners have been employed as "Excise Guards" from June 1998 and the 18th to 24th Petitioners have been employed as "Excise Guards" in the Department of Excise from June 2001. The Petitioners claim that they were confirmed in their posts after completing three years of service from their respective dates of appointment.

The Petitioners seek, inter alia, declarations that :-

(a) the promotions granted by the 1st Respondent to the 17th to 62nd Respondents and/or 63rd to 82nd Respondents to the post of "Excise Sergeants" with effect from 19.10.2012 were illegal and null and void; and

(b) the purported scheme of recruitment and/or amended marking scheme under which the promotions to the post of "Excise Sergeants" were granted by the 1st Respondent with effect from 19.10.2012 as contained in Clauses 06 and 07 of **P4** were illegal and null and void.

The Court on 24.01.2013 granted leave to proceed for the alleged violation of the Petitioners' fundamental rights enshrined in Article 12(1) of the Constitution.

Learned Senior State Counsel and the Counsel appearing for the 17th to 67th, 71st, 72nd, 74th to 77th and 79th to 82nd Respondents raised an objection of time bar in invoking the jurisdiction of this Court in their written submissions. However, the Petitioners in Paragraph 24 of the Petition states thus:-

> *"On or about 22/10/2012, the Petitioners became aware that the marking scheme contained in the draft scheme of recruitment, which had been forwarded in December 2008 for approval by the 1st Respondent to the Public Service Commission through the Director-General of Establishments, is not the marking scheme that is contained and/or reflected in the said notice published by the 1st Respondent dated 12/05/2011* ***(P4).***
>
> *A copy of the letter sent by the Director-General of Establishments to the Public Service Commission, dated 12/02/2009, which contains his recommendations in respect of the said draft scheme, is annexed hereto marked* ***P5*** *and pleaded as part and parcel hereof."*

The Petitioners invoked the jurisdiction of this Court on 19.11.2012. The Petitioners also challenge the promotions made to the post of "Excise Sergeants" with effect from 19.10.2012. Thus, the Petitioners' applications filed on 19.11.2012, challenging the promotion is well within the time limit of one month, as the list containing the promotees was published on 23.10.2012.

The 1st Respondent in his Affidavit dated 10.06.2013 at Paragraph 26 states as follows:-

(a) *I re-iterate the averments contained in paragraphs 16,18,22 and 23 hereof and state that the marking scheme to referred to in the Notice marked P4 have been duly approved;*

(b) *I further re-iterate that the draft Scheme of Recruitment marked* ***1R11/P6*** *was not applied in respect of the said promotions advertised by the said Notice marked P6 as the said scheme has not been approved as yet;*

(c) *In such circumstances there was no requirement to obtain the approval or recommendations of the Director General of Establishments or any other authority to publish the Notice marked P4 to take action thereunder;*

(d) *In view of the* ***large number of vacancies that had arisen (67), it was imperative to take action expeditiously to fill such vacancies*** *in order to avoid a disruption in the work and functioning of the Excise Department.*(emphasis added)

Learned Senior State Counsel in the written submission took up the position that the marking scheme **P4** was duly approved by the Ministry of Finance and Planning which was the duly constituted Appointing Authority at the relevant time as the Public Service Commission was not functioning during that time. The 1st Respondent in fact re-iterates this position in Paragraph 16 (e) of his Affidavit as well.

However, the Petitioners at paragraph 19 of their Affidavit state that Applications for the post of "Excise Sergeants" were called for by notice dated 12.05.2011 marked **P4.** At Paragraph 28, the Petitioners state that "they have just become aware and have reasonable cause to believe that the purported marking scheme and/or the scheme of recruitment reflected in **P4** has been neither recommended by the Director General of Establishments nor approved by the Public Service Commission."

This bare statement of the Petitioners, without indicating with sufficient documentary proof as to how they become aware that **P4** was not duly approved by the Public Service Commission, operates as a bar to challenge the validity of **P4.** In fact, the 1st Respondent at Paragraph 23 of his Affidavit states that all applicants including the Petitioners, were duly informed of the applicable marking scheme with the publication of the notice marked **P4** as far back as 12.05.2011. In these circumstances, the Court considers the notice marked **P4** as the valid scheme of recruitment and the notice marked **P4** cannot be challenged in these proceedings as the Petition was filed on 19.11.2012 well after the one month period stipulated in Article 126(2).

It was contended on behalf of the Petitioners in the course of the hearing, that even if the Public Service Commission was defunct at the relevant time, and assuming that the Cabinet of Ministers had duly delegated the functions of the Public Service Commission to a particular official in the Ministry of Finance and Planning, no such document establishing the delegation has been produced by the 1st Respondent. The Cabinet of Ministers cannot

certainly delegate the functions of the Public Service Commission to the "Ministry of Finance and Planning" which has several officers. The Court should know the particular official to whom the functions of the Public Service Commission had been delegated, and whether such official had properly exercised the said power or function. The document marked **1R7** on which the First Respondent relies has been signed by the Deputy Secretary to the Treasury, for and on behalf of the Secretary, Ministry of Finance and Planning. A copy of **1R7** has been sent to the Secretary, Public Service Commission for his information. The letter **1R7** was sent pursuant to a request made by the First Respondent as evidenced by **1R5** to the Secretary, Public Service Commission, through the Secretary, Ministry of Finance and Planning.

Learned Presidents' Counsel for the Petitioners, without prejudice to the foregoing submissions argued that the total number of vacancies that had been approved for promotion by the document dated 20.09.2009 marked **1R7** was limited to a total of 21. (i.e. 15 under the "written examination" category and 06 under the "merit" category) and therefore promoting a total of 67 persons to the post of Excise Sergeant was unlawful and/or devoid of any lawful approval/authority. It is on this basis, Counsel submitted that 46 persons in excess of the purported approval granted by **1R7** had been promoted arbitrarily and in serious violation of the law. Learned Counsel indicated to Court that the Petitioners are more concerned of the promotions made in excess of the approval granted by **1R7.**

By the letter dated 30.04.2009(**1R5)** the First Respondent has informed the Public Service Commission that by notice dated 11.09.2008 applications were called from "Excise Corporals" and "Excise Guards" to fill 21 vacancies in the post of "Excise Sergeants". Therefore, even if it is assumed, that the purported approval dated 10.09.2009 (**1R7)** was lawful and valid, the said approval was granted by the Deputy Secretary to the Treasury to fill 21 vacancies and no more. The Marking Scheme **P4** provides, inter alia, that 70% of the total number of vacancies in the "Excise Sergeant" cadre to be filled on the basis of marks obtained at a "written examination" and the balance 30% of the vacancies therein to be filled on the "merit" based criteria. Thus, out of the 21 vacancies, 15 vacancies had to be filled in terms of the "written examination" category and the balance 6 vacancies had to be

filled in terms of "merit" category. The approval given by the Deputy Secretary to the Treasury by letter dated 10.09.2009 (**1R7)** confirms this position. Any appointments made in excess of what has been approved by **1R7**, violates the Rule of Law. The Constitution enshrines and guarantees the Rule of Law and Article 12(1) of the Constitution is designed to ensure that each and every authority of the State, acts bona fide within the limits of its power and when the Court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the Court to afford justice to the persons who suffered in consequence of abuse or misuse of such power by the State officials. This Court in *Perera* Vs. *Cyril Ranatunga, Secretary Defence and Others* (1993) 1 S.L.R. 39 at page 51 dealt with the elements of the Rule of Law in the following manner :-

> "……*that the Rule of Law means, inter alia, (a) that everything must be done according to law (b) that Government should be conducted within the framework of recognized rules and principles which restrict discriminatory power…. that the Supreme Court is empowered to review and strike down any exercise of discretion by the Executive which exhibits discrimination and for that purpose has jurisdiction to invalidate any rule which would enable an authority to discriminate* ***or act arbitrarily.****"* (emphasis added)

Thus, it is well settled that the absence of arbitrary power is the first essential component by the Rule of Law. The Rule of Law from this point of view, means that decisions should be made, based on known principles and rules and such decisions should be predictable whereby a citizen should know where he stands in relation to such decisions. If the action of the Executive is not based on valid relevant principles applicable alike to all similarly situate and is based on extraneous or irrelevant considerations it would be denial of the doctrine of equality enshrined under Article 12(1) of the Constitution. It may even amount to "mala Fide" exercise of power.

Hence, when the approval was given by letter dated 10.09.2009 **(1R7)** to fill 21 vacancies, the First Respondent cannot ignore such approval and proceed to effect 47 promotions under the "written examination" category and 20 promotions under the "merit" category, totaling 67 promotions, on the scheme marked **P4.**

Learned Presidents' Counsel for the Petitioner drew the attention of Court, the case of *Narangoda and Others* Vs. *Kodituwakku, Inspector General of Police and Others* (2002) 1 S.L.R. 247, where Fernando, J., (with Gunasekere, J. and Yapa, J. agreeing) on 11.02.2002 quashed all promotions made by the Public Service Commission in pursuance of the interviews held in March and May 2000 (other than the 32nd Respondent) in view of the serious flaws found in the interview and selection process.

Considering the totality of the circumstances, I am of the view that any attempt to interfere with the process of selection in contravention of the approval granted by **1R7** was neither permissible nor desirable otherwise. I therefore, set aside all the appointments made to the post of "Excise Sergeants" in excess of the quota fixed by the document marked **1R7** dated 10.09.2009.

I therefore declare that the act of the 1st Respondent in making promotions contrary to **1R7** violates the fundamental rights of the Petitioners enshrined in Article 12(1) of the Constitution. I further declare that the promotions effected in excess of the quota fixed by **1R7** and contained in the documents marked **P-7(a)** and **P-7(b)** are illegal and null and void. Each one of the Petitioners is entitled for costs in sum of Rs. 5000/- payable by the First Respondent. Thus the Petitioners are entitled to receive a total sum of Rs. 120,000/- as costs. The First Respondent may seek the approval of the Public Service Commission to fill the balance vacancies in terms of the approved scheme of recruitment and to take action to fill such vacancies as expeditiously as possible following a transparent procedure.

CHIEF JUSTICE.

S.E. WANASUNDERA,P.C.,J.

I agree.

JUDGE OF THE SUPREME COURT

P. 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 and in terms of Articles 17 and 126 of the Constitution

1. M.M. Ravi Perera,
   No. 56A, Pahalagama,
   Gampaha.

2. K.Ramesh Kumar,
   No. 165A, New Kalmunai Road,
   Kallady,
   Batticaloa.

3. W.L.D. Wijesekara,
   No. 259B, West Doranagoda,
   Udugampola.

4. D.P. Hathurusingha,
   No. 564, Yakkaduwa,
   Ja-Ela.

Petitioners

S.C. (F.R.) Application . 663/2012

Vs.

1. Commissioner General of Excise,
   Department of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

2. P.W. Rajapakshe,
   Commissioner of Excise,
   (Administration/Human Resources),
   Department of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

3. W. Withanage,
   Deputy Commissioner of Excise,
   (Administration Department of Excise,,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.

4. The Secretary,
   Ministry of Finance and Planning,
   The Secretariat,
   Colombo 01.

5. Minister of Public Administration and
   Home Affairs,
   Independence Square,
   Colombo 7.

6. Director-General
   Establishments,
   Ministry of Public Administration and
   Home Affairs,
   Independence Square,
   Colombo 7.

7. Dr. Dayasiri Fernando,
   Chairman,
7A. Retired Hon. Justice Sathya Hettige, P.C.,
   Chairman.

8. Palitha M. Kumarasinghe, P.C.,
8A. S.C. Mannapperuma

9. Sirimavo A. Wijeratne
9A. Ananda Seneviratne

10. S.C. Manapperuma,
10A. N.H. Pathirana

11 . Ananda Seneviratne,
11A. S. Thillanadarajah

12. N.H. Pathirana
12A. A. Mohamed Nahiya

13. S. Thillanadarajah,
13A. Kanthi Wijetunge

14. M.D.W. Ariyawansa,
14A. Sunil S. Sirisena

15. A. Mohamed Nahiya,
15A. Dr. I.M. Zoysa Gunasekera
   All Members of the
   Public Service Commission,
   No. 177, Nawala Road, Narahenpita,
   Colombo 05.

16. T.M.L.C. Senarathna,
    Secretary,
    Public Service Commission,
    No. 177, Nawala Road, Narahenpita,
    Colombo 05.

17. T. Upali Peiris,
    Udugampola Road, Kotugoda.

18. Hemantha Karunathilaka,
    15/24, Senanayake Place,
    Padukka.

19. Terrence Weeratunga,
    65B, Temple Road,
    Ekala, Ja-Ela.

20. B.M.S. Bandara,
    Eagalla,
    Wadhakada.

21. W.H.M. Ozna Perera,
    Uduwela,
    Ibbagamuwa.

22. J.A.U.S. Chandrasiri,
    Kalapaluwawa,
    Rajagiriya.

23. S.W. Jayantha Chandana,
    Madurawela,
    Anguruwathota.

24. W.T.P. Premasiri,
    Ranala Road,
    Habarakada.

25. Morandage Kanti Violet Jayasinghe,
    Manana,
    Mahagam.

26. W.K.M. Samarathunga,
    223/1,
    Gangabada Road,
    Palathota,
    Kaluthara-North.

27. T.M.M.B. Tennakoon,
    Puttalam Road,
    Thittawella, Halpane.

28. T.M. Rewatha Tennakoon, Halpane Road,
    Giriulla.

29. A.A. Shantha Kumara, Madelgamuwa,
    Gampaha.

30. Imyhamy Mudiyanselage
    Nimal Karunasena,
    131, Wijaya Rajadahana,
    Meerigama.

31. N.D.U. Gunasekara,
32. T.M.R. Tennakoon,
33. R.M.B. Ranasinghe,
34. T.U. Peiris,
35. K.B. Chandrasiri,
36. R. Nesakumar,
37. S.P. Wijerathne,
38. T. Weerathunga,
39. A.P. Kurukulasuriya,
40. A.M.D. Nilanthi,
41. V.Thiruchelvam,
42. G.W.M.S.B. Walisundara,
43. M.T. Abdeen,
44. M. Sathyaseelan,
45. K.A.D.S. Kothalawala,
46. S.R.L.A.S. Priyadarshani,
47. Y.C. Abeyrathna,
48. M.V. Nilmini,
49. U.B. Chandrasiri,
50. J.P.M. Sadaraj,

All C/o. The Department of Excise,
No. 34,W.A.D. Ramanayake Mawatha,
Colombo 02.

51. The Attorney General,
    Attorney General's Department,
    Hulftsdorp Street,
    Colombo 12.

Respondents.

7A. D. Dissanayake, Chairman,

8A. Retired Hon. Justice A.W.A. Salam

9A. V. Jegarajasingham,

10A. Nihal Seneviratne,

11A. Dr. Prathap Ramanujam,
12A. S. Ranugge,

13A. D.L. Mendis,

14A. Sarath Jayathilaka,

15A. Dilhara Wijayatileke,

All Members of the
Public Service Commission,
No. 177, Nawala Road, Narahenpita,
Colombo 05.

Substituted Respondents

BEFORE **:** K. SRIPAVAN,C.J.
S.E. WANASUNDERA,P.C.' J.,
P. JAYAWARDENA, PC.,J.

COUNSEL **:** Sanjeewa Jayawardena, PC. with Nilshantha Sirimanne and Ms. Lakmini Warusawithana instructed by Amarasuriya Associates for the Petitioners.

Rajitha Perera, SSC for the 1st – 6th, 7a – 16a and 51st Respondents.
Mahendra Kumarasinghe for the 31th –35th , 37th, 39th, 40th, 42-45th and 47th -50th Respondents.

ARGUED ON : 30/03/2016

DECIDED ON : **14. 07.2016**

K. SRIPAVAN, C.J.,

On 30th March 2016, all Counsel agreed that the Order that would be made in S.C.F.R. 661/12 would apply to this case as well.

Since the Court has made an Order in S.C. F.R. 661/12 allowing the application, the same Order would apply to this case as well.

I therefore declare that the act of the First Respondent in making promotions contrary to **1R7** violates the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution. I further declare that the promotions effected in excess of the quota fixed by **1R7** are unlawful and null and void. Each one of the Petitioners is entitled for costs in a sum of Rs. 5,000/- payable by the First Respondent. Thus, the Petitioners are entitled to receive the total sum of Rs.20,000/- as costs.

The First Respondent may seek the approval of the Public Service Commission to fill the balance vacancies in terms of the approved Scheme of Recruitment and to take action to fill such vacancies as expeditiously as possible following a transparent procedure.

CHIEF JUSTICE

S.E. WANASUNDERA,P.C.,J.

I agree.

JUDGE OF THE SUPREME COURT

P. JAYAWARDENA, P.C.,J

I agree.

JUDGE OF THE SUPREME COURT

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

SC (FR) Application No. 389/2015

In the matter of an Application under Section 12/126 of the Constitution

Mohamed Niswer Ismail
102/114, Madara Uyana,
4th Lane, Mattegoda.

PETITIONER

Vs.

1. Engineer Y. Abdul Majeed
Acting Director General of Irrigation
Department of Irrigation,
230, P.O. Box 1138
Bauddhaloka Mawatha,
Colombo 7.

1A. Engineer Saman S.L. Weerasinghe
Director General of Irrigation
Department of Irrigation
230, P.O. Box 1138
Bauddhaloka Mawatha,
Colombo 7.

2. Engineer R.M.W. Rathnayake
Secretary,
Ministry of Irrigation and Water Resources Management,
No. 11, Jawatte Road,
Colombo 5.

3. J. Dadallage
Secretary, Ministry of Public Administration & Management
Independence Square,
Colombo 7.

4. S. S. Hettiarachchi
Director General of Pensions
Department of Pensions
Maligawatte Secretariat,
Maligawatte, Colombo 10.

5. Justice Sathya Hettige P.C.,
6. Ananda Seneviratne
7. N. H. Pathirana
8. S. Thillandarajah
9. A. Mohamed Nahiya
10. Kanthie Wijetunge
11. Sunil S. Sirisena
12. Dr. I. M. Zoysa Gunasekera

(All members of the Public Service Commission)

No. 177, Nawala Road,
Narahenpita, Colombo 5.

5A. Dharmasena Dissanayake
6A. A. Salam Abdul Waid
7A. D. Shirantha Wijayatilaka
8A. Dr. Prathap Ramanujam
9A. V. Jagarasasingam
10A. Santi Nihal Seneviratne
11A. S. Ranugge
12A. D. L. Mendis
12B. Sarath Jayathilaka

(All current members of the Public Service Commission)

No. 177, Nawala Road,
Narahenpita, Colombo 5.

SUBSTITUTED RESPONDENTS

(in the room of the 5th – 12th Respondents)

13. Hon. Attorney General
Attorney General's Department
P. O. Box 502,
Colombo 12.

RESPONDENTS

BEFORE: Priyasath Dep P.C., J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: M. Y. M. Faiz instructed by
R.A.N.C. Gunatillake for Petitioner

Parinda Ranasinghe D.S.G. for the Respondents

ARGUED ON: 07.07.2016

DECIDED ON: 20.09.2016

GOONERANTE J.

The Petitioner as pleaded in his petition dated 14.10.2015 retired from the public service as an Irrigation Engineer on 14.05.2014. His last

appointment in the public service as stated, he held the post of Divisional Engineer, Ratnapura. His main complaint is that he has not been paid a pension as from May 2014, and the prayer to the petition inter alia prays for the payment of commuted gratuity in a sum of Rs. 686,383.20. This court on or about 20.01.2016 granted leave to proceed for the alleged violation of Fundamental Rights enshrined under Article 12(1) of the Constitution.

Petitioner entered the Public Service as a Technical Assistant Class III in the Middle Level Technical Service (MLTS) of the Irrigation Department on or about March 1982 (P4). The body of the petition gives details of his gradual promotions in the Public Service (P5, P6 & P7). It is pleaded that Petitioner was placed as a Special Grade Engineering Assistant since 19.09.1998. The service particulars are contained in document P11. The letters P12, P13 indicates the appointment of the Petitioner as an Acting Engineer and P13/P14 as Irrigation Engineer and posted to Ratnapura.

Perusal of the material placed before court, it appears that letter P15, of 12.08.2014, provides some details as to why the Petitioner's pension was not paid. In the said letter Petitioner states that a request was made by him through the Colombo Zonal Director of Irrigation to retire him from the public service from 14.05.2014, on reaching the age of retirement. The said letter indicates that on making inquiries from the Head Office he became aware that

an incident occurred in the year 2008 (audit query) when he was Acting Divisional Irrigation Engineer in Wellawaya and a charge sheet was to follow against the Petitioner. Petitioner's position is that he was not made aware of same since 2008 and until his retirement the authorities concerned had not taken any steps and as such he was subjected to unfair treatment (attention drawn to P18).

Section 12(1) of the Minutes of Pensions reads thus:

> Where the explanation tendered by a public servant against whom, at the time of his retirement from public service, disciplinary proceedings were pending or contemplated in respect of his negligence, irregularity or misconduct is considered to be unsatisfactory by the competent authority, the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs may either withhold or reduce any pension , gratuity or other allowance payable to such public servant under these Minutes.

In this application the petitioner attempts to demonstrate that there is a violation of the requirements embodied in Section 12 of the Minutes on Pension. If that be the case this court would be in a better position to ascertain whether there was due compliance with the provisions contemplated under Section 12 of the Minutes on Pension, by searching intensively into the items of material presented to this court with this application. In this regard it would be necessary to find answers to the following questions.

(a) Was the Petitioner informed of any contemplated disciplinary action against him during the period of his service or at any time of his retirement on 14.05.2014.

(b) Were disciplinary proceedings contemplated by the authorities concerned during the period of service of the Petitioner.

(c) Whether a charge sheet was issued within one month of the Petitioner's retirement as referred to in Public Administration Circular No. 29/90 (Section 1.12 of annex 3).

(d) In the facts and circumstances of this case is a normal retirement under the Minutes of Pensions possible?

The Respondents no doubt rely on two letters marked 1R1 & 1R2. The letter 1R1 dated 14.10.2010 is a letter despatched to Secretary, Ministry of Irrigation and Water Management by the Director General of Irrigation. The said letter refer to a preliminary investigations carried out by the Internal Auditors and decision had been taken to forward charges against the Petitioner and a draft charge is annexed to 1R1. The Draft charges are not made available to this court as stated therein.

Letter 1R2 is a letter by Director General, Irrigations dated 23.12.2014, addressed to Secretary to Ministry of Irrigations and Water Resources seeking approval to retire the Petitioner for the reason stated in the said letter. The reasons are noted as follows:

1. It is stated inter alia that the Petitioner on reaching the age of retirement had requested the authorities to retire him from service.
2. There had been two disciplinary proceedings initiated against the Petitioner. One being the proceedings initiated where he was serving in the Welioya project for which proceedings were terminated on a warning given to Petitioner. The other was when he was Acting Engineer for the Hambegamuwa Irrigation Scheme. In this connection draft charges were ready and Ministry approval was sought by several letters, (Paragraph 5 of 1R2) for which there was no response. As such the Irrigation Department could not take steps to retire the Petitioner nor could the Department confirm the Petitioner in the post of Engineer.

The letter 1R2 in paragraph 6 states that charge sheet could not be issued to the Petitioner and as such steps could not be taken to retire the Petitioner. Therefore the Director, Irrigation recommend to the Secretary of the relevant Ministry to retire the Petitioner under the normal retirement.

This court is mindful of the fact that the learned Senior Deputy Solicitor General has very honestly and correctly placed the above material notwithstanding the fact that letter 1R2 does not favour the state. No doubt the Hon. Attorney General in his expected duty of a quisi judicial role thought it fit to resist this application of the Petitioner. Nevertheless letter 1R1 demonstrate some form of compliance as regards the requisites in Section 12 of the Minutes on Pensions, letter 1R2 on the other hand no doubt display the indifferent

careless, non-seriousness attitude to official work of the authorities concerned. The long delay to serve the charge sheet on the Petitioner dated 03.09.2015 is no excuse. It is almost 5 months after the date of retirement of the Petitioner. I wonder whether an unseen hand caused the long delay deliberately.? If so who should be held responsible?

A pension could be withheld or reduced in terms of Section 12(1) only where

(a) at the time of retirement from the public service, disciplinary proceedings were "pending or contemplated; and

(b) where the explanation offered by the public servant is unsatisfactory.

In the case in hand there was no disciplinary proceedings pending, and the Petitioner is not bound to explain. State takes up the position that disciplinary proceedings were contemplated in view of letter 1R1. There is absolutely no justification to contemplate such disciplinary proceedings and keep it going for a period of over 6 years and issue a charge sheet which was also served on the Petitioner after about 5 months, after petitioner's retirement from the public service. In the context and circumstances of the case in hand this court takes the view that the Petitioner has been unfairly treated and should not be made to suffer for the lapses on the part of the officials, as stated above. The manner in which Section 12 of the Minutes on Pensions is to be applied is set out in Public Administration Circular 29/90. I will include in this Judgment only the relevant portions in the Circular that concerns both parties.

"In the case of a public officer against whom disciplinary proceedings were pending or contemplated (i.e where a Charge Sheet has not been served) at the time of retirement from the public service.

> 1.12 Where a *prima facie* case has been established the Disciplinary Authority should issue a Charge Sheet within one month of the date of retirement. The officer should be informed that it is in his own interest to give a full and complete explanation, as he would have no opportunity of offering any further explanation. He should be given two weeks to submit his explanation.

It is very clear that the procedure laid down in PA Circular 29/90, More particularly the above Clause 1:12 had not been observed by the officials. This is a case where a draft charge was not considered and approved by the Secretary to the relevant Ministry/and or the officials in authority, for over 6 Years. It could have been done during the period the Petitioner was, in the government service, if the officials took their job seriously. A slack situation of this nature of those in authority cannot be condoned. If I may incorporate the very words contained in the Judgment delivered by *Dr. Amarasinghe J. in Wilbert Godawela Vs. S.D. Chandradasa and Other 1995 (2) SLR at pg. 341,* the case in hand would be better understood. It states:

> That Circular is entitled "Expediting the award of the pensions". It explains the difficulties experienced by public servants as a result of delays in the payment of pensions caused by the absence of relevant information, and prescribes a two-stage procedure for payment to obviate those difficulties. Paragraph 2.111 states that "a temporary pension of 70% of the full pension will be paid within one month from the date of retirement of an officer so that there will be no break in his income." It is further provided that. "a full pension will be paid not more than three months after retirement". The Circular, which was issued under the hand of the Secretary, Ministry of Public Administration, concludes with the following words: "Heads of Departments

> and all officers dealing with pensions are kindly requested to treat the question of the rapid disposal of pensions with humanity and sympathy. The persons with which this circular concerns itself are colleagues, who, in the large majority of cases have served in the Public Service honourably and faithfully. We should make every effort to ensure that their last years on this earth are made free from want and financial burden. I do hope, therefore you will give me your utmost co-operation in implementing these proposals…"

What is emphasized above is a rapid disposal of pensions with humanity and sympathy. The words and phrases referred to above leaves no room for delays and lapses, on the part of the officials, though PA Circular 29/90 is a guide to public servants and which has no force of law. As such I do not think in all the facts and circumstances of the case in hand State need to get over the difficulty of an apparent lapse by resorting to a legal maxim of 'directory' or 'mandatory' which is familiar to interpretation of statutes. The learned Deputy Solicitor General argued that a delay in serving the charge sheet is no bar as words used in para 1:12 of PA Circular 29/90 is directory.

I have to finally observe that in the matter before us the Petitioner was not officially intimated or put on notice of any kind of disciplinary proceedings to be initiated against him at the time he retired from service by operation of law (14.05.2014), and letter 1R2 provides details in this regard. Whatever decision taken by the officials were very late and was done only after Petitioner's retirement on 14.05.2014. I have discussed above the application of Section 12 of the Minutes on Pensions and the governing Public Administration

Circular 29/90, and the failure of those responsible to adhere to same. It is the view of this court that Petitioner's pension had been withheld unreasonably, and in an arbitrary manner. No doubt he has been subjected to unfair treatment. Section 12 of the Minutes on Pension and the governing Public Administration Circular had not been correctly observed and applied correctly in so far as the Petitioner is concerned. Therefore he has been denied the equal protection of the law guaranteed by the Constitution. I make order setting aside the decisions made against the Petitioner to withhold or reduce his pension, without prejudice of the rights of the state under any law.

Petitioner would be entitled to relief as per sub paragraphs (c), (e) & (g) of the prayer to the petition.

Relief granted as above.

Application allowed with costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Nalin Perera J.

I agree.

JUDGE OF THE SUPREME COURT

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

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

Kaluhath Ananda Sarath de Abrew,
No. 4/1, Attidiya Road,
Ratmalana.

Petitioner

Vs.

S.C. F/R No. 424/2015

1. Chanaka Iddamalgoda,
Chief Inspector of Police,
Head Quarters Inspector,
Police Station,
Mount Lavinia.

2 Wanasinghe,
Chief Inspector,
Officer in Charge of the Murder Investigation Unit,
Criminal Investigation Department,
Colombo 01.

3 B.R.S.R. Nagahamulla,
Director,
Criminal Investigation Department,
Colombo 01.

4. N.K. Illangakoon,
Inspector General of Police,
Police Headquarters,
Colombo 01.

5. Karunathilake,
Officer-in-Charge,
Public Complainants Unit,
Criminal Investigation Department,
Colombo 01.

6. C.W. Wickremasekera,
Assistant Superintendent of Police,
Criminal Investigation Department,
Colombo 01.

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

Respondents

BEFORE	**:**	K**.** Sripavan, C.J. P. Jayawardena, P.C., J. U. Abeyrathne, J.
COUNSEL		Manohara de Silva, P.C. with Uditha Egalahewa P.C., U.D.Z. Gunawardena, Daya Guruge, Luxman Amarasinghe, David Weeraratne, Ranga Dayananda and Arinda Wijesurendra for the Petitioner. Y. Kodagoda, P.C., A.S.G. with Yuresha de Silva, S.S.C. and Janaka Bandara, S.S.C. for the Respondents. J.C. Weliamuna with Pulasthi Hewamanne for the aggrieved party (Complainant)
ARGUED ON	:	04.12.2015, 08.12.2015 and 11.12.2015
WRITTEN SUBMISSIONS)	**:**	17.12.2015 by the Petitioner
FILED ON)	**:**	21.12.2015 by the Respondents.
DECIDED ON	**:**	11.01.2016

PRIYANTHA JAYAWARDENA, PC, J.

The Petitioner preferred this application in terms of Article 126 (1) of the Constitution alleging violation of his fundamental rights guaranteed under Articles 12(1), 13(3) and 13(5) of the Constitution as the 7th Respondent has taken a decision to indict the Petitioner under Section 365B of the Penal Code as amended and also has issued instructions to prosecute the Petitioner in the Magistrate's Court of Mount Lavinia under Section 314 of the Penal Code as amended, without conducting a fair and proper investigation.

The Petitioner, inter-alia, prayed for a declaration that the 7th Respondent violated or infringed and/or will imminently infringe the fundamental rights of the Petitioner as guaranteed by Articles 12(1), 13(3) and 13(5) of the Constitution by issuing instructions to prosecute the Petitioner for an alleged offence under Section 314 of the Penal Code in the Magistrate's Court of Mount Lavinia in addition to the Petitioner being indicted in the High Court of Colombo.

The Petition and the Submissions made by the Counsel for the Petitioner

The Petitioner stated in his Petition that he was looking for a domestic servant to take care of his wife and daughter and therefore placed an advertisement in the Silumina newspaper of 14.06.2015 to find a domestic servant. Consequent to the said advertisement the Petitioner received response on the very next day from one female named Mathotage Nilusha Damayanthi (hereinafter referred to as the Complainant) who visited the Petitioner's residence and sought employment. She had mentioned that she was living in separation from her husband and four grown up children. As the Petitioner was in dire need of domestic help to take care of his wife and daughter the Petitioner was compelled to employ her after obtaining personal details furnished by her in her own hand writing although she had no character certificates or testimonials of her past service or conduct.

The Petitioner stated that on or about 27.06.2015, a B-Report had been filed bearing No. B/2049/15 by the aforementioned 1st Respondent in the Magistrate's Court of Mount Lavinia informing Court that the Petitioner was, inter-alia, involved in the committing of an offence under Sections 314, 316 and 486 of the Penal Code. The Petitioner stated that the aforementioned B-Report had been filed on a purported complaint received from the aforementioned domestic maid employed by him.

The Petitioner in paragraph 12 of the Petition further stated that the said B-Report, inter-alia, stated that:-

i. The Complainant was employed by the Petitioner on 15.06.2015 when she responded to an advertisement placed by the Petitioner in the Silumina newspaper dated 14.06.2015'.
ii. her duties involved taking care of the Petitioner's mentally unstable child and the Petitioner's sick wife,
iii. the Complainant was confined to the Petitioner's residence and was not allowed to go out,
iv. the Petitioner's child frequently assaulted the Complainant and the Petitioner was a silent observer of these assaults,
v. thereafter on several days, the Petitioner had struck the Complainant with his pistol and as a result she suffered swelling on those areas including

around her eye and the Complainant stated that she was purportedly beaten severely at 2 p.m. on 26.06.2015'

vi. consequent to this assault she had difficulty in her vision,

vii. further, as a result of the said assault, her chest bore scratch marks,

viii. in the circumstances, the Complainant had run away from the Petitioner's house and made a complaint to the Police, consequent to which she had admitted herself to hospital,

ix. the said crime constitutes an offence under Section 314, 316 and 486 of the Penal Code.

x. Landebandarage Dilip Nuwan Kumara [Civil Defense Guard T 75920] of the Mount Lavinia Police Station, in his statement had stated that he was on duty from 10 p.m. on 26.06.2015 until 6 a.m. the following day and that he heard a shout at about 10.30 p.m. from inside the Petitioner's house, but similar shouts were heard regularly and therefore he did not take any notice of the same.

The Petitioner further stated that the aforementioned B-Report did not contain any allegation that the Petitioner in anyway sexually harassed or assaulted the Complainant as falsely alleged by the Complainant subsequently.

The Petitioner also stated in paragraph 16 of the Petition that :

i. on 16.06.2015, the Complainant had sent a short message (SMS) to the Petitioner's mobile phone stating that;

"Sir, baba cool drink genath dunnenehe kiyala Kaden apita Naraka wachana walin banala Gahanna enawa, room ekata gihin dora wahagannawa. Mokada karanne, mata nam bayai."

The Petitioner stated that the said 'SMS' was sent by the Complainant on the very next day she is said to have been sexually harassed by the Petitioner.

ii. on 21.06.2015, the Complainant had sent another short message (SMS) to the Petitioner's mobile phone stating that;

"*I am sorry sir, I want to go home. I can't stay here"* (sic)

From her mobile number 076609559. The Petitioner immediately

telephoned the Complainant to inquire the reason for sending the said message and the Complainant informed the Petitioner that the Petitioner's daughter was quarrelling with the Complainant and that she cannot bear any further.

Thereafter, on the night of the 26th of June, 2015, the Complainant left the Petitioner's premises being annoyed with the Petitioner and on the same night had lodged the aforesaid complaint with the 1st Respondent against the Petitioner. The Petitioner stated that a further statement had been recorded from the said Complainant on or about 30.06.2015 by the 2nd Respondent, falsely introducing further offences and/or graver charges alleged to have been committed by the Petitioner as evinced by the Report dated 30.06.2015 filed by the 2nd Respondent.

The Petitioner further stated that according to the evidence placed before the Magistrate's Court of Mount Lavinia, the alleged sexual abuse had taken place on 15.06.2015. However, the Complainant did not make such allegation on the first opportunity when she made the complaint on 26.06.2015. It was the position of the Petitioner that the allegation of sexual abuse is totally belated and has been made after the Criminal Investigation Department (CID) took over the investigation.

The Petitioner claimed that he was not against an investigation being conducted into the purported complaint made against the Petitioner, but there was no fair and exhaustive investigation conducted. The Petitioner stated that he instructed his Attorneys-at-Law to make representations to the Attorney-General against any decision to indict the Petitioner without first properly concluding a comprehensive investigation wherein statements from all material witnesses are recorded in order to confirm the veracity of the complaint before arriving at a decision to institute criminal proceedings against the Petitioner. Accordingly, by letter dated 20.07.2015, the Petitioner's Attorneys-at-Law requested for an interview with the Attorney General.

Subsequently, President's Counsel on behalf of the Petitioner made representations to the Attorney General to have the statements of several material witnesses referred to by the Petitioner recorded in order to properly determine whether criminal proceedings should

be instituted against the Petitioner.

In the meantime, the Petitioner's Attorney-at-Law filed motion dated 11.09.2015 and moved the Learned Magistrate of Mount Lavinia to direct the CID to obtain statements from witnesses set out therein to verify the statement of the Petitioner and to submit a further report to the Magistrate's Court. The witnesses set out in the motion include;

1) Mr. Damith, Manager, Interfashion Textile Shop, No. 129/28, Old Galle Road, Moratumulla.
   To establish that on the 24th of June, 2015, the Petitioner, the Petitioner's wife and daughter took the complainant for shopping to the aforesaid textile shop and bought clothes approximately in a sum of Rs. 15,000/- for the complainant as well;

2) Dr. Harsha Gunasekera, Neurologist, Jayawardenapura Hospital.
   To establish that on the evening of the 18th of June 2015, 19th of June 2015 and 22nd of June 2015 when the Petitioner's daughter was taken for medical examination to Norris Clinic, Nawaloka Hospital, Durdans Hospital and Sri Jayawardena Hospital, the complainant accompanied the Petitioner, Petitioner's wife and daughter.

3) Dr, Ruwan Ekanayake, Cardiologist, Norris Clinic, Colombo 08.
   To establish that on the evening of the 18th of June 2015, 19th of June 2015 and 22nd of June 2015 when the Petitioner's daughter was taken for medical examination to Norris Clinic, Nawaloka Hospital, Durdans Hospital and Sri Jayawardena Hospital, the complainant accompanied the Petitioner, Petitioner's wife and daughter.

4) Prof. Saman Gunathilake,Consultant Neurologist, Durdans Hospital.
   To establish that on the evening of the 18th of June 2015, 19th of June 2015 and 22nd of June 2015 when the Petitioner's daughter was taken for medical examination to Norris Clinic, Nawaloka Hospital, Durdans Hospital and Sri Jayawardena Hospital, the complainant accompanied the Petitioner, Petitioner's

wife and daughter.

5) Mr. Sarath de Silva, No. 9, 4th Lane, Ratmalana.
   To establish the demeanour of the complainant towards the Petitioner as he accompanied the Petitioner, Petitioner's wife, daughter and the complainant on 22.06.2015 when they visited the Sri Jayawardenapura Hospital .
6) Mr. Wijesena, proprietor of Flower Plant Nursery, Piliyandala Road, Katubedda.
   To establish that the Petitioner, together with the Petitioner's daughter and the complainant purchased several flower pots for the Petitioner's residence.
7) A detailed bill from Dialog Company in respect of all the incoming and outgoing calls and SMS between 14.06.2015 and 30.06.2015 by the mobile number of the Complainant bearing No. 0766095559. [Vide Paragraph 51 of the Petition]

Accordingly, the Learned Magistrate of Mount Lavina made order on 18.09.2015 directing the prosecution (C.I.D.) to take necessary action and submit a further report on 09.11.2015.

Learned Additional Solicitor General however argued that the direction made by the Learned Magistrate on 18.09.2015 did not amount to an order made, to record the statements of the aforesaid witnesses but an order for the C.I.D. to inform the next step in respect of the request of the Petitioner, after consulting the Attorney-General.

When the case was called again on 09.11.2015, a further report was filed by the C.I.D. informing Court that the request of the defence has been brought to the notice of the State Counsel handling the file and the advice of the Attorney General is awaited. The Court therefore adjourned the matter till 11.01.2016 for a further report to be filed by the C.I.D. informing the advice of the Attorney General.

Submissions made by the Counsel for the aggrieved Party

The Counsel for the aggrieved party made an application to Court that he be heard in terms of Article 134(3) of the Constitution as his client's rights may be affected as a result of the outcome of this application. His application for a hearing was allowed by Court. In his submissions Counsel urged that a serious crime has been committed against the Complainant and there was sufficient material to institute criminal proceedings and the Attorney General was required under the law to institute criminal proceedings against the

Petitioner.

Submissions made by the Counsel for the Respondents

During the course of the submissions the Learned Additional Solicitor General, handed over the file maintained at the Attorney General's Department to be perused by the Bench along with the file containing the statements recorded from various persons by the Police in respect of the investigation.

The minutes in the said file revealed that the file had been allocated to a Senior State Counsel to study the facts and to submit a report based on the said facts. The Senior State Counsel recommended that the Petitioner be charged under Section 365B and Section 486 of the Penal Code as amended, read with Section 44(b) of the Fire Arms Ordinance.

Thereafter, the matter had been considered by a Senior State Counsel, Senior Additional Solicitor General, Additional Solicitor General, Solicitor General and the Attorney-General. The Attorney-General, after considering the views of the five officers of the Department took a decision to prefer an indictment under Section 365 (b)(2)(A) of the Penal Code and charge the Petitioner under Section 314 of the Penal Code in the Magistrate's Court.

Powers of the Attorney-General

The statutory framework seems to envisage a significant role for the Attorney-General during the pre-trial investigation stages. Section 393(5) of the Code of Criminal Procedure Act as amended imposes upon the Superintendent or the Assistant Superintendent in charge of any Police division the duty to report to the Attorney-General. The Attorney-General's advice can be given *ex mero motu* or on an application. The Attorney-General has the right, by virtue of Sections 393(2) and 393(3) to summon any officer of the State or of a Corporation or of the Police to attend his office with the relevant books and documents to facilitate the exercise of his powers to advise State Departments, Public Officers in any criminal matter of importance or difficulty. It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. What is not permitted by Section 393

should be taken as forbidden and struck down by Court.

Can the decision of the Attorney-General be reviewed in these proceedings ?

In an application in respect of an infringement or imminent infringement of a fundamental right the focus shall be on the executive and administrative action whereby the Petitioner's fundamental right which is claimed infringed or about to be infringed by the decision of the Attorney-General without properly concluding an investigation. (Vide Paragraph 52 of the Petition). The question therefore is whether the Attorney-General when exercising his statutory powers abused the discretion conferred on him by acting in bad faith or with an ulterior motive or whether he has reached a decision based on objective facts.

While I agree with the submissions made by the Learned President's Counsel for the Petitioner that every power must be exercised by the authority fairly, reasonably and lawfully, the mere fact that the statements of witnesses of the defence has not been recorded as claimed by the Petitioner cannot make the decision of the Attorney-General unsustainable. The Attorney-General's decision to indict the Petitioner may be vitiated if a conclusion is arrived not on an assessment of objective facts or evidence but on subjective satisfaction. The reason is where the decision is based on subjective satisfaction if some of the statements turn out to be irrelevant, it would be impossible for a Superior Court to find out which of the statements are relevant or irrelevant, valid or invalid had brought about such satisfaction. But in a case where a conclusion is based on a collective assessment such difficulty would not arise. If it is found that there was evidence before the Attorney-General and such evidence had been considered by several officers of the said Department and a final decision was reached by the Attorney-General based on the views of the said officers, the Superior Court would not interfere and would hesitate to substitute its own view in place of the Attorney-General.

It may be appropriate to quote the following passage from H.W.R. Wade on Administrative Law – 11th Edition at Page 259.

> "*An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The*

principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the Courts are rigorous in requiring the power to be exercise by the precise person or body stated in the statute…."

The Attorney-General's Departmental file handed over to this Court on a confidential basis, shows that the decision to indict the Petitioner in the High Court and to charge him under Section 314 of the Penal Code as amended, in the Magistrate's Court was arrived at after several Officers of the said department have gone through the I.B. extracts, the statements forwarded by the C.I.D. and the representations made by three President's Counsel on behalf of the Petitioner. The main concern of the President's Counsel was to record the statements from certain witnesses including several Medical Practitioners. On 14.10.2015, the Senior State Counsel brought to the notice of Attorney-General the concerns of the President's Counsel and made the following minute :-

"*It is highly illogical and unrealistic to say that the said Consultants observed the behavior of the victim in their busy schedule of rushing to the next patient in the private channeling que.* (sic).

If the suspect is so insisting of getting down the "required" witnesses to testify on his behalf, he can easily do so, at the trial stage whilst confronting the victim on the said issues during her testimony. The same principle applies to the Manager of the Textile Shop and the owner of the Plant Nursery as well."

The Attorney-General had considered the views expressed by the Senior State Counsel and having given his mind to it, decided not to record the statements of the said witnesses. The Court while anxious to safeguard Petitioner's fundamental right will not interfere with the decision taken by the Attorney-General unless there are cogent reasons to do so. The Petitioner is entitled to resist any unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion. It is a fundamental requirement of the rule of law, viewed as a safeguard against arbitrary power that decision makers act within the powers conferred on them by law and do not exceed those powers.

Article 12(1) of the Constitution states that "all persons are equal before the law and are entitled to the equal protection under the law." The Constitution therefore accepts the right of equality and equal protection. Article 13(3) of the Constitution recognizes the need for a fair trial. Sri Lanka has an adversarial system of justice which rests on the premise that the best way to ascertain the truth is for the parties to present their respective cases before a Judge or a jury who has to ascertain the truth from the presentations submitted by both sides. On the totality of the circumstances, I am unable to hold that the Attorney-General has violated the provisions contained in Section 393 of the Code of Criminal Procedure Act as amended.

Learned President's Counsel for the Petitioner heavily relied on the case of *Victor Ivon* Vs. *Sarath Silva*, *Attorney General & Another* (1998) 1 S.L.R. 340. At page 341 Fernando, J. noted as follows:-

> "*In order to determine the nature of the discretion to file an indictment, and whether it is reviewable, and if so, in what circumstances and to what extent, it is useful first to examine the discretion to grant sanction: because it is difficult to see on what principle the Attorney General could conclude that a prosecution was not warranted and therefore refuse to grant sanction, but nevertheless file an indictment. Let me begin with an extreme hypothetical case. If a person complains that he was criminally defamed at a public meeting, at which he was not present, and the only witness he has, as to the actual words spoken, is a person who is quite hard of hearing, could sanction be granted, without any further investigation, and without the statement of the accused having been recorded?* ***A decision to prosecute in such circumstances would be, prima facie, arbitrary and capricious, ….****" [emphasis added]*

The significant feature in *Victor Ivon's* case is that the Court exercising its just and equitable jurisdiction, declined to review the decision of the Attorney-General to forward an indictment, even after the Court came to a finding that the alleged lack of proper investigation resulted in the reports not being made available to the Attorney-General. The Court noted at page 349, that "*… it does not appear, prima facie the lapse on the part of the State Counsel in not calling for further material has caused any prejudice whatsoever in regard to two of the three allegations. Errors and omissions do occur, and by themselves are not proof that the impugned decision was arbitrary, capricious, perverse or*

unreasonable on intended to interfere with the Petitioner's freedom of speech."

The case in hand is different from the hypothetical case referred to in *Victor Ivon's* case . In this case, the statement of the accused was recorded, investigation was conducted and the statements of several persons were recorded and all information together with the statements were sent to the Attorney-General in terms of Section 393(6) of Code of Criminal Procedure Act. Having considered the said material furnished, the Attorney-General made the following minute in the Departmental file on 30.10.2015 –

> *"I am satisfied that if charges under Section 365B(1)(a) and Section 314 are preferred against the suspect there is a realistic prospect of conviction…."*(sic)

The Court cannot therefore hold that the power or discretion of the Attorney-General had been exercised in violation of the fundamental right of the Petitioner.

The Attorney-General acts as the sentinal of professional Code of Conduct and is required to protect the rights and privileges of the lawyers as well as the purity and dignity of the profession. He is the "keeper of the conscience" and the guardian of the interests of the members of the public. Where the legislature has confided the power on the Attorney-General to forward indictment with a discretion how it is to be used, it is beyond the power of Court to contest that discretion unless such discretion has been exercised mala fide or with an ulterior motive or in excess of his jurisdiction. Upon the available material the Court is unable to conclude that the Attorney-General has exercised his discretion upon unreasonable grounds and in an arbitrary and capricious manner.

The Supreme Court of Nigeria on 25th February 1983 in the case of *The State (Appellant)* Vs. *S.O. Llori and Others (Respondents)* by a seven judge decision made the following observation with regard to the powers and functions of the Attorney-General.

> *".....As the Chief Law Officer of the State, the Attorney-General has always exercised the powers with regard to the public interest, interests of justice and the need to prevent abuse of legal process. But what happens is that he takes sole responsibility in coming to a decision, in the exercise of his discretion, as to what amounts to public interest, interests of justice and the need to prevent abuse of legal process. It is in his taking this responsibility, that he is a master of his house and a law unto himself.*

Whether or not he makes any consultation is a matter peculiarly within his discretion, but whatever decision he arrives at is his responsibility."

The aforesaid observation applies with equal force to this application as well. It clearly explains that in order to secure proper administration of justice, the Attorney-General must be left to exercise his discretion according to his own judgment, neither acting on any rule of thumb nor taking into account any other consideration other than what is provided by law and the public interest. Certainly, the Petitioner's remedy is not to ask this Court to question or review the exercise of the powers of the Attorney-General unless the Attorney-General has exercised his powers in bad faith or with an ulterior motive or in excess of his powers.

For the reasons adduced above, the Court is unable to hold that the Attorney-General in exercising his discretion acted in bad faith or with an ulterior motive or in excess of his powers.

Leave to proceed is therefore refused.

JUDGE OF THE SUPREME COURT.

K SRIPAVAN, C.J.

I agree.

CHIEF JUSTICE

U. ABEYRATHNE, J.

I agree.

JUDGE OF THE SUPREME COURT.

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

SC/HC/LA/ 22/2014
Commercial High Court Colombo
Case No: 267/2009/MR

In the matter of an appeal in terms of Part 1C of the Supreme Court Rules 1990.

V.V. Ramanathan & Company (Pvt) Ltd.
Hospital Circular Road,
Vavunia.

PLAINTIFF

Vs.

1. National Housing Development Authority
   No. 34, Sir Chittampalam A. Gardiner
   Mawatha, Colombo 2.

2. The Attorney General
   Attorney General' Department
   Colombo 12.

DEFENDANTS

AND BETWEEN

National Housing Development Authority
No. 34, Sir Chittampalam A. Gardiner
Mawatha, Colombo 2.

DEFENDANT-PETITIONER

Vs.

V.V. Ramanathan & Company (Pvt) Ltd.
Hospital Circular Road,
Vavunia.

PLAINTIFF-RESPONDNET

AND NOW

National Housing Development Authority
No. 34, Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

DEFENDANT-PETITIONER-PETITIONER

V.V. Ramanathan & Company (Pvt) Ltd.
Hospital Circular Road,
Vavunia.

PLAINTIFF-RESPONDNET-RESPONDENT

BEFORE: Priyasath Dep P.C., J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: Shavindra Fernando P.C., Senior A.S.G. with
Ravindra Pathirana D.S.G. for the Defendant-Petitioner-Petitioner

S. Mithrakrishnan with N. Mahendra
for Plaintiff-Respondent-Respondent

WRITTEN SUBMISSIONS TENDERED ON:

31.03.2016 – By the Plaintiff-Respondent-Respondent
20.04.2016 – By the Defendant-Petitioner-Petitioner

ARGUED ON: 27.04.2016

DECIDED ON: 22.09.2016

GOONERATNE J.

This was an action filed in the Commercial High Court, Colombo, based on a construction contract between the Plaintiff-Respondent-Respondent and the Defendant-Petitioner-Petitioner, the National Housing Development Authority. The plaint filed in the High Court indicates that on completion of the construction certain part payments had been made by the Defendant-Petitioner-Petitioner but action was filed on the balance sums due with interest as pleaded in the plaint. On the trial date (09.01.2012) the Defendant-Petitioner-Petitioner was absent and unrepresented. Accordingly the learned High Court Judge fixed the case for ex-parte trial and thereafter Judgment was entered against the Defendant-Petitioner-Petitioner on 30.03.2012. Inquiry was held to purge default in the High Court but after inquiry the learned Commercial High Court Judge by his Order X10 of 28.02.2014 refused to set aside the ex-parte Judgment.

The Defendant-Petitioner-Petitioner filed a Leave to Appeal Application in the Supreme Court. (bearing S.C. seal dated 11.04.2014). When this matter was taken up for support on 24.02.2016, the learned counsel for the Plaintiff-Respondent-Respondent raised a preliminary objection before the Supreme Court, as in the Journal Entry of 24.02.2016. However I would prefer

to examine the several journal entries prior to considering the preliminary objection. In a chronological order, the record bears the following.

1. Motion dated 10.11.2014 indicates the Attorney-at-Law for Respondent-Respondent-Petitioner's request to mention case on 27.05.2014, 23.05.2014 and 02.06.2014 to enable Deputy Solicitor General to support this application for Special Leave to Appeal.
2. 22.04.2014

   notice not tendered by Attorney at law for Petitioner

3. 27.05.2014

   Defendant-Petitioner-Petitioner and Plaintiff-Respondent-Respondent absent and unrepresented. Court makes no Order.

4. 05.08.2014 (minute to listing Judge)

   Refers to 'no Order' of court and moves to list the case on 10.06.2014, 08.06.2014 and 15.06.2014. Listing Judge makes Order to support with notice on 15.07.2014

5. 15.07.2014

   Senior counsel for Respondent not available D.S.G submits that his main complaint is from the refusal to vacate the ex-parte Order. Attorney on record was in fact hospitalised and seriously ill, as stated as an excuse.

   Court urges counsel for Respondent to consider a settlement of Petitioners proposal to pay a sum of Rs. 1.6 million as a settlement - matter fixed for support on 29.08.2014.

6. 29.08.2014

Both counsel moves for time to reach a settlement. Support on 31.10.2014

7. 31.10.2014

If settlement is reached parties agree to file a joint motion on

31.01.2015

8. 31.01.2015

Both counsel move to have this matter re-fixed. Support on 20.05.2015.

9. 20.05.2015

Counsel for Petitioner indisposed. Re-fixed for support on 23.07.2015

10. 23.07.2015

learned D.S.G moves for further time to consider an adjustment. Support on 04.11.2015

11. 04.11.2015 (Single Judge sitting)

No settlement. Re-fixed for support. A.S.G submits he needs to file amended caption. Support on 24.02.2016.

24.02.2016

The learned counsel for the Plaintiff-Respondent-Respondent raised the following preliminary objection.

"Is the Defendant-Petitioner's application misconceived in law in that the order in respect of which this application is made is a Judgment from which a direct appeal lies in terms of Section 88(2) of the Civil Procedure Code".

One month granted to file written submissions for both parties

Inquiry on 27.04.2016

27.04.2016

Order reserved.

A decision need to be made whether the said order is a Judgment from which a direct appeal lies or an order which requires to obtain Leave to Appeal from the Supreme Court. Both parties have filed written submissions on this point, and this court is mindful of such submissions.

The material made available to court no doubt indicates that an ex-parte Judgment (X6) was entered by the High Court. Thereafter the Defendant-Petitioner-Petitioner moved the High Court to purge the default and vacate the ex-parte Judgment. The High Court after inquiry made order (X10) refusing to set aside the ex-parte Judgment. At this point, I wish to observe that there is a growing tendency within the legal profession to contest and challenge orders and Judgments of courts by putting it in issue as to whether the pronouncement made by a court is an Order or Judgment. Perhaps clever counsel who serve his client would naturally attempt to do so to achieve the best result for his client notwithstanding the fact that the law is more or less settled and time tested. This has led to considerable confusion and hardship. Whatever it may be preliminary objection/question had been raised that Leave to Appeal is not available in the context and circumstances of the case in hand and more

particularly where default had occurred. It is necessary to examine the following provisions of the Civil Procedure Code in this regard, though such procedural law is very much familiar to those involved in civil litigation.

Section 88(1) and (2) reads thus:

No appeal against judgment for default but order setting aside or refusing to set aside judgment appealable.

(1) No appeal shall lie against any judgment entered upon default.

(2) The order setting aside or refusing to set aside the judgment entered upon default shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Court of Appeal.

Section 754(1) to (5) reads thus:

Mode of Preferring appeal.

(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 this Ordinance, for the purpose 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.

The proceedings before the High Court no doubt came to an end. High Court delivered an ex-parte Judgment. Thereafter the party concerned took steps to vacate the ex-parte order unsuccessfully. The last Order of the High Court Judge was the Order refusing to vacate the ex-parte Judgment (X10). As such the ex-parte Judgment and Order X10 stands, until set aside by a Superior Court. The Appellate procedure is a separate procedure which is a procedure governed by the Civil Procedure Code, High Court of the provinces (Special Provisions) Act and the Constitution of the country. As such order X10 is a final Order of the High Court which permits the ex-parte Judgment to stand as a Judgment of the High Court. In these circumstances Leave to Appeal is not available and the Order complained of is an appealable Order where the Civil Procedure Code requires the filing of Notice of Appeal and Petition of Appeal

within the stipulated time period as contained in the provisions of the Civil Procedure Code.

I would further emphasis that even the provisions contained in the High Court of the provinces (Special Provisions) Act No. 10 of 1996 contain similar provisions as in the Civil Procedure Code as stated above and X10 order should be deemed to be a Judgment in terms of Section 88(2) of the Civil Procedure Code. (Section requires that order shall be accompanied by a Judgement) Sections 5 & 6 of Act No. 10 of 1996 support my views and the appeal is a direct appeal to the Supreme Court. I note the following Sections of Act No. 10 of 1996.

5. (1) Any person who is dissatisfied with any judgment pronounced by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in any action, proceeding or matter to which such person is a party may prefer an appeal to the Supreme Court against such judgment, for nay error in fact or in law.

(2) Any person who is dissatisfied with any order made by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2 in the course of any action, proceeding or matter to which such person is, or seeks to be, a party, may prefer an appeal to the Supreme Court against such Order for the correction of any error in fact or in law, with the leave of the Supreme Court first had and obtained.

(3) In this section, the expressions “judgment” and “order” shall have the same meanings respectively, as in section 754 (5) of the Civil Procedure Code (Chapter 101).

6. Every appeal to the Supreme Court, and every application for leave to appeal under section 5 shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code (Chapter 101).

It is very clear and there is no doubt that Section 88(2) of the Code provides that the said order shall be accompanied by a Judgment adjudicating upon the facts, specifying the grounds upon which it is made and shall be liable to an appeal. Direct appeal lies to the Supreme Court from Order X10 which should follow from a Notice of Appeal filed within 14 days and a Petition of Appeal within 60 days from Order X10 dated 28.02.2014. Section 6 of Act No. 10 of 1996 fortify this position. It provides that every appeal and every application for Leave to Appeal shall be made as nearly as may be in accordance with the procedure contained in Chapter LVIII of the Civil Procedure Code. As such the preliminary objection is upheld.

It is very unfortunate to observe that even the time period specified by all the above statutes have also not been adhered to by the party concerned even if the court was to accept the argument of the Defendant-Petitioner-Petitioner. This court in any event is compelled to reject the application for Leave to Appeal as relief sought is misconceived. I have to add that several decided cases settled the question as regards a direct Appeal to the Appellate Court, vide *Wijeyanayake Vs. Wijeyanayake, Sriskantha's Law Reports Vol. V pg. 28; Bank of Ceylon Vs. Sirisena Fernando and Indrani Fernando. CA (LA) 125/80;*

A.S. Sangarapillai & Bros Vs. Kathiravelu, Sriskantha's Law Reports Vol. II Pg. 99; Leelawathie Vs. Ekanayake 2006 (3) SLR 155.

In all the above facts and circumstances the application for Leave to Appeal is rejected as application sought is misconceived. As such application is dismissed without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree

JUDGE OF THE SUPREME COPURT

Nalin Perera J.

I agree

JUDGE OF THE SUPREME COURT