SRI LANKA SUPREME COURT **Judgements Delivered (2017)**

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Judgments Delivered in 2017

14/ 12/ 17	SC FR Application No. 35/2016	1. Mohamed Hussain Hajiar Muhammad 5/4, Meda Mawatha Weligama. 2. M.H.T. Indrajith Priyadarshana Krishali Hiriketiya Road, Dikwella. 3. Bandula Wijesekera Sirimeda Medura Lelwala Neluwa. 4. Miyanawathura Ihala Gamage Sunil, Morawaka Road, Lelwala Neluwa 5. Daya Pushpakumara Hewa Battige Gunasandana Kamburugamuwa. 6. Lakshman Nirmal Samarasinghe Samaragiri Komangoda Thihagoda. 7. Sanath Hettiarachchi 'Nirmala' Kamburupitiya Road, Kirinda Puhulwella. 8. Abeywickrema Pahuruthotage Dayananda, Hanferd Rakwana Road Deniyaya. 9. Sunil Alladeniya 'Suhanda' Kaddugewatta, Deiyandara. 10. Ishwarage Mahinda, No. 3, Mananketiya Urubokka. 11. Sujeewa Wedage 'Gayana' Kapugama North Devinuwara. 12. Weerasuriya Mudiyanselage Sanjeewa Priyantha, 'Ranmini' Gathara Kamburupitiya. 13. Walliwala Gamage Nihal de Silva 'Siri Niwasa', Ihala Athuraliya, Akuressa. 14. Somasiri Weeraman Kadduwa Road, Malimbada Palatuwa. 15. I.D. Indunil Prasanga Jayaweera, 75, Yasabedda Road, Akuressa. 16. Hewa Halpage Charles Gunadasa, Pelagawawatte, Udupillagoda Hakmana. 17. Hewa KankanamgeWimal Priyajanaka No. 37, Ritrickpark, Kekanadura. 18. Rubasinghe Siriwardena Mahinda, 'Samanala' Alapaladeniya. Petitioners Vs. 1. Election Commission of Sri Lanka, Election Secretariat, Sarana Road, Rajagiriya. 2. Mahinda Deshapriya Chairman, Election Commission of Sri Lanka, Election Secretariat, Sarana Road, Rajagiriya. 3. N.J. Abeysekera PC,. Member 4. S. Ratnajeevan H. Hoole, Member, 3rd to 4th Respondents all at Election Commission of Sri Lanka, Election Secretariat, Sarana Road, Rajagiriya. 5. Faizer Mustapha, Minister of Local Government & Provincial Councils, Ministry of Local Government & Provincial Councils, 330, Dr. Colvin R. De. Silva Mawatha, Colombo 02. 6. Chandra Abeygunawardana Secretary, Weligama Urban Council; Weligama. 7. Mangalika Somakanthi Ratnaweera, Secretary, Dickwella Pradeshiya Sabha Dikwella. 8. Wanniarachchi Kankanamge Chandana Secretary, Thawalama Pradeshiya Sabha Thawalama. 9. Liyanage Premasiri Secretary, Neluwa Pradeshiya Sabha Neluwa. 10. Ranjani Lokuliyanage Secretary, Weligama Pradeshiya Sabha Weligama. 11. Hakmana Hewage Asanka Kumari Secretary, C/O: L. Thomson Secretary (covering up) ThihagodaPradeshiya Sabha Thihagoda. 12. Dikkumburage Dayaseeli Secretary, Kirinda Puhulwella Pradeshiya Sabha Kirinda Puhulwella 13. Mallika Dahanayake Secretary, Kotapola Pradeshiya Sabha Kotapola. 14. Agnes Christina Nirmala Jayawardana Secretary, Mulatiyana Pradeshiya Sabha Mulatiyana. 15. Liyanage Indra Premalatha Secretary, Pasgoda Pradeshiya Sabha Pasgoda. 16. Samaratunga Vidhanarachichige Karunasiri Secretary, Devinuwara Pradeshiya Sabha Devinuwara 17. Wimala Abeykone Secretary, Kamburupitiya Pradeshiya Sabha Kamburupitiya. 18. Kankanam Pathiranage Premawathie Secretary, Athuraliya Pradeshiya Sabha Athuraliya, 19. J.P.W.V.M.W.G.G. Almeida Secretary, Malimbada Sabha

14/ 12/ 17	SC Appeal 13/2016	Batagala Dona Dharmaratne Manike Accused-Appellant- Appellant Vs, Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent-Respondent
14/ 12/ 17	SC Appeal 45/2015	Ranasinghe Pedige Lional Subhasinghe, Kothwila Road, Ehaliyagoda. Plaintiff Vs, D.A.D. Engineering (Pvt) Ltd, No. 215/84, Bandaragama Road, Kesbewa, Piliyandala. Defendant And between D.A.D. Engineering (Pvt) Ltd, No. 215/84, Bandaragama Road, Kesbewa, Piliyandala. Defendant- Petitioner Vs, Ranasinghe Pedige Lional Subhasinghe, Kothwila Road, Ehaliyagoda. Plaintiff-Respondent And now between D.A.D. Engineering (Pvt) Ltd, No. 215/84, Bandaragama Road, Kesbewa, Piliyandala. Defendant-Petitioner-Appellant Vs, Ranasinghe Pedige Lional Subhasinghe, Kothwila Road, Ehaliyagoda. Plaintiff- Respondent-Respondent
14/ 12/ 17	SC/FR/ 487/2011	H.M.M. Fashan, Karaitivu, Ponparappi, Puttalam. Petitioner Vs. 1. S.D.A Borellessa, Secretary, Ministry of Home Affairs, Independence Square, Colombo 07. 1A. J.J. Rathnasiri, Secretary, Ministry of Home Affairs, Independence Square, Colombo 07 2. K.V.P.M.J. Gamage, Director General of Combined Services, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07. 3. Lathisha P. Liyanage, Director General of Combined Services, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07. 4. Jayantha Wijerathna, Chief Secretary, North Western Province, 1st Floor, Provincial Office Complex, Kurunegala. 5. N.H.A. Chithrananda, District Secretary, District Secretariat, Puttalam. 6. Ravindra Wikramasinghe, Divisional Secretary, Divisional Secretariat, Wanathavilluwa. 6A. Sanjeevani Herath, Divisional Secretary, Divisional Secretariat, Wanathavilluwa. 7. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents

14/ 12/ 17	SC FR 413/2013	Anura Gonapinuwala, 180, S.H. Dahanayake Mawatha, Galle. Petitioner Vs. 1. Sathya Hettige, Chairman, Public Service Commission. 2. S.C. Mannapperuma. 2. S.C. Mannapperuma. 3. Ananda Seneviratne. 4. N.H. Pathirana. 5. S. Thillanadarajah. 6. A. Mohamed Nahiya. 7. Kanthi Wijethunga. 8. Sunil S. Sirisena. 9. I.M. Zoysa Gunasekara. Members of the Public Service Commission, 177, Nawala Road, Narahenpita, Colombo 05. 2A. A. Salam Abdul Waid. 3A. D. Shirantha Wijayatilaka 4A. Dr. Prathap Ramanujam 5A. V. Jegarasasingam. 6A. Santi Nihal Seneviratne 7A. S. Ranugge 8A. D.L. Mendis 9A. Sarath Jayathilaka Members of the Public Service Commission, No. 177, Nawala Road, Colombo 05. 10. T.H.L.C Senaratne, Secretary, Public Service Commission, 177, Nawala Road, Narahenpita, Colombo 05. 10A. H.M.G. Senevirathne, Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, 11. J. Dadallage Secretary, Ministry of Public Administration, Provincial Council and Democratic Governance, Independence Square, Colombo 07. 11A. J.J. Rathnasiri, Secretary, Ministry of Public Administration and Management, Independence Square, Colombo 07. 12. R.P.P. Jayasingha, Director Engineering Services, Engineering Services Office, Ministry of Public Administration, Provincial Council and Democratic Governance, Independence Square, Colombo 07. 13. Hon. Attorney General, Attorney General's Department, Colombo 12. 14. H.W. Wijayarathna, Chairman of the Provincial Public Service Commission, Southern Province. 15. K.K.G.J.K. Siriwardana. 16. D.W. Vitharana. 17. Munidasa Halpandeniya. 18. Shreemal Wijesekara. Members of the Provincial Public Service Commission, Southern Province, 6th Floor, District Secretariat Building, Galle. 19. U.G. Vidura Kariyawasam, Secretary, Provincial Public Service Commission, Southern Province, 6th Floor, District Secretariat Building, Galle. 20. W.K.K. Athukorala, Chief Secretary – Southern Province, Chief Secretary Office, S.H. Dahanayake Mawatha, Galle. 20A. S.M.G.K. Perera, Acting Chief Secretary - Southern Province, Chief Secretary Office. Respondents
13/ 12/ 17	SC FR Application No. SC/ FR.361/201 5	Rev. Watinapaha Somananda Thero No.101, Sri Vajirasrama Buddhist Centre, Ananda Rajakaruna Mw, Colombo 10. Petitioner 1. Hon. Akila Viraj Kariyawawam Minister of Education, Ministry of Education, "Isurupaya" Pelawatta, Battaramulla. Sri Lanka 2. Mr. W. M. Bandusena, Secretary, Ministry of Education, "Isurupaya", Pelawata, Bataramulla. Sri Lanka. 3. Mr. S.U. Wijerathna The Additional Secretary, "Isurupaya",Pelawatta, Bataramulla. 4. G.R.Chandana Kumara Kadigamuwa No.136 D, Isuru Mawatha, Ellakkla. 5. Hon. Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12. Respondents

13/12/17	SC. Appeal.67/2015	Eliyadura Osman Weerasena Silva, No.4/3, Train Houses, Modera Moratuwa. Plaintiff VS. EliyaduraPadmaRanjani, No.126, Batuwita, Gonapola Junction. Defendant AND Eliyadura Padma Ranjani, No.126, Batuwita, Gonapola junction. Defendant-Appellant Vs. Eliyadura Osman Weerasena Silva No.4/3, Tain Houses, Modara, Moratuwa. Plaintiff-Respondent AND NOW Eliyadura Padma Ranjani, No.126, Batuwita, Gonapola junction. Defendant-Appellant-Petitioner Vs. Eliyadura Osman Weerasena Silva, No.4/3, Train Houses, Modera Moratuwa. Plaintiff-Respondent-Respondent
12/12/17	S.C (FR) Case No. 118/2013	Wijekoon Herath Mudiyanselage Nimal Bandara No. 20/4, Thekkawatta Road, Thennekumbura, Kandy. PETITIONER Vs. 1. National Gem and Jewellery Authority No. 25, Galle Face Terrace, Colombo 3. 2. Prasad Galhena 2A. Amitha Kumara Gamage 2B. Anura Gunawardena 2C. Asanaka Sanjeewa Welagedara Chairman and Chief Executive Office National Gem and Jewellery Authority No. 25, Galle Face Terrace, Colombo 3. SUBSTITUTED 2ND RESPONDENT 3. Sarath Samarakoon 3A. D.M Rupasinghe 3B. B.M.P.N.M. Wickramasinghe 4. Janaka Ratnayake 4A. A.K. Seneviratne 5. Chandra Ekanayake 5A. Bandula Egodage 5B. Ajith Perera 6. Nalaka Thiyambarawatta 6A. A.M. Puviharan 6B. Upali Suraweera 7. R.M Jayathilaka 7A. Navaratne Bandara Alahakoon 8. A.K Seneviratne 8A. Raja Pieris 9. T.H.O Chandrawansha 9A. Nevi Bandara Wegodapola 10. Dr. Nevi Gunawardena 10A. N. Godakanda Board of Directors National Gem and Jewellery Authority No. 25, Galle Face Terrace, Colombo 3. 11. Hon Attorney General Attorney General's Department Colombo 12. 12B. B.G Indika Kumudu Samaraweera 13. Chandra Kanthi Indira Malwatta 14. C.M.J.Y.P. Fernando 15. W. A. Chulananda Perera Board of Directors National Gem and Jewellery Authority No. 25, Galle Face Terrace, Colombo 3. RESPONDENTS
12/12/17	SC. Appeal 34/2015	The Democratic Socialist Republic of Sri Lanka COMPLAINANT Vs. Kattadige Amarasena ACCUSED AND BETWEEN Kattadige Amarasena ACCUSED-APPELLANT Vs. The Democratic Socialist Republic of Sri Lanka COMPLAINANT-RESPONDENT AND NOW BETWEEN Kattadige Amarasena ACCUSED-APPELLANT-APPELLANT Vs. The Democratic Socialist Republic of Sri Lanka COMPLAINANT-RESPONDENT-RESPONDENT

12/12/17	SC Appeal.243/14	Ranawaka Arachchige Brigette Alwis No.31/2, Kuruniyawatta Road, 2nd Lane, Avissawella Road, Wellampitiya. Plaintiff -Vs_ Allen Margret Wijethunga, No.81/9, Allen Mawatha, Dehiwala Defendant (deceased) Hettiarachchige Kusumalatha, No.81/9, Allen Mawatha, Dehiwala Substituted Defendant AND/BETWEEN Hettiarachchige Kusumalatha, No.81/9, Allen Mawatha, Dehiwala Substituted Defendant-Appellant Ranawaka Arachchige Brigette Alwis No.31/2, Kuruniyawatta Road, 2nd Lane, Avissawella Road, Wellampitiya. Plaintiff-Respondent NOW AND/BETWEEN Hettiarachchige Kusumalatha, No.81/9, Allen Mawatha, Dehiwala Substituted Defendant-Appellant- Petitioner -VS- Ranawaka Arachchige Brigette Alwis No.31/2, Kuruniyawatta Road, 2nd Lane, Avissawella Road, Wellampitiya. Plaintiff-Respondent-Respondent
11/12/17	SC /FR/ Application No 55/2016	Disapala Medagedara, No. 124/25, Veediya Bandara Mawatha, Nattandiya. And also at, National Livestock Development Board, Official Quarters, Welisara Farm, Welisara. Petitioner Vs, 1. National Livestock Development Board, No. 40, Nawala Road, Narahenpita, Colombo 05. 2. Prof. H.W. Cyril, Chairman, National Livestock Development Board, No. 40, Nawala Road, Narahenpita, Colombo 05. 3. D.U. Jayawardena, General Manager, National Livestock Development Board, No. 40, Nawala Road, Narahenpita, Colombo 05. 4. Mrs. T.D.S. Wasantha, Audit Superintendent, Auditor General's Department, Polduwa Road, Sri Jayawardenapura Kotte, Battaramulla. 5. W.C. Ranjan, No. 348/9 Maligathenna, Gurudeniya, Kelaniya. 6. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents
07/12/17	S.C(FR) No. 599/2011 .C(FR) No. 599/2011.C(FR) No. 599/2011.C(FR) No. 599/2011 .	Kanahipadi Kankanamge Nalin and 01 Others Petitioners Vs. Kamalsiri, Sergeant of Police 59558, Dodangoda Police Station and 07 Others Respondents

07/ 12/ 17	S.C.Appeal No. 211/2014	Magedera Gamage Jinapala Dasanayaka, No.12, Harmars Lane, Wellawatta. V. Magedera Gamage Nimal Dasanayaka (Deceased) 5(A) Hemasinghe Mudiyanselage Swarnalatha (After marriage) Dasanayaka. No.90, Koswatta Road, Nawala. AND Hemainghe Mudiyanselage Swarnalatha (After marriage) Dasanayaka, No.90, Koswatta Road, Nawala. 5A DEFENDANT-PETITIONER V. Nagan Sinnaiah No.142 1/1, Galle Road, Colombo 6. RESPONDENT AND Hemasinghe Mudiyanselage Swarnalatha (After marriage) Dasanayaka, No.90, Koswatta Road, Nawala. 5(A)DEFENDANT-PETITIONER-PETITIONER V. Nagan Sinnaiyah No.142 1/1, Galle Road, Colombo 6. RESPONDENT-RESPONDENT AND NOW BETWEEN Hemasinghe Mudiyanselage Swarnalatha(After marriage) Dasanayaka, No.90, Koswatta Road, Nawala. 5(A) DEFENDANT-PETITIONER-PETITIONER-APPELLANT V. Nagan Sinnaiyah No.142 1/1, Galle Road, Colombo 6. RESPONDENT-RESPONDENT-RESPONDENT
07/ 12/ 17	S.C. Appeal No. 103/2005	In the matter of an Application for Special Leave to Appeal Madampiti Hettiarachchige Cyril Norbet Tissera PLAINTIFF-JUDGMENT-CREDITOR PETITIONER-RESPONDENT-PETITIONER-APPELLANT Vs. Filicia Mary Magdaline Of No. 131, Negombo Road, Rilaulla, Kandana. SUBSTITUTED-DEFENDANT-RESPONDENT-PETITIONER-RESPONDENT-RESPONDENT
07/ 12/ 17	S.C (FR) No. 880/2009	Chief Inspector C.V. Weerasena No. 8A, 87, Jayawadana Gama Battaramulla. PETITIONER Vs. 1. Officer-In-Charge/Personnel 2nd Floor New Secretariat Building Colombo 1. 2. Deputy Inspector General/Personnel Range Police Headquarters, Colombo 1. 3. The Inspector General of Police Police Headquarters, Colombo 1. 4. Secretary, Ministry of Defence, Colombo 1. 5. Hon. Attorney General Attorney General’s Department, Colombo 12. RESPONDENTS

06/ 12/ 17	Supreme Court Appeal No.43/2012	M.H.Harison Officer in Charge Police Station Kuttigala, Kuttigala Complainant 1. Baranaduge Asanka No.635, Kachchigala Thunkama 2. Baranaduge Samantha Gunasiri 705, Kachchigala, Thunkama Accused G.Susantha No.19/A, Siyambalape South Siyambalape Claimant Registered Owner In the matter of a Revision application in terms of Article 138 of the constitution read with High Court (Special Provisions) Act No.19 of 1990 Ceylinco Leasing Corporation Limited Of No.97, Hyde Park Corner, Colombo 02 Now Head office at No.283, R.A.De Mel Mawatha Colombo 03. Claimant Absolute Owner Ceylinco Leasing Corporation Limited Of No.97, Hyde Park Corner, Colombo 02 Now Head office at No.283, R.A.De Mel Mawatha Colombo 03. Claimant Absolute Owner Petitioner Vs 1. M.H.Harison Officer in Charge Police Station Kuttigala, Kuttigala Complainant Respondent 2. Baranaduge Asanka No.635, Kachchigala Thunkama 3. Baranaduge Samantha Gunasiri 705, Kachchigala, Thunkama Accused Respondents 4. G.Susantha No.19/A, Siyambalape South Siyambalape Claimant Registered Owner Respondent 5. Hon. Attorney General Attorney General‟s Department Colombo 12. Respondent Ceylinco Leasing Corporation Limited Of No.97, Hyde Park Corner, Colombo 02 Now Head office at No.283, R.A.De Mel Mawatha Colombo 03. Claimant Absolute Owner Petitioner Vs 1. M.H.Harison Officer in Charge Police Station Kuttigala, Kuttigala Complainant Respondent Respondent 2. Baranaduge Asanka No.635, Kachchigala Thunkama 3. Baranaduge Samantha Gunasiri 705, Kachchigala, Thunkama Accused Respondents Respondent 4. G.Susantha No.19/A, Siyambalape South Siyambalape Claimant Registered Owner Respondent- Respondent 5. Hon. Attorney General Attorney General‟s Department Colombo 12. Respondent- Respondent AND NOW BETWEEN In the matter of an application for Special Leave to Appeal under Article 128(2) of the Constitution Ceylinco Leasing Corporation Limited Of No.97, Hyde Park Corner, Colombo 02 Now Head office at No.283, R.A.De Mel Mawatha Colombo 03. Claimant Absolute Owner Petitioner Petitioner- Petitioner Vs 1. M.H.Harison Officer in Charge Police Station Kuttigala, Kuttigala Complainant Respondent- Respondent Respondent 2. Baranaduge Asanka No.635, Kachchigala Thunkama 3. Baranaduge Samantha Guanasiri 705, Kachchigala, Thunkama Accused Respondent-Respondent[-Respondents 4. G.Susantha No.19/A, Siyambalape South Siyambalape Claimant Registered Owner Respondent Respondent - Respondent 5. Hon. Attorney General Attorney General‟s Department Colombo 12. Respondent -Respondent -Respondent

06/12/17	SC (LA)Appeal No. 70/2016	1. Gnanawathie Abeysinghe 2. Ruvini Sandamali Abeysinghe Both of 47, Depanama, Pannipitiya. PLAINTIFF Vs. 1. D. A. Yahampath 170, “Ranasiri” Horana Road, Kottawa, Pannipitiya. DECEASED – 1ST DEFENDANT 1A. Padukkage Dona Premalatha Gunawardena 2B. Yahampath Arachchige Don Kavinda Kanchuka 1C. Yahampath Arachchige Dona Nishani Namalika All of 170, “Ranasiri” Horana Road, Kottawa, Pannipitiya. SUBSTITUTED 1ST DEFENDANT 2. D. Mahinda Ranasinghe 45, Kottawa, Pannipitiya DEFENDANTS AND BETWEEN 1A. Padukkage Dona Premalatha Gunawardena 2B. Yahampath Arachchige Don Kavinda Kanchuka 1C. Yahampath Arachchige Dona Nishani Namalika All of “Ranasiri” No. 170, Horana Road, Kottawa, Pannipitiya. SUBSTITUTED 1ST DEFENDANT-APPELLANTS Vs. 1. Gnanawathie Abeysinghe 47, Depanama, Pannipitiya. 2. Ruvini Sandamali Abeysinghe Appearing by her Power of Attorney Holder Rathnamali Sirikanthi Abeysinghe Dissanayake. Both of 47, Depanama, Pannipitiya. PLAINTIFF-RESPONDENTS 2 D. Mahinda Ranasinghe 45, Kottawa, Pannipitiya 2ND DEFENDANT-RESPONDENTS AND NOW BETWEEN 1. Gnanawathie Abeysinghe 47, Depanama, Pannipitiya. 2. Ruvini Sandamali Abeysinghe Appearing by her Power of Attorney Holder Rathnamali Sirikanthi Abeysinghe Dissanayake. of 47, Depanama, Pannipitiya. PLAINTIFFS-RESPONDENTS-PETITIONERS Vs. 1A. Padukkage Dona Premalatha Gunawardena 2B. Yahampath Arachchige Don Kavinda Kanchuka 1C. Yahampath Arachchige Dona Nishani Namalika All of “Ranasiri” No. 170, Horana Road, Kottawa, Pannipitiya. SUBSTITUTED 1ST DEFENDANT-APPELLANTS-RESPONDENTS 3. D. Mahinda Ranasinghe 45, Kottawa, Pannipitiya 2ND DEFENDANT-RESPONDENT-RESPONDENT
05/12/17	S.C. (FR) No.629/2010	C. A. Piyadasa Mithurugama Road, Malaboda, Dodangoda PETITIONER Vs. 1. Mahinda Balasooriya Inspector General of Police, Police Headquarters, Colombo 01. 2. Udayakumara Headquarters Inspector of Police Matugama 3. Hon. Attorney General Attorney-General’s Department, Colombo 12. RESPONDENTS
04/12/17	SC. Spl. LA Application No :66/2017	1. Billingahawattegedara Karunaratne alias Raja Presently at Welikada Prisons 1ST ACCUSED- APPELLANT –PETITIONER -Vs- Hon. Attorney General Attorney General’s Department Colombo 12. COMPLAINANT-RESPONDENT- RESPONDENT

04/ 12/ 17	SC /FR/ Application No 43/2017	1. Paniyanduwage Saman, No. 110/2, Maha Ambalangoda, Ambalangoda. 2. Paniyanduwage Gigum Shavindra, No. 110/2, Maha Ambalangoda, Ambalangoda. (Appearing by his next friend and father, the above-mentioned 1st Petitioner - Paniyanduwage Saman, No. 110/2, Maha Ambalangoda, Ambalangoda) Petitioners Vs, 1. Hasitha Kesara Weththimuni, Principal, Dharmashoka Vidyalaya, Ambalangoda. 2. K.P. Dayaratne, Vice Principal, Dharmashoka Vidyalaya, Ambalangoda. 3. Dasan Nainduwawadu, 4. K.K. Kema Chandani, 5. Sujani Senaratne, 6. G.D. Nalaka De Silva, 7. Tharaka Maduwage, (All members of the Admissions Interview Board to Grade 1 of Dharmashoka Vidyalaya, Ambalangoda, and c/o. Dharmashoka Vidyalaya, Ambalangoda) 8. Francis Welage, Chairman, Admissions Appeal Board, Dharmashoka Vidyalaya, Ambalangoda 9. Shantha Ariyaratne, Chairman, Admissions Appeal Board, Dharmashoka Vidyalaya, Ambalangoda. 10. P.M. Vikum Priyalal, 11. K.A. Nishanthi, 12. Lushman Waduthanthri, 13. Ujith Indikaratne, 14. B. Anthony, (All of whom were members of the Admissions Appeals and Objections Board of Dharmashoka Vidyalaya, Ambalangoda) 15. Sunil Hettiarachchi, Secretary, Ministry of Education, “Isurupaya”, Pelawatte, Battarammulla. 16. S.P Chandrawathie, Zonal Director of Education, Zonal Education Office, Ambalangoda. 17. Y. Wickramasiri, Provincial Secretary of Education, Southern Province Provincial Ministry of Education, 2nd Floor, Talbert Town Shopping Complex, Dickinson Junction, Galle. 18. Hon. Attorney General, Attorney General’s Department, Colombo 12 Respondents
04/ 12/ 17	SC APPEAL 101/16	In the matter of an Appeal from the Civil Appellate High Court of Kurunegala. Kotagedera Liyanage George Patrick Perera, “Shanthi”, Ihala Katuneriya, Katuneriya. Plaintiff Vs Meththasinge Arachchige Mary Linette Fernando, Ihala Katuneriya, Katuneriya. Defendant AND BETWEEN Meththasinge Arachchige Mary Linette Fernando, Ihala Katuneriya, Katuneriya. Defendant Appellant Vs Kotagedera Liyanage George Patrick Perera, “Shanthi”, Ihala Katuneriya, Katuneriya. Plaintiff Respondent AND NOW BETWEEN Kotagedera Liyanage George Patrick Perera, “Shanthi”, Ihala Katuneriya, Katuneriya. Plaintiff Respondent Appellant 1A Warnakulasooriya Weerakuttige Mary Therese Fernando 1B Kotagedara Liyanage Disna Mariyam Geethani Perera 1C Kotagedara Liyanage Shanthi Kumar Perera All of, “Shanthi”, Ihala Katuneriya, Katuneriya. Substituted 1A, 1B and 1C Plaintiff Respondent Appellants Vs Meththasinge Arachchige Mary Linette Fernando, Ihala Katuneriya, Katuneriya. Defendant Appellant Respondent

03/12/17	SC APPEAL/185/15	Watagodagedara Mallika Chandralatha 88A, Ihagama, Madawala Harispattuwa Plaintiff Vs. 1. Hearath Mudiyanselage Punchi Banda Doranegama Road, Medawela Harispattuwa 2. Watagode Gedara Dhammika Ranjith Watagodage 26, Ihagama Medawela, Harispattuwa Defendants And Watagodagedara Mallika Chandralatha 88A, Ihagama, Medawela Harispattuwa Plaintiff-Appellant Vs 1. Hearath Mudiyanselage Punchi Banda Doranegama Road, Medawela Harispattuwa 2. Watagodgedara Dhammika Ranjith Watagodage 26, Ihagama Medawela, Defendants-Respondents And now between Watagodagedara Mallika Chandralatha 88A, Ihagama, Medawala Harispattuwa Plaintiff-Appellant-Petitioner Vs. 1. Hearath Mudiyanselage Punchi Banda Doranegama Road,Medawela, Harispattuwa 2. Watagode Gedara Dhammika Ranjith Watagodage 26, Ihagama Medawela, Harispattuwa Defendants-Respondents-Respondents
29/11/17	SC /FR/ Application No 06/2017	1. Anjali Thivaak Pushparajah Rohan 2. Rohan Rahul Ayushman Both of No 161/11, Galle Road, Bambalapitiya, Colombo 04. Petitioners Vs, 1. Akila Viraj Kariyawasam (M.P) Hon. Minister of Education, Ministry of Education, “Isurupaya” Battaramulla. 2. Sunil Hettiarachchi, Secretary- Ministry of Education, “Isurupaya” Battaramulla. 3. B.A. Abeyrathna, Principal- Royal Collage, Colombo 07. 4. L.W.K. Silva 5. R.M.I.P. Karunaratna 6. L.K. Jayathilaka 7. A.G.P.A. Gunawansa 8. T. Tennakoon 4th to 08th above all Members of the Interview Board (Admissions to Year 01) Royal Collage, Colombo 07. 9. A.G.N. Jayaweera 10. G.V. Jayasooriya 11. M. Ratnayake 12. M.H. Sunny 13. U.Malalasekara 14. Inoka Gunn 09th to 14th above all Members of the Appeal Board (Admissions to Year 01) Royal Collage, Colombo 07. 15. P.N. Illepperuma Director- National Schools, “Isurupaya” Battaramulla. 16. Hon. the Attorney General, Attorney General’s Department, Colombo 12. Respondents
28/11/17	SC Appeal No. 53/2011	Al Hareen Bin Ahamed No. 700, Galle Road, Colombo. 3 PLAINTIFF Vs. Mohamed Rafi Ismail Bin Hassan No. 44/1, Wajira Lane, Off Vajira Road, Colombo 4. DEFENDANT AND Mohamed Rafi Ismail Bin Hassan No. 44/1, Vajira Lane, Off Vajira Road, Colombo 4. DEFENDANT-APPELLANT Vs. Al Hareen Bin Ahamed No. 700, Galle Road, Colombo. 3 PLAINTIFF-RESPONDENT AND NOW AND BETWEEN Al Hareen Bin Ahamed No. 700, Galle Road, Colombo. 3 PLAINTIFF-RESPONDENT-PETITIONER Vs. Mohamed Rafi Ismail Bin Hassan No. 44/1, Wajira Lane, Off Vajira Road, Colombo 4. DEFENDANT-APPELLANT-RESPONDENT

27/11/17	SC Appeal 206/2016	IN THE DISTRICT COURT 1. ILLEKUTTIGE HELEN STELLA PHILOMINA FEENANDO Menikkurunduwatta, Devalamulla, Govinna 2.THUDUWAGE DONA KARUNAWATHIE PERERA Govinna Junction, Govinna PLAINTIFFS Vs. GOVINI THANTHRIGE PREMASIRI Wanawitiya, Devamulla, Govinna DEFENDANT IN THE HIGH COURT OF CIVIL APPEAL KALUTARA ILLEKUTTIGE HELEN STELLA PHILOMINA FEENANDO Menikkurunduwatta, Devalamulla, Govinna FIRST PLAINTIFF -APPELLANT Vs GOVINI THANTHRIGE PREMASIRI Wanawitiya, Devamulla, Govinna DEFENDANT-RESPONDENT THUDUWAGE DONA KARUNAWATHIE PERERA Govinna Junction, Govinna SECOND PLAINTIFF-RES NOW IN THE SUPREME COURT ILLEKUTTIGE HELEN STELLA PHILOMINA FEENANDO Menikkurunduwatta, Devalamulla, Govinna First Plaintiff-Appellant-Ptitioner-Appellant VS GOVINI THANTHRIGE PREMASIRI of Wanawitiya, Devamulla, Govinna Defendant-Respondent- Respondent- Respondent THUDUWAGE DONA KARUNAWATHI PERERA Govinna Junction Govinna KARUNAWATHIE PERERA of Govinna Junction, Govinna Second Plaintiff-Respondent-Respondent-Respondent
27/11/17	SC Appeal 53/2017	Sumudu Sanjeevanee Nanayakkara No.95, Cemetery Road, Mirihana Nugegoda. Plaintiff Vs 1. Hatton National Bank PLC, No.479, TB Jayah Mawatha Colombo10 Having a branch Office at No.63, Moratuwa Road, Piliyandala. 2. Don Ashok Ranjan Vitharana No.326/2 Pitakotte, Kotte Defendant AND Sumudu Sanjeevanee Nanayakkara No.95, Cemetery Road, Mirihana Nugegoda. Plaintiff-Petitioner Vs 1. Hatton National Bank PLC, No.479, TB Jayah Mawatha Colombo10 Having a branch Office at No.63, Moratuwa Road, Piliyandala. 2. Don Ashok Ranjan Vitharana No.326/2 Pitakotte, Kotte (DECEASED) 2a. Dona Sriyani Malkanthi Vitharana 2b. Dona Chandani Kamal Vitharana 2c. Dona Roshani Kumari Vitharana 2d. Don Sudantha Niroshan Vitharana All of No.326/2, Pitakotte, Kotte Defendant-Respondents AND NOW BEWEEN Sumudu Sanjeevanee Nanayakkara No.95, Cemetery Road, Mirihana Nugegoda. Plaintiff-Petitioner-Appellant Vs 1. Hatton National Bank PLC, No.479, TB Jayah Mawatha Colombo10 Having a branch Office at No.63, Moratuwa Road, Piliyandala. 2a. Dona Sriyani Malkanthi Vitharana 2b. Dona Chandani Kamal Vitharana 2c. Dona Roshani Kumari Vitharana 2d. Don Sudantha Niroshan Vitharana All of No.326/2, Pitakotte, Kotte Defendant-Respondent-Respondents

26/11/17	SC APPEAL 66/16	Hewa Devage Raymond Karunathilake, No. 167,Jaya Mawatha, Oruwalpitiya, Athurugiriya. Plaintiff Vs 1. Suduwa Devage Nimal Somasiri 2. Suduwa Devage Sunil Pathmasiri 3. Suduwa Devage Nihal Jayasiri 4. SuduwaDevage Charlette Somalatha(deceased) All of Jaya Mawatha, Oruwalpitiya, Athurugiriya. 4A. Hewa Devage Lilani Fernando, Jaya Mawatha, Oruwalpitiya, Athurugiriya. 5. Suduwa Devage Lal Deepananda, No. 165, Jaya Mawatha, Oruwalpitiya, Athurugiriya. 6. Pathmulla Kankanamalage Gunathilake, No. 299/4, Godagama Road, Athurugiriya. 7. Hakmana Vithanage Kamalawathie, No. 299/1, Godagama Road, Athurugiriya. 8. Singakkuti Arachchige Wimalasena, No. 836/1, Athurugiriya Road, Homagama. 9. Dehipitiya Mirissage Ariyawansa, No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama. 10. Dehipitiya Mirissage Sedin, No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama. 11. Hewa Devage Dhammika Chandrasiri, No. 165, Jaya Mawatha, Athurugiriya. 12. Hewa Devage Sriyani Chandrika, No. 156/5, Abayasinghe Mawatha, Athurugiriya. 13. K.A.G.Lesli (deceased), No. 19, Abayasinghe Mawatha, Athurugiriya. 13 A. Kumarapril Arachchige Don Nagananda, Samagi Mawatha, Panagoda, Homagama. Defendants AND NOW Hewa Devage Raymond Karunathilake, No. 167,Jaya Mawatha, Oruwalpitiya, Athurugiriya. Plaintiff Appellant Vs 1. Suduwa Devage Nimal Somasiri 2. Suduwa Devage Sunil Pathmasiri 3. Suduwa Devage Nihal Jayasiri 4. SuduwaDevage Charlette Somalatha(deceased) All of Jaya Mawatha, Oruwalpitiya, Athurugiriya. 4A. Hewa Devage Lilani Fernando, Jaya Mawatha, Oruwalpitiya, Athurugiriya. 5. Suduwa Devage Lal Deepananda, No. 165, Jaya Mawatha, Oruwalpitiya, Athurugiriya. 6. Pathmulla Kankanamalage Gunathilake, No. 299/4, Godagama Road, Athurugiriya. 7. Hakmana Vithanage Kamalawathie, No. 299/1, Godagama Road, Athurugiriya. 8. Singakkuti Arachchige Wimalasena, No. 836/1, Athurugiriya Road, Homagama. 9. Dehipitiya Mirissage Ariyawansa, No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama. 10. Dehipitiya Mirissage Sedin (deceased), No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama. 10 A. Egodahage Siripala Weerasiri Alwis Samarakoon, No. 671/4, Erawwala, Pannipitiya. 11. Hewa Devage Dhammika Chandrasiri, No. 165, Jaya Mawatha, Athurugiriya. 12. Hewa Devage Sriyani Chandrika, No. 156/5, Abayasinghe Mawatha, Athurugiriya. 13. K.A.G.Lesli (deceased), No. 19, Abayasinghe Mawatha, Athurugiriya. 13 A. Kumarapril Arachchige Don Nagananda, Samagi Mawatha, Panagoda, Homagama. Defendants Respondents AND NOW BETWEEN Egodahage Siripala Weerasiri Alwis Samarakoon, No. 671/4, Erawwala, Pannipitiya. 10 A Defendant Respondent Petitioner Vs Hewa Devage Raymond Karunathilake, No. 167, Jaya Mawatha, Oruwalpitiya, Athurugiriya. Plaintiff Appellant Respondent 1 A. Hewa Devage Dayawathie, No. 164/D, Oruwalpitiya, Athurugiriya 2.Suduwa Devage Sunil Pathmasiri 3. Suduwa Devage Nihal Jayasiri 4A. Hewa Devage Lilani Fernando, Jaya Mawatha, Oruwalpitiya, Athurugiriya. 5.Suduwa Devage Lal Deepananda, No. 165, Jaya Mawatha, Oruwalpitiya, Athurugiriya. 6. Pathmulla

26/11/17	SC FR 175/2014	

23/11/17	S.C.Appeal No:-107/10	1.Ranminipura Dewage Hemathunga 2.Ranminipura Dewage Darmasena 3.Ranminipura Dewage Gunathilaka 4.Ranminipura Hewage Somarathna 5.Raminipura Dewage Malani Premasiri 6.Ranminipura Dewage Sunil Dayarathna All of Kamuradeniya Danowita. PLAINTIFFS Vs 1.Ranminipura Dewage Agoris 1a.Ranminipura Dewage Karunawathi 2.Ranminipura Dewage Thegis 2a.Ranminipura Dewage Thegis 3.Ranminipura Dewage Maiya 4.Ranminipura Dewage Jayasinghe 5.Ranminipura Dewage Gunasinghe 6.Ranminipura Dewage Nimal Ranasingha 7.Ranminipura Dewage Peries 8a.Raminipura Dewage Senewirathna 8a.Ranminipura Dewage Anoma Chadralatha Senewirathna 9.Ranminipura Dewage Martin 10.Ranminipura Dewage Alpenis 10a.Ranminipura Dewage Jayalath Premathilaka All of Kamburadeniya, Danowita. 11.Corporative Society, Kamburadeniya, Danowita. 12.Ranminipura Dewage Karunathi 13.Ranminipura Dewage Bebinona 14.Ranminipura Dewage Jen 15.Ranminipura Dewage Premalatha 16.Ranminipura Dewage Albert 17.Ranminipura Dewage Smaradasa 18.Ranminipura Dewage Somapala 19.Ranminipura Dewage Kamalawathi All of Kamburadeniya Danowita. DEFENDANTS AND Ranminipura Dewage Hemathunga Kamburadeniya, Danowita. 1st PLAINTIFF-APPELLANT Vs 2.Ranminipura Dewage Darmasena 3.Ranminipura Dewage Gunathilaka 4.Ranminipura Dewage Somarathna 5.Ranminipura Dewage Malini Premasiri 6.Ranminipura Dewage Sunil Dayarathne All of Kamburadniya, Danowita. 2nd to 6th PLAINTIFF-RESPONDENTS 1a.Ranminipura Dewage Karunawathi 2a.Ranminipura Dewage Maiya 3.Ranminipura Dewage Maiya 4.Ranminipura Dewage Jayasinghe 5.Ranminipura Dewage Gunsinghe 6.Ranminipura Dewage Nimal Ranasinghe 7.Ranminipura Dewage Peries 8a.Ranminipura Dewage Anoma Chandralatha Senewirathne 9.Ranminipura Dewage Martin 10a.Ranminipura Dewage Jayalath Premathilaka All of Kamburadeniya, Danowita. 11.Corporative Society, Kamburadniya Danowita. 12.Ranminipura Dewage Karunawathi 13.Ranminipura Dewage Bebinona 14.Ranminipura Dewage Jen 15.Ranminipura Dewage Premalatha 16.Ranminipura Dewage Albert 17.Ranminipura Dewage Smaradasa 18.Ranminipura Dewage Somapala 19.Ranminipura Dewage Kamalawathi All of Kamburadeniya Danowita. DEFENDANT-RESPONDENTS AND NOW BETWEEN 1a.Ranminipura Dewage Karunawathi “Somi Niwasa” Kamburadniya Danowita. 13.Ranminipura Dewage Bebinona No. D/53, Alwis Watta Kamburadeniya, Danowita. 8.Ranminipura Dewage Somapala No.D 46/1, Kamburadeniya Danowita. 19.Ranminipura Dewage Kamalawathi No.D 46/2A, Kamburadeniya Danowita. 1a/12,13,18 & 19th DEFENDANT-RESPONDENTS Vs Ranminipura Dewage Hemathunga Kamburadeniya, Danowita. 1st PLAINTIFF-APPELLANT-RESPONDENT 2.Ranminipura Dewage Darmasena 3.Ranminipura DewageGunathilaka 4.Ranminipura Dewage Somarathna 5.Ranminipura Dewage Malini Premasiri 6.Ranminipura Dewage Sunil Dayarathne All of Kamburadeniya Danowita. 2nd to 6th PLAINTIFF-RESPONDENT-RESPONDENTS 2a.Ranminipura

23/11/17	SC CHC 36/2006	Telecommunication Consultants India Limited. (A Government of India Enterprise), 43, Nehru Place, New Delhi – 110019, India. Plaintiff Vs Pan Asia Bank Limited, 450, Galle Road, Colombo 03. Defendant AND Pan Asia Bank Limited, 450, Galle Road, Colombo 03. Defendant Appellant Vs Telecommunication Consultants India Limited. (A Government of India Enterprise), 43, Nehru Place, New Delhi – 110019, India. Plaintiff Respondent
23/11/17	SC APPEAL 147/16	Menikdiwela Senevirathnage Chandrasiri Sisira Kumara, No. 35/5, Rosmead Place, Colombo 07. Plaintiff Vs 1. Hapuarachchige Jayaratne Perera, No. 279/1, Hospital Road, Kiribathgoda, Kelaniya. 2. Seylan Securities and Finance (Pvt.) Ltd., Galle Road, Colombo 03. 3. Registrar, Land Registry, Colombo 07. Defendants THEN BETWEEN Hapuarachchige Jayaratne Perera, No. 279/1, Hospital Road, Kiribathgoda,Kelaniya. 1st Defendant Appellant. Vs Menikdiwela Senevirathnage Chandrasiri Sisira Kumara, No. 35/5, Rosmead Place, Colombo 07. Plaintiff Respondent 2. . Seylan Securities and Finance (Pvt.) Ltd., Galle Road, Colombo 03. 3. Registrar, Land Registry, Colombo 07 2nd and 3rd Defendants Respondents AND NOW BETWEEN Menikdiwela Senevirathnage Chandrasiri Sisira Kumara, No. 35/5, Rosmead Place, Colombo 07. Plaintiff Respondent Appellant Vs Hapuarachchige Jayaratne Perera, No. 279/1, Hospital Road, Kiribathgoda,Kelaniya. 1ST Defendant Appellant Respondent 2. Seylan Securities and Finance (Pvt.) Ltd., Galle Road, Colombo 03. 3. Registrar, Land Registry, Colombo 07 2nd and 3rd Defendant Respondent Respondents
21/11/17	SC APPEAL 227/2014	Ceylon Bank Employees Union, No. 20,Temple Road, Maradana, Colombo 10. (on behalf of S.M.Ranbanda) Applicant Vs Peoples' Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Respondent AND Peoples' Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Respondent Appellant Vs Ceylon Bank Employees Union, No. 20,Temple Road, Maradana, Colombo 10. (on behalf of S.M.Ranbanda) Applicant Respondent AND NOW BETWEEN Ceylon Bank Employees Union, No. 20,Temple Road, Maradana, Colombo 10. (on behalf of S.M.Ranbanda) Applicant Respondent Appellant. Vs Peoples' Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Respondent Appellant Respondent

21/11/17	S.C Appeal No. 43/2017	1. Beauty Ramani Ratnaweera 2. Olokku Patabendige Amarasena Both of “Amara”, Morakatiara, Nakulugamuwa. PLAINTIFFS Vs. 1. Amarakoon Kankanamge Sugunawathie 2. Dhammika Munasinghe Both of opposite O.P. Rice Mills, Kiralawalkatuwa. Embilipitiya. DEFENDANTS AND 1. Beauty Ramani Ratnaweera 2. Olokku Patabendige Amarasena (DECEASED) 2A. Olokku Patabendige Yenika Gayani Both of “Amara”, Morakatiara, Nakulugamuwa. PLAINTIFFS-APPELLANTS Vs. 1. Amarakoon Kankanamge Sugunawathie 2. Dhammika Munasinghe Both of opposite O.P. Rice Mills, Kiralawalkatuwa. Embilipitiya. DEFENDANTS-RESPONDENTS AND NOW BETWEEN 1. Amarakoon Kankanamge Sugunawathie 2. Dhammika Munasinghe Both of opposite O.P. Rice Mills, Kiralawalkatuwa. Embilipitiya. DEFENDANTS-RESPONDENTS-PETITIONERS Vs. 3. Beauty Ramani Ratnaweera 4. Olokku Patabendige Amarasena 2A. Olokku Patabendige Yenika Gayani Both of “Amara”, Morakatiara, Nakulugamuwa. PLAINTIFFS-APPELLANTS-RESPONDENTS
21/11/17	S.C Appeal 110/2014	1. Abdul Hameed Marikkar Mohamed Ismail 2. Mohamed Ismail Ummul Kadeeja Both of No.185, Old Road, Beruwela. PLAINTIFFS Vs. Mohamed Sainadeen Mohamed Saleem Of No. 181/1, Old Road, Beruwela. DEFENDANT AND Mohamed Sainadeen Mohamed Saleem Of No. 181/1, Old Road, Beruwela. (DECEASED) DEFENDANT-APPELLANT Mohamed Saleem Misriya No. 181/1, Old Road, Beruwela. SUBSTITUED-DEFENDANT-APPELLANT Vs. 1. Abdul Hameed Marikar Mohamed Ismail (DECEASED) 1ST PLAINTIFF-RESPONDENT 2. Mohamed Ismail Ummul Kadeeja (DECEASED) Both of No. 185, Old Road, Beruweala. SUBSTITUTED-1ST PLAINTIFF AND 2ND PLAINTIFF-RESPONDENT 1. Mohamed Ismail Mohamed 2. Mohamed Ismail Ahamed Maood 3. Mohamed Ismail Abdul Rahuman 4. Mohamed Ismail Sulaiha Umma 5. Mohamed Ismail Ahamed Bari 6. Mohamed Ismail Abdul Cader All of No. 185, Sheik Jamaldeen Road, Beruwala. 7. Abdul Raheema Umma Nafeema 8. Abdul Raheema Umma Aasiya 9. Abdul Raheema Umma Ameena All of No. 181/1, Sheik Jamaldeen Road, Beruwala. SUBSTITUTED-PLAINTIFF-RESPONDENTS AND NOW BETWEEN 1. Mohamed Ismail Mohamed 2. Mohamed Ismail Ahamed Maood 3. Mohamed Ismail Abdul Rahuman 4. Mohamed Ismail Sulaiha Umma 5. Mohamed Ismail Ahamed Bari 6. Mohamed Ismail Abdul Cader All of No. 185, Sheik Jamaldeen Road, Beruwala. 7. Abdul Raheem Umma Nafeema 8. Abdul Raheem Umma Aasiya 9. Abdul Raheem Umma Ameena All of No. 181/1, Sheik Jamaldeen Beruwela. SUBSTITUTED-PLAINTIFF-RESPONDENT-PETITIONERS Vs. Mohamed Saleem Misriya Of No. 181/1. Old Road, Beruwala. SUBSTITUTED-DEFENDANT-APPELLANT-RESPONDENTS

16/11/17	SC /FR/ Application No 372/2015	1. M.W. Leelawathie Hariot Perera, 2. W.W. Raj Lakmal Fernando 3. W.W. Roshini Shivanthi Fernando All of No 12, Kithalandaluwa Road, Willorawatte, Moratuwa. Petitioners Vs, 1. N.K. Illangakoon, Inspector General of Police, Police Head Quarters, Colombo 01. 1A. P. Jayasundera, Inspector General of Police, Police Head Quarters, Colombo 01. 2. Officer-in- Charge, Police Station, Moratuwa. 3. Officer-in- Charge, Police Station, Moratumulla. 4. Widanalage Amesh Asantha de Mel, No. 04/03, 1st lane, Kithalandaluwa Road, Willorawatte, Moratuwa. 5. Hon. Attorney General, Attorney General's Department, Colombo 12 Respondents
14/11/17	S.C (FR) Application 136/2014	Naomi Michelle Cokeman, 8, Waveley Road, Coventry England CV 13 AH, United Kingdom. PETITIONER Vs. 1. The Hon. Attorney General Attorney General's Department, Colombo 12. 2. Police Sergeant Upasena (22143) 3. Police Inspector Suraweera, Acting Officer-In-Charge THE 2ND AND 3RD RESPONDENTS OF POLICE STATION, KATUNAYAKE 4. Officer-In-Charge Negombo Prison, Negombo. 5. N.K. Illangakoon Inspector General of Police, Police Headquarters, Colombo 1. 6. Chulananda De Silva Controller General of Immigration and Emigration, Ananda Rajakaruna Mawatha, Colombo 10. RESPONDENTS
09/11/17	SC Appeal 154/2015	Mohiden Kasim Bibi Golu Maradankulama, Nachchiduwa, Anuradapura Plaintiff Vs S M Ratnawathi Manike Athuruwella, Nachchiduwa, Anuradapura Defendant AND Mohiden Kasim Bibi Golu Maradankulama, Nacchaduwa, Anuradapura Plaintiff-Appellant Vs S M Ratnawathi Manike Athuruwella, Nachchiduwa, Anuradapura Defendant-Respondent AND NOW BEWEEN S M Ratnawathi Manike Athuruwella, Nachchiduwa, Anuradapura Defendant-Respondent-Petitioner-Appellant Vs Mohiden Kasim Bibi Golu Maradankulama, Nachchiduwa, Anuradapura Plaintiff-Appellant-Respondent (Now Deceased) 1. Moonafiya New Town, Nachchiduwa, Anuradapura 2. Poisa Umma New Town, Nachchiduwa, Anuradapura 3. Badurunisa No.107, Kandara, Katukaliyawa, Ihalagama,Mihimnthalaya, 4. Noorthaira Umma New Town, Nachchiduwa, Anuradapura 5. SooraThumma No.41 New, Golumaradan Kulama Nachchiduwa, Anuradapura 6. Muhamath Kamsadeen New Town, Nachchiduwa, Anuradapura 7. Saripdeen ge Pausul Janapdeen New Town, Nachchiduwa, Anuradapura 8. Mohamad Asmeer Khan New Town, Nachchiduwa, Anuradapura Substituted Plaintiff-Appellant-Respondent-Respondent

07/11/17	S.C (FR) No. 138/2015	D.P.L. Sunil Shantha Gunasekara “Ariya Niwasa”, Widya Chandra Mawatha, Digaradda, Ahangama. PETITIONER Vs. 1. S.S. Hettiarachchi Director General of Pensions, Department of Pensions, Maligawatte, Colombo 10. 2. Justice Sathya Hettige P.C., Chairman 2A. Dharmasena Dissanayake, Chairman. 3. S.C. Mannapperuma, Member 3A. A. Salam Abdul Waid, Member. 4. Ananda Seneviratne, Member 4A. D. Shirantha Wijayatillake, Member 5. N.H. Pathirana, Member 5A Prathap Ramanujam, Member 6. Kanthi Wijetunge, Member 6A V. Jegarasasingam, Member 7. Sunil S. Sirisena, Member 7A. Santi Nihal Seneviratne, Member 8. S. Thillanadarajah, Member 8A. S. Ranugge, Member 9. A. Mohamed Nahiya, Member 9A. D.L. Mendis, Member 10. I.M. Zoysa Gunasekara, Member 10A. A Sarath Jayathilaka, Member 1st to 10th – All of Public Service Commission No. 177, Nawala Road, Narahenpita, Colombo 05. 11. T.M.L.C. Senaratne Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 11A. H.M.G. Senevirathne Secretary, Public Service Commission No. 177, Nawala Road, Narahenpita, Colombo 05. 12. Upali Marasinghe Secretary, Ministry of Education, Palawatta, Battaramulla. 13. Jayatissa Block Provincial Director of Education-Southern Province. Provincial Education Office- Southern Province, Upper Dixon Road, Galle. 14. Hon. Attorney General Attorney General’s Department, Colombo 12. RESPONDENTS
01/11/17	SC Appeal 99/2017	1. N.W.E.Buwaneka Lalitha Keembiela, Beddegama, Galle. 2. J.K.Amarawardhana 8, Bovitiyamaulla, Yatalamatta. 3. A.C.Gunasekera “Lakshmi”, Unawatuna, Galle. 4. J.K.Wijesinghe. 48-10A, Main Street, Ambalangoda 5. H.L.Prasanna Deepthilal 601/1, Visakam Road, Galle. Petitioners -Vs- 1. Geetha Samanmali Kumarasinghe No.2, Temple Road, Nawala, Rajagiriya. 2. M.N.Ranasinghe Controlller General of Immigration and Emigration Department of Immigration and Emigration 41, Ananda Rajakaruna Mawatha, Colombo 10. 3. Mahinda Amaraweera Secretary. United People‟s Freedom Alliance, 301, T.B.Jayah Mawatha, Colombo 10. 4. Dhammika Dassanayake. Secretary General of Parliament. Parliament of Sri Lanka, Sri Jayawardenapura, Kotte. Respondents AND NOW Geetha Samanmali Kumarasinghe No.2, Temple Road, Nawala, Rajagiriya. 1st Respondent Petitioner-Appellant 1. N.W.E.Buwaneka Lalitha Keembiela, Beddegama, Galle. 2. J.K.Amarawardhana 8, Bovitiyamaulla, Yatalamatta. 3. A.C.Gunasekera “Lakshmi”, Unawatuna, Galle. 4. J.K.Wijesinghe. 48-10A, Main Street, Ambalangoda 5. H.L.Prasanna Deepthilal 601/1, Visakam Road, Galle. Petitioner-Respondents 1. M.N.Ranasinghe Controlller General of Immigration and Emigration Department of Immigration and Emigration 41, Ananda Rajakaruna Mawatha, Colombo 10. 2. Mahinda Amaraweera Secretary. United People‟s Freedom Alliance, 301, T.B.Jayah Mawatha, Colombo 10. 3. Dhammika Dassanayake. Secretary General of Parliament. Parliament of Sri Lanka, Sri Jayawardenapura, Kotte. Respondents-Respondents Ihala Medagama Gamage Piyasena “Sandasiri”, Medagama, Neluwa. Added Respondent

30/ 10/ 17	SC /FR/ Application No 05/2017	1. Mallawa Weerage Chaminda Sri Lal Wijesekara, No. 17, Noel Senevirathna Mawatha, Kurunegala. 2. Mallawa Weerage Tharushi Chathurya Wijesekara, No. 17, Noel Senevirathna Mawatha, Kurunegala. Petitioners Vs, 1. Mrs. Soma Rathnayake, Principal, Maliyadeva Balika Vidyalaya, Kurunegala. 2. Director of National Schools, Ministry of Education, Isurupaya, Baththaramulla. 3. Secretary, Ministry of Education, Isurupaya, Baththaramulla. 4. K. Narasinghe, Member, (Interview Board to admit students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 5. B.H.C.M. Abeysinghe, Member, (Interview Board to admit students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 6. P.H.N. Karunasiri, Member, (Interview Board to admit students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 7. S.M.P.B. Siriwardhana, Member, (Interview Board to admit students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 8. D.M.B. Dissanayake, Chairman, (Appeal Board to Admit Students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 9. S.A.N. de. Silva, member, (Appeal Board to Admit Students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 10. Ms. E.M.P. Senehelatha, Member, (Appeal Board to Admit Students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 11. Ms. U.N. Biso Menike, Member, (Appeal Board to Admit Students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 12. C.D. Kahandawaarachchi, Member, (Appeal Board to Admit Students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 13. W. Ananda Weerasinghe, Member, (Appeal Board to Admit Students to Grade 01) Maliyadeva Balika Vidyalaya, Kurunegala. 14. Hon. Attorney General, Department of Attorney General, Colombo 12. Respondents
30/ 10/ 17	SC /FR/ Application No 444/2009	Major K.D.S. Weerasinghe, No. 100/2, Wewatenna Road, Ampitiya, Kandy Petitioner Vs, 1. Colonel G.K.B. Dissanayake, Colonel Coordinator (Volunteer) Volunteer Force Headquarters, Shalawa, Kosgama. 2. Major General Sumith Balasooriya, Commander of the Sri Lanka Army, Volunteer Force Headquarters, Akuregoda, Pelawatte, 2A. Major General H.C.P. Gunathilake, Commander of the Sri Lanka Army, Volunteer Force Headquarters, Akuregoda, Pelawatte, 3. Brigadier Padumadasa, Military Secretary, Army Headquarters, Colombo 02. 3A. Major General M.U.M.M.W. Senanayake, Military Secretary, Army Headquarters, Colombo 02. 4. General Sarath Fonseka, Commander of the Ari Lanka Army, Army Headquarters, Colombo 02. 4A. Lt. General Jagath Jayasuriya, Commander of the Ari Lanka Army, Army Headquarters, Colombo 02. 4B. Lt. General A.W.J.C. de Silva, Commander of the Ari Lanka Army, Army Headquarters, Colombo 02. 5. Gotabhaya Rajapaksha, Secretary of the Ministry of Defence, Colombo 03. 5A.B.M.U.D Basnayake, Secretary of the Ministry of Defence, Colombo 03. 5B.Karunasena Hettiarachchi, Secretary of the Ministry of Defence, Colombo 03. 6. Hon. Attorney General, Attorney General’s Department, Colombo 12 Respondents

29/ 10/ 17	SC FR APPLICATION No. 335/2016	1. B.M.Asiri Tharanga 21-5/1, Araluwagoda Road, Madawala Bazaar, Madawala. 2. Thiyagarajah Mahendran, 143/124, Vihara Mawatha, Mulgampola, Kandy. Petitioners Vs 1. The Principal,Kingswood College, Kandy. 2. The Director, National Schools, Ministry of Education, “Isurupaya”, Battaramulla. 3. The Secretary, Ministry of Education, “Isurupaya”, Battaramulla. 4. The Honourable Attorney General, Hulftsdorp, Colombo 12. Respondents
26/ 10/ 17	S.C. (LA) Appeal 175/2015	Bank of Ceylon York Street, Colombo 1. PLAINTIFF Vs. Aswedduma Tea Manufactures (Pvt) Ltd., No. 28, Park Road, Jayanthipura, Battaramulla. DEFENDANT AND BETWEEN Bank of Ceylon York Street, Colombo 1. PLAINTIFF-APPELLANT Vs. Aswedduma Tea Manufactures (Pvt) Ltd., No. 28, Park Road, Jayanthipura, Battaramulla. DEFENDANT-RESPONDENT AND NOW BETWEEN Bank of Ceylon York Street, Colombo 1. PLAINTIFF-APPELLANT-PETITIONER Vs. Aswedduma Tea Manufactures (Pvt) Ltd., No. 28, Park Road, Jayanthipura, Battaramulla. DEFENDANT-RESPONDENT-RESPONDENT
25/ 10/ 17	SC APPEAL No. 140/2012	1. M.R.Sanjeewani Seneviratne, No. 22/4, Mawilmada, Kandy. 2. M.D.Chandrasiri Seneviratne, No. 22/4. Mawilmada, Kandy. Plaintiffs Vs M. Priyankara Samarajeewa, No. 253/1/8, Stanley Thillakeratne Mawatha, Nugegoda. Defendant AND BETWEEN M. Priyankara Samarajeewa, No. 253/1/8, Stanley Thillakeratne Mawatha, Nugegoda Defendant Appellant Vs 1. M.R.Sanjeewani Seneviratne, No. 22/4, Mawilmada, Kandy. 2. M.D.Chandrasiri Seneviratne, No. 22/4. Mawilmada, Kandy. Plaintiff Respondents AND NOW BETWEEN M. Priyankara Samarajeewa, No. 253/1/8, Stanley Thillakeratne Mawatha, Nugegoda. Defendant Appellant Appellant Vs 1. M.R.Sanjeewani Seneviratne, No. 22/4, Mawilmada, Kandy. 2. M.D.Chandrasiri Seneviratne, No. 22/4. Mawilmada, Kandy. Plaintiff Respondent Respondents In the matter of an Appeal from the Civil Appellate High Court 1 M.R.Sanjeewani Seneviratne, No. 22/4, Mawilmada, Kandy. 2.M.D.Chandrasiri Seneviratne, No. 22/4. Mawilmada, Kandy. Plaintiffs Vs M. Priyankara Samarajeewa, No. 253/1/8, Stanley Thillakeratne Mawatha, Nugegoda Defendant AND BETWEEN 1. M.R.Sanjeewani Seneviratne, No. 22/4, Mawilmada, Kandy. 2.M.D.Chandrasiri Seneviratne, No. 22/4. Mawilmada, Kandy. Plaintiff Petitioner – Judgment Creditors Vs M. Priyankara Samarajeewa, No. 253/1/8, Stanley Thillakeratne Mawatha, Nugegoda Defendant Respondent- Judgment Debtor AND NOW BETWEEN M. Priyankara Samarajeewa, No. 253/1/8, Thillakeratne Mawatha, Nugegoda. Defendant Respondent Appellant Vs 1 M.R.Sanjeewani Seneviratne, No. 22/4, Mawilmada, Kandy. 2.M.D.Chandrasiri Seneviratne, No. 22/4. Mawilmada, Kandy. Plaintiff Petitioner Respondents

22/ 10/ 17	S.C. Appeal No. 30/2015	Talagalage Punchi Singho No. 251, Seelammala Mawatha, Oruwala South, Athurugiriya. PLAINTIFF Vs. Ratnayake Mudiyanselage Bandara Menike No. 64/C, Vidyala Mawatha, Oruwala. DEFENDANT AND Ratnayake Mudiyanselage Bandara Menike No. 64/C, Vidyala Mawatha, Oruwala. DEFENDANT-APPELLANT Vs. Talagalage Punchi Singho No. 251, Seelammala Mawatha, Oruwala South, Athurugiriya. (Deceased) PLAINTIFF-RESPONDENT Thalagalage Wijeratna No. 251, Seelammala Mawatha, Oruwala South, Athurugiriya. SUBSTITUTED-PLAINTIFF-RESPONDENT AND NOW BETWEEN Thalagalage Wijeratna No. 251, Seelammala Mawatha, Oruwala South, Athurugiriya. SUBSTITUTED-PLAINTIFF-RESPONDENT-APPELLANT Vs. Ratnayake Mudiyanselage Bandara Menike No. 64/C, Vidyala Mawathqa, Oruwala. DEFENDANT-APPELLANT-RESPONDENT
19/ 10/ 17	SC Appeal No:- 144/2015	Wickremagedera Ranhamy N0-25, Megammana Road, Wattegama. (Deceased) PLAINTIFF Wickremagedera Ukkumenika No.25, Meegammana Road, Wattegama. SUBSTITUTED PLAINTIFF Wickremagedera Karunaratne Wickremage, No.25, Meegammana Road, Wattegama. 1st DEFENDANT-SUBSTITUTED-PLAINTIFF V. 2.Wickremagedera Abeysinghe 3.Wickremagedera Wickremaratne 4.Wickremagedera Indra Wickremaratne, 5.Wickremagedera Pragnarathna 6.Gunarathna Manike, All of Temple Road,Meegammana, Wattegama. 7.M.G.NettiKumara, No 51, Meegammana, Wattegama. DEFENDANTS AND M.G.Netti Kumara, No 51. Meegammana, Wattegama. 7th DEFENDANT-APPELLANT 7A.Kuragoda Gamlathge Gnanawathie 7B.N.M.G.Menaka Ranjan Netikaumara 7C.N.M.G.Kushan Chandana Nettikumara 7D.D.N.M.G.Venulin Sandya Nettikumara All of No.51, Meegammana, Wattegama. SUBSTITUTED 7TH DEFENDANT-APPELLANTS V. Wickremagedera Karunarathne Wickremage No-25, Meegammana Road, Wattegama. 1st DEFENDANT-SUBSTITUTED-PLAINTIFF-RESPONDENT 2.Wickremagedera Abeysinghe 3.Wickremagedera Wickremaratne 4.Wickremagedera Indra Wickremaratne 5.Wickremagedera Pragnarathna 6.Gunarathna Menike All of Temple Road, Meegammana. DEFENDANTS-RESPONDENTS AND BETWEEN Wickremagedera Karunarathne Wickremage No.25, Meegammana Road,Wattegama. 1st DEFENDANT-SUBSTITUTED-PLAINTIF- RESPONDENT-APPELLANT V. 7A.Kuragoda Gamlathge Gnanawathie 7B.N.M.G.Menaka Ranjan Nettikumara 7C.N.M.G. Kushan Chandana Nettikumara 7D.N.M.G.Venulin Sandya Nettikumara All of No. 51, Meegammana, Wattegama. SUBSTITUTED 7TH DEFENDANT-APPELLANT-RESPONDENTS 2.Wickremagedera Abeysinghe 3.Wickremagedera Wickremaratne 4.Wickremagedera Indra Wickremaratne 5.Wickremagedera Pragnarathna 6.Gunarathna Menike, All of Temple Road, Meegammana. DEFENDANT-RESPONDENT-RESPONDENTS

15/ 10/ 17	S.C. Appeal No. 89/2013	Neil Jayasundera No. 283, Morris Road, Maitipe, Galle PLAINTIFF Vs. Agostinu Saranapala No. 16A, Aluthgedarawatta 3rd Lane, Maitipe, Galle. DEFENDANT AND Neil Jayasundera No. 283, Morris Road, Maitipe, Galle PLAINTIFF-APPELLANT Vs. Agostinu Saranapala No. 16A, Aluthgedarawatta 3rd Lane, Maitipe, Galle. DEFENDANT-RESPONDENT AND NOW BETWEEN Agostinu Saranapala No. 16A, Aluthgedarawatta 3rd Lane, Maitipe, Galle. DEFENDANT-RESPONDENT-PETITIONER Vs. Neil Jayasundera No. 283, Morris Road, Maitipe, Galle PLAINTIFF-APPELLANT-RESPONDENT
08/ 10/ 17	S.C. Appeal No. 8/2016	Nadaraja Rajendra No. 40, Dr. E.A. Cooray Mawatha, Colombo 6. PLAINTIFF Vs. Thevathasan Sritharan No. 8/4, Vivekananda Avenue, Colombo 6. DEFENDANT AND BETWEEN Nadaraja Rajendra No. 40, Dr. E.A. Cooray Mawatha, Colombo 6. PLAINTIFF-PETITIONER Vs. Thevathasan Sritharan No. 8/4, Vivekananda Avenue, Colombo 6. DEFENDANT-RESPONDENT AND BETWEEN Thevathasan Sritharan No. 8/4, Vivekananda Avenue, Colombo 6. DEFENDANT-RESPONDENT-PETITIONR Vs. Nadaraja Rajendra No. 40, Dr. E.A. Cooray Mawatha, Colombo 6. PLAINTIFF-PETITIONER-RESPONDENT AND NOW BETWEEN Thevathasan Sritharan No. 8/4, Vivekananda Avenue, Colombo 6. DEFENDANT-RESPONDENT-PETITIONER-APPELLANT Vs. Nadaraja Rajendra No. 40, Dr. E.A. Cooray Mawatha, Colombo 6. PLAINTIFF-PETITIONER-RESPONDENT-RESPONDENT
05/ 10/ 17	SC /FR/ Application No 556/2010	Ekanayake Udaya Kumara Ekanayake, “Sriyani”, Diyambalapitiya, Kotugoda. Petitioner Vs, 1. Mahinda Balasooriya, Inspector General of Police, Inspector General’s Office, Police Headquarters, Colombo 01. 2. Officer in Charge, Personal Administration, Police Headquarters, Colombo 01. 3. Deputy Inspector General, Discipline and Conduct Division, Police Headquarters, Colombo 01. 4. Director Legal, Police Legal Division, Police Headquarters, Colombo 01. 5. The Secretary, Police Commission, National Police Commission, 3rd Floor, Rotunda Towers, No.109, Galle Road, Colombo 03. 6. The Secretary, Public Service Commission. Carlwill Place, Colombo 03. 7. The Secretary, Ministry of Defence, Law and Order, 15/5, Baladaksha Mw, Colombo 03. 8. Hon. Attorney General, Attorney General’s Department, Colombo 12. 9. N.K. Illangakoon, Inspector General of Police, Police Headquarters, Colombo 01. 10. Nanda Mallawarachchi, The Secretary, Ministry of Law and Order, Janadhipathi Mw, Colombo 01. 11. Sathya Hettige, Chairman, Public Service Commission, No.177, Nawala Road, Narahenpita. 12. Kanthi Wijetunga, Member 13. Sunil A. Sirisena, Member 14. I.N. Soyza, Member All of the Public Service Commission, No 177, No.177, Nawala Road, Narahenpita. Respondents
01/ 10/ 17	SC APPEAL No 22/2016	

26/ 09/ 17	SC (FR) 431/2005	Kandage Gamini de Silva 264, Bandaranayake Mawatha, Katubedda, Moratuwa. PETITIONER Vs. 1. Nishan de Silva Officer in Charge Police Station Piliyandala. 2. Manjula Police Constable (38356) Police Station, Kohuwela. 3. P. S. Rajakaruna 4. K. M. Smarakoon Banda 3rd & 4th Respondents both of Special Investigations Branch Ceylon Electricity Board 540, Colombo. 5. U. M. C. Alahakoon Regional Engineer, CEB Depot, 76/1, Attidiya Road, Rathmalana. 6. P. Nishantha Priyankara Assistant Superintendent CEB Depot Kesbewa. 7. Ceylon Electricity Board No. 50, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. 8. Nalaka Udayanga Senanayaka “Dimuth”, Iddagoda, Mathugama. 9. Ruhunu Wickramarachchi Manager Investigations, Ceylon Electricity Board No. 50, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. 10. Hon. Attorney General Attorney-General’s Department, Colombo 12. RESPONDENTS
20/ 09/ 17	SC APPEAL No 82/2016	
18/ 09/ 17	SC Appeal 130/10	K.L.A. Kulathunga, 624/8, Godage Mawatha, Anuradhapura. Defendant-Appellant-Appellant Vs, Karthigesu Nagaligam, Depot Road, Kanagapuram, Killinochchi. (The Deceased Plaintiff) (Appeared through his Power of Attorney holder Vairamuttu Thanapakyam) Nagalingam Rasalingam, 10, Ananda Nagar, KIllinochchi. Substituted Plaintiff- Respondent-Respondent
18/ 09/ 17	SC APPEAL 152/2014.	R.H.S.C. Soyza, Kimbulamaladeniya, Berathuduwa, Gonapeenuwala. Applicant Vs Asiri Central Hospitals PLC, No. 37, Horton Place, Colombo 07. Respondent A N D Asiri Central Hospitals PLC, No.37, Horton Place, Colombo 07. Respondent Appellant Vs R.H.S.C. Soyza, Kimbulamaladeniya, Berathuduwa, Gonapeenuwala. Applicant Respondent AND NOW BETWEEN Asiri Central Hospitals PLC, No. 37, Horton Place, Colombo 07. Respondent Appellant Appellant Vs R.H.S.C. Soyza Kimbulamaladeniya, Berathuduwa, Gonapeenuwala. Applicant Respondent Respondent

17/ 09/ 17	SC APPEAL 179/2015	1. Galagedarage Don Chandrawathie, No. 12, Chandralekha Mawatha, Colombo 08. 2. Galagedarage Don Premaratne alias Pemaratne, No. 109, Dr. N.M.Perera Mawatha, Colombo 08. Now of, No. 12, Chandralekha Mawatha, Colombo 08. 3. Galagederage Don Manel, No. 20, Chandralekha Mawatha, Colombo 08. 4. Galagederage Don Dammika Priyantha, No. 105, Dr. N.M.Perera Mawatha, Colombo 08. Plaintiffs Vs 1. Carmen Angeline de Silva alias Angeline Naidu 2. Fathima Farzana Rafik alias Shafik Both of , No. 109, Dr. N.M.Perera Mawatha, Colombo 08. Defendants A N D 1. Galagedarage Don Chandrawathie, No. 12, Chandralekha Mawatha, Colombo 08. 2. Galagedarage Don Premaratne alias Pemaratne, No. 109, Dr. N.M.Perera Mawatha, Colombo 08. Now of, No. 12, Chandralekha Mawatha, Colombo 08. 3. Galagederage Don Manel, No. 20, Chandralekha Mawatha, Colombo 08. 4. Galagederage Don Dammika Priyantha, No. 105, Dr. N.M.Perera Mawatha, Colombo 08. Plaintiff Petitioners Vs 1. Carmen Angeline de Silva alias Angeline Naidu 2. Fathima Farzana Rafik alias Shafik Both of , No. 109, Dr. N.M.Perera Mawatha, Colombo 08. Defendant Respondents A N D N O W 1. Galagedarage Don Chandrawathie, No. 12, Chandralekha Mawatha, Colombo 08. 2. Galagedarage Don Premaratne alias Pemaratne, No. 109, Dr. N.M.Perera Mawatha, Colombo 08. Now of, No. 12, Chandralekha Mawatha, Colombo 08. 3.Galagederage Don Manel, No. 20, Chandralekha Mawatha, Colombo 08. 4.Galagederage Don Dammika Priyantha, No. 105, Dr. N.M.Perera Mawatha, Colombo 08. Plaintiff Petitioner Appellants Vs 1. Carmen Angeline de Silva alias Angeline Naidu 2.Fathima Farzana Rafik alias Shafik Both of , No. 109, Dr. N.M.Perera Mawatha, Colombo 08. Defendant Respondent Respondents
13/ 09/ 17	S.C. Appeal No. 61/2012	G. M. M. Majeed No. 94/1, School Lane, Galhinna. 1ST DEFENDANT-PETITIONER Vs. G.R.W.M. Weerakoone No. 09, Colombo Street, Kandy. PLAINTIFF-RESPONDENT Jayantha Fernando 29/9. Sri Pushpananda Mawatha, Kandy. 2ND DEFENDANT-RESPONDENT AND BETWEEN G. M. M. Majeed No. 94/1, School Lane, Galhinna. 1ST DEFENDANT-PETITIONER-PETITIONER Vs. G.R.W.M. Weerakoone No. 09, Colombo Street, Kandy. PLAINTIFF-RESPONDENT-RESPONDENT Jayantha Fernando 29/9. Sri Pushpananda Mawatha, Kandy. 2ND DEFENDANT-RESPONDENT-RESPONDENT
13/ 09/ 17	S.C (CHC) Appeal No. 18/2008	Muruthawalage Chandrarathne No. 74/10, Thalgassa Road, Thibbotuwawa, Akuressa. PLAINTIFF Vs. Sri Lanka Insurance Corporation Limited ‘Rakshana Mandiraya’ No. 21, Vauxhall Street, Colombo 2. DEFENDANT AND NOW (BY AND BETWEEN) Muruthawalage Chandrarathne No. 74/10, Thalgassa Road, Thibbotuwawa, Akuressa. PLAINTIFF-APPELLANT Vs. Sri Lanka Insurance Corporation Limited ‘Rakshana Mandiraya’ No. 21, Vauxhall Street, Colombo 2. DEFENDANT-RESPONDENT

13/ 09/ 17	SC Appeal 103/2015	Samara Archchige Chandra Sagara Sri Palabaddala, Ratnapura Accused-Appellant-Petitioner-Appellant vs 1. Officer-in-Charge Police Station, Kiribathgoda. Complainant-Respondent-Respondent-Respondent 2. Honourable Attorney General Attorney General's Department Colombo 12 Respondent-Respondent-Respondent
13/ 09/ 17	SC Appeal 50/2014	J B Dissanayake No. 44/13, Dodandeniya Matale Plaintiff Vs Seemasahitha Keells Tours (Pudgalika) Samagama Correct Name Keells Tours (Private) Limited No.429 Ferguson Road Colombo 15 Defendant AND BETWEEN Seemasahitha Keells Tours (Pudgalika) Samagama Correct Name Keells Tours (Private) Limited No.429 Ferguson Road Colombo 15 Defendant-Appellant Vs J B Dissanayake No. 44/13, Dodandeniya Matale Plaintiff-Respondent AND NOW BETWEEN Seemasahitha Keells Tours (Pudgalika) Samagama Correct Name Keells Tours (Private) Limited No.429 Ferguson Road Colombo 15 Defendant-Appellant- Appellant Vs J B Dissanayake No. 44/13, Dodandeniya Matale Plaintiff-Respondent_ Respondent
12/ 09/ 17	SC Appeal 157/2013	1. Malavi Pathirannahelage Vindya Ruwangi Perera 2. Malavi Pathirannahelage Rukshala Santhsini Perera 3. Malavi Pathirannahelage Tarindu Perera All of No.86/9 Lesly Ranagala Mawatha Colombo 8 7th to 9th Defendant-Appellant- Petitioner-Appellants Vs 1. Walpola Mudalige Podihamine No.87, Walpola Watta, Kalanimulla, Angoda. Plaintiff-1st Respondent-Respondent 2. MPRT Perera 3. MPS Perera 4. MPI Perera 5. MPP Perera All of No.87/1, Walpola Watta, Kalanimulla Angoda 6. MPWD Perera No. 145, Siridamma Mawatha Colombo 8 2nd to 6th Defendant-Respondent-Respondents Vs
12/ 09/ 17	SC Appeal 87A/2006	D D Gnanawathi Ranasinghe, 165/5,Park Road, Colombo 5 Petitioner-Appellant(Deceased) PHK Dharmasiri Ranasinghe 165/5,Park Road, Colombo 5 Substituted Petitioner-Appellant Vs 1. Hon. Minister of Lands, Ministry of Lands, 80/5, Govijana Mandiraya, Battaramulla. & five others Respondent _Respondents

03/ 09/ 17	S.C. Appeal No.118/2012	Gamathige Dona Premawathie Perera ‘Sinhalena’, Hirana, Panadura. PLAINTIFF 1. Kongaha Pathiranage Don Sarath Gunarathne Perera Hirana, Panadura. 2. Tantrige Neulin Peiris (Near Dispensary) Hirana Panadura. DEFENDANTS AND BETWEEN Tantrige Neulin Peiris (Near Dispensary) Hirana Panadura. 2nd DEFENDANT-APPELLANT Vs. Gamathige Dona Premawathie Perera ‘Sinhalena’, Hirana, Panadura. PLAINTIFF-RESPONDENT Kongaha Pathiranage Don Sarath Gunarathne Perera Hirana, Panadura. 1ST DEFENDANT-RESPONDENT AND NOW BETWEEN Tantrige Neulin Peiris (Near Dispensary) Hirana Panadura. 2nd DEFENDANT-APPELLANT-PETITIONER-APPELLANT Vs. Gamathige Dona Premawathie Perera ‘Sinhalena’, Hirana, Panadura. PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT Kongaha Pathiranage Don Sarath Gunarathne Perera Hirana, Panadura. 1ST DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENT
30/ 08/ 17	SC-FR 222-2014	
03/ 08/ 17	SC SPL No. 03/2014	Hikkadu Koralalage Don Chandrasoma G -16, National Housing Scheme, Polhena, Kelaniya. Petitioner Vs. 1. Mawai S. Senathirajah Secretary, Illankai Thamil Arasu Kadchi, 30, Martin Road, Jaffna. 1(a) K. Thurairasasingham Secretary, Illankai Thamil Arasu Kadchi, 30, Martin Road, Jaffna. (Substituted 1st Respondent) 1. Mahinda Deshapriya Commissioner of Elections, Elections Secretariat, Sarana Mawatha, Rajagiriya. 2. Hon. Attorney General, Attorney General’s Department Colombo 12. Respondent
03/ 08/ 17	SC FR (Application) No.12/2012	N.H.Palitha Nandasiri, Rathumalpitiya, Harangalagama, Nalapitiya. Petitioner 1. N. A. T. Jayasinghe, Assistant Superintendent, Special Investigation Unit, Police Head Quarters Colombo 01. 2 Vidyajothi Dr. Dayasiri Fernando (Chairman) 3 Mr.Palitha Kumarasinghe P.C. (Member) 4 Mrs. Sirimavo A. Wijeratne (Member) 5. Mr. S. C. Mannapperuma (Member) 6. Mr. Ananda Seneviratne (Member) 7. Mr. N. H. Pathirana (Member) 8. Mr.S. Thillanadarajah (Member) 9. Mr. M. D. W. Ariyawansa (Member) 10. Mr.A. Mohamed Nahiya (Member) The 2nd to 10th Respondents of The Public Service Commission177, Nawala Road, Narahenpita. 11. Inspector General of Police, Sri Lanka Police Head Quarters, Colombo 01. 12. R. A. Karunasoma, Inquiring Officer, Disciplinary Inquiry, 176A, Kadawathgama, Hulangama, Matale. 13. Hon. Attorney General, Attorney-General’s Department, Colombo 12. Respondents

03/ 08/ 17	SC APPEAL NO-193/2012	W.D.M.Ganga Prasath Tikiri Banda Dissanayake, Pethum Uyana, Pallekelle, Kundasale PLAINTIFF V. R.G.R.M Hemali Priyantha Menike Ratnayake, 50, Keerapane, Gampola. DEFENDANT AND BETWEEN W.D.M.Ganga Prasath Tikiri Banda Dissanayake. Pethum Uyana, Pallekelle, Kundasale. PLAINTIFF-APPELLANT V. R.G.R.M. Hemali Priyantha Menike Ratnayake. 50, Keerapane, Gampola. DEFENDANT-RESPONDENT AND NOW BETWEEN W.D.M.Ganga Prasath Tikiri Banda Dissanayake, Pethum Uyana, Pallekelle, Kundasale. PLAINTIFF-APPELLANT-APPELLANT V. R.G.R.M. Hemali Priyantha Menike Ratnayake. 50, Keerapane, Gampola. DEFENDANT-RESPONDENT-RESPONDENT
03/ 08/ 17	SC /FR 353 / 2016	A. B. T. Rasanga, No. 193/13, Uda Peradeniya, Peradeniya. Petitioner Vs. 1. The Principal, Kingswood College, Kandy. 2. The Director - National Schools, Ministry of Education, “Isurupaya’ Battaramulla. 3. The Secretary, Ministry of Education, “Isurupaya’ , Battaramulla. 4. Hon. Attorney General, Attorney General’s Department Colombo 12. Respondents
03/ 08/ 17	SC / Appeal / 158/2014	1. Navaratnarasa Jayalingam 2. Navaratnarasa Jeevalingam, 3. Navaratnarasa Jothilingam, All of No.16 1/17, Mudalige Mawatha Presently of No. 415/2A, Galle Road, Mt. Lavinia. Plaintiffs Vs. Kuda Bandara Wettewa, No. 18/1, Eladaluwa Road, Badulla. Defendant AND BETWEEN 1. Navaratnarasa Jayalingam, 2. Navaratnarasa Jeevalingam, 3. Navaratnarasa Jothilingam, All of No.16 1/17, Mudalige Mawatha Presently of No. 415/2A, Galle Road, Mt. Lavinia. Plaintiff Appellants Vs. Kuda Bandara Wettewa, No. 18/1, Eladaluwa Road, Badulla. Defendant Respondnt AND NOW BETWEEN 1. Navaratnarasa Jayalingam, 2. Navaratnarasa Jeevalingam, 3. Navaratnarasa Jothilingam, All of No.16 1/17, Mudalige Mawatha Presently of No. 415/2A, Galle Road, Mt. Lavinia. Plaintiff Appellant-Appellants Vs. Kuda Bandara Wettewa, No. 18/1, Eladaluwa Road, Badulla. Defendant Respondent-Respondent
03/ 08/ 17	SC / Appeal / 151/2013	Thambachchi Ramiah Mallikanu Letchchumi, No. 51, Kotahena Weediya, Colombo 13. Plaintiff Vs. Bambarendage Jimoris Jinadasa, No. 255, Vihara Mavatha, (Assessment No 17) Hunupitiya Road, Wattala. AND BETWEEN Bambarendage Jimoris Jinadasa, No. 255, Vihara Mavatha, (Assessment No 17) Hunupitiya Road, Wattala. Defendant Appellant Vs. Thambachchi Ramiah Mallikanu Letchchumi, No. 51, Kotahena Weediya, Colombo 13. Plaintiff Respondent AND NOW BETWEEN Thambachchi Ramiah Mallikanu Letchchumi, No. 51, Kotahena Weediya, Colombo 13. Plaintiff Respondent Appellant Vs. Bambarendage Jimoris Jinadasa, No. 255, Vihara Mavatha, (Assessment No 17) Hunupitiya Road, Wattala. Defendant Appellant Respondent

03/ 08/ 17	SC FR Application No. 112/2010	Ishantha Kalansooriya “Jayanthi” Narawala, Poddala And also at No. 267, School Lane Borrelesgamuwa Petitioner Vs. 1. Karunaratne Inspector of Police Officer In charge of Police Station Poddala. 2. Indika Sub Inspector of Police Police Station, Poddala. 3. Saminda Police Constable Poddala Police Station Poddala. 4. Mahinda Balasuriya (Now retired) Pujith Jayasundera Inspector General of Police of Sri Lanka Police Headquarters. 5. Hon. Attorney General Attorney General’s Department Colombo 12. Respondents
03/ 08/ 17	SC. Appeal No. 41/2015 and SC/ CHC Appeal 37/2008	SC Appeal No. 41/2015 CA No. 399/99(F) Dona Padma Priyanthi Senanayake No. 48/3 Kottagewatta Road Battaramula Plaintiff-Appellant-Appellant Vs 1. H.G. Chamika Jayantha No. 494/1, Udumulla Road Battaramulla 2. Leelawathi Siriwardena 2nd Floor, Cycle Bazaar Building Galle Road, Bambalapitiya 3. H.D. Susila Anuruddhika No. 494, Udumulla Road Battaramulla. Defendant-Respondent-Respondent SC CHC Appeal No. 37/2008 HC (Civil No. 44/2007 MR Mohamed Woleed Mohamed Zawahir No. 103, Sirikulam Watta Mallawapitiya. Plaintiff-Appellant Vs. Amana Takaful Company Limited “Amana House” No. 550 , R.A. De Mel Mawatha Colombo 03 Head Office, Baddhaloka Mawatha Colombo 4. Defendant-Respondent
03/ 08/ 17	SC (FR) Application No.SC/ Special/ 04/2014	Ms. P. Thavarajanie, Nursing Tutor – Grade 1, No.154, Thambimuthu Road, Thambiluvil – 2, Thirukkovil. Petitioner Vs. 1. Kanaganayagam Acting Principal College of Nursing Ampara. 2. Sriwardena (Mrs.) Director, Nursing Education, Ministry of Health, “Suwasiripaya” Colombo 10. 3. Indranee (Mrs.) Acting Warden, College of Nursing, Ampara. 4. Anil. (Mr.) Management Assistant College of Nursing, Ampara. 5. Anjan (Mr.) College of Nursing, Ampara 6. Honourable Attorney General, Attorney General’s Chambers, Colombo 12. Respondents
03/ 08/ 17	SC (LA) Appeal 165/14	M.J.Marikkar Plaintiff -vs- Jayatunga Defendant Between Jayatunga Defendant-Appellant Vs. Sithy Zarooha Zuhair Substituted Plaintiff-Respondent Now between Sithy Zarooha Zuhair No.98/1, Pieris Mawatha, Kalubowila, Dehiwala. Substituted Plaintiff-Respondent- Petitioner B.H.R.Jayatunga, No.172/1/1, Madawala Road, Katugastota. Defendant-Appellant-Respondent.

03/08/17	SC Appeal 246,247,249 & 250/14	Divisional Secretary Kalutara Petitioner Vs. Kalupahana Mestrige Jayatissa No.09/20, Mahajana Pola Kalutara South Respondent AND Kalupahana Mestrige Jayatissa No.09/20, Mahajana Pola Kalutara South Respondent-Petitioner Vs 1. Divisional Secretary Kalutara 2. The Attorney General Attorney General's Department Colombo. Applicant-Respondents AND 1. Divisional Secretary Kalutara 2. The Attorney General Attorney General's Department Colombo. Applicant-Respondent-Petitioners Vs Kalupahana Mestrige Jayatissa No.09/20, Mahajana Pola Kalutara South Respondent-Petitioner-Respondent AND NOW BETWEEN 1. Divisional Secretary Kalutara 2. The Attorney General Attorney General's Department Colombo. Applicant-Respondents-Petitioner-Petitioners Vs Kalupahana Mestrige Jayatissa No.09/20, Mahajana Pola Kalutara South Respondent-Petitioner-Respondent -Respondent
02/08/17	S.C. Appeal No. 97/2013	Samarakoon Mudiyanselage Saheli Sajeera Samarakoon No. 80, Library Mawatha, Maharagama PLAINTIFF Vs. Karunadasa Abeywickrema No. 72, "Samram Groceries" High Level Road, Maharagama DEFENDANT AND BETWEEN Karunadasa Abeywickrema No. 72, "Samram Groceries" High Level Road, Maharagama DEFENDANT-APPELLANT Vs. Samarakoon Mudiyanselage Saheli Sajeera Samarakoon No. 80, Library Mawatha, Maharagama PLAINTIFF-RESPONDENT AND NOW Karunadasa Abeywickrema No. 72, "Samram Groceries" High Level Road, Maharagama DEFENDANT-APPELLANT-PETITIONER-APPELLANT Vs. Samarakoon Mudiyanselage Saheli Sajeera Samarakoon No. 80, Library Mawatha, Maharagama PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT
02/08/17	SC APPEAL No. 200/2015	1. Barbara Iranganie De Silva, No. 125/A, Weliamuna Road, Hekitta, Wattala. 2. Malagalage Dona Chanithrie Kanchana Perera, No. 125/A, Weliamuna Road, Hekitta , Wattala. Plaintiffs Vs Hewa Waduge Indralatha, No. 22, Peiris Mawatha, Colombo 15. Defendant AND THEN BETWEEN Hewa Waduge Indralatha, No. 22, Peiris Mawatha, Colombo 15. Defendant Petitioner Vs 1.Barbara Iranganie De Silva, No. 125/A, Weliamuna Road, Hekitta, Wattala. 2.Malagalage Dona Chanithrie Kanchana Perera, No. 125/A, Weliamuna Road, Hekitta , Wattala. Plaintiffs Respondents AND THEREAFTER BETWEEN Hewa Waduge Indralatha, No. 22, Peiris Mawatha, Colombo 15. DEFENDANT PETITIONER APPELLANT Vs 1. Barbara Iranganie De Silva, No. 125/A, Weliamuna Road, Hekitta, Wattala 2. Malagalage Dona Chanithrie Kanchana Perera, No. 125/A, Weliamuna Road, Hekitta, Wattala. PLAINTIFFS RESPONDENTS RESPONDENTS AND NOW BETWEEN 1.Barbara Iranganie De Silva, No. 125/A, Weliamuna Road, Hekitta, Wattala 2. Malagalage Dona Chanithrie Kanchana Perera, No. 125/A, Weliamuna Road, Hekitta, Wattala. PLAINTIFFS RESPONDENTS RESPONDENTS APPELLANTS Vs Hewa Waduge Indralatha, No. 22, Peiris Mawatha, Colombo 15. DEFENDANT PETITIONER APPELLANT RESPONDENT

02/08/17	SC/Spl/LA 188/2015	L. S. Weerakone of No.178, Batadobatuduwa Road, Alubomulla. Applicant-Owner Vs. P.T.Weerakoon of No.308, “Florance” Batadobaguduwa Road, Alubomulla. Tenant-Respondent AND BETWEEN P. T. Weerakoon of No.308, “Florence” Batadobatuduwa Road, Alubomulla. Tenant-Respondent-Petitioner Vs. 1. L. S. Weerakoon No.178, Batadobatuduwa Road, Alubomulla Applicant-Owner-respondent 2.Mrs.G.Lekha Geethanjali Perera of No.89, Kaduwela Road, Battaramulla. Former Western Province Housing Commissioner-Respondent 3.Mrs. P. H. Colombage Of dNo.89, Kaduwela Road Battaramulla. Substituted Former Western Province Housing Comissioner-Respondent- Respondent AND NOW BETWEEN P. T. Weerakoon of No.308, “Florance” Batadombaguduwa Road, Alubomulla. Tenant-Respondent-Petitioner- Petitioner Vs. 1 .L. S. Weerakoon of No.178 Batadobatuduwa Road, Alubomulla. Applicant-Owner-Respondent- Respondent 2. Mrs.G.Lekha Geethanjali Perera of No.89, Kaduwela Road, Battaramulla. Former Western Province Housing Commissioner-Respondent 3.Mrs. P. H. Colombage Of dNo.89, Kaduwela Road Battaramulla. Present Western Province Housing Commissioner-Respondent- Respondent
02/08/17	S.C F.R. No.167/2013	NadarajahGunasekeram of Arasady Veethy,ThayiddyEastKKSandpresently of 105, Arasady Road,Kandarmadam. PETITIONER Vs 1. a) Gotabaya Rajapaksa Secretary (Since left the services) And now b) M.D.U.Basnayake – present holder Ministry of Defence and Urban Development 15/5, Baladaksha Mawatha, Colombo 3. 2. a) Lieutenant General Jagath Jayasuriya, (Former Commander of the Army) b) Lieutenant General R.M.D.Ratnayake Present Army Commander Sri Lanka Army Army Headquarters Colombo 3. c) Lieutenant Gen. A.W.J.C. De Silva RWP USP Former Commander – Sri Lanka Army Army Headquarters, Colombo 3. d) Major General Jagath Rambukpotha Former Commander, Army Headquarters – Colombo 3. e) Major General A.W.J. Chrisantha de Silva Present Army Commander Army Headquarters – Colombo 3. 3. a) Major General Mahinda Hathurusinghe, Commander, Security Forces (Jaffna) Since transferred b) Major General Udaya Perera Commander Security Forces (Jaffna) Since transferred c) Major General Jagath Alwis Security Forces Head Quarters, Jaffna Present Commander d) Major General NandanaUdawatta Present Holder –Security Forces, Jaffna 4. Divisional Secretary Divisional Secretariat, Tellippalai. 5. Honourable Attorney General Attorney General’s Department, Colombo 12. 6. Land Commissioner, Colombo. RESPONDENTS

01/ 08/ 17	SC SPL LA No: 133/2015	1. A.A. Gunawardane B 1/1, Jathika Mahal Niwasa Pamankada Road, Kirulapone, Colombo 06 2. M.P. Perera B 2/2 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 3. R.E.D Amarasena B 1/2 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 4. P.H. Wimalasiri B 3/1 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 5. N.A. Illukpitiya B 2/1 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 Complainants Vs. S.J. Sirisena BG 1 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 Respondent AND THEN In the matter of an application for a mandate or a writ in the nature of a writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka S.J. Sirisena BG 1 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 Respondent-Petitioner Vs. 1. A.A. Gunawardane B 1/1, Jathika Mahal Niwasa Pamankada Road, Kirulapone, Colombo 06 1st Complainant-Respondent 2. Mrs. Dombagahawattage Nandwathie Perera B 2/2 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 2nd Respondent 3. R.E.D Amarasena B 1/2 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 3rd Complainant-Respondent 4. P.H. Wimalasiri B 3/1 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 4th Complainant-Respondent 5. N.A. Illukpitiya B 2/1 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 5th Complainant-Respondent 6. Condominium Management Authority First Floor, National Housing Department Building, Sir Chittampalam A. Gardiner Mawatha, Colombo 02 6th Respondent AND NOW BETWEEN S.J. Sirisena BG 1 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 Respondent – Petitioner-Petitioner Vs. 1. A.A. Gunawardane B 1/1, Jathika Mahal Niwasa Pamankada Road, Kirulapone, Colombo 06 1st Complainant-Respondent-Respondent 2. Mrs. Dombagahawattage Nandwathie Perera B 2/2 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 2nd Respondent-Respondent 3. R.E.D Amarasena B 1/2 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 3rd Complainant-Respondent-Respondent 4. P.H. Wimalasiri B 3/1 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 4th Complainant-Respondent-Respondent 5. N.A. Illukpitiya B 2/1 Jathika Mahal Niwasa, Pamankada Road, Kirulapone, Colombo 06 5th Complainant-Respondent-Respondent 6. Condominium Management Authority First Floor, National Housing Department Building, Sir Chittampalam A. Gardiner Mawatha, Colombo 02 6th Respondent – Respondent

01/08/17	SC APPEAL No. 113/13	Don Padmasiri Abeysingha, Anguruwatota Road, Horana. Plaintiff Vs 1. Abdul S. Mohamed Anver, No. 43, Anguruwatota Road, Horana. (Deceased) 2. Gamage Don Sisiliyawathi, Anguruwatota Road, Horana. (Deceased) 2A. Gamage Don W. Gunawardena, No. 110, Sri Somananda Mawath, Horana. 3.Y.W.Costa, Anguruwatota Road, Horana. 4. Induruwage P. Thisera, No. 69, Anguruwatota Road, Horana. 5. Gamage Don W. Gunawardena, Anguruwatota Road, Horana. 6. Thalagalage David Gunatilake, Anguruwatota Road, Horana. 6A. Karunarathna Banda Wijesekera Mediwaka, No. 47, Anguruwatota Road, Horana. 6B. Weerasekera Wasala Mudiyanselage Mediwaka Walawwe Buddika Apsara Mediwaka, No. 47, Anguruwatota Road, Horana. 7. Induruwage Rosalin Thisera, Anguruwatota Road, Horana. Defendants AND Abdul Salam Mohamed Anver, No. 43, Anguruwatota Road, Horana. 1st Defendant Appellant Vs Don Padmasiri Abeysingha' Anguruwatota Road, Horana. Plaintiff Respondent Don Muditha Abeysingha, No. 30, Ariyawilasa Road, Horana. Substituted Plaintiff Respondent 2A. Gamage Don W. Gunawardena, No. 110, Sri Somananda Mawath, Horana. 3.Y.W.Costa, Anguruwatota Road, Horana. 4. Induruwage P. Thisera, No. 69, Anguruwatota Road, Horana. 5. Gamage Don W. Gunawardena, Anguruwatota Road, Horana. 6. Thalagalage David Gunatilake, Anguruwatota Road, Horana. 6A. Karunarathna Banda Wijesekera Mediwaka, No. 47, Anguruwatota Road, Horana. 6B. Weerasekera Wasala Mudiyanselage Mediwaka Walawwe Buddika Apsara Mediwaka, No. 47, Anguruwatota Road, Horana. 7. Induruwage Rosalin Thisera, Anguruwatota Road, Horana. 7A. Weerasekera Wasala Mudiyanselage Mediwaka Walavve Buddika Apsara Mediwaka, No. 47, Anguruwatota Road, Horana. Defendants Respondents AND THEN Weerasekera Wasala Mudiyanselage Mediwaka Walavve Buddika Apsara Mediwaka, No. 47, Anguruwatota Road, Horana. 6B & 7A Substituted Defendant Respondent Petitioner Vs Abdul Salam Mohamed Anver, No. 43, Anguruwatota Road, Horana. 1st Defendant Appellant Respondent (now deceased) AND NOW BETWEEN Weerasekera Wasala Mudiyanselage Mediwaka Walavve Buddika Apsara Mediwaka, No. 47, Anguruwatota Road, Horana. 6B & 7A Substituted Defendant Respondent Appellant Petitioner Vs 1A. Abdul Samadu Marikkar Ummu Ala, No. 432, Galle Road, Horetuduwa, Moratuwa. 1B.Mohamed Anver Ahmed Jausakky, No. 137/4, Hill Street, Dehiwela. 1C. Mohamed Anver Ahamed Hassan, No. 38, De Vos Lane, Grandpass, Colombo 14. 1D. Mohamed Anver Pattumma Husseniya, No. 432, Galle Road, Horetuduwa, Moratuwa. 1E. Mohamed Anver Ummul Nihara, No. 432, Galle Road, Horetuduwa, Moratuwa. Substituted 1st Defendant Respondent Respondents

01/ 08/ 17	SC FR Application No. 50/2015	SC FR Application No. 50/2015 Petitioners Vs. 1. Sumith Parakramawansha Principal & Chairman - Interview Board Dharmashoka Vidyalaya Ambalangoda. 2. Rekha Nayani Mallawarachchi Secretary – Interview Board 3. Mr. Diyagubaduge Dayaratne Member – Interview Board 4. Malliyawadu Sheryl Chandrasiri Member – Interview Board 5. Nilenthi Santhaka Thaksala De Silva Member – Interview Board 6. W.T.B. Sarath Chairman – Appeals and Objections Board 7. Rekha Nayani Mallawarachchi Secretary – Appeals and Objections Board 8. P.D. Pathirana Member – Appeals and Objections Board 9. K.P. Ranjith Member – Appeals and Objections Board 10. Jagath Wellage Member – Appeals and Objections Board All c/o Dharmashoka Vidyalaya, Ambalangoda 11. Director National Schools, Isurupaya, Battaramulla. 12. Secretary, Ministry of Education, Isurupaya, Battaramulla. 13. Honourable Attorney General, Attorney General's Department, Colombo 12. Respondents
01/ 08/ 17	SC FR Application No. 60/15	1. Seekkuge Rashantha, No.22, Saman Madura Watta Road, Heppumulla Ambalangoda 2. Seekkuge Iduwara Umanjana (minor, No.22, Saman Madura Watta Road, Heppumulla Ambalangoda Petitioners Vs. 1. Akila Viraj Kariyawawsam (M.P.) Hon. Minister of Education, Ministry of Education, "Isurupaya", Battaramulla. 2. Upali Marasinghe, Secretary – Ministry of Education, "Isurupaya", Bataramulla. 2 (A) W. M. Bandusena Secretary – Ministry of Education, Isurupaya, Battaramulla. 3. Sumith Parakramawansha, Former Principal – Dharmashoka Vidyalaya Galle Road, Ambalangoda. 3A. W. T. Ravindra Pushpakumara, Principal – Dharmashoka Vidyalaye, Galle Road, Ambalangoda. 4. R. N. Mallawarachchi 5. Diyagubaduge Dayarathne 6. M. Shirley Chandrasiri 7. N.S.T.de Silva 4th to 7th Above All: Members of the Interview Board, (Admissions to Year 1) C/o Dharmashoka / Vidyalaya, Galle Road, Ambalangoda. 8. W. T. B. Sarath 9. P. D. Pathirathne 10. K. P. Ranjith 11. Jagath Wellage 4th and 8th to 11th above All: Members of the Appeal Board, (Admission to Year 1) C/o Dharmashoka/Vidyalaya, Galle Road, Ambalangoda. 12. Ranjith Chandrasekara, Director-National Schools, Isurupaya, Battaramulla. 13. Hon. The Attorney General, Attorney General's Department, Colombo 12. Respondents
01/ 08/ 17	S.C.F.R. Application No. 337/2012	V.M.P Buddhika Karunadasa of No 86/1, Keselwatte, Spring Valley, Badulla. Petitioner Vs. 1. D.K.M.K Dasanayake, Chairman 2. Rajaratnam Gnanasekaran, Member 3. Mohan Ratwatte, Member 4. A.A Salam, Member 5. D.C Dahanayake, Member 6. R.M.T.B Hathiyaldeniya, Secretary The 1st – 5th Respondents are the Chairman and the members and the 6th Respondent is the Secretary of the Uva Provincial Public Service Commission, 14/4, Peelipothagama Road, Pinarawa, Badulla. 7. The Governor, Uva Province, The Governor's Office, Rajaweediya, Badulla. 8. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents

01/ 08/ 17	SC Appeals 187 & 188/2015	Naomi Leela Elizabeth Perera No.17, Mendis Mawatha Moratuwa. Plaintiff VS 1. J. W. P. E. Vernon Botejue of No.183, Nawala Road, Nugegoda 2. J.W.Thelma Maude Phylis Vitanage nee Botejue of No.31, Kotuwegoda, Rajagiriya. (deceased) 3. R. A. Edwin Sincho of No.49, 5th Lane, Nawala 4. J. W. Aruna V. P. Botejue, Agarapatana Now of No.183 Nawala Road, Nugegoda. 5. B. S. C. Cooray of No.39, Kotuwegoda, Rajagiriya, Defendants IN THE HIGH COURT 4. J. W. Aruna V. P. Botejue, Agarapatana Now of No.183 Nawala Road, Nugegoda 4th Defendant-Appellant Vs. Naomi Leela Elizabeth Perera No.17, Mendis Mawatha Moratuwa. Plaintiff-Respondent 3. J. W. P. E. Vernon Botejue of No.183, Nawala Road, Nugegoda. 4. J.W.Thelma Maude Phylis Vitanage nee Botejue of No.31, Kotuwegoda, Rajagiriya. (deceased) 3. R. A. Edwin Singho of No.49, 5th Lane, Nawala 5. B. S. C. Cooray of No.39, Kotuwegoda, Rajagiriya, Defendants-Respondents NOW IN THE SUPREME COURT 4. J. W. Aruna V. P. Botejue, Agarapatana Now of No.183 Nawala Road, Nugegoda 4th Defendant-Appellant-Petitioner Vs. Naomi Leela Elizabeth Perera No.17, Mendis Mawatha Moratuwa. Plaintiff-Respondent-Respondent 1. J. W. P. E. Vernon Botejue of No.183, Nawala Road, Nugegoda 2. J.W.Thelma Maude Phylis Vitanage nee Botejue of No.31, Kotuwegoda, Rajagiriya. now of 1636/5, Kotte Road, Rajagiriya (deceased) 3. R. A. Edwin Singho of No. 49, 5th Lane, Nawala . 5. B. S. C. Cooray of No.39, Kotuwegoda, Rajagiriya, Defendants-Respondents-Respondents
31/ 07/ 17	SC APPEAL No. 168/14	Mahadura Chandradasa Thabrew alias Mahadura Chandradasa Weerawardena, ‘Allan Niwasa’, No. 47, Uposatharama Road, Panadura. Plaintiff Vs 1. Mahadura Padmini Hemalatha Thabrew, Uposatharama Road, Pinwatta, Panadura. 2. Seylan Bank PLC, Head Office, Sir Baron Jayathilaka Mawatha, Colombo 2. Defendants AND BETWEEN Mahadura Chandradasa Thabrew alias Mahadura Chandradasa Weerawardena, ‘Allan Niwasa’, No. 47, Uposatharama Road, Panadura. Plaintiff Appellant Vs 1. Mahadura Padmini Hemalatha Thabrew, Uposatharama Road, Pinwatta, Panadura. 2. Seylan Bank PLC, Head Office, Sir Baron Jayathilaka Mawatha, Colombo 2. Defendant Respondents AND NOW BETWEEN Mahadura Padmini Hemalatha Thabrew, Uposatharama Road, Pinwatta, Panadura. 1ST Defendant Respondent Petitioner Vs Mahadura Chandradasa Thabrew alias Mahadura Chandradasa Weerawardena, ‘Allan Niwasa’, No. 47, Uposatharama Road, Panadura. Plaintiff Appellant Respondent Seylan Bank PLC, Head Office, Sir Baron Jayathilaka Mawatha, Colombo 02. 2nd Defendant Respondent Respondent

31/ 07/ 17	SC APPEAL No. 120/09	Don Andrayas Rajapaksa, No. 62, Hakmana Road, Gabadaveediya, Matara. Plaintiff Vs Gnanapala Weerakoon Rathnayake, Aluthkade alias Middeniyekade, Hettiyawala East, Puhulwella, Kirinda. Defendant AND BETWEEN Don Andrayas Rajapaksa, No. 62, Hakmana Road, Gabadaveediya, Matara. Plaintiff Appellant Vs Gnanapala Weerakoon Rathnayake, Aluthkade alias Middeniyekade, Hettiyawala East, Puhulwella, Kirinda. Defendant Respondent AND NOW BETWEEN Gnanapala Weerakoon Rathnayake, Aluthkade alias Middeniyekade, Hettiyawala East, Puhulwella, Kirinda. Defendant Respondent Appellant Vs Don Andrayas Rajapaksa, No. 62, Hakmana Road, Gabadaveediya, Matara. Plaintiff Appellant Respondent Shirantha Pushpalal Rajapaksa, No. 62D, Gabadaveediya, Matara. Substituted Plaintiff Appellant Respondent.
31/ 07/ 17	SC Appeal No.62/2013	BHADRA DE SILVA RAJAKARUNA Uduvaragoda, Kahawa. PLAINTIFF VS. 1. GENERAL MANAGER OF RAILWAYS Sri Lanka Railway Department, Colombo. 2. JAGAMUNI PIYASENA DE SILVA No.263, Duwa Road, Akurala, Kahawa. 3. HANDUNETTI LALITH WIJESUNDERA Duwa Road, Akurala, Kahawa. 4. HON. ATTORNEY GENERAL Attorney General's Department, Colombo 12. DEFENDANTS AND BETWEEN 1. GENERAL MANAGER OF RAILWAYS Sri Lanka Railways Department, Colombo. 4. HON. ATTORNEY GENERAL Attorney General's Department, Colombo 12. 1st AND 4th DEFFENDANTS- APPELLANTS VS. BHADRA DE SILVA RAJAKARUNA Uduvaragoda, Kahawa. PLAINTIFF-RESPONDENT 2. JAGAMUNI PIYASENA DE SILVA No.263, Duwa Road, Akurala, Kahawa. 3. HANDUNETTI LALITH WIJESUNDERA Duwa Road, Akurala, Kahawa. DEFENDANTS-RESPONDENTS 2A. HENDADURA KANTHILATHA No. 263, Samurdhi Mawatha, Duwa Road, Akurala, Kahawa. 3A. KANAKKAHEWA JAYANTHI No.260,Duwa Road, Akurala, Kahawa. SUBSTITUTED DEFENDANTS- RESPONDENTS AND NOW BETWEEN 1. GENERAL MANAGER OF RAILWAYS Sri Lanka Railways Department, Colombo. 4. HON. ATTORNEY GENERAL Attorney General's Department, Colombo 12. 1st AND 4th DEFFENDANTS-APPELLANTS- PETITIONERS/APPELLANTS VS. BHADRA DE SILVA RAJAKARUNA Uduvaragoda, Kahawa. PLAINTIFF-RESPONDENT- RESPONDENT 2A. HENDADURA KANTHILATHA No. 263, Samurdhi Mawatha, Duwa Road, Akurala, Kahawa. 3A. KANAKKAHEWA JAYANTHI No.260,Duwa Road, Akurala, Kahawa. SUBSTITUTED DEFENDANTS- RESPONDENTS-REPONDENTS

31/ 07/ 17	S.C.Appeal No: SC CHC 39/06	SEYLAN BANK LIMITED No. 69, Janadhipathi Mawatha, Colombo 1. Presently at “Ceylinco- Seylan Towers”, No. 90,Galle Road, Colombo 03. PLAINTIFF VS. 1. CLEMENT CHARLES EPASINGHE No.301/B, Kanjukkuliya, Mugunuwatawana. 2. WEERAKKODY ARATCHIGE NIMALA EPASINGHE No.301/B, Kanjukkuliya, Mugunuwatawana. 3. BRAHMANA MUDALIGE BASIL PETER Suduwella Farm,Suduwella, Madampe. 4. BODAWALA MARASINGHALAGE SARATH KARUNATHILAKE MARASINGHE Rest House,Chilaw. DEFENDANTS AND NOW SEYLAN BANK LIMITED No. 69, Janadhipathi Mawatha, Colombo 1. Presently at “Ceylinco- Seylan Towers”, No.90, Galle Road, Colombo 03. PLAINTIFF-APPELLANT VS. 1. CLEMENT CHARLES EPASINGHE No.301/B, Kanjukkuliya, Mugunuwatawana. 2. WEERAKKODY ARATCHIGE NIMALA EPASINGHE No.301/B, Kanjukkuliya, Mugunuwatawana. 1ST AND 2ND DEFENDANTS- RESPONDENTS
31/ 07/ 17	SC / Appeal / 53/2013	Nuwarapaksa Pedige Gunawathie Polwattewedagedara, Meepitiya. Plaintiff Vs. 1. Nuwarapaksa Pedige Malani, Atabomulahena, Dampelgoda, Bossala. 2. Meragal Pedige Wimaladasa, Atabomulahena, Dampelgoda, Bossala. Defendants AND BETWEEN 1. Nuwarapaksa Pedige Malani, Atabomulahena, Dampelgoda, Bossala. 2. Meragal Pedige Wimaladasa, Atabomulahena, Dampelgoda, Bossala. Defendant Appellants Vs. Nuwarapaksa Pedige Gunawathie, Polwattewedagedara, Meepitiya. Plaintiff Respondent AND NOW BETWEEN Nuwarapaksa Pedige Gunawathie, Polwattewedagedara, Meepitiya. Plaintiff Respondent Appellant Vs. 1. Nuwarapaksa Pedige Malani, Atabomulahena, Dampelgoda, Bossala. 2. Meragal Pedige Wimaladasa, Atabomulahena, Dampelgoda, Bossala. Defendant Appellant Respondents

31/ 07/ 17	SC. Appeal 50/2013	Officer in Charge, Police Station, Matara. Complainant Vs. 1. Mudugamuwa Hewage Gunasena, 2. Kankanamdurage Wimalawathie, Both of No 60, Samdale Farm, Tepudeniya. 3. Hawage Chaminda Sandamal, 4. Mudugamuwa Hewage Pathma Rangika, Both of Ipitawatta Galdola, Kotapola. 5. Mudugamuwa Hewage Lasanthi Shashikala, No. 60, Semdale Farm, Tepudeniya. Accuseds AND BETWEEN Mudugamuwa Hewage Gunasena, Both of No 60, Samdale Farm, Tepudeniya. 1st Accused Appellant Vs. Officer in Charge Police Station, Akuressa. Complainant Respondent Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent 2. Kankanamdurage Wimalawathie, No 60, Samdale Farm, Tepudeniya. 3. Hawage Chaminda Sandamal, 4. Mudugamuwa Hewage Pathma Rangika, Both of Ipitawatta Galdola, Kotapola. 5. Mudugamuwa Hewage Lasanthi Shashikala, No. 60, Semdale Farm, Tepudeniya. Accused Respondents AND NOW BETWEEN Mudugamuwa Hewage Gunasena, Both of No 60, Samdale Farm, Tepudeniya. 1st Accused Appellant-Appellant Vs. Officer in Charge Police Station, Akuressa. Complainant Respondent-Respondent Hon. Attorney General, Attorney General's Department, Colombo 12. Respondent-Respondent 2. Kankanamdurage Wimalawathie, No 60, Samdale Farm, Tepudeniya. 3. Hawage Chaminda Sandamal, 4. Mudugamuwa Hewage Pathma Rangika, Both of Ipitawatta Galdola, Kotapola. 5. Mudugamuwa Hewage Lasanthi Shashikala, No. 60, Semdale Farm, Tepudeniya. Accused Respondent-Respondents
31/ 07/ 17	SC / Appeal / 69/2007	Uralaliyanage Caroline Perera, Dewala Road, Pamunuwa, Maharagama. Plaintiff Vs. People's Bank, Sir Chittampalam Gardiner Mawatha, Colombo 2. Defendant AND Uralaliyanage Caroline Perera, Dewala Road, Pamunuwa, Maharagama. Plaintiff petitioner Vs. People's Bank, Sir Chittampalam Gardiner Mawatha, Colombo 2. Defendant Respondent AND Uralaliyanage Caroline Perera, Dewala Road, Pamunuwa, Maharagama. Plaintiff Petitioner-Petitioner Vs. People's Bank, Sir Chittampalam Gardiner Mawatha, Colombo 2. Defendant Respondent-Respondent AND People's Bank, Sir Chittampalam Gardiner Mawatha, Colombo 2. Defendant Respondent-Respondent Petitioner Vs. Uralaliyanage Caroline Perera (dead), K. M. C. Perera Dewala Road, Pamunuwa, Maharagama. Substituted Plaintiff Petitioner- Petitioner Respondent AND NOW BETWEEN Uralaliyanage Caroline Perera (dead), K. M. C. Perera (dead) Kalubowilage Prema Kumara Perera, Dewala Road, Pamunuwa, Maharagama. 1A. Substituted Plaintiff Petitioner- Petitioner Respondent Appellant Vs People's Bank, Sir Chittampalam Gardiner Mawatha, Colombo 2. Defendant Respondent-Respondent Petitioner Respondent

27/ 07/ 17	SC FR Appln No. SCFR 59/15	1. Naragal Nilantha de Silva, No.48, Kanda Road, Ambalangoda 2. Naragal Rasindu Harshana de Silva (minor) No.48,Kanda Road, Ambalangoda. Petitioners Vs. 1. Akila Viraj Kariyawawsam (M.P.) Hon. Minister of Education, Ministry of Education, “Isurupaya”, Battaramulla. 2. Upali Marasinghe, Secretary – Ministry of Education, “Isurupaya”, Bataramulla. 2(A) W.M.Bandusena Secretary – Ministry of Education, Isurupaya, Battaramulla. 3. Sumith Parakramawansha, Former Principal – Dharmashoka Vidyalaya Galle Road, Ambalangoda. 3A. W.T.Ravindra Pushpakumara, Principal – Dharmashoka Vidyalaye, Galle Road, Ambalangoda. 4. R.N.mallawarachchi 5. Diyagubaduge Dayarathne 6. M.Shirley Chandrasiri 7. N.S.T.de Silva 4th to 7th Above All: Members of the Interview Board, (Admissions to Year 1) C/o Dharmashoka /Vidyalaya, Galle Road, Ambalangoda. 8. W.T.B.Sarath 9. P.D.Pathirathne 10. K.P.Ranjith 11. Jagath Wellage 4th and 8th to 11th above All: Members of the Appeal Board, (Admission to Year 1) C/o Dharmashoka/Vidyalaya, Galle Road, Ambalangoda. 12. Ranjith Chandrasekara, Director-National Schools, Isurupaya, Battaramulla. 13. Hon. The Attorney General, Attorney General’s Department, Colomb o 12. Respondents
26/ 07/ 17	S.C. Appeal 125/2015	Hatton National Bank PLC No. 479, T.B. Jaya Mawatha, Colombo 10. and previously at 481, T.B. Jayah Mawatha, Colombo 10. And having and maintaining a branch office at 22, Kandy Road, Nittambuwa (previously known as Hatton National Bank Ltd) PLAINTIFF Vs. 1. Sakalasuriya Appuhamilage Upul Aruna Shantha Kukulnape, Pallewela. 2. Senanayake Amarasinghe Mohotti Appuhamilage Sudath Denzil No. 64, Kirindiwita. Gampaha. 3. Subasinghe Dissanayake Appuhamilage Upul Hemantha Subsasinshge, No. 74, Marapola, Veyangoda. DEFENDANTS AND BETWEEN Hatton National Bank PLC No. 479, T.B. Jaya Mawatha, Colombo 10. and previously at 481, T.B. Jayah Mawatha, Colombo 10. And having and maintaining a branch office at 22, Kandy Road, Nittambuwa (previously known as Hatton National Bank Ltd) PLAINTIFF-APPELLANT Vs. 1. Sakalasuriya Appuhamilage Upul Aruna Shantha Kukulnape, Pallewela. 2. Senanayake Amarasinghe Mohotti Appuhamilage Sudath Denzil No. 64, Kirindiwita. Gampaha. 3. Subasinghe Dissanayake Appuhamilage Upul Hemantha Subsasinshge, No. 74, Marapola, Veyangoda. DEFENDANT-RESPONDENTS AND NOW BETWEEN Senanayake Amarasinghe Mohotti Appuhamilage Sudath Denzil No. 64, Kirindiwita. Gampaha. 2ND DEFENDANT-RESPONDENT-APPELLANT Hatton National Bank PLC No. 479, T.B. Jaya Mawatha, Colombo 10. and previously at 481, T.B. Jayah Mawatha, Colombo 10. And having and maintaining a branch office at 22, Kandy Road, Nittambuwa (previously known as Hatton National Bank Ltd) PLAINTIFF-APPELLANT-RESPONDENT Vs. 1. Sakalasuriya Appuhamilage Upul Aruna Shantha Kukulnape, Pallewela. 2. Subasinghe Dissanayake Appuhamilage Upul Hemantha Subsasinshge, No. 74, Marapola, Veyangoda. DEFENDANT-RESPONDENT-RESPONDENTS

26/ 07/ 17	S.C. Appeal No. 74/2015	Sinnaiya Siwasamy 112, Ragala Bazar Halgranoya. PLAINTIFF Vs. M. Nadaraga Moorthi 8 ¼, Ragala Bazar Halgranoya. DEFENDANT NOW BETWEEN Sinnaiya Siwasamy 112, Ragala Bazar Halgranoya. PLAINTIFF-APPELLANT Vs. M. Nadaraga Moorthi 8 ¼, Ragala Bazar Halgranoya. DEFENDANT-RESPONDENT AND NOW BETWEEN Sinnaiya Siwasamy 112, Ragala Bazar Halgranoya. PLAINTIFF-APPELLANT-APPELLANT Vs. M. Nadaraga Moorthi 8 ¼, Ragala Bazar Halgranoya. DEFENDANT-RESPONDENT-RESPONDENT
26/ 07/ 17	SC FR Application No.15/2010	1. Shanmugam Sivarajah 2. Sivarajah Sarojini Devi Presently residing in Sagetrastrasse 12,3133 Belp, Switzerland. Petitioners Vs. 1. Officer in Charge, Terrorist Investigation Division, Chaithya Road, Colombo 01 2. Director, Terrorist Investigation Division, Police Headquarters, Chaithya Road, Colombo 01. 3. Deputy Inspector General of Police, Terrorist Investigation Division, Chaithya Road, Colombo 01. 4. Inspector Abdeen, Terrorist Investigation Division, Chaithya Road, Colombo 01. 5. Subair, Terrorist Investigation Division, Colombo 01. 6. Mr. Mahinda Balasuriya, Inspector General of Police, Police Head Quarters, Colombo 01. 6A. Mr. N.K.Illangakoon, Inspector General of Police, Police Headquarters, Colombo 1. 7. Secretary to the Ministry of Defence, Public Security and Law and Order, Ministry of Defence, Colomb o 02. 7A. Mr. B.M.U.D Basnayake Secretary to the Ministry of Defence, Public Security and Law and Order, Ministry of Defence, Colombo 2. 7B Eng. Karunasena Hettiarachchi, Secretary to the Ministry of Defence, Ministry of Defence, Colombo 2. 8. Mr. H. K. Balasuriya, Additional Secretary, Ministry of Defence, Public Security and Law and Order, Ministry of Defence, Colombo 02. 8A Mr. S.Hettiarachchi, Additional Secretary, Ministry of Defence, Public Security and Law and Oder, Ministry of Defence, Colombo 2. 8B Mr. S.Hettiarachchi, Additional Secretary Ministry of Defence, Ministry of Defence,Colomb Colombo 2 9. Mr. Lalith Weerathunga, Secretary to His Excellency the President, Presidential Secretariat, Colombo 01. 9A P.B.Abeykoon, Secretary to His Excellency the President, Presidential Secretariat, Colombo 01. 10. The Honourable Attorney General, Department of the Attorney General, Colombo 12. Respondents.
25/ 07/ 17	Supreme Court (FR) Application No.63/2013	C. W. Jayasekera No.4, Stadium Cross Road Anuradhapura PETITIONER -Vs- 1. Municipal Council Anuradhapura 2. H. P. Somadasa Mayor Municipal Council Anuradhapura 3. S. R. Dharmadasa Municipal Commissioner Municipal Council Anuradhapura 4. The Honourable Attorney General The Attorney General's Department Colombo 12. RESPONDENTS

19/ 07/ 17	SC / Appeal / 133/2010	Saifi Ismail Patel carrying on business under the name and style of “Saifi Trading Company”, No. 39, New Moor Street, Colombo 01. Plaintiff Vs. Commercial Bank of Ceylon Limited, No. 57, Baron Jayathileka Mawatha, Colombo 1. Defendant AND BETWEEN Commercial Bank of Ceylon Limited, No. 57, Baron Jayathileka Mawatha, Colombo 1. Defendant Appellant Vs. Saifi Ismail Patel carrying on business under the name and style of “Saifi Trading Company”, No. 39, New Moor Street, Colombo 01. Plaintiff Respondent AND NOW BETWEEN Commercial Bank of Ceylon Limited, No. 57, Baron Jayathileka Mawatha, Colombo 1. Defendant Appellant-Appellant Vs. Saifi Ismail Patel carrying on business under the name and style of “Saifi Trading Company”, No. 39, New Moor Street, Colombo 01. Plaintiff Respondent-Respondent
13/ 07/ 17	SC Application No. SCFR 58/15	1. Sawunda Marikkala Damith de Silva, No.1/129, Polwaththa Road, Kaluwadumulla, Ambalangoda 2. Sawunda Marikkala Thenuk Sanmitha de Silva (minor), No. 1/129, Polwattha Road, Kaluwadumulla, Ambalangoda. Petitioners Vs. 1. Akila Viraj Kariyawawsam (M.P.) Hon. Minister of Education, Ministry of Education, “Isurupaya”, Battaramulla. 2. Upali Marasinghe, Secretary – Ministry of Education, “Isurupaya”, Bataramulla. 3. Sumith Parakramawansha, Former Principal – Dharmashoka Vidyalaya Galle Road, Ambalangoda. 3A. Ravindra Pushpakumara, Principal – Dharmashoka Vidyalaye, Galle Road, Ambalangoda. 4. R. N. mallawarachchi 5. Diyagubaduge Dayarathne 6. Mr. Shirley Chandrasiri 7. NS.T.de Silva 4th to 7th Above All: Members of the Interview Board, (Admissions to Year 1) C/o Dharmashoka / Vidyalaya, Galle Road, Ambalangoda. 8. W. T. B. Sarath 9. P. D. Pathirathne 10. K. P. Ranjith 11. Jagath Wellage 4th and 8th to 11th above All: Members of the Appeal Board, (Admission to Year 1) C/o Dharmashoka /Vidyalaya, Galle Road, Ambalangoda. 12. Ranjith Chandrasekara, Director-National Schools, Isurupaya, Battaramulla. 13. Hon. The Attorney General, Attorney General‟s Department, Colombo 12. Respondents
12/ 07/ 17	SC APPEAL NO. 77/15	1. People’s Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2. 2. Don Wimalasiri Dissanayake, No. 177 G, Maya Avenue, Colombo 5. Petitioners Vs Hetti Kankanamlage Gunasi- Ngha, Wanuwagalawatta, Haggala, Ellakala. Respondent AND BETWEEN Hetti Kankanamlage Gunasi- Ngha, Wanuwagalawatta, Haggala, Ellakala. Respondent Appellant 1. People’s Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2. 2. Don Wimalasiri Dissanayake, No. 177 G, Maya Avenue, Colombo 5. Petitioner Respondents AND NOW BETWEEN Hetti Kankanamlage Gunasi- Ngha, Wanuwagalawatta, Haggala, Ellakala. Respondent Appellant Appellant Vs 1.People’s Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2. 2.Don Wimalasiri Dissanayake, No. 177 G, Maya Avenue, Colombo 5. Petitioner Respondent Respondents

11/07/17	S.C Appeal Mo. 170/2015	H.D. Lionel Weeraratne of No. 156, Walpola Road, Ragama. PLAINTIFF Vs. 1. Velu Kannappan 2. Sawarimuththu Rajendra 3. Hakmana Kaluthanthrige Don Anthony Bernard Perera All of Suraweera Mawatha, Walpola, Ragama. DEFENDANTS AND BETWEEN 1. Velu Kannappan More correctly Velu Kannappan Thevar (now deceased) 1a. Kannappan Ranjith 2. Sawarimuththu Rajendra 3. Hakmana Kaluthanthrige Don Anthony Bernard Perera All of Suraweera Mawatha, Walpola, Ragama. DEFENDANTS-APPELLANTS Vs. H H.D. Lionel Weeraratne of No. 156, Walpola Road, Ragama. PLAINTIFF-RESPONDENT AND NOW BETWEEN H H.D. Lionel Weeraratne of No. 156, Walpola Road, Ragama. PLAINTIFF-RESPONDENT-PETITIONER Vs. 1. Velu Kannappan More correctly Velu Kannappan Thevar (now deceased) 1a. Kannappan Ranjith 2. Sawarimuththu Rajendra 3. Hakmana Kaluthanthrige Don Anthony Bernard Perera All of Suraweera Mawatha, Walpola, Ragama. DEFENDANTS-APPELLANTS-RESPONDENTS

Judgments Delivered in 2017

10/ 07/ 17	SC /FR 126 / 2008	1. Uspatabendige Buddhi Iwantha Gunasekera, Dommie Jayawardena Mawatha, Eranavila, Meetiyagoda. 2. Uspatabendige Jayantha Gunasekera, Dommie Jayawardena Mawatha, Eranavila, Meetiyagoda. Petitioners Vs. 1. Sub Inspector Athukorala Crime Division, Police Station, Meetiyagoda. 2. Inspector Nissanka, Officer in Charge, Police Station, Meetiyagoda. 3. Home Guard Soysa, Police Station, Meetiyagoda. 4. W. T. Siripala, Domanvila, Meetiyagoda. 5. The Inspector General of Police, Police Headquarters, Colombo 1. 6. Hon. Attorney General, Attorney General's Department Colombo 12. Respondents
10/ 07/ 17	SC. Appeal 232/14	Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant Vs. Dissanayake Appuhamilage Amarasiri Dissanayake. Accused AND BETWEEN Dissanayake Appuhamilage Amarasiri Dissanayake. Accused Appellant Vs. Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant Respondent AND NOW BETWEEN Dissanayake Appuhamilage Amarasiri Dissanayake. Accused Appellant-Appellant Vs. Hon. Attorney General, Attorney General's Department, Colombo 12. Complainant Respondent-Respondent
10/ 07/ 17	SC / Appeal / 148/2013	1. Bulathsinghalage Gnanawathie, 2. Presanna Ramanayake, Both of No. 211 A, Nawala Road, Nugegoda. Plaintiff Vs. 1. Warnakula Patabendige Konrad Anthony Perera, No. 282, Badulla Road, Bandarawela. 2. Ivon Indrani Rupasinghe, No. 37/01, the Fonseka Road, Colombo 5. 3. Peoples Bank, Nugegoda Branch, Nugegoda. Defendants AND BETWEEN 1. Bulathsinghalage Gnanawathie, 2. Presanna Ramanayake, Both of No. 211 A, Nawala Road, Nugegoda. Plaintiff Appellant Vs. 1. Warnakula Patabendige Konrad Anthony Perera, No. 282, Badulla Road Bandarawela. 2. Ivon Indrani Rupasinghe, No. 37/01, the Fonseka Road, Colombo 5. 3. Peoples Bank, Nugegoda Branch, Nugegoda. Defendant Respondents AND NOW BETWEEN 1. Bulathsinghalage Gnanawathie, 2. Presanna Ramanayake, Both of No. 211 A, Nawala Road, Nugegoda. Plaintiff Appellant Appellants Vs. 1. Warnakula Patabendige Konrad Anthony Perera, No. 282, Badulla Road Bandarawela. 2. Ivon Indrani Rupasinghe, No. 37/01, the Fonseka Road, Colombo 5. 3. Peoples Bank, Nugegoda Branch, Nugegoda. Defendant Respondent Respondents

04/ 07/ 17	S.C. Appeal No. 92A/ 2008	Pandigamage Podinona No.44, Kandy Road, Medawachchiya Plaintiff -Vs- M. H. M. Suweyal, No.40, New Siyana Hotel, Jaffna Road, Medawachchiya Defendant And Between M. H. M. Suweyal No.40, New Siyana Hotel, Jaffna Road, Medawachchiya. Defendant/ Appellant -Vs. Pandigamage Podinona No.44, Kandy Road, Medawachchiya Plaintiff/Respondent And Now Between M. H. M. Suweyal No.40, New Siyana Hotel, Jaffna Road, Medawachchiya. Presently at No.22/1, Bulugahatenna, Akurana Defendant/Appellant/ Appellant -Vs- Pandigamage Podinona (deceased) No.44, Kandy Road, Medawachchiya. Plaintiff/Respondent/ Respondent 1A. Hettiaarachchige Sriyani 1B. Hettiarachchiige Wasantha Kumara Hettiarachchi 1C. Hettiarachchige Chalton Jayaweera 1D. Hettiarachchige Nandaniemala All of No.44, Kandy Road, Medawachchiya. Substituted Plaintiff/ Respondent/Respondents
04/ 07/ 17	S.C (FR) Application No. 57/2012	1. Dewndara Wedasinghage Manusha Madhurangana 20/ A, Pansalhena Road, Wellampitiya. And 87 others PETITIONERS Vs. 24. Hon. Attorney General Attorney General’s Department Colombo 12. And 23 others RESPONDENTS

29/ 06/ 17	SC Appeal No.71/2010	Officer-in-Charge Police Station Tissamaharama Complainant Vs. 1. Poddana Priyankarage Ajith Indika Nissnsala, Polgahawalan Debarawewa Tissamaharama 2. Hewa Thondilage Nissanka Akkara 80, Uduwila Tissamaharama 3. Palliyaguruge Premapala Molakaputana Tissamaharama 4. Landage Piyatissa 522/35 – Gangasiripura Tissamaharama 5. Lokuyaddehige Niroshan Seylan Bank Road Deberawewa Tissamaharama 6. Pelaketiyage Sunil Shantha Molakeuthana Polgahawalan Tissamaharama 7. Yaddehi Guruge Damayanthi 403/5 – Molakeputhana Road Debarawewa Tissamaharama 8. Weligath Sethuge Indralatha Lasanthi Molakeputhana Tissamaharama 9. Amarasinghe Kankanamge Aruna Sampath 582/2A – Gangasiripura Tissamaharama 10. Hewajuan Kankanamage Ariyatilake Wijerama Molakeputhana Road Polgahawalana Deberawewa 11. Liyana Arahchige Milton Mahindapura Pannagamuwa Tissamaharama 12. Balagodage Jinasena Molakeputhana Deberawewa Tissamaharama 13. Landage Sanath 553/9 Gangasiripura Tissamaharama 14. Visanthi Baduge Wimalaratne Molakeputhana Road Polgahawalane Tissamaharama 15. Ananda Madawanarachchi Molakeputhana Road Polgahawalane Tissamaharama 16. Susantha Gunasekera Molakeputhana Road Polgahawalane Tissamaharama Accused And 1. Poddana Priyankarage Ajith Indika Nissnsala, Polgahawalan Debarawewa Tissamaharama 2. Hewa Thondilage Nissanka Akkara 80, Uduwila Tissamaharama 3. Palliyaguruge Premapala Molakaputana Tissamaharama 4. Landage Piyatissa 522/35 – Gangasiripura Tissamaharama 5. Lokuyaddehige Niroshan Seylan Bank Road Deberawewa Tissamaharama 6. Pelaketiyage Sunil Shantha Molakeuthana Polgahawalan Tissamaharama 7. Yaddehi Guruge Damayanthi 403/5 – Molakeputhana Road Debarawewa Tissamaharama 8. Weligath Sethuge Indralatha Lasanthi Molakeputhana Tissamaharama 9. Amarasinghe Kankanamge Aruna Sampath 582/2A – Gangasiripura Tissamaharama 10. Hewajuan Kankanamage Ariyatilake Wijerama Molakeputhana Road Polgahawalana Deberawewa 11. Liyana Arahchige Milton Mahindapura Pannagamuwa Tissamaharama 12. Balagodage Jinasena Molakeputhana Deberawewa Tissamaharama 13. Landage Sanath 553/9 Gangasiripura Tissamaharama 14. Visanthi Baduge Wimalaratne Molakeputhana Road Polgahawalane Tissamaharama 15. Ananda Madawanarachchi Molakeputhana Road Polgahawalane Tissamaharama 16. Susantha Gunasekera Molakeputhana Road Polgahawalane Tissamaharama Accused-Appellants Vs. 1. The Officer-in-Charge Police Station Tissamaharama 2. The Attorney General Attorney General‟s Department Colombo 12

29/06/17	SC Appeal 129/2013	Nuwarapakshage Neelakanthi alias Baby Wanduradeniya, Damunupla Plaintiff Vs Nuwarapakshage Balasuriya Wanduradeniya, Damunupla Defendant AND Nuwarapakshage Balasuriya Wanduradeniya, Damunupla Defendant-Appellant Vs Nuwarapakshage Neelakanthi alias Baby Wanduradeniya, Damunupla Plaintiff-Respondent And Now Between Nuwarapakshage Balasuriya Wanduradeniya, Damunupla Defendant-Appellant-Petitioner-Appellant Vs Nuwarapakshage Neelakanthi alias Baby Plaintiff-Respondent-Respondent-Respondent
29/06/17	SC Appeal 159/2015	M.P.S. Wijesinghe, Dambulamure Walawwa, “Diyoguvilla”, Ella Road, Wellawaya. Plaintiff Vs T.K.J. Chandrasekera, Paragasmankada, Ella Road, Wellawaya. Defendant AND 1. M.S.M. Sijaudeen 2. M.H.M. Insaaf 3. H.M.F. Mohamed 4. M.U.M. Vufraan 5. M.U.M. Rilwaan 6. M.H.M. Initiyas 7. S.H.J. Aabdeen (The present Board of Trustees of Wellawaya Mohideen Jumma Mosque) All of Monaragala Road, Wellawaya. Intervenient Petitioners Vs M.P.S. Wijesinghe, Dambulamure Walawwa, “Diyoguvilla”, Ella Road, Wellawaya. Plaintiff Respondent T.K.J. Chandrasekera, Paragasmankada, Ella Road, Wellawaya. Defendant Respondent AND THEN M.P.S. Wijesinghe, Dambulamure Walawwa, Diyoguvilla, Ella Road, Wellawaya. Plaintiff Respondent Petitioner Vs 1. M.S.M. Sijaudeen 2. M.H.M. Insaaf 3. H.M.F. Mohamed 4. M.U.M. Vufraan 5. M.U.M. Rilwaan 6. M.H.M. Initiyas 7. S.H.J. Aabdeen (The present Board of Trustees of Wellawaya Mohideen Jumma Mosque) All of Monaragala Road, Wellawaya. Intervenient Petitioner Respondents T.K.J. Chandrasekera, Paragasmankada, Ella Road, Wellawaya. Defendant Respondent Respondent AND NOW BY AND BETWEEN 1. M.S.M. Sijaudeen 2. M.H.M. Insaaf 3. H.M.F. Mohamed 4. M.U.M. Vufraan 5. M.U.M. Rilwaan 6. M.H.M. Initiyas 7. S.H.J. Aabdeen (The present Board of Trustees of Wellawaya Mohideen Jumma Mosque) All of Monaragala Road, Wellawaya. Intervenient Petitioner Respondent Petitioners Vs M.P.S. Wijesinghe, Dambulamure Walawwa, “ Diyoguvilla”, Ella Road, Wellawaya. Plaintiff Respondent Petitioner Respondent & T.K.J. Chandrasekera, Paragasmankada, Ella Road, Wellawaya. Defendant Respondent Respondent Respondent

		1A. Godallawattage Somawathie 1B. Suduwadewage Wasntha Ramyalatha 1C. Suduwadewage Dekma Ramyalatha All of Remuna Anguruwatota. Substituted Plaintiffs Vs. 1A. Hewahakuruge Evgin, Thuththiripitiya, Halthota. 2A. Mahadurage Opisa, Remuna, Anguruwathota. 3A. Mahadurage Ariyarathna, Mahahena, Horana. 4. Mahadurage Opisa, Remuna, Anguruwathota. 5. Mahadurage Saraneris, Anguruwathota. 6. P. Leelawathie, Remuna, Anguruwathota. 7. Godellawaththage Nandasena, 8. Godellawaththage Carolis, 9. Godellawaththage Darmasena, 10. Godellawaththage Caralain, 11. Godellawaththage Karunawathie, 12. Godellawaththage Seelawathie, 13. Godellawaththage Yasawathie, All of Mahagama. 14. Godellawaththage David, 14A. Godellawaththage Menso, 15A. Godellawaththage Upaneris alias Somasiri, 16. Panawannage Adwin, 17. Sarathchandra Hettiwatta, 17A. Hettipathira Kankanamlage Kusumawathie, 17B. Harsha Kumara Hettiwaththa, 17C. Yamuna Rani Hettiwaththa, 17D. Wimala Kumara Hettiwaththa, 17E. Padmanjali Hettiwaththa, 18. Bothalage Kirineris, 18A. Godellawaththage Cicilin, All of Remuna, Anguruwathota. 19. Bothalage Jayadasa, 20. Bothalage Wimaladasa, 20A. Prema samaranayaka, All of Gungamuwa, Bandaragama. 21. H. Ranjo, 21A.B. Wilson, 22. B. Wilbert, 23. B. William, 24. B. Disilin, 25. B. Melin Jayawqathie, 26. Suduwage Mulin, 27. Kodithuwakku Arachchige Jayathilake, 28. S. A. Edirisinghe, 29. Piyasena Edirisinghe,30. S. D. Agnes, 31. S. Norman Edirisinghe, 31A. S. Chaminda Edirisinghe, 32. S. Magilin. All of Remuna, Anguruwathota. 33. H. Dharmasiri, 34. H. Sunil Chandrasiri, 35. H. Martin, All of Siriniwasa, Withanawatta, Mahagama North. 36. H. Geethani Dharmalatha, Temple Road, Neboda. 37. S. D. Admond, Pinnakolawatta, Walpita, Horana. 38. Thilaka Hewage, Dawasa, Temple Road, Neboda. 39. G. James Fernando, Arambakanda, Horana. 39A. C. Punnyadasa, Arambawatta, Remuna, Horana. 40. H. Noisa, Kaduganmulla, Kiriella. 41. G. Dayawathie, Kaduganmulla, Kiriella. 42. G Somawathie, 43. G. H. Hemasiri Wanigadewa. Both of Remuna, Anguruwathota. 44. G. Piyasiri Munidasa, 45. G. Hemantha Munidasa, 46. G. Premawathie Munidasa, All of 26, Uyankele Road, Panadura. 47. G. Nandawathie Munidasa, Bombuwala, Temple Road, Elhenakanda. Defendants AND BETWEEN 1A. Godallawattage Somawathie 1B. Suduwadewage Wasntha Ramyalatha 1C. Suduwadewage Dekma Ramyalatha All of Remuna Anguruwatota. Substituted Plaintiff Appellants Vs. 1A. Hewahakuruge Evgin, Thuththiripitiya, Halthota. 2A. Mahadurage Opisa, Remuna, Anguruwathota. 3A. Mahadurage Ariyarathna, Mahahena, Horana. 4. Mahadurage Opisa, Remuna, Anguruwathota. 5. Mahadurage Saraneris

28/ 06/ 17	SC / Appeal / 150/2011	Seylan Bank Limited Presently known as Seylan Bank PLC No. 69 Janadhipathy Mawatha, Colombo 01. Presently at Ceylinco-Seylan Towers, No. 90, Galle Road, Colombo 03. Plaintiff Vs. 1. Construction and Personal Servicers (Pvt) Ltd, No. 88, Horton Place, Colombo 07. 2. Madhavan Lanka (Pvt) Ltd. No. 65/19, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Defendant AND NOW BETWEEN Madhavan Lanka (Pvt) Ltd. No. 65/19, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. 2nd Defendant Appellant Vs. Seylan Bank Limited Presently known as Seylan Bank PLC No. 69 Janadhipathy Mawatha, Colombo 01. Presently at Ceylinco-Seylan Towers, No. 90, Galle Road, Colombo 03. Plaintiff Respondent Construction and Personal Servicers (Pvt) Ltd, No. 88, Horton Place, Colombo 07. 1st Defendant Respondent
28/ 06/ 17	SC APPEAL No. 182/16	N.L.D. Ariyaratne, No. 21/3, 2nd Lane, Galpotte Road, Nawala. Petitioner Vs 1. P.B.P.K. Weerasingha, The Commissioner of Labour, Labour Secretariat P.O.Box 575, Kirula Road, Narahenpita, Colombo 5. 2. D.A.Wijewardena, Arbitrator, Labour Secretariat, P.O. Box 575, Kirula Road, Narahenpita, Colombo 5. 3. Kahawatte Plantation Ltd., No. 52, Maligawatte Road, Colombo 10. Respondents AND NOW BETWEEN Kahawatte Plantation Ltd., No. 52, Maligawatte Road, Colombo 10. 3rd Respondent Petitioner Vs N.L.D. Ariyaratne, No. 21/3, 2nd Lane, Galpotte Road, Nawala. Petitioner Respondent 1. P.B.P.K. Weerasingha, The Commissioner of Labour, Labour Secretariat P.O.Box 575, Kirula Road, Narahenpita, Colombo 5. 2. D.A.Wijewardena, Arbitrator, Labour Secretariat, P.O. Box 575, Kirula Road, Narahenpita, Colombo 5. Respondent Respondents

28/ 06/ 17	SC / Appeal / 103/2009	R. M. Punchi Manike, No. 130, Thennekumbura, Kandy. Plaintiff Vs. G. G. Jayarthne, No. 130, Thennekumbura, Kandy. Defendant AND BETWEEN G. G. Jayarthne, No. 130, Thennekumbura, Kandy. Defendant Appellant Vs. R. M. Punchi Manike (deceased) 1. G. G. Kiribanda, Pandiwatta, Sirimalwatta, Gunnepana. 2. G. G. Muthubanda, No. 213/7, Thalwatta, Kandy. 3. G. G. Senevirathna Banda, N0. 46/21, Thennekumbura, Kandy. 4. G. G. Tikiri Banda, No. 96/112, Rajapihilla Mawatha, Kandy. 5. G. G. Nawarathna Banda, No. 37/26A, Pitiyegedara, Medawatta, Wattegama. 6. G. G. Thilakarathna Banda, No. 213/7, Pattiyakelewatta, Thalwatta, Kandy. 7. G. G. Anula Kumarihamy, No. 130/1, Thennekumbura, Kandy. 8. G. G. Seetha Kumarihamy. N0. 213, Thalwatta, Kandy. 9. G. G. Wijerathna Banda, No. 130/1, Thennekumbura, Kandy. Substituted Plaintiff Respondents AND NOW BETWEEN G. G. Jayarthne, No. 130, Thennekumbura, Kandy. Defendant Appellant Petitioner Vs. R. M. Punchi Manike (deceased) 1. G. G. Kiribanda, Pandiwatta, Sirimalwatta, Gunnepana. 2. G. G. Muthubanda, No. 213/7, Thalwatta, Kandy. 3. G. G. Senevirathna Banda, N0. 46/21, Thennekumbura, Kandy. 4. G. G. Tikiri Banda, No. 96/112, Rajapihilla Mawatha, Kandy. 5. G. G. Nawarathna Banda, No. 37/26A, Pitiyegedara, Medawatta, Wattegama. 6. G. G. Thilakarathna Banda, No. 213/7, Pattiyakelewatta, Thalwatta, Kandy. 7. G. G. Anula Kumarihamy, No. 130/1, Thennekumbura, Kandy. 8. G. G. Seetha Kumarihamy. N0. 213, Thalwatta, Kandy. 9. G. G. Wijerathna Banda, No. 130/1, Thennekumbura, Kandy. Substituted Plaintiff Respondent -Respondents

27/ 06/ 17	S.C (FR) Application No.92/2016	1. M. J. M. Faril President of the Board of Trustees Wekada Jumma Mosque, Horana Road, Eluwila, Panadura. 2. Moulavi M.B.M. Haris Principal Anas Ibnu Malik Hiflul Quran Madrasa (Dhamma School) 147, Wella Road, Pinwala, Eluwila, Panadura. PETITIONERS Vs. 1. Bandaragama Pradeshiya Sabha Panadura Raod, Bandaragama. 2. N.D.I. Swarna K. Perera Secretary, Bandaragama Pradeshiya Sabha Panadura Road, Bandaragama. 3. Menaka Priyantha Abeyratne Divisional Secretary, Bandaragama. Divisional Secretariat, Bandaragamna.4. Urban Development Authority 6th & 7th Floor, Sethsiripaya, Battaramulla. 5. The Director, Department of Muslim Religious and Cultural Affairs, No. 180, T. B. Jaya Mawatha, Colombo 10. 6. Ven. Bolgoda Seelarathana Thero Patalirukkaramaya, Pinwala, Panadura. 7. The Hon. Attorney General Attorney General's Department Colombo 12. RESPONDENTS AND NOW BETWEEN Ven. Pinwala Chandarathana Thero Patalirukkaramaya Pinwala, Panadura. PARTY SEEKING SUBSTITUTION IN THE ROOM OF THE DECEASED 6TH RESPONDENT Vs. 3. M. J. M. Faril President of the Board of Trustees Wekada Jumma Mosque, Horana Road, Eluwila, Panadura. 4. Moulavi M.B.M. Haris Principal Anas Ibnu Malik Hiflul Quran Madrasa (Dhamma School) 147, Wella Road, Pinwala, Eluwila, Panadura. 1ST & 2ND PETITIONERS-RESPONDENTS AND Vs. 1. Bandaragama Pradeshiya Sabha Panadura Raod, Bandaragama. 2. N.D.I. Swarna K. Perera Secretary, Bandaragama Pradeshiya Sabha Panadura Raod, Bandaragama. 3. Menaka Priyantha Aebyratne Divisional Secretary, Bandaragama. Divisional Secretariat, Bandaragamna . 4. Urban Development Authority 6th & 7th Floor, Sethsiripaya, Battaramulla. 5. The Director, Department of Muslim Religious and Cultural Affairs, No. 180, T. B. Jaya Mawatha, Colombo 10. 6. Ven. Bolgoda Seelarathana Thero Patalirukkaramaya, Pinwala, Panadura. 7. The Hon. Attorney General Attorney General's Department Colombo 12. 1ST TO 7TH RESPONDENT-RESPONDENTS

27/ 06/ 17	S C APPEAL No. 99/2010	A.C.R. Wijesurendra. No. 275, Wackwella Road, Galle. Applicant Vs Sri Lanka Insurance Corporation Ltd., “ Rakshana Mandiraya “, No. 21, Vauxhall Street, Colombo 02. Respondent AND BETWEEN Sri Lanka Insurance Corporation Ltd., “ Rakshana Mandiraya “, No. 21, Vauxhall Street, Colombo 02. Respondent Appellant Vs A.C.R. Wijesurendra. No. 275, Wackwella Road, Galle. Applicant Respondent AND NOW BETWEEN Sri Lanka Insurance Corporation Ltd., “ Rakshana Mandiraya “, No. 21, Vauxhall Street, Colombo 02. Respondent Appellant Appellant Vs A.C.R. Wijesurendra. No. 275, Wackwella Road, Galle. Applicant Respondent Respondent
22/ 06/ 17	SC FR 654/09	1.Everad Anthony Payoe, Member, Hatton Dick Oya Urban Council, and also at Sirinsaru, Dick Oya. 2. M.I.M. Muhajarin, Member, Hatton Dick Oya Urban Council, Hatton, Dick Oya. 3. G.L.Kithsiri, 32/25, Hatton House Road, Gaminipura, Hatton. 4. A. A. M. L. Lebbe, 28, Hatton House Road, Gaminipura, Hatton. 5. H. A. Neelarathna, 32/28, Hatton House Road, Hatton. 6. D. W. A. Buddadasa, 32/17, Hatton House Road, Gaminipura, Hatton. Petitioners Vs 1. Hatton Dickoya Urban Council, Hatton-Dickoya. 2. A.P.Anura de Silva, Member, Hatton Dickoya Urban Council, Hatton Dickoya. And also at No. 72, Hatton House Road, Hatton. 3. Gopal Nadesan, No.1, Gaminipura Road, Hatton. 4. A. Nandakumar, Chairman & Member, Hatton Dickoya Urban Council, Hatton Dickoya. 5. Upali Alahakoon, Commissioner of Local Government(Central Province), Department of Local Government (Central Province), Secretariat Office, Kandy. 6. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents 7. Ms. Singaram Priyadarshini, Acting Secretary and Competent Authority of Hatton Dickoya Urban Council, Hatton Dickoya. Added Respondent
21/ 06/ 17	SC Appeal 87/2011	1. Wijsmuller Salvage B.V. Sluisplein 34 1975 AG Ijmuiden The Netherlands 2. Sri Lanka Shipping Company Limited 46/5, NawamMawatha P.O. Box 1125 Robert Senanayaka Building Colombo 2 Plaintiffs-Petitioners-Petitioners Vs 1. The Bangladesh Motor Vessel „M.V. JAMMI currently lying in the Port of Colombo 2. Midlands Shipping lines Limited 1st Floor, HBFC Building Agrabad, Commercial Area Chittagong 4100 Bangladesh Defendants-Respondents-Respondents 1. Sri Lanka Ports Authority 19. Church Street, Colombo 1 2. Sea Consortium Lanka (Private ltd) 256, Srimath Ramanathan Mawatha Colombo 15. Intervenient-Defendants-Respondents-Respondents
21/ 06/ 17	SC Appeal 57/2014	

21/ 06/ 17	S.C. C.H.C. Appeal No 40/2010	1. K.R. ARIYAWATHIE SENADHEERA 516-195, Forum Drive, Mississauga, L423MS Canada. 2. MAHESHA DILANI SENADHEERA 516-195, Forum Drive, Mississauga, L423MS Canada. PLAINTIFFS VS. 1. SHANTHA SENADHEERA No. 21, Temple Road, Negombo. Presently residing at 206, Seven Sisters Road, Finsbury Park, London N43NX, England. 2. AMAL RANDENIYA, No. 281, Colombo Road, Weligampitiya, Ja-Ela. 3. SUNIL WIJESIRIWARDENA, Vibhavi Academy of Fine Arts, No. 38, New Jayaweera Mawatha, Ethul Kotte, Kotte. DEFENDANTS AND NOW BETWEEN 1. K.R. ARIYAWATHIE SENADHEERA 516-195, Forum Drive, Mississauga, L423MS Canada. 2. MAHESHA DILANI SENADHEERA 516-195, Forum Drive, Mississauga, L423MS Canada. PLAINTIFFS- APPELLANTS VS. 1. SHANTHA SENADHEERA No. 21, Temple Road, Negombo. Presently residing at 206, Seven Sisters Road, Finsbury Park, London N43NX, England. 2. AMAL RANDENIYA, No. 281, Colombo Road, Weligampitiya, Ja-Ela. DEFENDANTS- RESPONDENTS
21/ 06/ 17	S.C. Appeal No.226/14	GALLAGE DON SUNIL SHANTHA No. 12, Puttalam Road, Nikaweratiya. PLAINTIFF VS. DISSANAYAKE MUDIYANSELAGE KUSUMAN PATRICIA No. 10, Puttalam Road, Nikaweratiya. DEFENDANT AND DISSANAYAKE MUDIYANSELAGE KUSUMAN PATRICIA No. 10, Puttalam Road, Nikaweratiya. DEFENDANT-APPELLANT VS. GALLAGE DON SUNIL SHANTHA No. 12, Puttalam Road, Nikaweratiya. PLAINTIFF-RESPONDENT AND NOW BETWEEN GALLAGE DON SUNIL SHANTHA No. 12, Puttalam Road, Nikaweratiya. PLAINTIFF-RESPONDENT -PETITIONER/APPELLANT VS. DISSANAYAKE MUDIYANSELAGE KUSUMAN PATRICIA No. 10, Puttalam Road, Nikaweratiya. DEFENDANT-APPELLANT- RESPONDENT

21/ 06/ 17	SC Appeal No.199/2014	K.R.SUMANAWATHIE, Ampitiya Road, Nuwarawela, Kandy. PLAINTIFF VS. S.SEELAWATHIE, No. 29/250B, Ampitiya Road, Nuwarawela, Kandy. DEFENDANT AND BETWEEN S.SEELAWATHIE, No. 29/250B, Ampitiya Road, Nuwarawela, Kandy. DEFENDANT- PETITIONER VS. K.R.SUMANAWATHIE, Ampitiya Road, Nuwarawela, Kandy. PLAINTIFF-RESPONDENT KULATUNGA RAMANI GUNASEKERAM No.29/250, Ampitiya Road, Nuwarawela, Kandy. SUBSTITUTED PLAINTIFF-RESPONDENT AND NOW BETWEEN S.SEELAWATHIE, No. 29/250B, Ampitiya Road, Nuwarawela, Kandy. DEFENDANT- PETITIONER- PETITIONER/APPELLANT VS. K.R.SUMANAWATHIE, Ampitiya Road, Nuwarawela, Kandy. (Deceased) PLAINTIFF-RESPONDENT KULATUNGA RAMANI GUNASEKERAM No.29/250, Ampitiya Road, Nuwarawela, Kandy. SUBSTITUTED PLAINTIFF- RESPONDENT-RESPONDENT
21/ 06/ 17	SC Appeal No. 103/2013	N.H.M.S.PERERA “Anula”, Polwatte, Kolonna. PLAINTIFF VS. MARGARET PERERA Kadapola, Kolonna. DEFENDANT 1A. G.D.LEELARATNE Kadapola, Kolonna. 2A. G.D.RUPANI Aluth Walauwwa, Kolonna. SUBSTITUTED DEFENDANTS AND 1A. G.D.LEELARATNE Kadapola, Kolonna. 2A. G.D.RUPANI Aluth Walauwwa, Kolonna. SUBSTITUTED DEFENDANTS- APPELLANTS VS. N.H.M.S.PERERA “Anula”, Polwatte, Kolonna. PLAINTIFF-RESPONDENT AND NOW 1A. G.D.LEELARATNE Kadapola, Kolonna. SUBSTITUTED 1A DEFENDANT- APPELLANT-PETITIONER/ APPELLANT VS. N.H.M.S.PERERA “Anula”, Polwatte, Kolonna. PLAINTIFF-RESPONDENT-RESPONDENT M.A. ANULA PERERA “Anula”, Polwatte, Kolonna. SUBSTITUED PLAINTIFF- RESPONDENT-RESPONDENT G.D.RUPANI Aluth Walauwwa, Kolonna. SUBSTITUTED 1B DEFENDANT- APPELLANT-RESPONDENT

21/ 06/ 17	SC Appeal No. 103/2011	HEWAWASAM THUDUWAWATHTHAGE SARATH “Sri Wijaya Mawatha”, Maliyagoda, Ahangama. PLAINTIFF VS. 1. KAMALAWATHIE WIJEWEERA Maliyagoda, Ahangama. 2. D.W. SAMINONA, “Sri Wijaya Mawatha”, Maliyagoda, Ahangama. 3. LOKUBARANIGE PATHMINI KARAWITA, “Sri Wijaya Mawatha”, Maliyagoda, Ahangama. 4. L.D. WAIDYARATHNE, No.149A, Gabada Weediya, Matara. 5. W. ABEYGUNAWARDENA, Visaka Mawatha, Gampaha. 6. I.ABEYGUNAWARDENA, Visaka Mawatha, Gampaha. 7. LILIAN SILVA WIJERATHNE, No.155B, John Rodrigo Mawatha, Katubedda, Moratuwa. DEFENDANTS AND BETWEEN HEWAWASAM THUDUWAWATHTHAGE SARATH “Sri Wijaya Mawatha”, Maliyagoda, Ahangama. PLAINTIFF-APPELLANT VS. 1. KAMALAWATHIE WIJEWEERA Maliyagoda, Ahangama. 2. D.W. SAMINONA, “Sri Wijaya Mawatha”, Maliyagoda, Ahangama. 3. LOKUBARANIGE PATHMINI KARAWITA, “Sri Wijaya Mawatha”, Maliyagoda, Ahangama. 4. L.D. WAIDYARATHNE, No.149A, Gabada Weediya, Matara. 5. W. ABEYGUNAWARDENA, Visaka Mawatha, Gampaha. 6. I.ABEYGUNAWARDENA, Visaka Mawatha, Gampaha. 7. LILIAN SILVA WIJERATHNE, No.155B, John Rodrigo Mawatha, Katubedda, Moratuwa. DEFENDANTS-RESPONDENTS AND NOW BETWEEN KAMALAWATHIE WIJEWEERA Maliyagoda, Ahangama. 1st DEFENDANT-RESPONDENT- PETITIONER/ APPELLANT VS. HEWAWASAM THUDUWAWATHTHAGE SARATH “Sri Wijaya Mawatha”, Maliyagoda, Ahangama. PLAINTIFF-APPELLANT-RESPONDENT 2. D.W. SAMINONA, “Sri Wijaya Mawatha”, Maliyagoda, Ahangama. 3. LOKUBARANIGE PATHMINI KARAWITA, “Sri Wijaya Mawatha”, Maliyagoda, Ahangama. 4. L.D. WAIDYARATHNE, No.149A, Gabada Weediya, Matara. 5. W. ABEYGUNAWARDENA, Visaka Mawatha, Gampaha. 6. I.ABEYGUNAWARDENA, Visaka Mawatha, Gampaha. 7. LILIAN SILVA WIJERATHNE, No.155B, John Rodrigo Mawatha, Katubedda, Moratuwa. 2nd TO 7th DEFENDANTS- RESPONDENTS- RESPONDENTS

19/ 06/ 17	SC (FR) Nos. 345/2016 with 346/2016, 347/2016 & 348/2016	1. L.G.L. Sumithra Menike, No. 43, Viharagama Janapadaya, Pahala Owala, Kaikawala 2. R.P. Aruna Malini, No. 185/1, Neluwa Kanda, Alwatte, Matale. 3. Subadra Wijekanthi, Wijaya Sevana, Kambi Adiya, Kaikawala, Matale. 4. P. G. Dharmaratne, Maussagolla, Rattota. 5. I. G. Sumanasena, No. 132, Neluwa Kanda, Alwatte, Matale 6. D.G. Indrani Swarnalatha No. 5, Walathalawa, Rattota. 7. H.M. Kumudini Herath, No. 193/6, Palleweragama, Kaikawala. 8. W.P.M. Sandmal De Silva 103/6A, Kuruwawa, Rattota. PETITIONERS Vs. 1. Commissioner of Local Government-Central Province, Office of the Commissioner of Local Government – Central Province. 2. Secretary, Rattota Pradeshiya Sabha, Rattota. 3. Director General of Establishments, Ministry of Public Administration, Local Government and Democratic Governance, Independence Square, Colombo 7. 4. Rattota Pradeshiya Sabha, Rattota. 5. Hon. Attorney General Attorney General's Department, Colombo 12 RESPONDENTS
19/ 06/ 17	SC APPEAL 161/2012	Ranjith Palipana, No. 121, Telangapatha Road, Wattala. Presently at 46, 6/2, Seagull Apartments, Collingwood Place, Wellawatte. Applicant Vs Celltel Lanka (Pvt.) Ltd., No. 25, Galle Face Centre Road, Colombo 03. Presently known as Etislat Lanka (Pvt.) Ltd.. Mukthar Plaza, No. 78, Grand Pass Road, Colombo 14. Respondent AND BETWEEN Ranjith Palipana, No. 121, Telangapatha Road, Wattala. Presently at 46, 6/2, Seagull Apartments, Collingwood Place, Wellawatte . Applicant Appellant Vs Tigo (Pvt.) Ltd., No. 78, Mukthar Plaza Building, 3rd Floor, Grand Pass Road, Colombo 14. Presently known as Etisalat Lanka (Pvt.) Ltd., Mukthar Plaza, No. 78, Grand Pass Road, Colombo 14. Respondent Respondent AND NOW BETWEEN Ranjith Palipana, No. 121, Telangapatha Road, Wattala. Presently at 46, 6/2, Seagull Apartments, Collingwood Place, Wellawatte . Applicant Appellant Appellant Vs Etisalat Lanka (Pvt.) Ltd., Mukthar Plaza, No. 78, Grand Pass Road, Colombo 14. Respondent Respondent Respondent

15/ 06/ 17	S.C. F/R No: 32/14	1. Palitha Victor Mendis Rajakaruna Wathuru Villa, Kahaduwa. 2. Hakmana Kodithuwakkuge Jayathissa 22/4, Guru Pura Rd., Mathugama. 3. Herath Mudiyanselage Panchananda Athula Bandara Herath Kuruvee Kotuwa Kengalla,Kandy. 4. Chaminda Pasquel Dilanka, 32, Meddegoda Rd., Mathugama. 5. Rathanayake Mudiyanselage Upananda Bandara Rathnayaka 22/8, Udaperadeniya, Peradeniya. 6. Sri Lanka Nidahas Ruber Inspectors' Union, 96/6, Mollamure Avenue 2, Kegalle. Petitioners - Vs- 1. R. B. Premadasa Director-General, Rubber Development Department, No.55/75, Vauxhall Lane, Colombo 2. 2. Mrs. Sudharma Karunaratne Secretary, Ministry of Plantation Industry, 55/75, Vauxhall Lane, Colombo 02. 2A. Anura M. Jayawickrema Secretary, Ministry of Plantation Industry, 11th Floor, Sethsiripaya 2nd Stage, Battaramulla 2B. Mr. Upali Marasinghe Secretary, Ministry of Plantation Industry 11th Floor, Sethsiripaya 2nd Stage, Battaramulla. 3. Dr. Dayasiri Fernando (Former) Chairman, Public Service Commission. 4. Palitha M. Kumarasinghe, PC. 5. Mrs. Sirimavo A. Wijeratne 6. S.C. . Mannapperuma 7. Ananda Seneviratne 8. N. H. Pathirana 9. S. Thillanadarajah 10. M. D. W. Ariyawansa 11. A. Mohamed Nahiya All (Former)Members of the Public Service Commission. 12. Mrs. T. M. L. C. Senaratne (Former) Secretary, Public Service Commission, No.177, Nawala Road Narahenpta. 12A. H.M.G.Seneviratne Secretary, Public Service Commission, 177, Nawala road, Narahenpita 13. Neville Piyadigama (Former)Co-Chairman, National Salaries and Cadre Commission 14. Ravi Dissanayake (Former)Co-Chairman National Salaries and Cadre Commission Room 2-G 10, BMICH, Bauddhaloka Mawatha, Colombo 07. 15. D. Godakanda Director-General, Department of Management Services, Ministry of Finance and Planning, General Treasury, Colombo 01 16. Attorney-General, Attorney-General's Department, Colombo 12. 17. Neville Piyadigama, (Former)Co-Chairman, National Pay Commission. 17A. K.L.L.Wijeratne Chairman, Salaries and Cadre Commission, BMICH, Bauddhaloka Mawatha, Colombo 07. 18. J. R. Wimalasena Dissanayake, (Former)Co-Chairman, 19. Wimaladasa Samarasinghe, (Former) Member, 20. V. Jegarasasingham, (Former)Member, 21. G. Piyasena, (Former) Member, 22. Rupa Malini Peiris, (Former) Member, 23. Dayananda Vidanagamachchi (Former)Member, 24. S. Swarnajothi, (Former) Member, 25. B. K. Ulluwishewa, (Former) Member, 26. Sujeewa Rajapakse, (Former) Member, 27. H. W. Fernando, (Former) Member, 28. Prof. Sampath Amaratunga, (Former) Member, 29. Dr. Ravi Liyanage, (Former) Member 30. W. K. H. Wegapitiya, (Former) Member, 31. Keerthi Kotagama, (Former) Member, 32. Reyaz Mihular, (Former) Member, 33. Priyantha

14/ 06/ 17	SC / Appeal / 135/2015	Firoza Mohamed Hamza, No. 15, Hill Castle Place, Colombo 12. Petitioner Vs. 1. Road Development Authority, Office of the Land and Land Acquisition Officer, 3rd Floor. 'Sethsiripaya', Battaramulla. Plaintiff Respondent 2. Ummu Waduda Meera Sahib, No. 22, Charles Place, Dehiwala. 3. Seyyad Oaman Meera Sahib, No. 22, Charles Place, Dehiwala. 4. Mohammed Fasulul Rahman Meera Sahib, No. 22, Gajaba Housing Complex, 2nd Lane, Kolonnawa. 5. Riyazur Rahman Meera Sahib, No. 24, Farm Road, Maatakkuliya, Colombo 15. 6. Siththy Navasiya Mohammed Rauf, No. 22, Charles Place, Dehiwala. AND BETWEEN Firoza Mohamed Hamza, No. 15, Hill Castle Place, Colombo 12. Petitioner-Petitioner Vs. 1. Road Development Authority, Office of the Land and Land Acquisition Officer, 3rd Floor. 'Sethsiripaya', Battaramulla. Plaintiff Respondent-Respondent 2. Ummu Waduda Meera Sahib, No. 22, Charles Place, Dehiwala. 3. Seyyad Oaman Meera Sahib, No. 22, Charles Place, Dehiwala. 4. Mohammed Fasulul Rahman Meera Sahib, No. 22, Gajaba Housing Complex, 2nd Lane, Kolonnawa. 5. Riyazur Rahman Meera Sahib, No. 24, Farm Road, Maatakkuliya, Colombo 15. 6. Siththy Navasiya Mohammed Rauf, No. 22, Charles Place, Dehiwala. Respondent-Respondents AND NOW BETWEEN Firoza Mohamed Hamza, No. 15, Hill Castle Place, Colombo 12. Petitioner-Petitioner Appellant Vs. 1. Road Development Authority, Office of the Land and Land Acquisition Officer, 3rd Floor. 'Sethsiripaya', Battaramulla. Plaintiff Respondent Respondent-Respondent 2. Ummu Waduda Meera Sahib, No. 22, Charles Place, Dehiwala. 3. Seyyad Oaman Meera Sahib, No. 22, Charles Place, Dehiwala. 4. Mohammed Fasulul Rahman Meera Sahib, No. 22, Gajaba Housing Complex, 2nd Lane, Kolonnawa. 5. Riyazur Rahman Meera Sahib, No. 24, Farm Road, Maatakkuliya, Colombo 15. 6. Siththy Navasiya Mohammed Rauf, No. 22, Charles Place, Dehiwala. Respondent-Respondent- Respondents

05/ 06/ 17	S.C (FR) No. 121/2011	Jayanetti Koralalage Rajitha Prasanna Jayanetti Of No. 237, Thimbirigasyaya Road, Colombo 5. PETITIONER Vs. 1. H.H. Harischandra (PS 28312) Police Sergeant Police Station, Matugama. 2. Anura Samaraweera Sub Inspector of Police, Special Criminal Investigation Unit Police Station, Matugama 3. Neville Priyantha (PS 10967) Sub Inspector of Police Special Criminal Investigation Unit Police Station, Matugama. 4. K. Udaya Kumara Chief Inspector of Police Head Quarter Inspector Police Station, Matugama. 5. Dr. M. Balasooriya Inspector General of Police Police Headquarters, Colombo. 6. Pinnawalage Chandrasena Pahala Uragala Ingiriya. 7. Hon. Attorney General Attorney General's Department Colombo 12. RESPONDENTS
04/ 06/ 17	SC Appeal No. SC(LA)116/2014	1. Kuruwitage Don Preethi Anura No. 234, Sri Jayawardenapura Mawatha Rajagiriya 2. K.Don Suwinith Rohan Siriwardena No. 48, Ambathale, Mulleriyawa Town. 3. K. Vajira Gamini Gunasekara No. 31/1, De Fonseka Road Colombo 05. Plaintiff-Respondent-Appellants Vs. 1. Makalandage William Silva No. 326/18 Udumulla, Mulleriyawa New Town 2. Makalandage Gnanathilake No. 437/2, Udumulla, Mulleriyawa New Town Defendant-Appellant-Respondent
01/ 06/ 17	SC (CHC) Appeal No. 28/2008	Papeteries De Maudit No. 07, Avenue Ingres, 76016, Paris, France. PLAINTIFF Vs. Tylos Tea (Private) Limited Serendib Park, Indolamulla Dompe. DEFENDANT AND NOW Tylos Tea (Private) Limited Serendib Park, Indolamulla Dompe. DEFENDANT-APPELLANT Vs. Papeteries De Maudit No. 07, Avenue Ingres, 76016, Paris, France. PLAINTIFF-RESPONDENT
01/ 06/ 17	SCFR 430/2005	
31/ 05/ 17	SC / Appeal / 151/2011	Ambagahage Vithorianu Basil Fernando, C/O Canute Peiris, Milagahawatta, Mudukatuwa, Marawiwila. Plaintiff Vs. Ambagahage Leslie Malcom Fernando, Thalawila, Marawila. Defendant AND BETWEEN Ambagahage Leslie Malcom Fernando, Thalawila, Marawila. Defendant Appellant Vs. Ambagahage Vithorianu Basil Fernando, C/ O Canute Peiris, Milagahawatta, Mudukatuwa, Marawiwila. Plaintiff Respondent AND NOW BETWEEN 1a. Poruthotage Mary Rose Hysinth Indrani Perera, 1b. Nirmalee Irosha Udayanganee Fernando, 1c. Werjin Ishanka Malshani Fernando, All of Thalawila, Marawila. Substituted Defendant Appellant-Appellants Vs. Ponnamperumage Charlot Mary Matilda Fernando, Milagahawtta, Mudukatuwa, Marawila. Substituted Plaintiff Respondent Respondent

31/ 05/ 17	SC / Appeal / 11/2016	Western Refrigeration (Private) Limited, 7/B, Panna Lal Silk Mills Compound, 78, LBS Marg, Bhandup (West), Mumbai-400076, Maharashtra, India. Plaintiff Vs. State Bank of India, 16, Sir Baron Jayathilake Mawatha, Post Box No. 93, Colombo 1, Sri Lanka. Defendant AND BETWEEN State Bank of India, 16, Sir Baron Jayathilake Mawatha, Post Box No. 93, Colombo 1, Sri Lanka. Defendant Appellant Vs. Western Refrigeration (Private) Limited, 7/B, Panna Lal Silk Mills Compound, 78, LBS Marg, Bhandup (West), Mumbai-400076, Maharashtra, India. Plaintiff Respondent AND NOW BETWEEN Western Refrigeration (Private) Limited, 7/B, Panna Lal Silk Mills Compound, 78, LBS Marg, Bhandup (West), Mumbai-400076, Maharashtra, India. Plaintiff Respondent Appellant Vs. State Bank of India, 16, Sir Baron Jayathilake Mawatha, Post Box No. 93, Colombo 1, Sri Lanka. Defendant Petitioner Respondent
29/ 05/ 17	SC APPEAL No. 122/2013	1. Navarajakulam Muthukumaraswamy, No.18, Lilly Avenue, Colombo 06. 2. Vaithilingam Muthukumaraswamy, No. 18, Lilly Avenue, Colombo 06. Plaintiffs Vs 1. Suresh Thirugnanasampanthan, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda. 2.Gowreshwary Suresh, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda. Defendants AND 1.Navarajakulam Muthukumaraswamy, No.18, Lilly Avenue, Colombo 06. 2.Vaithilingam Muthukumaraswamy, No. 18, Lilly Avenue, Colombo 06. Plaintiffs Appellants Vs 1. Suresh Thirugnanasampanthan, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda. 2.Gowreshwary Suresh, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda. Defendants Respondents AND NOW 1.Navarajakulam Muthukumaraswamy, No.18, Lilly Avenue, Colombo 06. 2.Vaithilingam Muthukumaraswamy, No. 18, Lilly Avenue, Colombo 06. Plaintiffs Appellants Appellants Vs 1. Suresh Thirugnanasampanthan, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda. 2. Gowreshwary Suresh, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda. Defendants Respondents Respondents

29/ 05/ 17	SC_FR_131_132_133_135_157_2015	Nalin Sandaruwan, 242 / 5, Dambahena Road, Maharagama. Sampath Ranasinghe, “Ranagiri” Sri Darmarama Road, Malamulla, Panadura. W. H. A. Sanath Chandrakumar, “Sinhagiri”, Panamura Road, Middeniya. Wasantha Kumari Ambulugala, Mahahenawatte, Anangoda, Walahanduwa, Galle. Wanni Arachchi Nevil, No 15A, Summit Flats, Keppetipola Mawatha, Colombo 05. Petitioners Vs. 1. Hon. RanjithMadduma Bandara, Minister of Internal Transport, No 01, D.R. Wijewardena Mawatha, Colombo 10. 2. Dr. Lalithasiri Gunaruwan, Secretary, Ministry of Internal Transport, No.1, D.R. Wijewardena Mawatha, Colombo 10. 3. National Transport Commission, No 241, Park Road, Colombo 05. 4. Dr. D.S. Jayaweera, Chairman, National Transport Commission, No 241, Park Road, Colombo 05. 5. Hewawalimunige Wipulasena, Director Operations (Acting) National Transport Commission, No. 241, Park Road, Colombo 05. 6. Hon Attorney General, Attorney General’s Department, Colombo 12. Respondents
29/ 05/ 17	SC FR Application No. 244 / 2010	Chaminda Sampath Kumara Wickremapathirana. Maithri Mawatha, Walgama, Welimilla Junction. Petitioner Vs 1. Sub Inspector Salwatura, Police Station, Bandaragama. 2. Sergeant Manoj, Police Station, Bandaragama. 3. Constable Ashoka, Police Station, Bandaragama. 4. Seargeant Kithsiri , Police Station, Bandaragama. 5. Security Assistant Dissanayake, Police Station, Bandaragama. 6. Charles Wickremasinghe, Officer in Charge, Police Station, Bandaragama. 7. Assistant Superintendent of Police, Prasad Ranasinghe, Panadura Division, ASP’s Office, Panadura. 8. The Inspector General of Police, Police Headquarters, Colombo 01. 9. Hon. Attorney General, Attorney General’s Department, Colombo 12. Respondents

28/ 05/ 17	S.C (FR) No. 04/2016	1. Environmental Foundation (Guarantee) Limited No. 146/34, Havelock Road, Colombo 5. 2. Wildlife and Nature Protection Society of Sri Lanka No. 86, Rajamalwatte Road, Battaramulla. 3. L. J. Mendis Wickramasinghe 31/5, Alwis Town, Hendala, Wattala. PETITIONERS Vs. 1. A. Sathurusinghe Conservator General of Forests Department of Forest, No. 82, Rajamalwatte, Battaramulla. 2. Central Environmental Authority “Parisara Piyasa” Rajamalwatte, Battaramulla. 3. K. P. Welikannage Director-Central Environmental Authority Sabaragamuwa Provincial Office, No. 27, Vidyala Mawatha, Kegalle. 4. G. D. L. Udaya Kumari Divisional Secretary Divisional Secretariat Kalawana. 5. Hon. Minister of Mahaweli Development and Environment Ministry of Mahaweli Development and Environment No. 55, T. B. Jaya Mawatha, Colombo 10. 6. Ceylon Electricity Board Sir Chiththampalam A. Gardiner Mawatha, P.O. Box 50, Colombo 02. 7. Director General Department of Irrigation P. O. Box 1138, 230, Baudhaloka Mawatha, Colombon7. 8. Commissioner General Land Commissioner General’s Department “Mihikatha Madura” Land Secretariat, 12006, Rajamalwatta Road, Battaramulla. 9. Public Utilities Commission of Sri Lanka 6th Floor, B.O.C. Merchant Tower St. Michael’s Road, Colombo 3. 10. Waste Management Water Power (Pvt) No. 115, Pirivena Road, Boralesgamuwa. 11. Dhammika Wijesinghe Secretary General Sri Lanka National Commission for UNESCO Ministry of Education 5th Floor, “Isurupaya”, Battaramulla. 12. Hon. Attorney General Attorney General’s Department, Colombo 12. RESPONDENTS
25/ 05/ 17	S.C. CHC Appeal 06/2011	Commercial Leasing Company Ltd., No. 68, Bauddhaloka Mawatha, Colombo 4. And formerly of Commercial House No. 21, Bristol Street, Colombo 1. PLAINTIFF Vs. 1. Naurunna Badalge Princy Sujatha Prince Radio & Electricals No. 67, Akuressa Road, Weligama. 2. Indrajith Bandula Dickson Jayasinghe 974/1, Sri Sumangala Mawatha, Ratmalana. 3. Liyana Gunawardhana Sunil Litiyamulla Pitidura, Weligama. DEFENDANTS AND NOW BETWEEN 1. Naurunna Badalge Princy Sujatha Prince Radio & Electricals No. 67, Akuressa Road, Weligama. 2. Indrajith Bandula Dickson Jayasinghe 974/1, Sri Sumangala Mawatha, Ratmalana. DEFENDANT-APPELLANTS Vs. Commercial Leasing Company Ltd., No. 68, Bauddhaloka Mawatha, Colombo 4. And formerly of Commercial House No. 21, Bristol Street, Colombo 1. PLAINTIFF-RESPONDENT 2. Liyana Gunawardhana Sunil Litiyamulla Pitidura, Weligama. DEFENDANT-RESPONDENT

22/ 05/ 17	S.C. Appeal 195/2015	Sea Consortium Lanka (Pvt) Limited 174, George R de Silva Mawatha, Colombo 10. PLAINTIFF Vs. 1. The Associated Newspapers of Ceylon Limited Lake House No. 35, D.R. Wijewardena Mawatha, Combo 10. 2. E. Weerapperuma No. 21/22, Maradana Road, Hendala. Wattala. DEFENDANTS AND BETWEEN In the matter of an Appeal under Section 754(1) of the Civil Procedure Code, read together with Section 5A of the High Court of the Provinces (Special Provisions Amendment) Act No. 54 of 2006 1 The Associated Newspapers of Ceylon Limited Lake House No. 35, D.R. Wijewardena Mawatha, Combo 10. 2. E. Weerapperuma No. 21/22, Maradana Road, Hendala. Wattala. DEFENDANT-APPELLANTS Vs. Sea Consortium Lanka (Pvt) Limited 174, George R de Silva Mawatha, Colombo 10. PLAINTIFF-RESPONDENTS AND NOW In the matter of an Application Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006 1. The Associated Newspapers of Ceylon Limited Lake House No. 35, D.R. Wijewardena Mawatha, Combo 10. 2. E. Weerapperuma No. 21/22, Maradana Road, Hendala. Wattala. DEFENDANT-APPELLANT-PETITIONERS Vs. Sea Consortium Lanka (Pvt) Limited 174, George R de Silva Mawatha, Colombo 10. And presently of 256, Sri Ramanathan Mawatha, Colombo 15. PLAINTIFF-RESPONDENT-RESPONDENT
18/ 05/ 17	SC Appeal No. 198/2014	SEYLAN BANK PLC No. 69, Janadhipathi Mawatha, Colombo 03 and now of Ceylinco-Seylan Towers, No.90, Galle Road,Colombo 03. (New Company NO. P.Q.9) PLAINTIFF VS. 1. NEW LANKA MERCHANTS MARKETING (PVT) LIMITED No. 31/5, Horton Place, Colombo 07 and also of No.25, Abdul Jabbar Mawatha, Colombo 12. 2. KOSHY THOMES 3. PUWANESHWARY THOMES 4. NELSON THOMES 5. SALLY THOMES All of No.25, Abdul Jabbar Mawatha, Colombo 12. DEFENDANTS AND NOW BETWEEN 1. NEW LANKA MERCHANTS MARKETING (PVT) LIMITED No. 31/5, Horton Place, Colombo 07 and also of No.25, Abdul Jabbar Mawatha, Colombo 12. 2. KOSHY THOMES 3. PUWANESHWARY THOMES 4. NELSON THOMES 5. SALLY THOMES All of No.25, Abdul Jabbar Mawatha, Colombo 12. DEFENDANTS-PETITIONERS/ APPELLANTSVS. 1. SEYLAN BANK PLC No. 69, Janadhipathi Mawatha, Colombo 03 and now of Ceylinco-Seylan Towers, No.90, Galle Road,Colombo 03. (New Company NO. P.Q.9) PLAINTIFF-RESPONDENT AND 2. THE GOLDEN KEY CREDIT CARD COMPANY LIMITED No. 2. R.A.De Mel Mawatha, Colombo 03. 3. DR. LALITH KOTELAWALA No. 2. R.A.De Mel Mawatha, Colombo 03. PARTIES TO BE ADDED- RESPONDENTS

15/ 05/ 17	SC. FR. Application No. 180/2016	1. Wanigasundara Appuhamilage Don Dharmasiri Wanigasundara, 210/D/1, Medagama, Panirendawa, Madampe. 2. Megesuriya Mudiyanselage Palitha Priyankara Bandara Megesuriya, Aludeniya, Hemmathagama. 3. Udadeniya Viyannalage Nandapala, No. 341/1, Negambo Road, Katunayaka. 4. Miyanamaditte Gedara Ranjith Wijerathna Bandara Kaduwela, No. 60/3, Amarathunga Mawatha, Mirigama. 5. Kodippili Patabendige Priyantha Nilmini Kumari No. 367/3, Pasyala Road, Mirigama. 6. Munasingha Appuhamilage Janaka Ravindra Munasingha, No. 264/3. Gorge E De Silva Mawatha, Kandy. 7. Badana Mudiyanselage Mahindasena, 26, Puchibogahapitiya, Balagolla, Kengalla. 8. Adikari Mudiyanselage Lalith Parakrama Adikaram, No. 41/1 Heeressagala Road, Kandy. 9. Jayapathma Herath Mudiyanselage Amarathilaka Jayapathma, Dangahamulahenewatta, Galapitiyagama, Nikaweratiya. 10. Galabalana Dewage Karunasena, No. 85, Bogahawatta, Kirindiwela. PETITIONERS -Vs- 1. Kalyani Dahanayake Commissioner General of Inland Revenue The Inland Revenue Department, Sir Chittampalam A Gardiner Mawatha Colombo 2. 2. U. B. Wakkumbura Senior Commissioner (Human Resources) The Inland Revenue Department, Sir Chittampalam A Gardiner Mawatha Colombo 2. 3. Dr. R.H.S. Samaratunge Secretary, Ministry of Finance Secretariat Building Colombo 01. 4. Dharmasena Dissanayake Chairman, Public Service commission 177, Nawala Road Narahenpita Colombo 05. 5. A. Salam Abdul Waid 6. D. Shriyantha Wijayatilaka 7. Prathap Ramanujam 8. V. Jegarasasingam 9. Santi Nihal Seneviratne 10. S. Ranugge 11. D.L. Mendis 12. Sarath Jayathilaka (5th to 12th Respondent- all members of the Public Service Commission, 177, Nawala Road, Narahenpita Colombo 05). 13. H.M. Gamini Seneviratne Secretary, Public Service commission 177, Nawala Road Narahenpita Colombo 05. 14. The Attorney General Attorney General’s Department Colombo 12. RESPONDENTS
06/ 04/ 17	SC/CHC/ 35/2009	W.A.H. Weerasinghe, “Dambuwa Walawwa”, Radawana Road, Yakkala. Plaintiff -Vs- Peoples Bank, No.75, Sir Chittampalam A. Gardiner Mawatha, Colombo-02. And Now Between Peoples Bank, No.75, Sir Chittampalam A. Gardiner Mawatha, Colombo-02. Defendant-Appellant W.A.H. Weerasinghe, “Dambuwa Walawwa” Radawana Road, Yakkala. Plaintiff-Respondent

05/ 04/ 17	SC APPEAL 195/2012	Seyadu Mohamadu Mohamed Munas, No. 1/96, Dehigama, Muruthalawa. Plaintiff Vs Sitti Patu Umma, No. 19, Dehianga, Muruthalawa. Defendant AND BETWEEN Sitti Patu Umma, No. 19, Dehianga, Muruthalawa. Defendant Appellant Vs Seyadu Mohamadu Mohamed Munas, No. 1/96, Dehigama, Muruthalawa. Plaintiff Respondent AND NOW BETWEEN Seyadu Mohamadu Mohamed Munas, No. 1/96, Dehigama, Muruthalawa. (Now deceased) Mohamed Muhuseen Inul Zulfika, No. 1/96, Dehianga, Muruthalawa. Substituted Plaintiff Respondent Appellant Vs Sitti Patu Umma, No. 19, Dehianga, Muruthalawa. Defendant Appellant Respondent
05/ 04/ 17	S.C. Appeal No.173/2011	SENADHEERAGE CHANDRIKA SUDARSHANI, No.497/ A/1,Ranmuthugala, Kadawatha. PLAINTIFF VS. MUTHUKUDA HERATH MUDIYANSELAGE GEDARA SOMAWATHI No.406/2/A, Welipillawa, Ganemulla. DEFENDANT AND MUTHUKUDA HERATH MUDIYANSELAGE GEDARA SOMAWATHI No.406/2/A, Welipillawa, Ganemulla. DEFENDANT-APPELLANT VS. SENADHEERAGE CHANDRIKA SUDARSHANI No.497/ A/1,Ranmuthugala, Kadawatha. PLAINTIFF-RESPONDENT AND NOW BETWEEN SENADHEERAGE CHANDRIKA SUDARSHANI No.497/A/1,Ranmuthugala, Kadawatha. PLAINTIFF- RESPONDENT -PETITIONER/ APPELLANT VS. MUTHUKUDA HERATH MUDIYANSELAGE GEDARA SOMAWATHI No.406/2/A, Welipillawa, Ganemulla. DEFENDANT-APPELLANT -RESPONDENT

05/ 04/ 17	S.C.C.H.C. Appeal No: 26/2010	PAN ASIA BANKING CORPORATION at No.450, Galle Road, Colombo 03 and a branch office and/or a place of business called and known as the “Panchikawatte Branch,” at No 221/221A, Sri Sangaraja Mawatha, Colombo 10. PLAINTIFF VS. RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA, No. 400/60/9, Longdon Avenue, Colombo 07. DEFENDANT AND PAN ASIA BANKING CORPORATION at No.450, Galle Road, Colombo 03 and a branch office and/or a place of business called and known as the “Panchikawatte Branch,” at No 221/221A, Sri Sangaraja Mawatha, Colombo 10. PLAINTIFF-PETITIONER VS. RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA, No. 400/60/9, Longdon Avenue, Colombo 07. DEFENDANT-RESPONDENT AND RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA, No. 400/60/9, Longdon Avenue, Colombo 07. DEFENDANT-RESPONDENT -PETITIONER VS. PAN ASIA BANKING CORPORATION PLC, at No.450, Galle Road, Colombo 03 and a branch office and/or a place of business called “Panchikawatte Branch” at No 221/221A, Sri Sangaraja Mawatha, Colombo 10. PLAINTIFF-PETITIONER REPONDENT AND NOW BETWEEN PAN ASIA BANKING CORPORATION PLC, at No.450, Galle Road, Colombo 03 and a branch office and/or a place of business called “Panchikawatte Branch” at No 221/221A, Sri Sangaraja Mawatha, Colombo 10. PLAINTIFF-PETITIONER REPONDENT-PETITIONER/ APPELLANT VS. RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA, No. 400/60/9, Longdon Avenue, Colombo 07. DEFENDANT-RESPONDENT-PETITIONER-RESPONDENT
04/ 04/ 17	S.C.Appeal No.94/2013	Nihal Ranjith Weerawarna No.91, Wijaya Road, Madaketiya, Tangalla Defendant-Appellant-Appellant Vs. Herbert Walter Techope No.91, Wijaya Road, Madaketiya, Tangalla Plaintiff-Respondent-Respondent
02/ 04/ 17	SC CHC APPEAL 20/2003	Somerville and Company Limited No. 137, Vauxhall Street, Colombo 02. Plaintiff Somerville and Company Limited No. 137, Vauxhall Street, Colombo 02. Plaintiff
30/ 03/ 17	SC CHC APPEAL 12/2011	Peoples’ Bank, No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. Plaintiff Vs Rola x Enterprises (Pvt.) Ltd., No. 97/8, Galle Road, Dehiwala. Defendant NOW BETWEEN Rolax Enterprises (Pvt.) Ltd., No. 97/8, Galle Road, Dehiwala. Defendant Appellant Vs Peoples’ Bank, No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo. Plaintiff Respondent

30/ 03/ 17	S.C Appeal No. 59/2016	Ceylon Estates Staffs' Union (Lanka Wathu Sewa Sangamaya) No. 6, Aloe Avenue, Colombo 3. (On behalf of N C Kodituwakku) APPLICANT Vs. 1. The Superintendent Belmont Tea Factory Hulandawa Estate, Akuressa. 2. Namunukula Plantations PLC No. 310, High Level Road, Navinna, Maharagama. RESPONDENTS AND BETWEEN Ceylon Estates Staffs' Union (Lanka Wathu Sewa Sangamaya) No. 6, Aloe Avenue, Colombo 3. (On behalf of N C Kodituwakku) APPLICANT-APPELLANT Vs. 1. The Superintendent Belmont Tea Factory Hulandawa Estate, Akuressa. 2. Namunukula Plantations PLC No. 310, High Level Road, Navinna, Maharagama. RESPONDENTS-RESPONDENTS AND BETWEEN 1. The Superintendent Belmont Tea Factory Hulandawa Estate, Akuressa. 2. Namunukula Plantations PLC No. 310, High Level Road, Navinna, Maharagama. RESPONDENTS-RESPONDENTS-APPELLANTS Vs. Ceylon Estates Staffs' Union (Lanka Wathu Sewa Sangamaya) No. 6, Aloe Avenue, Colombo 3. (On behalf of N C Kodituwakku) APPLICANT-APPELLANT-RESPONDENTS
26/ 03/ 17	SC/HC/ CALA306/2013	Walpola Mudalige Janenona No.87/1, Walpolawatta Kelanimulla, Angoda. PLAINTIFF Vs. Manamala Gamage Nandawathie 337, Kothlawala, Kaduwela DEFENDANT AND BETWEEN Manamala Gamage Nandawathie 337, Kothlawala, Kaduwela DEFENDANT-APPELLANT Vs. Walpola Mudalige Janenona(deceased) No.87/1, Walpolawatta Kelanimulla, Angoda PLAINTIFF-RESPONDENT Malwi Pathirannehelage Walter Dickson Perera No.145, Siridamma Mawatha Colombo 10. SUBSTITUTED PLAINTIFF RESPONDENT AND Malwi Pathirannehelage Walter Dickson Perera No.145. Siridamma Mawatha Colombo 10. SUBSTITUTED PLAINTIFF RESPONDENT PETITIONER Vs. Manamala Gamage Nandawathie 337, Kothlawala, Kaduwela DEFENDANT APPELLANT RESPONDENT
23/ 03/ 17	S.C.Appeal No.83/2014	Jayanthi Chandrika Perera No.132/2, Kolonnawa Road, Dematagoda, Colombo Presently at No.161, Hospital Road, Kalubowila, Dehiwala Defendant-Petitioner-Appellant Vs. D. Don Chandrakumara No. 161, Hospital Road, Kalubowila, Dehiwela Presently at No.167/6 Hospital Road, Kalubowila, Dehiwala Plaintiff-Respondent-Respondent

19/ 03/ 17	S.C. Appeal No. 10/2013	Jayasinghe Appuhamilage Anura Jayasinghe Ambawela of No. 58, Edwin Wijerathna Mawatha, Kegalle. PLAINTIFF Vs. Liyanage Shanthapriya Lalith Kumara Liyanage of No. 50, Edwin Wijerathna Mawatha, Kegalle. DEFENDANT AND Jayasinghe Appuhamilage Anura Jayasinghe Ambawela of No. 58, Edwin Wijerathna Mawatha, Kegalle. PLAINTIFF-APPELLANT Vs. Liyanage Shanthapriya Lalith Kumara Liyanage of No. 50, Edwin Wijerathna Mawatha, Kegalle. DEFENDANT-RESPONDENT AND NOW BETWEEN Liyanage Shanthapriya Lalith Kumara Liyanage of No. 50, Edwin Wijerathna Mawatha, Kegalle. DEFENDANT-RESPONDENT-PETITIONER Vs. Jayasinghe Appuhamilage Anura Jayasinghe Ambawela of No. 58, Edwin Wijerathna Mawatha, Kegalle. PLAINTIFF-APPELLANT-RESPONDENT
16/ 03/ 17	S.C. Appeal 36/12	Dinayadura Kanakaratne, Dolikanda, Boossa. Defendant-Respondent-Respondent-Appellant -VS. - 1. Wasalage Gunawathie, Kendala, Boossa. Plaintiff-Respondent-Respondent-Respondent 2. Dedimuni Kamani Sriyalatha De Silva, Rubberwatte, Kapumulla, Rathgama. Petitioner-Appellant-Respondent (Deceased) Loku Liyaage Shiromi De Zoysa, Rubberwatte, Kapumulla, Rathgama.. Substituted Petitioner-Appellant-Respondent
16/ 03/ 17	SC (CHC) Appeal No. 18/09	People’s Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2. Plaintiff Vs Sri Lanka Insurance Corporation Ltd., No. 21, Vauxhall Street, Colombo 2. Defendant AND NOW Sri Lanka Insurance Corporation Ltd., No. 21, Vauxhall Street, Colombo 2. Defendant Appellant Vs People’s Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2. Plaintiff Respondent

15/ 03/ 17	SC Appeal 99/2013	Konara Mudiyanselage Bandara Menika Bogahawattegedara, Dambagalla, Monaragala Plaintiff Vs (deceased) Konara Mudiyanselage Kumara Mutuwella Defendant 1a. Konara Mudiyanselage Chula Indika Kumara 1b. Konara Mudiyanselage Wajira Saminda Kumara 1c. Konara Mudiyanselage Manoj Dilanka Kumara Podinilame All of „Kumara Niwasa‟, Dambagalla Monaragala Substituted Defendants AND 1a. Konara Mudiyanselage Chula Indika Kumara 1b. Konara Mudiyanselage Wajira Saminda Kumara 1c. Konara Mudiyanselage Manoj Dilanka Kumara Podinilame All of „Kumara Niwasa‟, Dambagalla Monaragala. Substituted Defendant-Appellants Vs Konara Mudiyanselage Bandara Menika Bogahawattegedara, Dambagalla, Monaragala Plaintiff-Respondent AND NOW BETWEEN Konara Mudiyanselage Bandara Menika Bogahawattegedara, Dambagalla, Monaragala Plaintiff-Respondent-Petitioner-Appellant Konara Mudiyanselage Heen Menika. Udumulla, Dambagalla, Monaragala Substituted Plaintiff-Respondent-Petitioner-Appellant Vs 1a. Konara Mudiyanselage Chula Indika Kumara 1b. Konara Mudiyanselage Wajira Saminda Kumara 1c. Konara Mudiyanselage Manoj Dilanka Kumara Podinilame All of „Kumara Niwasa‟, Dambagalla Monaragala. Substituted Defendant-Appellants-Respondent-Respondents
14/ 03/ 17	SC Appeal No. 117/2011	Manamalage Michael Ranjith Fernando alias Mahipalage Michael Ranjith Perera of No. 44, Baseline Road, Seeduwa. Plaintiff Vs 1. Manamalage Marcus Fernando, 2. Prema Dayani Both of “Sadawarana Veda Medura” Seeduwa North, Seeduwa. Defendants AND BETWEEN 1. Manamalage Marcus Fernando 2. Prema Dayani Both of “Sadawarana Veda Medura”, Seeduwa North, Seeduwa. Defendants Appellants Vs Manamalage Michael Ranjith Fernando alias Mahipalage Michael Ranjith Perera, of No.44,Baseline Road, Seeduwa. Plaintiff Respondent AND NOW BETWEEN Manamalage Michael Ranjith Fernando alias Mahipalage Michael Ranjith Perera, of No.44,Baseline Road, Seeduwa. Plaintiff Respondent Appellant Vs 1.Manamalage Marcus Fernando 2.Prema Dayani Both of “Sadawarana Veda Medura”, Seeduwa North, Seeduwa. Defendants Appellants Respondents

13/ 03/ 17	SC Appeal No. 15/2012	Rev. Bengamuwe Dhammadinna Thero Purana Rajamaha Viharaya Pelmadulla. PLAINTIFF Vs. 1. Pallage Karunaratna Perera No. 79, Ratnapura Road, Pelmadulla. 2. D. P. Kariyawasam No. 79, Ratnapura Road, Pelmadulla. DEFENDANTS AND BETWEEN 1. Pallage Karunaratna Perera No. 79, Ratnapura Road, Pelmadulla. 1st DEFENDANT-APPELLANT Vs. Rev. Bengamuwe Dhammadinna Thero Purana Rajamaha Viharaya Pelmadulla. PLAINTIFF-RESPONDENT 2. D. P. Kariyawasa No. 79, Ratnapura Road, Pelmadulla. 2nd DEFENDANT-RRSPONDENT AND NOW BETWEEN Rev. Bengamuwe Dhammadinna Thero Purana Rajamaha Viharaya Pelmadulla. PLAINTIFF-RESPONDENT-APPELLANT 1. Pallage Karunaratna Perera No. 79, Ratnapura Road, Pelmadulla. 1st DEFENDANT-APPELLANT-RESPONDENT 2. D. P. Kariyawasa No. 79, Ratnapura Road, Pelmadulla. 2nd DEFENDANT-RRSPONDENT-RESPONDENT
13/ 03/ 17	S.C. CHC Appeal 29/11	Independent Television Network Limited, Wickremasinghepura, Battaramulla. Plaintiff Vs 1. Godakanda Herbals Private Ltd., 102, Kandy Road, Veveldiniya. 2. Lelwala G. Godakanda, 102, Kandy Road, Veveldeniya. Carrying on sole proprietyship under the name and style of “V.L.C. Advertising”. Defendants AND NOW BETWEEN Independent Television Network Limited, Wickremasinghepura, Battaramulla. Plaintiff Appellant Vs 1. Godakanda Herbals Private Ltd., 102, Kandy Road, Veveldiniya. 2. Lelwala G. Godakanda, 102, Kandy Road, Veveldeniya. Carrying on sole proprietyship under the name and style of “V.L.C. Advertising”. Defendant Respondents
13/ 03/ 17	SC APPEAL 167 / 10	Dankoluwa Hewa Bulath Kandage Dona Subashini Ruchira Manjari, Of No. 396/4/A, Kotikawatta, Angoda. Plaintiff Vs Dangolla Appuhamilage Wimalawathie, Of Walawwatta, Kahahena, Waga. Defendant AND BETWEEN Dangolla Appuhamilage Wimalawathie, Of Walawwatta, Kahahena, Waga. Defendant Appellant Vs Dankoluwa Hewa Bulath Kandage Dona Subashini Ruchira Manjari, Of No. 396/4/A, Kotikawatta, Angoda. Plaintiff Respondent AND NOW BETWEEN Dangolla Appuhamilage Wimalawathie, Of Walawwatta, Kahahena, Waga. Defendant Appellant Appellant Vs Dankoluwa Hewa Bulath Kandage Dona Subashini Ruchira Manjari, Of No. 396/4/A, Kotikawatta, Angoda. Plaintiff Respondent Respondent

07/ 03/ 17	SC APPEAL 110/2010	T. Mohamed Razak, No. 43, Lake Crescent, Colombo 12. Plaintiff Vs 1. N. Ammal Thiyagarajah 2. K. Thiyagarajah Both of No. 21, Galle Face Terrace, Colombo. Defendants AND T. Mohamed Razak, No. 43, Lake Crescent, Colombo 12. Plaintiff Appellant Vs 1. N. Ammal Thiyagarajah 2. K. Thiyagarajah Both of No. 21, Galle Face Terrace, Colombo. Defendants Respondents AND NOW 1. N. Ammal Thiyagarajah 2. K. Thiyagarajah Both of No. 21, Galle Face Terrace, Colombo. Defendants Respondents Appellants Vs T. Mohamed Razak, No. 43, Lake Crescent, Colombo 12. Plaintiff Appellant Respondent
06/ 03/ 17	S.C. Appeal No. 139/2013	Mohamed Wahid ‘Rock View’, 9th Mile Post Alawatugoda. Probate holder of late Muhandiramge Aboobakkar Lebbe Mohamed Yusoof of 9th Mile Post, Alawatugoda. PLAINTIFF Vs. Rev. Wattegama Sumana Tissa Sri Wijayaramaya, Kuriwela, Ukuwela. (Deceased) DEFENDANT Rev. Wattegama Siri Sumana Elwela Temple, Elwela. (Deceased) SUBSTITUTED-DEFENDANT Rev. Kalundewe Chandrasiri Elwela Temple, Elwela. SUBSTITUTED DEFENDANT AND Rev. Kalundewe Chandrasiri Elwela Temple, Elwela. SUBSTITUTED-DEFENDANT-PETITIONER Vs. Mohamed Wahid ‘Rock View’, 9th Mile Post Alawatugoda. Probate holder of late Muhandiramge Aboobakkar Lebbe Mohamed Yusoof of 9th Mile Post, Alawatugoda. PLAINTIFF-RESPONDENT AND NOW Mohamed Wahid ‘Rock View’, 9th Mile Post Alawatugoda. Probate holder of late Muhandiramge Aboobakkar Lebbe Mohamed Yusoof of 9th Mile Post, Alawatugoda. PLAINTIFF-RESPONDENT-PETITIONER Vs. Rev. Kalundewe Chandrasiri Elwela Temple, Elwela. SUBSTITUTED-DEFENDANT-PETITIONER-RESPONDENT

02/ 03/ 17	SC.FR Application No:-09/2011	1.Suriyarachchige Lakshman de Silva 2.B.M.Ajantha Weerasinghe Both of 19/1 ‘Eksath” Mawatha, Kadawatha. PETITIONERS V. 1. Officer-In- Charge, Edirisuriya Patabendige Chaminda Edirisuriya. Police Station Kiribathgoda, Also at residence:-No.94, Maya Mawatha Kiribathgoda. 2. Officer-In-Charge, Crime Division, M.A.D.Ruwan Viraj, Police Station, Kiribathgoda. Also at residence:-No.109, Galpothgoda Pugoda, New Town. 3. Sergeant P.L.R. Percey Dissanayake, Crime Division, Police Station, Kiribathgoda. Also at residence:-No.421/A/ 1, Ahugammana, Demalagama,Miragawatta 4. Police Constable R.M.Sanjwwea Suriya Ruwan, Police Station, Kiribathgoda. Also at residence:-No.8, Anumethigama, Bingiriya. 5. B.Carmer, (Proprietor) K.C.C.Engineering Co (PVT) Ltd, No.690, Kapuwaththa, Ja-Ela. Also at residence:- No.214/15, Fathima Mawatha, Kiribathgoda. 6. Deputy Inspector General of Police Police Station, Peliyagoda. 7. Pujitha Jayasundera, Sri Lanka Police Department, Police Head Quarters, Colombo 1. 8. The Hon. Attorney General, Attorney General’s Department, Hulftsdorp, Colombo 12. RESPONDENTS
02/ 03/ 17	S.C (FR) No.164/2015 with S.C (FR) No.276/2015	S.C (FR) No.164/2015 1. P. H. Balasooriya of 52, Mile Post, Kannattiya, Mihinthale. And 31 others PETITIONERS Vs. People’s Bank People’s Bank Head Office No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. And 13 others RESPONDENTS S.C (FR) No. 276/2015 1. P.P.M. Wijewickrama “Pramuditha”, Thalahagamwaduwa Walasmulla. And 39 others PETITIONERS Vs. 1. People’s Bank No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. And 3 others RESPONDENTS
28/ 02/ 17	SC Appeal 88/2010	NGA Wijenayake No. 4B, 57L Raddolugama. Applicant Vs International Construction Consortium Ltd Bernards Building, First Floor, No.106/4, Kohuwala, Dehiwala Presently at No.70, S. de.SJayasinghaMawatha, Kohuwala, Dehiwala Respondent AND BETWEEN NGA Wijenayake No. 4B, 57L Raddolugama. Applicant-Appellant Vs International Construction Consortium Ltd Bernards Building, First Floor, No.106/4, Kohuwala, Dehiwala Presently at No.70, S. de.SJayasinghaMawatha, Kohuwala, Dehiwala Respondent-Respondent AND NOW BETWEEN NGA Wijenayake No. 4B, 57L Raddolugama. Applicant-Appellant-Petitioner-Appellant Vs International Construction Consortium Ltd Bernards Building, First Floor, No.106/4, Kohuwala, Dehiwala Presently at No.70, S. de.SJayasinghaMawatha, Kohuwala, Dehiwala Respondent-Respondent-Respondent-Respondent

28/ 02/ 17	SC Appeal No.47/2014	TAD Hemasiri Gomis No.71, Vihara Mawatha. Singharamulla, Kelaniya Applicant Vs Kelaniya Co-operative Society Ltd., Biyagama Road, Kelaniya. Respondent AND TAD Hemasiri Gomis No.71, Vihara Mawatha. Singharamulla, Kelaniya Applicant-Appellant Vs Kelaniya Co-operative Society Ltd., Biyagama Road, Kelaniya. Respondent-Respondent AND NOW BETWEEN TAD Hemasiri Gomis No.71, Vihara Mawatha. Singharamulla, Kelaniya Applicant-Appellant-Petitioner-Appellant Vs Kelaniya Co-operative Society Ltd., Biyagama Road, Kelaniya. Respondent-Respondent-Respondent-Respondent
28/ 02/ 17	SC. Appeal No. 215/12	Sri Lanka Telecom Ltd., Head Office, Lotus Road, Colombo 01. PETITIONER-PETITIONER-APPELLANT -Vs- 1. Human Rights Commission of Sri Lanka, No. 36, Kynsey Road, Colombo 08. 2. Justice S. Anandacoomaraswamy, Former Chairman, 2A. Dr. Deepika Udagama, Chairperson, 3. Justice D. Jaywickrama, Former Member, 3A. Ghazali Hussain, Member, 4. M.T. Bafiq, Former Member, 4A. Saliya Peiris Member, 5. N.D. Abeywardena, Former Member, 5A. Ambika Sathkunanadan, Member, 6. Mahanama Thilakaratne, Former Member, 6A. Dr. Upananda Vidanapathirana, Member, 7. Nimal G. Punchihewa, Former Additional Secretary, 7A. S. Jayamanna, The Secretary, All of the Human Rights Commission of Sri Lanka, No. 36, Kynsey Road, Colombo 8. 8. M.M.M. Zaheed, 585/1/A, 2nd Division, Maradana, Colombo 10. RESPONDENT-RESPONDENT-REAPONDENTS
28/ 02/ 17	Sc Appeal 117-2012	

27/ 02/ 17	S.C (FR) 383/2008	1. W.J. Fernando 77/1, Church Road Gampaha. 2. A.M.M. Aththanayake 199/1, Borella Road, Godagama. 3. J. Wijesinghe LG-3, Maligawatta Flats, Colombo 10. 4. E.A.D. Weerasekera Bhathiya Mawatha, Kiribathgoda. 5. K.N. Perera 65/1, Weli Amuna Road, Hendala, Wattala. 6. S. Hewavitharana 89, Temple Lane, Colombo 10. 7. B.D.D. Kularatne 89, Thelangapatha Road, Wattala. 8. W.C. Alwis 217, J.N.H.S. Gogithota Wattala. 9. G.D.K. Rathnasekera 51-4, Galudupita Road, Maththumagala, Ragama. 21. P.K. Dayananda Wikumpadma Hikkaduwa. 22. S.P. Guruge 37, Pallewela Road, Katetiya. 23. K.I. Premadasa 202, Thotupola Road, Bolgoda, Bandaragama. PETITIONERS Vs. 1. Priyantha Perera Former Chairman. 2. Gunapala Wickramaratne Former Member. 3. M. J. Mookiah Former Member. 4. Srima Wijeratne Former Member. 5. W.P.S. Wijewardena Former Member. 6. Mendis Rohanadheera Former Member. 7. Bernard Soyza Former Member. 8. Palitha Kumarasinghe Former Member. 9. Dayasiri Fernando Former Member & former Chairman . All of the Public Service Commission Presently of No. 177, Nawala Road, Narahenpita, Colombo 5. 10. R.M.K. Rathnayake Former Secretary, Ministry of Trade and Consumer Affairs and Acting Food Commissioner, Department of Food, 330, Union Place, Colombo 02. 10A. Lalith Rukman de Silva Former Secretary, Ministry of Trade Marketing Development Co-operative and Consumer Service, Union Place, Colombo 02. 10B. Sunil Sirisena Former Secretary, Ministry of Trade Marketing Development Co-operative and Consumer Service, Union Place, Colombo 02. 10C. G.K.D. Amarawardena Secretary, Ministry of Trade Marketing Development Co-operative and Consumer Service, Union Place, Colombo 02. 10D. P.S.J.B. Sugathadasa Secretary, Ministry of Food Security Sathosa Building Vauxhall Street, Colombo 02. 10E. T.M.K.P. Tennakoon Secretary Industrial & Trade Marketing Affairs Ministry No. 73/1, Galle Road, Colombo 3. 11. Mrs. P. Siriwardena Former Director of Establishments Ministry of Public Administration and Home Affairs, Torrington Square, Colombo 7. 11A. M.A. Dharmadasa Former Director of Establishments Ministry of Public Administration and Home Affairs, Torrington Square, Colombo 7. 11B. W.S. Somadasa Director of Establishments Ministry of Public Administration and Home Affairs, Torrington Square, Colombo 7. 12. Justice Nimal Dissanayke Former Chairman Administrative Appeals Tribunal Colombo 8. 12A. Justice Imam Chairman, Administrative Appeals Tribunal Horton Place, Colombon7. 13. Attorney General Attorney General's Department Colombo 12. 14. S.C. Mannapperuma Former Member 14. A A.A. Salam Abdul Waid Member 15. Ananda Seneviratne Former Member 15A. D. Shirantha

22/ 02/ 17	S.C (FR) 224/2012	1. M. G. Nishantha Rupasinghe No. 59, Vihara Mawatha, New Puttalam Road, Pothanegama. PETITIONER Vs. 1. Dharmakeerthi Wijesundera No. 280A, New Town, Anuradhapura. 2. Viraj Perera Commissioner of Local Government Office of the Commissioner of Local Government Office, Provincial Council Building of the North Central Province, Anuradhapura. 3. Dumindu Dayasena Retiyala (Member of the Municipal Council of Anuradhapura) “Hotel Thammenna”, Airport Road, Anuradhapura. 4. Headquarter Inspector of Anuradhapura Headquarter Inspector’s Office, Anuradhapura. 5. W.M.R. Wijesinghe Assistant Divisional Secretary Divisional Secretariat Office (Negenahira Nuwaragampalatha), Anuradhapura. 6. Divisional Secretary Divisional Secretariat’s Office (Negenahira Nuwaragampalatha), Anuradhapura. 7. Dayananda, Grama Niladari, No. 258, Thulana, Anuradhapura. 8. Dissanayake (Sub Inspector of Police), Police Station, Anuradhapura. 9. Rupasinghe (Police Sergeant – 24707), Police Station, Anuradhapura. 10. Nalaka (Police Constable – 9241) Police Station, Anuradhapura. 11. Jagath (Police Constable – 46768), Police Station, Anuradhapura. 12. Sirimal (Police Constable – 62953) Police Station, Anuradhapura 13. Keerthi (Police Constable – 22255) Police Station, Anuradhapura. 14. Inspector General of Police, Police Headquarters, Colombo 1. 15. Provincial Commissioner of Lands, North Central Province, Kachcheri Building, Anuradhapura. 16. The Hon. Attorney General Department of the Attorney General. Colombo 12. RESPONDENS

21/ 02/ 17	S.C. Appeal 182/2014	1. Kahandage Colman Edward Silva 2. Paul Felix Silva 3. Raymond Joseph Silva 4. Anthony Silva All of Pallethennegedara Kurukudhegama, Pattiyegedera PLAINTIFFS Vs. 1. A.M. Punchibanda (Deceased) ORIGINAL DEFENDENT 2. A.M. Gunasekera 3. A.M. Appuhamy 4. A.M. Wijesekera 5. A.M. Rathnayake 6. A.M. Siriwardena 7. A.M. Dingiribanda 8. A.M. Kumarihamy 9. A.M. Sudubanda (Deceased) All of Hapukanuwa, Kurukudhegama, Pattiyegedera. SUBSTITUTED-DEFENDANTS AND 1. Kahandage Colman Edward Silva 2. Paul Felix Silva 3. Raymond Joseph Silva 4. Anthony Silva All of Pallethennegedara Kurukudhegama, Pattiyegedera PLAINTIFFS-APPELLANTS Vs. 1. A.M. Punchibnada (Deceased) ORIGINAL DEFENDENT 2. A.M. Gunasekera 3. A.M. Appuhamy 4. A.M. Wijesekera 5. A.M. Rathnayake 6. A.M. Siriwardena 7. A.M. Dingiribanda 8. A.M. Kumarihamy 9. A.M. Sudubanda All of Hapukanuwa, Kurukudhegama, Pattiyegedera. SUBSTITUTED-DEFENDENT-RESPONDENTS AND NOW BETWEEN 2. A.M. Gunasekera 4. A.M. Wijesekera Both of Hapukanuwa, Kurukudhegama, Pattiyegedera SUBSTITUTED 2ND AND 4TH DEFENDANT-RESPONDENT-PETITIONERS Vs. 1. Kahandage Colman Edward Silva 2. Paul Felix Silva 3. Raymond Joseph Silva 4. Anthony Silva All of Pallethennegedara Kurukudhegama, Pattiyegedera PLAINTIFF-APPELLANTS-RESPONDENTS 3. A.M. Appuhamy 5. A.M. Rathnayake 6. A.M. Siriwardena 7. A.M. Dingiribanda 8. A.M. Kumarihamy 9. A.M. Sudubanda All of Hapukanuwa, Kurukudhegama, Pattiyegedera. SUBSTITUTED 3RD AND 5TH – 9TH DEFENDANT-RESPONDENT-RESPONDENTS

21/ 02/ 17	S.C. FR Application No.308/2015	Dr. Nalin de Silva 109/1, Railway Avenue, Maharagama. 1. Ranil Wickremasinghe, Prime Minister of Sri Lanka, Prime Minist4r's Office No.58, Sir Earnest De Silva Mawatha, Comobmbo 07, Sri Lanka. 2. DEW Gunasekera, Former Minister of Rehabilitation and Prison Reforms. Communist Party of Sri Lanka, Headquarters, 91, Dr. N.M.Perera Mawatha, 3. Dhammika Dassanayake Secretary General of Parliament Parliament of Sri Lanka Sri Jayewardenepura Kotte, Sri Lanka. 4. P.B.Abeykoon Secretary to the President, Presidential Secretariat Galle Face Colombo 01. 5. Sujeeva Senasinghe Former Member of Parliament Deputy Minister of Justice, Ministry of Justice – Sri Lanka Superior Courts Complex Colombo 12. 6. Arjuna Mahendran, Governor Central Bank of Sri Lanka P.O.Box 590, Janadhipathi Mawatha Colombo o 1. 7. Perpetual Treasuries Ltd., 10, Alfred House Gardens, Colombo3. 8. Chamal Rajapaksa, (former) Speaker, Parliament of Sri Lanka, c/o Secretary General of Parliament of Sri Lanka Sri Jayewardenepura Kotte, Sri Lanka. 9. The Attorney General, Attorney-General's Department, Colombo 12.
19/ 02/ 17	S.C.Appeal No. 119/09	Samathapala Jayawardena, No. 38, Maligawatta Road, Colombo 10. Plaintiff Vs People's Bank, No.75,Sir Chittampalam A.Gardiner Mawatha, Colombo 2. Defendant AND People's Bank, No.75,Sir Chittampalam A.Gardiner Mawatha, Colombo 2. Defendant Appellant Vs Samathapala Jayawardena, No. 38, Maligawatta Road, Colombo 10. Plaintiff Respondent AND NOW BETWEEN People's Bank, No.75,Sir Chittampalam A.Gardiner Mawatha, Colombo 2. Defendant Appellant Appellant Vs Samathapala Jayawardena, No. 38, Maligawatta Road, Colombo 10. Plaintiff Respondent Respondent (Deceased) 1. Ariyawathie Jayawardena 2. Tyronne Deepal Jayawardena 3. Buddhika Upamalika Jayawardena 4. Ryan Jayawardena 5. Rienzie Nalin Jayawardena 6. Surath Nilantha Jayawardena All of No. 38, Maligawatta Road, Colombo 10. Substituted Plaintiff Respondent Respondents

16/02/17	SC HC CA LA 127/2014 & SC HC CA LA 128/2014	N. Habeebu Mohamedge Masahima Umma Alias Siththi Raheema (Deceased) No. 145, Bulugohotenna Road Akurana Plaintiff-Respondent-Respondent 1. P.T.G. Mohamed Sifan Najimudeen 2. P.T.G. Fathima Shifani Najimudeen 3. F. Masani Janimudeen All of No. 145, Bulughatenna, Palleweliketiya, Akurana Substituted – Plaintiff-Respondent- Respondent-Petitioners Vs. 9. Mahagamage Chandrasena alias Chandrasiri of Bamunugedera, Kurunegala Defendant-Respondent-Petitioner Respondent 1. Abdul Hasan Mohomed Iqbal 2. Abdul Hasan Mohomed Sarook 3. Abdul Hasan Mohomed Mursheed 4. Abdul Hasan Mohomed Muneer 5. Abdul Hasan Mohomed Jarjees All of 188, Dodamgolla, Akurana 6. Habeebu Mohomed Fauziya Umma (Deaceased) Of 99/1, Bulugohotenna, Akurana 6A. Enderu Tenne Gedera Seyed Mohomed Habeebu Mohomed of 99/1, Bulugohotenna, Akurana. 7. Abdul Kadar Fathima Mafas of No. 41, Bulugohotenna, Akurana 8. Nuwara Gedera Habeebu Mohomedge Sanufa Umma of No. 237, Bulugohotenna, Akurana 10. Nuware Gedera Habeebu Mohomed Misiriya Umma 11. Welimankada Gedera Mohomed Anwar Siththi Afeera 12. Welimankada Gedera Mohomed Anwar Siththi Fariha All of No. 237, Bulugohotenna, Akurana Defendants-Appellants-Respondents-Respondents 9. Mahagamage Chandrasena alias Chandrasiri of Bamunugedera, Kurunegala Defendant-Respondent- Petitioner-Petitioner Vs. 1. Abdul Hasan Mohomed Iqbal 2. Abdul Hasan Mohomed Sarook 3. Abdul Hasan Mohomed Mursheed 4. Abdul Hasan Mohomed Muneer 5. Abdul Hasan Mohomed Jarjees All of 188, Dodamgolla, Akurana 6. Habeebu Mohomed Fauziya Umma (Deceased) Of 99/1, Bulugohotenna, Akurana 6A. Enderu Tenne Gedera Seyed Mohomed Habeebu Mohomed of 99/1, Bulugohotenna, Akurana. 7. Abdul Kadar Fathima Mafas of No. 41, Bulugohotenna, Akurana 8. Nuwara Gedera Habeebu Mohomedge Sanufa Umma of No. 237, Bulugohotenna, Akurana 10. Nuware Gedera Habeebu Mohomed Misiriya Umma 11. Welimankada Gedera Mohomed Anwar Siththi Afeera 12. Welimankada Gedera Mohomed Anwar Siththi Fariha All of No. 237, Bulugohotenna, Akurana Defendants-Respondents-Respondents-Respondents 1. Fathima Shifani Najimudeen 2. Muhammad Sifan Najimudeen 3. Fathima. Masani Najimudeen All of No. 145, Bulugohotenna Palleweliketiya, Akurana Respondents (Heirs of the deceased Plaintiff-Appellant sought to be substituted)

14/ 02/ 17	SC. APPEAL. No: 218/2014	WicramaPathiranage Mahesh Ruwan Pathirana “Sampath”, Udumulla, Nugathalawa, Welimada. PLAINTIFF Vs. GinthotaSarukkaleVitharanage Hemalatha Piyathilake Alis Hemalatha Piyathilake Ginthota “Links View”, Kandy Road, NuwaraEliya. DEFENDANT AND BETWEEN Wicrama Pathiranage Mahesh Ruwan Pathirana “Sampath”, Udumulla, Nugathalawa, Welimada. PLAINTIFF-APPELLANT Vs. Ginthota Sarukkale Vitharanage Hemalatha Piyathilake Alis Hemalatha Piyathilake Ginthota “Links View”, Kandy Road, NuwaraEliya. DEFENDANT-RESPONDENT AND NOW BETWEEN Ginthota Sarukkale Vitharanage Hemalatha Piyathilake Alis Hemalatha Piyathilake Ginthota “Links View”, Kandy Road, NuwaraEliya. DEFENDANT-RESPONDENT APPELLANT Vs. Wicrama Pathiranage Mahesh Ruwan Pathirana “Sampath”, Udumulla, Nugathalawa, Welimada. PLAINTIFF-APPELLANT-RESPONDENT
14/ 02/ 17	SC. Appeal No. 55/2015	Piscal Kankanamalage Don Alfred Victor Plaintiff-Appellant-Appellant Vs. 01 Nekath Gamlath Ralalage Disa Nona 02 Maalimage Don Jayantha Pushpakumara 03 Maalimage Don Nishantha Pushpakumara 04 Maalimage Achala Shiromi All of 277/A, Kusalawatta, Udakanampella, Pugoda. 05 Udage Arachchige Sarath Gamini of Pelpita, Pugoda Defendants-Respondents-Respondents
14/ 02/ 17	SC/Appeal No 03/10	National Institute of Co-operative Development Polgolla Respondent-Appellant- Petitioner-Appellant -Vs- VimalJayathilake Wijesekara Nikathenna, Puwakdheniya Kegalle Applicant-Respondent-Respondent-Respondent
14/ 02/ 17	SC. FR. Application No: 190/2016	
14/ 02/ 17	SC. FR. Application No: 458/2010	Kandegedara Priyawansa, No. 42/28-B, Katumana, Nuwara-Eliya, (currently, detained at the Welikada Remand Prison) PETITIONER Vs. 1. GotabhayaRajapakse Secretary, Ministry of Defence, Public Security and Law & Order, No. 15/5, BaladakshaMawatha, Colombo 3. 2. C.N. Wakishta Deputy Inspector General of Police, Director, Terrorist Investigation Division, 2nd Floor, Secretariat, Colombo 01. 3. Officer-in-Charge Welikada Remand Prison, Welikada, Colombo 8. 4. S. Hettiarachchi Additional Secretary, Ministry of Defence, Public Security and Law & Order, No. 15/5, BaladakshaMawatha, Colombo 3. 5. Bogamuwa Inspector of Police, Terrorist Investigation Division, 2nd Floor, Secretariat, Colombo 01. 6. Hon. Attorney-General Attorney-General’s Department, Colombo 12. RESPONDENTS

14/ 02/ 17	SC APPEAL No. 199/12	Mahawattage Dona Chanika Diluni Abeyratne, No. 227/2, Stanley Thilakaratne Mawatha, Nugegoda. Plaintiff Vs. 1. Janaka R. Goonewardene, No.17, 1st Lane, Kirillapone, Colombo 05. 2. Jaykay Marketing Services(Pvt)Ltd, Registered office No. 130, Glennie Street, Colombo 02. Place of business Keels Super Supermarket, No.225, Stanley Thilakaratne Mawatha, Nugegoda. Defendants AND BETWEEN Jaykay Marketing Services (Pvt) Ltd, No. 130, Glennie Street, Colombo 02. Carrying on business at: Keels Supermarket, No. 225, Stanley Thilakaratne Mawatha, Nugegoda. 2nd Defendant-Petitioner Vs. 1. M.D.C.D. Abeyratne, No.227/2, Stanley Thilakaratne Mawatha, Nugegoda. Plaintiff-Respondent 2. J.R. Goonewardene, No.17, 1st Street, Colombo 05. 1st Defendant- Respondent AND NOW BETWEEN Mahawattage Dona Chanika Diluni Abeyratne, No. 227/2, Stanley Thilakaratne Mawatha, Nugegoda. Plaintiff-Respondent-Petitioner Vs. Jaykay Marketing Services (Pvt) Ltd, No. 130, Glennie Street, Colombo 02. Carrying on business at: Keels Supermarket, No. 225, Stanley Thilakaratne Mawatha, Nugegoda. 2nd Defendant-Petitioner-Respondent J.R. Goonewardene, No.17, 1st Street, Colombo 05. 1st Defendant- Respondent-Respondent
14/ 02/ 17	S.C. (FR) Application No. 394/2008	Oenone Saummiya Amalasontha Gunewardena No. 285/12, Hokandara South Hokandara PETITIONER Vs. 1. Sri Lankan Airlines Limited Level 22, East Tower, World Trade Centre, Echelon Square, Colombo 1. 2. Dr. P. B. Jayasundera Chairman Sri Lanka Airlines Limited, Level 22, East Tower, World Trade Centre, Echelon Square. Colombo 1. 2A. Ajith Dias Chairman Sri Lankan Airlines Limited Level 22, East Tower, World Trade Centre, Echelon Square, Colombo 1. 3. Manoj Gunewardena Chief Executive Officer, Sri Lankan Airlines Limited, Level 22, East Tower, World Trade Centre, Echelon Square. Colombo 1. 3A. Rakhitha Jayawardena Chief Executive Officer, Sri Lankan Airlines Limited Level 22, East Tower, World Trade Centre, Echelon Square, Colombo 1. 4. Capt/ Milinda Ratnayake Sri Lankan Airlines Limited Level 22, East Tower, World Trade Centre, Echelon Square, Colombo 1. 5. Hon. Attorney General Attorney General’s Department, Colombo 1. RESPONDENTS

08/ 02/ 17	SC APPEAL No. 92/2013 & SC APPEAL No. 93/2013	1. Ariyasena Amarasingha 2. Mahinda Amarasingha, both of No. 82/3, Hokandara South Hokandara. 1st & 3rd Defendant-Respondent-Petitioner Vs. 1. Wedimbuli Arachchige Wijesiri Perera 2. Nalanee Amarasinghe Both of No. 82 Hokandara South Hokandara Plaintiff-Appellant-Respondent SC APPEAL No. 92/2013 & SC APPEAL No. 93/2013 2 3. Sunil Amarasingh 4. Sarath Amarasinghe (deceased) 4.A Ariyasena Amarasinghe (substituted) 5. Ratnasiri Amarasingha All of No. 82/3, Hokandara South Hokandara. 6. Weragalage Don Weerasiri Dayananda, No. 78, Hokandara South, Hokandara 7. Makuburage Wimalasena Hokandara South, Hokandara 8. Egodahage Piyadasa Alwis Samarakoon, No.75/1, Hokandara South, Hokandara Defendants-Respondents- Respondents 1. Wedimbuli Arachchige Wijesiri Perera 2. Nalanee Amarasinghe Both of No. 82 Hokandara South Hokandara Plaintiff-Appellant-Respondent Vs. 1. Ariyasena Amarasingha 2. Sunil Amarasingh 3. Mahinda Amarasingha, 4. Sarath Amarasinghe (deceased) 4.A Ariyasena Amarasinghe (substituted) 5. Ratnasiri Amarasingha All of No. 82/3, Hokandara South Hokandara. 6. Weragalage Don Weerasiri Dayananda, No. 78, Hokandara South, Hokandara 7. Makuburage Wimalasena Hokandara South, Hokandara 8. Egodahage Piyadasa Alwis Samarakoon, No.75/1, Hokandara South, Hokandara Defendants-Respondents- Respondents
08/ 02/ 17	S.C. Appeal 59/2014	Liyanage Indrani Manel Charlotte Watawala nee Perera Of No. 462/12, Main Street, Negombo. PLAINTIFF-RESPONDENT-PETITIONER Vs. Ratnayake Mudiyanselage Jayatilleke Bandara of No. 135, Thopawewa, Polonnaruwa. DEFENDANT-APPELLANT-RESPONDENT Liyanage Anoma Kanthi Juliyana Bamunuwatte nee Perera Of No. 42/17, Dias Place, Panadura. DEFENDANT-RESPONDENT-RESPONDENT

08/02/17	SC Appeal No. 161/2015	Epage Suwaris of Meddekanda, Rathmale, Polgampola. PLAINTIFF Vs. 1. Diyapaththugama Vidanelage Hendrick Samarasinghe (since Deceased) 1A Diyapaththugama Vidanelage Sirisena Samarasinghe 2. Seemon Suwandagoda of Kurupita, Polgampola. 3. Abraham Samarasinghe 4. Marynona Samarasinghe 5. Jayasinghe Siriwardanage Piyadasa All of Rathmale Polgampola. DEFENDANTS ---------- AND BETWEEN IN THE PROVINCIAL HIGH COURT OF WESTERN PROVINCE 1A Diyapaththugama Vidanelage Sirisena Samarasinghe 3. Abraham Samarasinghe 5. Marynona Samarasinghe All of Rathmale Polgampola. DEFENDANTS-APPELLANTS Vs. Epage Suwaris of Meddekanda, Rathmale, Polgampola. PLAINTIFF-RESPONDENTS 2. Seemon Suwandagoda of Kurupita, Polgampola. 5 Jayasinghe Siriwardanage Piyadasa Both of Rathmale, Polgampola. DEFENDANTS-RESPONDENTS ---------- AND NOW BETWEEN IN AN APPLICATION TO THE SUPREME COURT 3. Abraham Samarasinghe 5. Marynona Samarasinghe All of Rathmale, Polgampola. DEFENDANTS-APPELLANTS-PETITIONERS Vs. Epage Suwaris of Meddekanda, Rathmale, Polgampola. PLAINTIFF-RESPONDENT-RESPONDNET 2. Seemon Suwandagoda of Kurupita, Polgampola. 5. Jayasinghe Siriwardanage Piyadasa Both of Rathmale, Polgampola. DEFENDANTS-RESPONDENTSRESPONDENTS
02/02/17	S.C. Appeal 116/2010	Hapugastenne Plantation Limited, No.186, Vauxhall Street, Colombo 02. Plaintiff -Vs- Kitnan Karunanidi, Hapugasthenna Estate, Gallella. Defendant AND BETWEEN Kitnan Karunanidi Hapugastenna Estate, Gallella. Defendant-Petitioner -Vs- Hapugastenne Plantation Limited, No.186, Vauxhall Street, Colombo 02. Plaintiff-Respondent AND NOW BETWEEN Hapugastenne Plantation PLC, No.186, Vauxhall Street, Colombo 02. Plaintiff-Respondent-Petitioner -Vs- Kitnan Karunanidi Hapugastenna Estate, Gallella. Defendant-Petitioner-Respondent

01/ 02/ 17	SC/FR/ No. 424/2013 SC/FR/ No. 427/2013	Mohamed Thalkeen Fathima Sahar 293/B Nagavillu Palavi Petitioner 1. University of Moratuwa, Moratuwa 2. ProfessorAnanda Jayawardena Vice Chancellor University of Moratuwa Katubedde, Moratuwa 3. Hon.Attorney-General Attorney General‟s Department Colombo 12 4. Professor R A Attalage Chairman and Deputy Vice Chancellor–Board of Residence and Discipline – University of Moratuwa – Moratuwa 5. Professor P K S Mahanama Co-Chairman– Board of Residence and Discipline –University of Moratuwa – Moratuwa 6. Major General M Peiris 7. Dr. T.A.G.Gunasekera 8. Professor U G A Puswewala 9. Mr. D K Vithanage 10. Mrs. R C Kodikara 11. Archt D P Chandrasena 12. Mr. L D I P Seneviratne 13. Archt U P P Liyanage 14. Dr J N Munasinghe 15. Dr P G Rathnasiri 16. Prof.S M A Nanayakkara 17. Dr C D Gamage 18. Dr A M K B Abeysinghe 19. Dr M P Dias 20. Dr A A Pasquel 21. Professor (Mrs) V M Wickremasinghe 22. Dr S U Adikari 23. Professor T S G Peiris 24. Dr V K Wimalsiri 25. Dr W D G Lanarolle 26. Dr T Sivakumar 27. Mrs K A D T Kulawansa 28. Dr L Ranatunga 29. Mr P M Karunaratne 30. Professor M S Manawadu 31. Professor (Mrs) B M W P K Amarasinghe 32. Professor A A P De Alwis 33. Professor S A S Perera 34. Professor K A M K Ranasinghe 35. Professor L L Ratnayake 36. Professor (Mrs) N Ratnayake 37. Professor K A S Kumarage 38. Professor W P S Dias 39. Professor N D Gunawardena 40. Professor J M S J Bandara 41. Professor N T S Wijesekera 42. Professor S S L Hettiarachchi 43. Professor S A S Kulathilake 44. Professor M T R Jayasinghe 45. Professor S P Samarawickrema 46. Professor (Mrs) C Jayasinghe 47. Professor H S Thilakasiri 48. Professor A A D A J Perera 49. Professor P G V Dias 50. Professor P G R. Dharmaratne 51. Professor J R Lucas 52. Professor H Y R Perera 53. Professor S P Kumarawadu 54. Prof. N Wickramarachchi 55. Professor J A K S Jayasinghe 56. Professor S A D Dias 57. Professor S W S B Dassanayake 58. Professor H S C Perera 59. Professor R G N de S Munasinghe 60. Professor K K C K Perera 61. Professor A S Karunananda 62. Professor M L de Silva 63. Dr U G D Weerasinghe 64. Mrs N C K Seram 65. Professor V S D Jayasena 66. Professor W A S N Wijetunge 67. Mr S C Premaratne 68. Dr S V Rabel 69. Mr. H Madanayake 70. Ms V Kulasekara 6th to 70th Respondents are members of the Board of Residence and Discipline of the University of Moratuwa - Moratuwa Respondents

31/ 01/ 17	S.C.F.R. Application No.45/2016	1. CENTRAL ENGINEERING CONSULTANCY BUREAU ENGINEERS' ASSOCIATION No. 415, Bauddhaloka Mawatha, Colombo 07. 2. I.R.P. GUNATHILAKE President, Central Engineering Consultancy Bureau Engineers' Association, No. 415, Bauddhaloka Mawatha, Colombo 07. 3. S.V. MUNASINGHE Secretary, Central Engineering Consultancy Bureau Engineers' Association, No. 415, Bauddhaloka Mawatha, Colombo 07. 4. S. WIJESINGHE Deputy General Manager, Central Engineering Consultancy Bureau Engineers' Association, No. 415, Bauddhaloka Mawatha, Colombo 07. 5. W.S.U. KUMARA Engineer, Central Engineering Consultancy Bureau Engineers' Association, No. 415, Bauddhaloka Mawatha, Colombo 07. PETITIONERS VS. 1. CENTRAL ENGINEERING CONSULTANCY BUREAU No. 415, Bauddhaloka Mawatha, Colombo 07. 2. G.D.A. PIYATHILAKE Chairman, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 3. K.L.S. SAHABANDU General Manager, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 4. T.D. WICKRAMARATNE Corporate Additional General Manager, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 5. S.P.P. NANAYAKKARA Corporate Additional General Manager, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 6. LALANI PREMALTHA Administrative Officer, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 7. A.GALKETIYA Engineer, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 8. J.J. JAYASINGHE Engineer, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 9. G.A.U.GAMLATH Engineer, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 10. H.M.T.N. DHANAWARDENA Engineer, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 11. K.K.IRESHA Architect, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 12. U.G.N.N. GAMLATH Engineer, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 13. H.M.G.U.KARUNARATHNE Engineer, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 14. J.D.N.P. JAYASOORIYA Engineer, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 15. J.M.M. JAYASINGHE Engineer, Central Engineering Consultancy Bureau, No. 415, Bauddhaloka Mawatha, Colombo 07. 16. HON. ATTORNEY- GENERAL Attorney-General's Department, Colombo 12. RESPONDENTS

26/ 01/ 17	S.C.Appeal No. 172/2013	KAHANDAWA APPUHAMILAGE DON TILAKARATNE No.43, Negombo Road, Banduragoda. PLAINTIFF VS. 1. WIJESINGHE MUDIYANSELAGE CHANDRASIRI 2. CHANDRANI ADHIKARI Both of Makandura, Gonawila. DEFENDANTS AND 1. WIJESINGHE MUDIYANSELAGE CHANDRASIRI 2. CHANDRANI ADHIKARI Both of Makandura, Gonawila. DEFENDANTS-APPELLANTS VS. KAHANDAWA APPUHAMILAGE DON TILAKARATNE No.43, Negombo Road, Banduragoda. PLAINTIFF-RESPONDENT AND NOW BETWEEN KAHANDAWA APPUHAMILAGE DON TILAKARATNE No.43, Negombo Road, Banduragoda. PLAINTIFF-RESPONDENT-PETITIONER/APPELLANT VS. 1. WIJESINGHE MUDIYANSELAGE CHANDRASIRI 2. CHANDRANI ADHIKARI Both of Makandura, Gonawila. DEFENDANTS-APPELLANTS- RESPONDENTS
25/ 01/ 17	S.C. C.H.C. Appeal No.05/2012	THE FINANCE COMPANY PLC No.97, Hyde Park Corner, Colombo 02 (formerly, The Finance Company Ltd of No.69, Ceylinco Tower 3rd floor Janadhipathi Mawatha, Colombo 01.) PLAINTIFF VS. 1. JAYAKODY ARACHCHIGE DON THUSHARA, No.199/A, Palan Oruwa, Gonapola. 2. HALLINNA LOKUGE JAYATH LAKSUMANA PERERA, No.261/10, Waragoda Road, Kelaniya. 3. ATULUWAGE NIROSH CHAMIKA JAYARATNE Wagawathugoda, Maha Uduwa, Kuda Uduwa, Horana. DEFENDANTS AND NOW BETWEEN THE FINANCE COMPANY PLC No.97, Hyde Park Corner, Colombo 02 (formerly, The Finance Company Ltd of No.69,Ceylinco Tower 3rd floor, Janadhipathi Mawatha, Colombo 01.) PLAINTIFF-APPELLANT VS. 1. JAYAKODY ARACHCHIGE DON THUSHARA, No.199/A, Palan Oruwa, Gonapola. 2. HALLINNA LOKUGE JAYATH LAKSUMANA PERERA, No.261/10, Waragoda Road, Kelaniya. 3. ATULUWAGE NIROSH CHAMIKA JAYARATNE Wagawathugoda, Maha Uduwa, Kuda Uduwa, Horana. DEFENDANTS- RESPONDENTS

24/01/17	Sc Appeal 27_2014	Loku Yaddehige Ruwan Kulunuguna, Of No. 244/1, Jaya Mawatha, Makola. Plaintiff Vs. Scanwell Customs Brokers (Pvt.) Ltd., Of No. 3/2, No. 15, Galle Face Terrace, Colombo 03. Defendant2 IN THE HIGH COURT Scanwell Customs Brokers (Pvt.) Ltd., Of No. 3/2, No. 15, Galle Face Terrace, Colombo 03. Defendant-Appellant Vs. Loku Yaddehige Ruwan Kulunuguna, Of No. 244/1, Jaya Mawatha, Makola. Plaintiff-Respondent AND NOW BETWEEN IN THE SUPREME COURT Loku Yaddehige Ruwan Kulunuguna, Of No. 244/1, Jaya Mawatha, Makola. Plaintiff-Respondent-Petitioner Vs. Scanwell Customs Brokers (Pvt.) Ltd., Of No. 3/2, No. 15, Galle Face Terrace, Colombo 03.3 But presently at: Scanwell Customs Brokers Pvt. Ltd., No. 67/1, Hudson Road, Colombo 03. Defendant-Appellant-Respondent ---- Loku Yaddehige RuwanKulunuguna, Of No. 244/1, Jaya Mawatha, Makola. Plaintiff-Respondent-Appellant Vs. Scanwell Customs Brokers (Pvt.) Ltd., Of No. 3/2, No. 15, Galle Face Terrace, Colombo 03. Defendant-Appellant-Respondent
24/01/17	Sc Appeal 27_2014	Loku Yaddehige Ruwan Kulunuguna No.244/1, Jaya Mawatha, Makola Plaintiff-Respondent-Appellant Vs Scanwell Customs Brokers (Pvt) Ltd. No.3/2, No.15, Galle Face Terrace. Colombo.03 Defendant-Appellant-Respondent
24/01/17	S.C. (C.H.C) 07/2009	Flexport (Private) Limited of 127, Jambugasmulla Mawatha, Nugegoda. PLAINTIFF Vs. Bank of Ceylon Bank of Ceylon Headquarters Colombo 1. DEFENDANT Flexport (Private) Limited of 127, Jambugasmulla Mawatha, Nugegoda. PLAINTIFF-APPELLANT Bank of Ceylon Bank of Ceylon Headquarters Colombo 1. DEFENDANT-RESPONDENT

23/ 01/ 17	SC / Appeal / 172/2012	Kaluwalage Champika Kumari De Silva, No 204, Vam Ivuru Yaya, 03, Mahawillachchiya, Anuradhapura. Plaintiff Vs. 1. Kodithuwakku Arachchige Neville Kodithuwakku, No. 85, Nayapana Janapadaya, Gampola. 2. Commissioner General of Prisons, Department of Prisons, No. 50, Baseline Road, Colombo 09. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. Defendants AND Kaluwalage Champika Kumari De Silva, No 204, Vam Ivuru Yaya, 03, Mahawillachchiya, Anuradhapura. Plaintiff Appellant Vs. 1. Kodithuwakku Arachchige Neville Kodithuwakku, No. 85, Nayapana Janapadaya, Gampola. 2. Commissioner General of Prisons, Department of Prisons, No. 50, Baseline Road, Colombo 09. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. Defendant Respondents AND NOW BETWEEN Kaluwalage Champika Kumari De Silva, No 204, Vam Ivuru Yaya, 03, Mahawillachchiya, Anuradhapura. Plaintiff Appellant-Appellant Vs. 1. Kodithuwakku Arachchige Neville Kodithuwakku, No. 85, Nayapana Janapadaya, Gampola. 2. Commissioner General of Prisons, Department of Prisons, No. 50, Baseline Road, Colombo 09. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. Defendant Respondent-Respondents
23/ 01/ 17	S.C. Appeal No. 8/2013	1. Subramaniam Jegatheeswaran and wife 2. Jegatheeswari both of Sellapillaiyar Kovilady, Polikandy. 1st and 2nd Defendants-Appellants-Petitioners. Vs 1. Vaithilingam Rameswara Iyer and Wife 2. Krishnavimarosa both of Manthigai Amman Kovilady, Puloly. Plaintiffs-Respondents-Respondents 3. Vaithilanga Kurukkal Sundareswara Kurukkal Manthigai Amman Kovilady, Puloly 3rd Defendant –Respondent-Respondents

19/01/17	S.C F.R. 57/2016	CAPTAIN CHANNA D.L. ABEYGUNEWARDENA No.322/55, Saraswathie Estate, Thalawathugoda. PETITIONER VS. 1. SRI LANKA PORTS AUTHORITY No.19, Chaithya Road, Colombo 01. 2. DHAMMIKA RANATHUNGA Chairman, Sri Lanka Ports Authority, No.19, Chaithya Road, Colombo 01. 3. SARATH KUMARA PREMACHANDRA Managing Director, Sri Lanka Ports Authority, No.19, Chaithya Road, Colombo 01. 4. MAGAMPURA PORT MANAGEMENT COMPANY (PRIVATE) LIMITED, Ports Administration Complex, Mirijjawila, Hambantota. 5. DAMMIKA RANATHUNGA-CHAIRMAN 6. DR. LALITH PERERA 7. SANJEEWA WIJERATNE 8. THAMEERA MANJU 9. UDITHA GUNAWARDENA 10. SHIRANI WANNIARACHCHI 11. JAYANTHA PERERA Directors of Magampura Port Management Company (Pvt) Limited. 12. SARATH PERERA General Manager, Magampura Port Management Co. (Pvt.) Ltd, Port Administration Complex Mirijjawila, Hambantota. 13. HON. ATTORNEY-GENERAL Attorney-General‟s Department, Colombo 12. RESPONDENTS
18/01/17	SC Appeal no 102-2012	
18/01/17	SC. SPL/LA No. 231/2015	D.S.Aaron Senarath P.O.Box 02, Maskeliya Applicant-Appellant-Petitioner Vs. 1. The Manager Moray Estate, Maskeliya. 2. Maskeliya Plantations Limited, No. 310, High Level Road Nawinna, Maraharagama. Respondents-Respondents-Respondents
18/01/17	S.C FR Application No. 608/2008	Sarath Kumara Naidos 312/51, Moragodawatte Kesbewa, Piliyandala Presently at Remand Prison, Welikada. PETITIONER Vs. 1. Inspector Damith Police Station Moratuwa. 2. Police Constable Kavinda Police Station Moratuwa. 3. Officer In Charge Police Station Moratuwa. 4. Superintendent of Police Moratuwa Division Office of the Superintendent of Police, Moratuwa. 5. The Inspector General of Police Police Headquarters Colombo 1. 6. Hon. Attorney General Attorney General’s Department Colombo 12. RESPONDENTS

18/ 01/ 17	S.C. FR No. 370/2011	1. Alawathupitiya Ratnayake Mudiyanselage Tikiribanda, No. 85, “Nishanthi”, Kobbekaduwa, Yahalatenna. 2. Ganiha Arachchilage Wijeratne Marakkalamulla, Dummalasooriya. PETITIONERS Vs. 1 (A) Abdul Majeed Secretary, Ministry of Muslim Religious Affairs & Posts, Postal Services Headquarters, D.R. Wijewardena Mawatha, Colombo 10. 1. M.K.B. Dissanayake Postmaster General Postal Services Headquarters, D.R. Wijewardena Mawatha, Colombo 10. 2 (a) D.L.P. Rohana Abeyratne Postmaster General Postal Services Headquarters, D.R. Wijewardena Mawatha, Colombo 10. 3 (b) Dharmasena Dissanayake - Chairmanr 4 (b) A. Salam Abdul Waid - Member 5 (b)Ms. D. Shirantha Wijeyathilaka - Member 6(b) Dr. Pradeep Ramanugam - Member 7 (b) Mrs V. Jegarasasingham - Member 8(b) Santi Nihal Seneviratne - Member 9 (b) S. Ranugge - Member 10(b) D.C. Mendis - Member 11(b) Sarath Jayathilaka - Member All of Public Service Commission No. 177, Nawala Road, Narahenpita, Colombo 5. 12. Ashoka Mampitiya Arachchi Deputy Postmaster General Postal Headquarters Colombo 1. 13. Mrs. Theshani J. Abeyratne Deputy Director of Customs Sri Lanka Customs Colombo 1. 14. Mrs. K.C.H. Randeniya Director, Policy Planning Ministry of Postal Services, 310, D.R. Wijewardena Mawahta, Colombo 10. 15. Mrs. M.D.S. Jayasumana Assistant Director of Establishment Ministry of Public Administration & Home Affairs, Colombo 7. 16. K. Sunil Weerasekera ‘Premawasa’ Baddegama 17. J.A. Kankanamge Ganegama South Baddegama. 18. Hon. Attorney General Attorney General’s Department Colombo 12. RESPONDENTS
16/ 01/ 17	SC FR 319-12	
16/ 01/ 17	SC/APPEAL No. 58/14	1.GalgamuwaKankanamlage Malani 2. GalgamuwaKankanamlage Sarath Dharmasiri both of No. 201, Pamunugama, Alubomulla. Defendants-Appellants-Appellants Vs Habaragamuwage Dickson PeirisThilakapala of No. 201, Pamunugama, Alubomulla. Plaintiff-Respondent-Respondent

16/01/17	S.C. Appeal No.175/2010	Panambarage Jude Fernando No.154, Chilaw Road Manaweriya Kochchikade. Plaintiff Vs. 1. Hetti Thanthirige Anesta Malani Fernando 2. Jayakodige Jerrad Fernando Both of No.46 Owitiyawatte Kochchikade. Defendants And Between Panambarage Jude Fernando No.154, Chilaw Road Manaweriya Kochchikade. Plaintiff-Appellant Vs. 1. Hetti Thanthirige Anesta Malani Fernando 2. Jayakodige Jerrad Fernando Both of No.46 Owitiyawatte Kochchikade. Defendants-Respondents And Now In the matter of an appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provinces) (amendment) Act No.54 of 2006. Panambarage Jude Fernando No.154, Chilaw Road Manaweriya Kochchikade. Plaintiff-Appellant-Petitioner Vs. 1. Hetti Thanthirige Anesta Malani Fernando 2. Jayakodige Jerrad Fernando Both of No.46 Owitiyawatte Kochchikade. Defendants-Respondents-Respondents

Judgments Delivered in 2017

16/01/17	SC/ APPEAL No. 58/14	1.GalgamuwaKankanamlage Malani 2. GalgamuwaKankanamlage Sarath Dharmasiri both of No. 201, Pamunugama, Alubomulla. Defendants-Appellants-Appellants Vs Habaragamuwage Dickson PeirisThilakapala of No. 201, Pamunugama, Alubomulla. Plaintiff-Respondent-Respondent
15/01/17	S.C. F.R. Application No. 484/2011	Jayaweerage Sumedha Jayaweera, Deputy Principal's Residence, Royal College, Colombo 07 Petitioner Vs. 1. Prof. Dayasiri Fernando, Former Chairman. 1A. Dharmasena Disanayake Chairman 2. Sirima Wijeratne, Former Member. 2A. Salam Abdul Waid, Member. 3. Palitha Kumarasinghe, Former Member 3A. D. Shirantha Wijeyatilaka, Member. 4. S.C. Mannapperuma, Former Member 4A. Prathap Ramanujam Member 5. Ananda Seneviratne, Former Member. 5A. Mr. E. Jegarasasingam, Member 6. N.H., Pathirana, Former Member, 6A. Santi Nihal Seneviratne, 7. S. Thillanadarajh, Former Member, 7A. S. Ranugge, Member 8. M.D.W. Ariyawansa, Former Member, 8A. D.L. Mendis, Member 9. A. Mohamed Nahiya, Member. 9A. Sarath Jayathilaka, Member All of the Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 5. 10. H.M.Gunasekara, The Secretary, Ministry of Education, Isurupaya, Battaramulla 10A. Gotabaya Jayarathne, The Secretary, Isurupaya, Battaramulla 10B. Upali Marasinghe, The Secretary, Ministry of Education, Isurupaya, Battaramulla 10C. Mr. B.W.M. Bandusena, The Secretary, Ministry of Education, Isurupaya, Battaramulla 10D. Sunil Hettiarachchi, The Secretary, Ministry of Education, Isurupaya, Battaramulla. The Hon. Attorney General, Department of the Attorney General, Colombo 12. Respondents

08/01/17	SC FR Application No. 330/2015	Ajith P. Dharmasuriya, No. 1, New Town, Aluthwatta Road, Rajawella. Petitioner Vs. 1. Mahaweli Authority of Sri Lanka, No. 500, T.B. Jayah Mawatha, Colombo 10.. 2. Director General, Mahaweli Authority of Sri Lanka, No. 500, T.B. Jayah Mawatha, Colombo 10.. 3. Resident Project Director – Victoria Project, Mahaweli Authority of Sri Lanka, Victoria Resident Project Manager's Office, Digana, Nilangama, Rajawella. 4. Secretary, Ministry of Mahaweli Development and Environment, No. 500, T.B. Jayah Mawatha, Colombo 10. 5. Divisional Secretary, Divisional Secretariat of Mede-Dumbara, Theldeniya. 6. Meda-Dumbara Pradeshiya Sabha, Theldeiya. 7. Kundasale Pradeshiya Sabha, Menikhinna. 8. Central Environment Authority, "Parisara Piyasa", No. 104, Robert Gunawardene Mawatha, Battaramulla. 9. Hon. Attorney General, Attorney General's Department, Colombo 12. 10. E.M.M.W.D. Bandaranayake, No. 77/2A, Kanda, Karalliyadda, Theldeniya. 11. E.M. Wijeratne, No. 250/06, Kandy Road, Karaliyadda, Theldeniya. 12. R.K. Abeykoon, No. 6, Kolongahawatta, Kengalle. 13. J.M.R. Bandara Jayasundara, C/o. Mahaweli Authority of Sri Lanka, Victoria Resident Project Manager's Office, Nilangama, Rajawella. 14. W.M.M. Costa, Rathmaloya Road, Balagolla. 15. J.M.U.W. Barnes Rambukwelle, Opposite Theldeniya Magistrate's Court/District Court, Theldeniya. Respondents
14/12/16	SC 147/2011	Annamalai Muthuappan Chettiar No.111, Sea Street, Colombo 11. Defendant-Appellant-Petitioner V. Subramaniam Sankaran No.109, Sea Street, Colombo 11. Plaintiff-Respondent-Respondent

08/12/16	S.C.APPEAL NO:-92/2012	1.Sumathipala Vidana Pathirana, No.202A, Richmond Hill Road, Galle. (deceased) 2.Charles Vidana Pathirana, No.30/38, Longdon Place, Colombo 7.(deceased) 3.Anulawathi Vidana Pathirana, No.59, Lighthouse Street, Galle. 4.Dayawathi Vidana Pathirana, Punchi Duuwa, Uluvitike,Galle. 1A.Sumudu Lakmal Abeywardena, Vidana Pathirana, No.202A, Richmond Hill Road, Galle. 2A.Gamini Charles Vidana Pathrana, No.30/38, Longdon Place, Colombo 7. PLAINTIFFS V. 1.Thawalama Gamage Anura, Thalangalla, Opatha. 2.Wickremanayake Karunarathna Wasantha.Thalangalla, Opatha. 3.Samarage Sunil, Thalangalla, Opatha. 4.Punchhewamulle Mudiyanselage Indrawathi, Thalangalla, Opatha. 5.Nilanka Sampath, Thalangalla, Opatha 6.Jayanthi Chandralatha, Thalangalla, Opatha. 7.Saumyadasa Koralage, Thalangalla,Opatha. 8.Padma Shanthini Weerasinghe, No.3/33, Udayapura, Robert Gunawardena Mawatha, Battrmulla. DEFENDANTS AND BETWEEN Punchihewamulle Mdiyanselage Indrawathi, 4th DEFENDANT-PETITIONER v. 1.Sumathipala Vidana Parhirana, No. 202A, Richmond Hill Road, Galle. (deceased) 2.Charles Vidana pathirana , No.30/38, Longdon Place, Colombo 7 (deceased) 3.Anulawathi Vidana Pathirana, No.59, Lighthouse Street,Galle. 4.Dayawathi Vidana Pathirana, Punchi Duuwa, Uluvitike,Galle. 1A.Sumudu Lakmal Abeywardena, Vidana Pathirana, No.202A, Richmond Hill Road,Galle. 2A.Gamini Charles Vidana Pathirana, No.30/38, Longdon Place, Colomb0 2 PLAINTIFF-RESPONDENTS AND 1.Thawalama Gamage Anura, Thalangalla, Opatha. 2.Wickremanayake Karunaratna Wasantha. Thalangalla Opatha. 3.Samarage Sunil, Thalangalla, Opatha. 5.Nilanka Sampath, Thalangalla,Opatha 6.Jayanthi Chandralatha, Thalangalla, Opatha. 7.Saumyadasa Koralage, Thlangalla, Opatha. 8.Padma Shanthini Weerasinghe, No.3/33, Udayapura, Robert Gunawardena Mawatha,Battaramulla DEFENDANT-RESPONDENTS AND NOW BETWEEN Punchihewamulle mudiyanselage Indrawathi, Thalangalla Opatha. 4Th DEFENDANT-PETITIONER-PETITIONER V. 1.Sumathipala Vidana Pathirana, No.202A, Richmond Hill Road, Galle. 1A.Sumudu Lakmal Abeywarden Vidana Pathirana, No. 202A, Richmond Hill Road, Galle. 2.Charles Vidana Pathirana, No.30/38, Longdon Place, Colombo 2. (deceased) 2A.Gamini Charles Vidana Pathirana, No.30/38, Longdon Place, Colombo 2. 3.Anulawathi Vidana Pathirana, No.59, Lighthouse Street, Galle. 4.Dayawathi Vidana Pathirana, Punchi Duuwa, Uluvitike, Galle. PLAINTIFF-RESPONDENT-RESPONDENTS 1.Thawalama Gamage Anura, Thalangalla, Opatha. 2.Wickremanayake Karunarathna Wasantha, Thalangalla, Opatha. 3.Samarage Sunil, Thalangalla, Opatha. 5.Nilanka Sampath, Thalangalla, Opatha 6.Jayanthi Chandralatha,Thalangalla, Opatha. 7.Saumyadasa Koralage, Thalangalla, Opatha. 8.Padma Shanthini Weerasinghe, No.3/33, Udayapura, Robert Gunawardena Mawatha, Battaramulla DEFENDANT-RESPONDENT-RESPONDENTS

29/11/16	SC Appeal No:-69/2015	SC Appeal No:-69/2015 V. Badanasinghe Nangallage Punyasiri 221/2, Diggala Road, Keselwatta, Panadura. Defendant AND Badanasinghe Nangallage Punyasiri, 221/2, Diggala Road,Keselwatta, Panadura. By his Attorney Badanasinghe Nangallage Jayatissa No. 5/3, Temple Road, Keselwatta, Panadura. Defendant-Respondent-Appellant V. K.R.W.Dalpadadu, No.237, Diggala Road, Keselwatta, Panadura. Plaintiff-Appellant-Respondent
09/11/16	SC Appeal No:-102/2011	1.Uyanwattalage Piyarathne 2.Uyanwattalage Jayarathne Both of Hangamuwa, Ratnapura. Plaintiffs V. 1.Rajapakse Mudiyanselage Somapala Rajapaksha, Demalaporuwa Karangoda. 2.Malini Somalatha Wakkumbura nee Weerasena, Bopitiya Road, Pelmadulla. 3.Lalani Nirmala Wakkumbura, Radella, Karannagoda, Ratnapura. 4.Habarakada Arachchige Hansawathie (deceased) 4A.Lalani Nirmala Wakkumbura Radell, Karannagoda, Ratnapura. Defendants AND BETWEEN 1.Uyanwattalage Piyarathne 2.Uyanwattalage Jayarsthne Both of Hangamuwa Ratnapura. Plaintiff-Appellants V 1.Rajapakse Mudiyanselage Somapala Rajapaksha Demalaporuwa, Karannagoda. 2.Malini Somalatha Wakkumbura Bopitiya Road, Pelmadulla. 3.Lalani Nirmala Wakkumbura, Radella, Karannaoda, Ratnapura 4.Habarakada Arachchige Hansawathie (deceased) 4A.Lalani Nirmala Wakkumbura Radella, Karnnagoda, Ratnapura. Defendant-respondents AND NOW BETWEEN Lalani Nirmala Wakkumbura Radella, Karannagoda, Ratnapura. 3rd [4A] Defendant-Respondent-Petitioner-Appellant V. 1.Uyanwattalage Piyarathne, 2.Uyanwattalage Jayarathne Both of Hangamuwa, Ratnapura. Plaintiff-Appellant-Respondent-Respondents AND 1A. Karangoda Gamage Kusumawathie1B. Ajith Mohan Rajapakse 1C. Gihani Sandhaya Rajapakse 1D. Thanuja Rajapakse 1E. Chaminda Rajapakse 1F. Udeshika Rajapakse All of Demalaporuwa, Karannagoda, Ratnapura. 1A -1F Substituted Defendant-Respondent-Respondent-Respondents 2.Malini Somalatha Wakkumbura Nee Weerasena. Bopitiya Road, Pelmadulla. 4.Habarakada Arachchige Hansawathie (deceased) 2nd & 4th Defendant-Respondent-Respondent-Respondents

03/11/16	SC Appeal Case No:-195/2011	The Head Quarters Inspector, Ratnapura Police Station, Ratnapura. COMPLAINANT V. Galaudakanda Watukarage Siripala Deheragoda, Ellawala. ACCUSED AND Totapitiya Arachchige Abeypala, Deheragoda, Ellawala. PETITIONER V. 1.The Head Quarter's Inspector, Ratnapura Police Station, Ratnapura. COMPALINANT-RESPONDENT 2.Galaudakanda Watukarage Siripala, Deheragoda, Ellawala. ACCUSED-RESPONDENT 3.The Hon. Attorney-General, Attorney-General's Department, Colombo. RESPONDENT AND BETWEEN Galaudakanda Watukarage Siripala. Deheragoda, Ellawala. ACCUSED-RESPONDENT-APPELLANT v. Totapitiya Arachchige Abeypala, Deheragoda, Ellawala. PETITIONER-RESPONDENT AND NOW BETWEEN Galaudakanda Watukarage Siripala. Deheragoda, Ellawala. ACCUSED-RESPONDENT-APPELLANT-PETITIONER v. Totapitiya Arachchige Abeypala. Deheragoda, Ellawala. PETITIONER-RESPONDENT-RESPONDENT
27/10/16	S.C.Appeal Case No.02/2016	Dissanayaka Mudiyanselege Renuka Dissanayaka, No.164, Village No.4, Muthukandiya, Siyabalanduwa. APPLICANT Dissanayaka Mudiyanselege Renuka Dissanayaka, No.164, Village No.4, Muthukandiya, Siyabalanduwa. APPLICANT V. R.M.Pradeep Weerasinghe, No.47, Near School, Kandaudapanguwa,Siyabalanduwa. RESPONDENT-RESPONDENT AND NOW BETWEEN R.M.Pradeep Weerasinghe, No.47, Near School, Kandaudpanguwa,Siyabalanduwa. RESPONDENT-RESPONDENT-APPELLANT v. Dissanayaka Mudiyanselage Renuka Dissanayaka, No.164, Village No.4, Muthukandiya, Siyabalanduwa. APPLICANT-APPELLANT-RESPONDENT
27/09/16	SC/FR Application No:-194/2012	Arshan Rajinikanth Mirishena Watte,Bulathsinghala. Petitioner Vs (1)Officer in Charge Bulathsinhala Police Station Bulathsinhala. (2)Sub Inspector Kumaratne Bulathsinhala Police Station, Bulathsinhala. (3)ASP Matugama Office of the Assistant Superintendant (4)SI Pathmalal Office of the Assistant Superintendant Of police, Katukurunda, Kalutara. (5)N.K.Illangakoon Inspector General of police Police Headquaters, Colombo 1. (6)Dr. R.M.A.Rathnayake Judicial Medical Officer Teaching Hospital, Ragama. (7)Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents
18/09/16	SC Appeal No. 196/2015	Suppaiah Wijeratnam No.47, Kandy Road, Kengalle Plaintiff V. Sarath Perera, No.90, Kandy Road, Kengalle. Defendant THEN BETWEEN Sarath Perera, No.90, Kandy Road, Kengalle. Defendant-Appellant V. Suppaiah Wijeratnam, No.47, Kandy Road, Kengalle. Plaintiff-Respondent NOW BETWEEN Suppaiah Wijeratnam, No. 90, Kandy Road, Kengalle. Plaintiff-Respondent-Petitioner V. Sarath Perera, No.90, Kandy Road, Kengalle. Defendant-Appellant-Respondent

03/08/16	SC.Appeal No106/2011	Abans Retail (Pvt) Ltd., 498, Galle Road,Colombo, 3. Plaintiff V. H.N.Jayaratne Bandara, No. 448, Buddhayaye, Galmuna, Hingurakgoda, Polonnaruwa. AND NOW BETWEEN Abans Retail (Pvt) Ltd., No. 498, Galle Road, Colombo 3. Plaintiff-Petitioner V. H.N.Jayaratne Bandara, N0.448, Buddhayaye, Galamuna, Hingurakgoda, Polonnaruwa. Defendant-Respondent
21/07/16	SC (FR) Application No. 527/2011	Puwakketiyage Sajith Suranga Bogahawatta, Lellkada, Ginimalgaha. Petitioner Vs 1.Prasad Sub-Inspector of Police Station, Thelikada. 2.Sunil Sergeant Thelikada Police Station Thelikada. 3.Sugath Palitha Sergeant Thelikada Police Station, Thelikada. 4.Samantha Civil Defence Officer, Thelikada Police Station, Thelikada. 5.Inspector of Police Nalaka Officer-in-Charge, Thelikada Police Station, Thelikada. 6.N.K.Illangakoon, Inspector General of Police Police Head Quarters, Colombo 1. 7.Hon.Attorney General Attorney General's Department, Colombo 12. Respondents

IN THE SUPREME COURT OF THE REPUBLIC OF SRI LANKA

Loku Yaddehige Ruwan Kulunuguna
No.244/1, Jaya Mawatha,
Makola

Plaintiff-Respondent-Appellant

Vs
Scanwell Customs Brokers (Pvt) Ltd.
No.3/2, No.15, Galle Face Terrace.
Colombo.03

Defendant-Appellant-Respondent

S.C.Appeal No.27/2014
SC/HCCCA/LA No.353/2013
WP/HCCA/COL/39/2005(F)
D.C.Colombo Case No.22148/MR

Date: 25.01.2017

CHITRASIRI, J.

I had the opportunity of reading the draft judgment of Sisira de Abrew,J, and I agree with his decision to allow this appeal. However, I am not inclined to agree with his decision in respect of the quantum of damages awarded to the plaintiff-respondent-appellant. (hereinafter referred to as the plaintiff) I shall now set out the reasons for my decision to dissent from the findings of De Abrew J as to the quantum of damages awarded to the plaintiff.

This action was filed by the plaintiff to recover the monies due to him, for hiring his container carrier lorry to the defendant-appellant-respondent. (hereinafter referred to as the defendant) Learned District Judge held that there was a contract between the plaintiff and the defendant, to hire the said container carrier lorry for the use of the defendant. Accordingly, the learned District Judge decided the case in favour of the plaintiff as prayed for in the plaint. However, the learned Judges in the Civil Appellate High Court of the Western Province Holden in Colombo have held that the aforesaid contract between the two parties had been frustrated and therefore the plaintiff is not entitled for damages for breach of contract. Even though there was no issue raised in the District Court on the question of frustration of the contract, the learned Judges in the Civil Appellate High Court may have considered the said issue of frustration as a question of law and arrived at the aforesaid decision. Accordingly, they have held that the contract between the parties had been frustrated and therefore the defendant is not liable to pay damages to the hirer who was the plaintiff. Accordingly, Civil Appellate High Court Judges have decided to dismiss the action of the plaintiff.

Upon considering the facts of the case, I do not see any material to establish frustration of the contract. Hence, it is clear that the learned Judges in the Civil Appellate High Court have misdirected themselves on the question of frustration. Since De Abrew J has adequately dealt with

the said issue of frustration, it is not necessary for me to elaborate on His Lordship's decision to dismiss the appeal to which I agree.

While allowing the appeal, De Abrew J has awarded damages calculated at the rate of Rs.85/- per hour as hiring charges for the period commencing from 12.06.1998. Admittedly, the original agreement was to pay Rs.60/- per hour as hiring charges to the plaintiff with effect from 07.05.1998. On that date, the lorry belonging to the plaintiff had been hired to transport the container to the premises belonging to the defendant.

The change of hiring charges had been communicated to the respondent by the letter dated 24.09.1998 marked P3. It is a letter written by the plaintiff to the Manager of the defendant company. However, no evidence is forthcoming to establish that the defendant has accepted or agreed to pay the increased hiring charges with effect from 12.06.1998. Furthermore, no material is found to determine as to how the said date namely 12.06.1998 came into place. The plaintiff in his plaint has merely stated that he claims Rs.85/- per hour with effect from 12.06.1998 due to the increase of the transport charges. No valid reason is shown to demand such an increase. Certainly, when the parties have agreed for Rs.60/- per hour on 07.05.1998, it is improbable to have increased it to Rs.85/- per hour within a period 35 days.

Moreover, no material is found to show that the defendant has accepted or agreed to pay such an increase of the hiring charges for the lorry that was hired by it. Therefore, it is clear that there was no agreement between the parties to pay an increased amount.

In the circumstances, the plaintiff is not entitled to claim an increased amount of Rs.25/- per hour with effect from 12.06.1998 as hiring charges for the lorry. Therefore, the plaintiff is entitled only to claim Rs.60/- per hour for the entire period as agreed at the commencement. Accordingly, the issue No.4, raised before the learned District Judge should be answered in favour of the defendant.

With the variation referred to above in respect of the quantum of damages, I decide that the appeal should be allowed.

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) 0f the High Court of the Provinces (Special Provisions)(Amended) Act No. 54 of 2006 read together with Article 127 of the Constitution.

Annamalai Muthuappan Chettiar
No.111, Sea Street, Colombo 11.

Defendant-Appellant-Petitioner

Case No:-SC 147/2011

SC HC (CA LA) No.166/2010

WP HC CA/COL/358/2002 (F)

DC Colombo Case No.17598/L

V.

Subramaniam Sankaran
No.109, Sea Street, Colombo 11.

Plaintiff-Respondent-Respondent

BEFORE:-B.P.ALUWIHARE, PC, J.

ANIL GOONERATNE J. &

H.N.J.PERERA, J.

COUNSEL:- Nihal Jayamanna PC with C.V.Vivekanandan Uditha Collure

Instructed by Pancy N.Joseph for the Defendant-Appellant Petitioner

Hiran de Alwis with Asitha Ranasinghe for the Plaintiff-Respondent-Respondent

Argued On:-31.08.2016

DECIDED ON:-15.12.2016

H.N.J.PERERA, J.

The Plaintiff-Respondent (hereinafter referred to as the Plaintiff) Respondent instituted action against the Defendant-Appellant (hereinafter referred to as the Defendant) praying inter alia for a declaration of title to the upper floor of premises No. 109, Sea street, Colombo 11, more fully described in the 2nd schedule to the plaint, for ejectment of the Defendant therefrom and for recovery of damages. The Defendant by his amended answer prayed for a dismissal of the plaintiff's action.

It was the Plaintiff's position that by virtue of Final decree in the Partition Case No. 14414/P in the District Court of Colombo the Plaintiff was entitled to the premises bearing Assessment No.109, Sea Street,

Colombo more-fully described in the 1st schedule thereto. The said premises consisted of a ground floor and an upper floor. The upper floor is more fully described in the 2nd schedule to the plaint. The plaintiff alleged that the Defendant who is a trespasser is in wrongful and/ or unlawful occupation of the premises described in the 2nd schedule to the plaint. By Notice dated 3rd June 1996 the Plaintiff gave the Defendant Notice to quit and to deliver peaceful and vacant possession of the said premises to the Plaintiff at the expiry of 31st July 1996.The plaintiff's position was that the Defendant continued to be in unlawful possession from 1st August 1996.

The Defendant's position was that he has been in possession of the said portion of the upper floor of No. 109, Sea Street as a Tenant and sought dismissal of the Plaintiff's action.

After trial, the learned Additional District Judge of Colombo delivered his judgment on 30th April 2002 in favour of the Plaintiff. Being aggrieved by the said judgment of the learned trial Judge, the Defendant preferred an Appeal to the Civil Appellate High Court Colombo which too upheld the said judgment of the learned District judge in favour of the Plaintiff.

Being aggrieved by the said judgment dated 30.04.2010 of the Civil Appellate High Court Colombo, the Defendant filed an application for Leave to Appeal to the Supreme Court, and the Court granted leave on the following questions of Law raised by the Counsel appearing for the Defendant.

(1) In view of the proceedings and Final decree and the terms of settlement effected in the District Court of Colombo Case No.14414/P dated 29.07.1992 was the Defendant-Appellant declared a Tenant of the Plaintiff-Respondent of the premises in suit?

(2) Did the Learned High Court Judge err in holding that the Defendant-Appellant was not a Tenant of the Plaintiff-Respondent?

(3) Could the Plaintiff-Respondent file a case for declaration of title and ejectment to eject the Defendant-Appellant on the basis that he was in unlawful possession, in terms of the facts in this case?

And on the following question of Law raised by the Counsel for the Plaintiff-Respondent.

(4) Did the Defendant discharge his burden of establishing that he was a tenant of the said Plaintiff-Respondent of the premises in suit?

There is no dispute between the parties that the Plaintiff in this case was the Plaintiff in the said Partition case No.1444/P and the Defendant in this case was the 3rd defendant in the Partition case. The Plaintiff in this case claims title to the corpus described in the second schedule under and by virtue of the Final decree in the said Partition Action. The title of the Plaintiff is not in dispute. It is also not in dispute that the Defendant is in occupation of these premises. The Defendant's contention is that he is the tenant of the premises in suit. According to the pedigree the Plaintiff is entitle to 2/3rd of the property and the 1st Defendant to 1/3 of the property plus 2 Perches.

It is an admitted fact that "Letchchumy Jewellers" is a business carried on by the Defendant and that he was carrying on the said business even when the Partition Action was pending. It is also accepted that "Letchchumy Jewellers" was also carried on in the premises by the Defendant that was allotted to the Plaintiff in the Final Partition Decree and that it was decided that the Defendant will have full tenancy right in respect of the lot allotted to the Plaintiff by the Partition Decree. It was the contention of the learned President's Counsel for the Defendant that

if the Defendant was in unlawful possession of the divided portion allotted to the Plaintiff in the Partition decree there is specific remedy available to the Plaintiff under the Partition Act itself to obtain possession. It was further contended that Section 52 of the Partition Law No.2 of 1977as amended provides specific remedy of obtaining delivery of possession. The Plaintiff should have made an application for possession in terms of Section 52 of the Partition Law as held in Munidasa & Others Vs. Nandasena reported in (2001) 2 Sri.L.R.224. It was the learned Counsel's position that in view of this judgment, the present case cannot be had and maintained by the Plaintiff.

In Munidasa & Others Vs Nandasena the question arose as to whether a party to a Partition Action who was allotted a lot could proceed under Section 325 of the Civil Procedure Code without resorting to the specific provisions under Section 52(1) and Section 53(1) of the Partition Act. In that case it was held that the Partition Law provides a specific remedy, the Plaintiff-Respondent is not entitled to resort to provisions of the Civil Procedure Code. It was further held that the provisions of the Partition Act are mandatory provisions and provides a simple and easy remedy of obtaining delivery of possession.

In the instant case the Plaintiff has not made an application under Section 52 of the Partition Act to obtain possession of the said premises which is allocated to him by the Final decree of the said Partition Action. But after about four years from the date of the final decree he has filed the present action to eject the defendant from the said premises and to obtain possession of the same on the basis that he is the owner of the said premises and that the Defendant is in unlawful possession of the same.

There is no doubt that in the said Partition Action the Defendant has been allowed to continue in possession of the said premises allocated to

the Plaintiff by the said Final Decree on the basis that he is a Tenant. The Plaintiff has filed the present Action against the Defendant after about 4 years of the entering of the Final decree in the said Partition Action on the basis that the Defendant is no longer in lawful possession of the same and that as the owner of the said premises the Plaintiff is entitled to get possession of the same.

In Martin Sinngho and Two Others V, Nanda Peiris and Two Others [1995] 2 Sri.L.R 221, it was held that Section 52 read with Section 48(1) of the Partition Law and Section 14 (1) of the Rent Act required Court to determine :-

(1)Whether the petitioners had entered into occupation of the premises as Tenants prior to the date of the Final Decree.

(2)Whether they were entitled to continue in occupation of the premises as Tenants under the original Respondent (i.e Plaintiff)

Section 52 (2) read with section 48(1) of the Partition Law and section 14 (1) of the Rent Act, required court to determine –

(1)Whether the Defendant had entered into occupation of the premises as tenants prior to the date of the final decree and

(2)Whether the Defendant was entitled to continue in occupation of the premises as a tenant under Plaintiff who was allotted the lot in which the relevant house stood.

If the Defendant succeeds in satisfying court of the two matters aforesaid, the application of the Plaintiff has to be dismissed, as section 14(1) of the Rent Act makes provision for the tenants of residential premises to continue as such, under any co-owner who has been allotted the relevant premises in the final decree.

In the instant case there in no such application under Section 52 of the Partition Law been made by the Plaintiff to obtain possession of the said

premises. Instead the plaintiff has filed the instant Action against the Defendant to eject the Defendant from the said premises on the basis that the Defendant is in unlawful possession of the said premises and that the Plaintiff is the lawful owner of the said premises.

The Plaintiff has filed a Rei Vindicatio Action against the Defendant to eject him from the said premises on the basis that he is the owner of the said premises described in the 2nd schedule to the plaint and that the Defendant is in unlawful possession of the said premises. Therefore it is very clear that the Plaintiff has instituted this action on the basis of his title to the said premises.

It is not disputed that the Plaintiff is the owner of the said premises. He has become the owner of the said premises by virtue of the Final Decree entered in the Partition case No. 14414/p in the District Court of Colombo. It is also not in dispute that the Defendant is in occupation of the said premises.

In Luwis Singho and Others V. Ponnamperuma [1996] 2 Sri.L.R 320 it was held that:-

(1) Actions for declaration of title and ejectment and vindicatory actions are brought for the same purpose of recovery of property. In Rei vindication action the cause of action is based on the sole ground of the right of ownership, in such an action proof is required that:-

(a)The Plaintiff is the owner of the land in question. i.e he has the dominium.

(b)That the land is in the possession of the Defendant.

The moment the title of the Plaintiff is admitted or proved the right to possess it, is presumed.

Willie in his book “Principles of South African Law” (3rd edition) at page 190 discussing the right to possession, states:-

“The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession he may retain it. If he is illegally deprived of his possession, he may by means of vindication or reclaim recover possession from any person in whose the thing is found. In a vindicatory action the claimant need merely prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the Defendant”.

In Siyaneris V. Jayasinghe Udenis de Silva 52 N.L.R 289, it was held that in an action for declaration of tile to property, where the legal title is in the Plaintiff but the property is in the possession of the Defendant , the burden of proof is on the Defendant.

It was contended on behalf of the Plaintiff that the Defendant has failed to prove that he is in lawful possession of the said premises in dispute.

The said Final Decree in the Partition Action has been entered in 1992. The present action has being filed against the Defendant in 1996.The Defendant has failed to submit any document to substantiate the position that he was a tenant of the Plaintiff in 1996.

The Defendant has clearly admitted that he received the Quit Notice marked P4 sent by the Plaintiff in this case. (Vide page 2 of the proceedings of 15.06.1999 and page 8 of the proceedings of 23.05.2001). In the circumstances it is clear that the Notice to Quit P4 dated 03.06.1996 has been received by the Defendant. The Defendant also admits that he did not sent a reply to the said Quit Notice marked P4.

It is trite Law that what is admitted need not be proved. In Mariammal V. Pethrupillai 21 N.L.R 200 it was held that:-

“If a party in a case makes an admission for whatever reason, he must stand by it; It is impossible for him to argue a point on appeal which he formally gave up in the court below”.

It is sometimes permissible to withdraw admissions on questions of law but admissions on questions of fact cannot be withdrawn. See Uvais V. Punyawathie [1993] 2 Sri.L.R 46.

The Notice marked P4 had been dispatched requiring the Defendant to vacate the said premises. The Defendant whilst giving evidence had admitted that he received the said Notice and that he did not respond to it.

The Defendant had admitted having received the Notice to Quit but failed to reply to the said Notice. In all circumstances, I feel that this is a case which a reply to P4 is expected. The defendant could have informed the Plaintiff that he is the Tenant of the said premises and that he continues to occupy the said premises on that basis and that he is in lawful possession of the said premises as the tenant.

In Jayawardenea V.Wanigasekera and Others [1985] 1 Sri.L.R 125 it was held that the best test for establishing tenancy is proof of the payment of rent. The best evidence of the payment of rent is the rent receipts. Also see Martin Singho and Two Others V. Nanda Peiris and Two Others [1995] 2 Sri.L.R 221

In the present action no rent receipts were produced by the Defendant at the trial. Although in his answer he has stated that h continued to be the tenant of the upstairs of the premises No.109 and because the plaintiff refused to accept the rent from him he had paid the same to the Municipality Colombo, the Defendant did not state so in his evidence and also failed to mark and produce a single receipt issued by the Colombo municipal Council to substantiate the same. The Defendant has very

clearly failed to lead evidence and prove that he was a tenant of the said premises described in the 2nd schedule to the plaint.

The main contention of the learned Counsel for the Defendant was that the Plaintiff cannot deny and is in fact bound by the decree to the portion that the defendant is the lawful tenant of the premises in which "Letchchumy jewellers' is carried on by the defendant which falls within the portion allotted to the Plaintiff. Therefore the Plaintiff should have made the application for possession under and in terms of section 52 of the Partition law.

In Virasinghe V.Virasinghe and Others [2002] 1 Sri.L.R 264 where the issues as to tenancy have been answered in favour of the Defendant and it was held that the Rent Act applies in respect of premises and that he is the tenant of the co-owners in the District Court, the Plaintiff appealed from the said findings to the Court of Appeal and the appeal was dismissed by the Court of Appeal , the Supreme Court granted leave to appeal on questions raised in the Petition of Appeal as to the findings on tenancy; alternatively on the question whether the matter of a monthly tenancy can come within the scope of a trial in a partition action and whether such question should be considered , if at all, at the stage of execution in terms of section 52 of the Partition Law.

The Supreme Court held that in view of the provisions of Section 5(a) read with section 48(1), the claim of a monthly tenant is not within the scope of a partition action. It is not permissible to enter a finding, in a judgment, interlocutory decree, or final decree in a partition action with regard to any claim of a monthly tenant in respect of the land sought to be partitioned. Sarath N Silva C.J observed that:-

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

encumbrance affecting land. In both laws, whilst a lease for a specified period exceeding one month is considered an encumbrance affecting land and should be notarially executed, a lease at will or for a period not exceeding one month (same language used in both laws) is not considered an encumbrance affecting land.

Therefore, it is not permissible to enter a finding, in a judgment, interlocutory decree or final decree, in a partition action with regard to any claim of a monthly tenant in respect of the land that is sought to be partitioned."

It was further held in the said case that it would be inconsistent with the scheme of the Partition Act and the provisions of the Rent Act to bring the claim of a monthly tenant within the scope of trial in a partition action.

It was further held that a person having a claim in respect of a lease at will or for a period not exceeding one month, is not a necessary party to a Partition action.

Therefore it cannot be said that the Plaintiff is bound by the decree to the portion that the Defendant is the lawful tenant of the premises in which "Lethchumy Jewellers" is carried on by the Defendant which falls within the portion allotted to the Plaintiff. Therefore the Defendant cannot claim tenancy under the said Final decree entered In case No.14414/P in Colombo.

In the instant action the Plaintiff has clearly exercised his right as the owner of the said premises to vindicate his title and to eject the Defendant from the said premises. Being the absolute owner of the said premises the Plaintiff is entitled to claim the possession of it from the Defendant. The Plaintiff has denied the fact that there was a tenancy agreement between the two parties in 1996.The mere fact that the

Plaintiff did not make an application under section 52 of the Partition law in Case No 14414/P is not a bar to institute an action to vindicate his title against the Defendant since this present action will have the effect of deciding finally whether in fact the Defendant is a tenant of the said premises or not.

In Virasinghe V. Virasinghe (supra) it was further held that Section 52 (2) (a) appears to contemplate a situation where the applicant for an order for delivery of possession recognizes the person in occupation as a tenant but moves for eviction on the basis that he is not entitled to continue in occupation of the house as a tenant under the applicant as landlord. If, however, the applicant, on the premise that he does not recognize the person in occupation as a tenant, moves for an order for the delivery of possession who claims to be a tenant entitled to continue such occupation of the house as tenant under the applicant as landlord, could resist the Fiscal and seek hearing from court to establish his right in terms of section 52 (2) (b). In the present action the Plaintiff does not recognize the defendant as a tenant. Therefore even if the Plaintiff makes an application under section 52 the Partition law the burden would be on the Defendant to establish his right in terms of section 52 (2) (b).

In this case as observed by the learned District Judge and the learned Judges of the Civil Appellate High Court, the Plaintiff has proved that he is the owner of the said premises and the Defendant has failed to produce documentary evidence in proof of his tenancy. The best test of establishing tenancy is proof of payment of rent, and the best evidence of payment of rent is rent receipts. (See Jayawardena V. Wanigasekera) I see no reason to interfere with the order of the Civil Appellate High Court.

Accordingly I answer the questions of law raised in this case in favour of the plaintiff-Respondent in the following manner.

Question No.1-----No.

Question No.2------No.

Question No.3------Yes.

Question No.4------No.

I affirm the judgment of the Civil Appellate High Court Colombo dated 30.04.2010 and dismiss the Defendant's appeal with cost.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PCJ.

I agree

JUDGE OF THE SUPREME COURT

ANIL GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Section 5C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990. [as later amended by amending acts including Act No.54of 2006] for leave to appeal against judgment dated 09/01/2013 delivered by the High Court of the Western Province (Exercising civil appellate jurisdiction of Colombo in the appealbearing number HCCA/Col/267/2003 (F) [A] D.C. Colombo Case No.14834/P.

IN THE DISTRICT COURT

SC Appeals 187 & 188/2015
SC/HCCA/LA/55/2013
WP/HCCA/COL/267/2003/
(F) (A) D. C. Colombo Case
No.14834/P

Naomi Leela Elizabeth Perera
No.17, Mendis Mawatha
Moratuwa.

Plaintiff

VS

1. J. W. P. E. Vernon Botejue of
   No.183, Nawala Road,
   Nugegoda

2. J.W.Thelma Maude Phylis Vitanage
   nee Botejue of
   No.31, Kotuwegoda, Rajagiriya.

(deceased) 3. R. A. Edwin Sincho of
   No.49, 5th Lane, Nawala

4. J. W. Aruna V. P. Botejue,
   Agarapatana Now of No.183
   Nawala Road, Nugegoda.

5. B. S. C. Cooray of
   No.39, Kotuwegoda, Rajagiriya,

Defendants

IN THE HIGH COURT

4. J. W. Aruna V. P. Botejue,
Agarapatana Now of No.183
Nawala Road,
Nugegoda

4th Defendant-Appellant

Vs.

Naomi Leela Elizabeth Perera
No.17, Mendis Mawatha
Moratuwa.

Plaintiff-Respondent

3. J. W. P. E. Vernon Botejue of
No.183, Nawala Road,
Nugegoda.

4. J.W.Thelma Maude Phylis Vitanage
nee Botejue of
No.31, Kotuwegoda, Rajagiriya.

(deceased) 3. R. A. Edwin Singho of
No.49, 5th Lane, Nawala

5. B. S. C. Cooray of
No.39, Kotuwegoda, Rajagiriya,

Defendants-Respondents

NOW IN THE SUPREME COURT

4. J. W. Aruna V. P. Botejue,
Agarapatana Now of No.183
Nawala Road,
Nugegoda

4th Defendant-Appellant-Petitioner

Vs.

Naomi Leela Elizabeth Perera

No.17, Mendis Mawatha
Moratuwa.

Plaintiff-Respondent-Respondent

1. J. W. P. E. Vernon Botejue of
No.183, Nawala Road,
Nugegoda

2. J.W.Thelma Maude Phylis Vitanage
nee Botejue of
No.31, Kotuwegoda, Rajagiriya.
now of 1636/5, Kotte Road,
Rajagiriya

(deceased) 3. R. A. Edwin Singho of
No. 49, 5th Lane, Nawala

. 5. B. S. C. Cooray of
No.39, Kotuwegoda, Rajagiriya,

Defendants-Respondents-Respondents

BEFORE: **B.P.ALUWIHARE, PC, J**
UPALY ABEYRATHNE, J &
ANIL GOONARATNE, J

COUNSEL: Dr. S. F. A. Cooray with Narmada Nayanakanthi for the 4th Defendant-Appellant-Petitioner
Palitha Kumarasinghe, PC with Priyantha Alagiyawanne instructed by Sandya Danthanarayana for the Plaintiff-Respondent-Respondent
Vernon Botheju,1st defendant Respondent Respondent, in person

ARGUED ON: 31.05.2016

DECIDED ON: 02.08.2017

ALUWIHARE, PC, J:

In this matter the court granted leave to appeal in S.C appeal Nos. 187/2015 and 188/2015 and the parties consented to abide by a single judgment in both cases.

This was an action for partition instituted by the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) to partition the land which is the subject matter of the action.

At the conclusion of the trial the learned District Judge came to a finding that the corpus was co-owned by the Plaintiff and the 1st Defendant and accordingly ordered the partition thereof. Aggrieved by the said judgment the 2nd Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the 2nd Defendant) appealed against the said order to the Court of Appeal. The said appeal by virtue of the provisions of the High Court of the Provinces (Special Provisions) Act No.19 of 1990, stood transferred to the High Court of Civil Appeals.

Parallel to the appeal by the 2nd Defendant, the 4th Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the 4th Defendant) also invoked the appellate jurisdiction of the Court of Appeal. The appeal filed by the 4th Defendant had also been transferred to the High Court of Civil Appeals.

When the two appeals were taken up for argument, a preliminary objection had been raised on behalf of the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) that, both the 2nd and the 4th Defendants had failed to comply with Section 754 and Section 755 of the Civil Procedure Code in lodging the two appeals. Compliance with the section in question being mandatory, the Plaintiff moved the High Court of Civil Appeals to have the two appeals rejected *in limine*.

The High Court of Civil Appeals delivered identical orders on both appeals, on 9th January, 2013 upholding the preliminary the objection raised on behalf of the Plaintiff and dismissing the appeals *in limine*.

The questions of law on which leave was granted by this court are as follows:

(i) Had the 4th Defendant-Appellant complied sufficiently with the provision of Section 755 (2) (b) of the Civil Procedure Code when he proved service of a copy of the notice of appeal by registered post on the Plaintiff-Respondent herself instead of her registered Attorney-at-Law.

(ii) Did the High Court err in holding that there had been insufficient compliance with the said Section 755 (2) (b) when the 4th Defendant-appellant furnished proof of service of a copy of the notice of appeal on the Plaintiff-Respondent herself.

(iii) Had the High Court erred in not granting relief under Section 759 (2) of the Civil Procedure Code.

The questions of law referred to in paragraphs (a) and (c) of of paragraph 12 of the Petition of the Petitioner, on which leave was granted (referred to as (i) and (ii) above) appear to be the same question but paraphrased differently.

Thus the two issues this Court has to decide, based on the questions of law referred to above are:

(1) Have the appellants sufficiently complied with Section 755 (2) (b) of the Civil Procedure Code
and assuming that the court holds that the appellants had not strictly complied with Section 755(2)(b) referred to above,

(2) Whether court ought to have granted relief to the appellants under Section759 (2) of the Civil Procedure Code.

Facts

The judgment of the District Court had been delivered by the learned District Judge on 27th August, 2003 and on the 9th September, 2003 both the 2nd and the 4th Defendants had filed Notices of Appeal. In proof of delivery of the said notices, the Registered Attorney for the **4th Respondent** had pasted the receipts of the Registered Postal Article. The said receipts are in the names of N. L. A. Perera, the Plaintiff and C. Cooray the 5th Defendant.

The journal entry Nos. 134 and 135 dated 15th October, 2003 reveals that both the 2nd and the 4th Defendants had filed Petitions of Appeal and in journal entry 134 the court had made an observation that the Notice of Appeal had not been given in the proper manner and court had made order staying further steps being taken until such time the matter is regularised.

Subsequently, on 7th November, 2003 in response to the journal entry referred to above, the Attorney-at-Law for the **2nd Defendant** by way of a motion had affirmed that notice of appeal had been accepted by the 1st Defendant and the Attorney on record of the 4th Defendant.

An even dated similar motion had been filed on behalf of the **4th Defendant** affirming that the notice of appeal had been accepted by the 1st Defendant and the Attorney on record for the 2nd Defendants. Ironically, in the said motion, the 4th Defendant does not claim that the notice of appeal had been sent to the registered Attorney of the Plaintiff.

In the case of the **4th Defendan**t, he does not claim having given notice to the registered Attorneys of any of the parties other than the registered attorney for the 2nd Defendant, in the said motion. The court also had observed that of the two receipts of Registered Postal articles pasted on the motion filed on behalf of the 2nd Defendant, one such purported recipient is "W. M. D. Nanayakkara" who was not a party to this case.

Thus, what could be gleaned from the proceedings is that, notices of Appeal had neither been served on the Registered Attorneys for the Plaintiff nor the 5th Defendant. There is also no proof of service of such notice on the 5th Defendant by the 2nd Defendant.

The preliminary objection raised before the High Court Civil Appeals pivots on a solitary issue: would the serving the Notice of appeal, on the parties rather than on their registered attorneys be sufficient compliance, with Section 755 (2) (b) of the Civil procedure Code.

The contention of the Plaintiff before this court as well as before the High Court of Civil Appeals was that, compliance was insufficient. Plaintiff took up the position that the compliance with Section 755 (2) (b) of the Civil Procedure Code is mandatory and due to the non-compliance, the appeal must be rejected in limine.

Section 755 (2) (b) of the Civil Procedure reads thus:

> "proof of service, on the respondent or on his registered attorney, of a copy of the notice of appeal, in the form of a written acknowledgement of the receipt of such notice or the registered postal receipt in proof of such service"

A plain reading of the Section is devoid of any ambiguity in that the requirement is to have the Notice of appeal filed within 14 days and the same to accompany with proof of service on the Respondent or on his registered Attorney.

The learned President's Counsel for the Plaintiff argued that though the section is worded in that manner, when a respondent has the services of a registered Attorney, Notice of appeal has to be served on the registered Attorney and not on the

Respondent. The learned President's Counsel relied on the decision of this court in the case of Fernando Vs. Sybil Fernando and others 1997, 3 S.L.R pg1. In the said case His Lordship Justice Dr. Amarasinghe held:

> *"So long as such an instrument of the appointment of a registered Attorney-at-Law is in force, a litigant who has executed such an instrument must act through his registered attorney until all proceedings in the action are ended and the judgment satisfied so far as regards that litigant: While the proxy is in force, he cannot himself perform any act in court relating to the proceedings of the action"*

It was argued on behalf of the Plaintiff, relying on the decision of his lordship Justice Dr. Amarasinghe in the case referred to, that while the proxy is in force he (the party) cannot himself perform any act in court relating to the proceedings of the action. It was further argued that the same principle applies when the law requires a party to give notice of its intention to appeal against a judgement, to other parties to that case, and that requirement can only be satisfied by giving notice to the registered Attorneys of such parties and not to the party itself.

It was the contention, on behalf of the Plaintiff, that when there is a Registered Attorney on record, all acts of the Action has to be done **through** the Registered Attorneys representing the parties and that requirement extends to service of process or notice as well, except in cases where personal service has been ordered.

It was argued, that the words "on the Respondent **or** his registered Attorney" that occurs in Section 759 (2) (b) ought to be interpreted to mean **"on the registered attorney"** when there is an Attorney-at-Law on record for the Respondent.

In the case of *Fernando Vs Sybil Fernando 1997 (3) SLR page 1* his Lordship Justice Amarasinghe did consider the meaning that should be attached to the words **" signed**

by the Appellant or his registered attorney" as they occur in Section 755 (1) of Civil Procedure Code.

It would be pertinent to refer to the facts of the case of *Fernanado v. Sybil Fernando,* so that the rationale of their lordship's decision could be appreciated.

The issue in the case referred to was: who is entitled to sign the **Notice of appeal**

To start with, the Section 755 (1) requires that **" *Every Notice of Appeal…. shall be signed by the Appellant or his registered Attorney……. ."*** It is to be noted that the operative words in Section 755 (1), are similar to the words that in Section 755 (2) (b) of Civil Procedure Code.

When the appeal came up for hearing before the Court of Appeal it was brought to the attention of the court that the notice of appeal had been personally signed by the appellant, and not by his duly appointed registered Attorney-at-Law.

The Court of Appeal rejected the notice of appeal and dismissed the petition of appeal on the ground that, at the date of the notice of appeal, there was a duly appointed registered attorney, the notice of appeal should have been signed by that attorney and not by the appellant personally.

In the case referred to, it had been submitted on behalf of the appellant that, upon a plain reading of section 755 (1) of the Civil Procedure Code, a Notice of appeal may be **signed either by the appellant or by his registered attorney. (**Emphasis is mine)

Having considered a long line of authorities his Lordship Justice Amarasinghe reasoned out that sections in the present Code should be interpreted firstly in relation to the principles set out by the long series of authorities, and secondly in a manner not to cause disorder in court proceedings. He then held that "permitting such a practice would lead to disorder and confusion in court proceedings. The words 'shall be signed by the appellant or his registered attorney' should be understood and interpreted to mean that the Notice of appeal can be signed by the appellant when **he has no registered attorney on record**..."

I am of the view that the judges of the High Court Of Civil Appeals were correct in giving a similar interpretation to the section 755 (2) (b)

In the present case it had also been pointed out on behalf of the Plaintiff that the Defendants had sent lists of witness and documents to the registered attorney for the plaintiff, Mr. Kannangara attorney-at-law. The defendants in return had received documents sent by the said registered Attorney for the Plaintiff and further right throughout, the name of Mr. Kannangara had been recorded as the attorney on record for the Plaintiff. Thus, it was contended that the Defendants were aware that the plaintiff had an Attorney on record.

Considering the Judgement referred to above and the long line of authorities on the same issue, that consistently held that it is the Attorney on record who has the right to act for and on behalf the parties with regard to a case, I cannot fault the learned judges of the High Court of Civil Appeals holding in the negative with regard to the questions of law (i) and (ii) referred to above and I hold that the 2nd and the 4th Defendants had not sufficiently complied with section 755(2) (b) of the Civil Procedure Code.

The Defendants further argued that, where the appellate court finds that there had been no compliance with Section 755(2)(b) with regard to proof of service of a copy of the Notice of Appeal, the appellate court has a duty to act under Section 759(2) of the Code.

Section 759 (2) reads thus.

> *"in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of foregoing section (other than the provision specifying the period within which any act ot thing is to be done)the Court of Appeal may, if it should be of the opinion that the respondent has not been materially prejudiced, grant relief on such terms as may deem just"*

It was held in the case of *Nanaykkara v.Warnakulasuriya 1994 2 SLR 289* "the power of the court to garnt relief under Section 759(2) of the Code is wide and discretionary…. However relief cannot be granted if the Court is of the view that the respondent has been materially prejudiced in which event the appeal has to be dismissed.

The two questions the court is required to consider is whether it is just and fair to grant relief at this stage in terms of Section 759(2) of the Code and if relief is granted whether the respondents would be materially prejudiced.

The District Court action had been instituted way back in 1989 and the parties have gone through a protracted trial which had reached a conclusion in 2003.

Aggrieved by the said judgment the 2nd and 4th Respondents had invoked the appellate jurisdiction of the High Court of Civil Appeals before which the preliminary objection was raised.

The Defendants in my view should have invited court to act under Section 759(2), instead chose to confine to Section 755 and attempted to justify that the Defendants were in compliance with Section 755(1) of the Code.

The High Court of Civil Appeals having considered the extensive written submissions filed by the parties delivered its order on 09-01-2013, rejecting the appeal filed by the 2nd and 4th Defendants and the said parties invoked the jurisdiction of this court .

If relief sought by the defendants is to be granted, then in effect this court has to get into the shoes of the High Court of Civil Appeals and exercise the discretion that was vested with that court in terms of Section 759(2). In that event , I am of the view, that this court is required to consider whether it would be just and fair by the Plaintiff and the other Defendants to exercise the discretion of court in terms of Section 759(2) in favour of parties who were remiss, namely the 2nd and the 4th Defendants. Although her Ladyship Justice Ekanayake, in the case of *Jayasekera V. Lakmini* (supra)did hold that it is incumbent upon the court to utilise the statutory provision embodied in

Section 759(2) of the Code, I am of the view that the 2nd and 4th Defendants had at least a duty to draw the attention of court to the said provision, which,the 2nd and 4th Defendents, failed to do.

As referred to above, already more than 27 years have lapsed since action was initiated before the District Court and I am of the opinion it would not be just and fair by the Plaintiff and the other parties, to grant relief, acting under Section 759 (2) of the Code, in the instant situation.

Thus, as to the third question of law, I hold, that the High Court of Civil Appeals cannot be faulted for not resorting to Section 759(2) for the grant of relief to the 2nd and 4th Defendants.

Accordingly, I dismiss the Appeal. I make no order as to costs.

JUDGE OF THE SUPREME COURT

JUSTICE UPALY ABEYRATHNE

JUDGE OF THE SUPREME COURT

JUSTICE ANIL GOONARATNE

JUDGE OF THE SUPREME COURT

S.C.Appeal 106/2011

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

In the matter of an application for Leave to Appeal from the order dated 30.05.2011 of the Commercial High Court of the Western Province holden in Colombo.

Abans Retail (Pvt) Ltd.,

498, Galle Road,Colombo, 3.

Plaintiff

SC.Appeal No:-106/2011

SC.HC LA No:-52/2011

Commercial High Court Colombo

Case No:-37/2009 MR

V.

H.N.Jayaratne Bandara,

No. 448, Buddhayaye, Galmuna,

Hingurakgoda, Polonnaruwa.

AND NOW BETWEEN

Abans Retail (Pvt) Ltd.,

No. 498, Galle Road, Colombo 3.

Plaintiff-Petitioner

V.

H.N.Jayaratne Bandara,

N0.448, Buddhayaye, Galamuna,

Hingurakgoda, Polonnaruwa.

Defendant-Respondent

BEFORE:- B.P ALUWIHARE, PCJ.

SISIRA J.DE ABREW, J.

H.N.J.PERERA,J.

COUNSEL:- K.N.Choksy for the Plaintiff-Petitioner

Pubudu Alwis with Nandana Perera and

K.A.D.Karasinghe for the Defendant-Respondent

ARGUED ON:- 06.06.2016

DECIDED ON:-04.08.2016

H.N.J.PERERA, J.

The Plaintiff-Petitioner filed action against the Defendant-Respondent seeking inter alia:-

(A) For judgment and Decree against the Defendant in a sum of Rs.5,068,074/26 together with legal interest thereon from 25th July till payment in full;

(B) For costs; and

(C) For such other relief as to the Court shall seem meet.

The Defendant-Respondent filed his answer and prayed for a dismissal of the action and further sought a sum of Rs.2,500,000/- as

compensation from the Plaintiff-Petitioner as a cross claim. Thereafter the Plaintiff-Petitioner filed Replication and denied the claim in Reconvention of the Defendant-Respondent and further stated that the assets, liabilities and stocks of Abans Ltd was taken over by the Plaintiff's company as from 24.08.2008.

The said matter was fixed for written Admissions and Issues for 23.06.2010 and for trial on 03.08.2010. Thereafter by motion and draft plaint both dated 14.05.2010 the Plaintiff-Petitioner moved to amend the Plaintiff's Plaint. The amendments sought by the Plaintiff were as follows:-

(1) In paragraph 3 by the deletion of the word the Plaintiff Company and addition of the word "Abans Ltd;"
(2) In paragraph 5 by the deletion of the word "Plaintiff" and addition of the word "Abans Ltd"
(3) In paragraph 9 by the deletion of the word "Plaintiff" and the addition of the word "Abans Ltd"
(4) By the addition of a new paragraph 9A "The Plaintiff states that as from 24.07.2008 the assets, liabilities and stocks of Abans Ltd., were taken over by the Plaintiff.

The Defendant-Respondent objected to the said amendments and after inquiry the Learned Trial judge made order on 30.05.2011 refusing the application of the Plaintiff-Petitioner to amend its Plaint. The Supreme Court granted leave to Appeal on the following ground:-

"Whether the Commercial High Court of the Western Province holden in Colombo erred in dismissing the application of the Plaintiff-Petitioner to amend its Plaint by its application dated 14.05.2010."

It was contended by the learned Counsel for the Plaintiff-Appellant that the said application to amend the Plaint was an application made under

Section 93(1) of the Civil Procedure Code which grants the Court the full power of amending in its discretion all pleadings in an action by way of addition, alteration and/or omission. It was the contention of the Counsel for the Plaintiff-Appellant that the learned High Court Judge has failed to consider that the said application has been made by the Plaintiff-Appellant long prior to the first trial date and that notice of the said application had been served on the Defendant-Respondent.

The power to amend pleadings is granted by Section 93(1) of the Civil Procedure Code, it provides that:-

"Upon application made to Court before the first date of trial of the action the presence or after giving reasonable notice to all the parties to the action the Court shall have full power of amending its discretion all pleadings in the action by way of addition or alteration or omission."

It is to be noted that this is not an application made under Section 93(2) of the Civil Procedure Code as the application made long prior to the first date of trial. Section 93(1) of the Civil Procedure Code applies to all instances where an application is made as in the present case, before the day first fixed for trial.

In Mackinnon Mackenzie & Co V. Grindlay's Bank Ltd [1986] it was held:-

"That the rules of procedure have no other aim than to facilitate the task of administering justice and that multiplicity of suits should be avoided."

In Senevitarne V Candappa 20 NLR 60 quoting with approval the observations of Bret M. R in Clarapede V. Commercial Union Association 32 W.R 263 it was held that an amendment should be allowed, if it can be made without injustice to the other side "however negligent or careless may have been the first omission, and however late the proposed amendment."

Further in Cassim Lebbe V. Natchiya 21 NLR 205 Shaw, J. stated

"The general rule with regard to amendments of pleadings which has been laid down by this Court in previous cases that an amendment which is bona fide desired should be allowed at any period of the proceedings, if it can be allowed without injustice to the other side, and in most cases conditions as to costs will ensure no prejudice being caused to the other side."

This action has been filed on the basis that the Defendant-Respondent had been an employee of the Plaintiff Company and he violated his terms of employment causing loss to the Plaintiff Company. In the caption of the original plaint as well as the draft amended Plaint the Abans Retail (Pvt) Limited has been named as the Plaintiff. The Defendant has filed answer and stated that he has never been an employee of the Plaintiff Company and he was employed at the Company called Abans Limited as the Show Room Manager of the Hingurakkgoda Branch from 25.08.2003.

By the draft amendment the Plaintiff Petitioner had sought to include the words "Abans Limited" instead of the word "Plaintiff" in paragraph 3,5 and 9 of the Plaint and proposed to add a new paragraph as 9(a) stating that the plaintiff has taken over all the assets, liabilities and stocks from Abans Limited with effect from 24.07.2008.

Answering paragraph 3 of the answer in paragraph 6 of its replication the Plaintiff has clearly stated that as from 2008 07.24 the assets, liabilities and stocks of Abans Limited was taken over by the Plaintiff. The plaintiff has moved to bring in the said amendments to the plaint in order to clarify the said position of the plaintiff as to how the plaintiff became the employer of the Defendant-Respondent in this case. It is clearly seen that by this amendment the plaintiff tries to explain or clarify the relationship of the parties at the time the plaint was filed in Court. There is no attempt by the plaintiff to change the name of the plaintiff or to bring in another party as a plaintiff to this case by this amendment.

As held in Cassim Lebbe V.Natchiya an amendment which is bona-fide should be allowed at any period of the proceedings if it can be allowed without injustice to the other side. Clearly this amendment deals with the real issue between the parties and does not convert the character of the said action.

Further it was held in Mackinnons V. Grindlays Bank that provisions for amendment of pleadings are intended for promoting the ends of justice and not for defeating them. The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence. However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.

In my opinion this amendment would clearly facilitate the task of administering justice between the parties. Section 93(1) of the Civil Procedure Code confers on the Court a wide discretion to amend all pleadings. The discretionary power must, however, be exercised according to the principles applicable to the exercise of such a power and is subject to the limitations imposed by section 46(2) of the Civil Procedure Code that an amendment cannot be made which has the effect of converting an action of one character into an action of another character. Apart from that limitation the discretion vested in the trial Judge by section 93(1) is unrestricted and should not be fettered by judicial interpretation. The discretion must be exercised according to law. The learned High Court Judge has failed to address himself to the decisive question whether the amendment is required in the interest of justice. The amendment sought is necessary for the right decision of the case - whether the defendant was an employee of the plaintiff and whether he is liable to pay damages as pleaded by plaintiff in his plaint.

I am of the view that the learned High Court Judge has erred in disallowing this amendment. In my view the said amendment did not alter the character of the case or introduce a different cause of action and that it should be allowed.

I allow the appeal, set aside the order of the Commercial High Court Judge dated 30.05.2011 and direct the Commercial High Court Judge to accept the amended plaint of the Plaintiff and to take necessary steps according to law. The learned Judge is directed to proceed with the trial expeditiously.

The appeal is allowed with costs.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PCJ.

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 Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 9 of The Provinces (Special Provisions) Act No.19 of 1990 as amended and Section 14(2) of the Maintenance Act No.37 of 1999.

Dissanayaka Mudiyanselege Renuka Dissanayaka, No.164, Village No.4, Muthukandiya, Siyabalanduwa.

APPLICANT

S.C.Appeal Case No.02/2016

S.C.Application No.SC/SPL/73/2015

Provincial High Court of Monaragala

Case No.11/2014/Appeal

Monaragala Magistrate's Court

Case No.47241/2011 **V.**

R.M.Pradeep Weerasinghe,

No.47, Near School,

Kandaudapanguwa, Siyabalanduwa.

RESPONDENT

AND

Dissanayaka Mudiyanselage Renuka

Dissanayaka, No.164, Village No.4,

Muthukandiya, Siyabalanduwa.

APPLICANT-APPELLANT

V.

R.M.Pradeep Weerasinghe,

No.47, Near School,

Kandaudapanguwa,Siyabalanduwa.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

R.M.Pradeep Weerasinghe,

No.47, Near School,

Kandaudpanguwa,Siyabalanduwa.

RESPONDENT-RESPONDENT-APPELLANT

v.

Dissanayaka Mudiyanselage Renuka

Dissanayaka, No.164, Village No.4,

Muthukandiya, Siyabalanduwa.

APPLICANT-APPELLANT-RESPONDENT

BEFORE:- B.P.ALUWIHARE,PCJ.

H.N.J.PERERA, J. &

PRASANNA .S.JAYAWARDENA, PCJ.

COUNSEL:-Niranjan de Silva for the Respondent-Respondent-Appellant

Nuwan Bopage with Lahiru Welgama and Chathura Weththasinghe for the Applicant-Appellant-Respondent

ARGUED ON:-14.09.2016

DECIDED ON:-28.10.2016

H.N.J.PERERA, J.

The Applicant-Appellant-Respondent (hereinafter sometimes referred to as the Applicant) instituted the above styled action against the Respondent-Respondent-Appellant (hereinafter sometimes referred to as the Appellant) her husband under Section 2(1) and Section 4(1)(c) of the Maintenance Act No. 37 of 1999 in the Magistrate's Court of Monaragala seeking maintenance of Rs. 6000/= per month. The Appellant resisted the said application on the basis that the Applicant is living in adultery and is therefore not entitled to receive maintenance under the said Act.

Thereafter, after inquiry the learned Magistrate delivered order dated 21.07.2014 in favour of the Appellant holding that it has been proved

that the Applicant is living in adultery and that hence under Section 2(1) the applicant is not entitled to any maintenance under the Maintenance Act. Being aggrieved by the said judgment the Applicant preferred an appeal to the High Court of Moneragala seeking to set aside the said judgment.

The High Court delivered judgment dated 19.03.2015 and set aside the order of the Magistrate dated 21.07.2014 in favour of the Applicant holding that the Appellant had not established that the Applicant was living in adultery for the Applicant to be disqualified for maintenance under Section 2(1) of the Maintenance Act.

Thereafter the Appellant filed an application before the High Court seeking leave to appeal from the judgment of the High Court dated 19.03.2015 and the said application was refused by the High Court on 01.04.2015. Subsequently the Appellant preferred this special leave to appeal application to the Supreme Court and the Supreme Court granted leave to appeal on the following questions of law averred in paragraphs 11(B) and 11(G) of the said Special Leave to Appeal application.

11(B)-Is the judgment/final order of the Honourable Provincial High Court of Uva Province Holden in Moneragala marked as “Y” dated 19.03.2015 contrary to the weight and the meaning of the evidence led in the Magistrate’s Court of Moneragala?

11(G)- Has the Learned High Court Judge of the Honourable Provincial High Court of the Uva Province Holden in Moneragala erred in law in holding that for ”living in adultery” as envisaged by Section 2(1) proviso contained in the Maintenance Act No.37 of 1999 to exist that there should be instances of adultery committed by the Applicant at least within a two month period before the parties stopped living together or adultery committed at the time when the Application for maintenance

was preferred by the Applicant under the Maintenance Act No. 37 of 1999?

It was contended on behalf of the Applicant that in order to succeed with proviso of the Section 2(1) of the Maintenance Act the Appellant must prove the wife is living in adultery.

Section 2(1) of the Maintenance Act No 37 of 1999 reads as follows:-

" Where any person having sufficient means, neglects or unreasonably refuses to maintain such person's spouse who is unable to maintain himself or herself, the Magistrate may, upon an application being made for maintenance, and upon proof of such neglect or unreasonable refusal order such person to make a monthly allowance for the maintenance of such spouse at such monthly rate as the Magistrate thinks fit having regard to the income of such person and the means and circumstances of such spouse."

"Provided however, that no such order shall be made if the applicant spouse is living in adultery or both the spouses are living separately by mutual consent."

Therefore in order to succeed with proviso of the section 2(1) of the Maintenance Act, the husband must prove that the wife is "living in adultery". It is admitted that parties married on 2nd July 2009. The Petitioner himself admitted the fact that till 5th December 2010 parties were living together. However subsequent to an incident occurred on that date they were separated. The Applicant's case was on or about 5th December 2010 the Appellant had left the matrimonial home after assaulting the Applicant subsequent to which the Appellant has completely refrained from maintaining the Respondent.

The Appellant while admitting the fact that till 5th December 2010 he was living with the Applicant took up the position that there were previous

incidents that Applicant committed adultery with her brother-in-law. The Appellant's position was that the Applicant was living in adultery and accordingly under the section 2(1) of the Maintenance Act No 37 of 1999, the Applicant is not liable to pay maintenance for a person living in adultery.

The main issue before this Court in this appeal is the interpretation of the phrase "Living in adultery" contained in Section 2(1) of the Maintenance Act No 37 of 1999.The Sri Lanka Courts have interpreted "living in adultery" literally, and held that it is not sufficient that the wife had lived in adultery before the application, but that the applicant must be proved to be "living in adultery" at the time the application is made. Thus the burden is cast upon the person alleging immorality to prove it since the law presupposes the wife is leading a chaste life.

If the husband while admitting that she is his wife, alleges that she is living in adultery, it is for him to prove that fact. There is a presumption of innocence not only in regard to the commission of a crime, but also in regard to any allegation of wrong doing or immoral conduct. There is a burden on the person who alleges immorality to prove it. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person-(Section 101,102, and 103 of the Evidence Ordinance).

In Selliah V. Sinnammah 48 N.L.R 261, it was held that when allegation is made under section 4 of the Maintenance Ordinance that the wife is living in adultery, the burden is on the husband to prove the fact.

Therefore there is no doubt that, in the instant case the burden was on the Appellant to prove that the Applicant was "living in adultery."

It was also held in Armugam V. Athai 50 N.L.R that a person who asserts that his wife is disentitled by section 4 of the Maintenance Ordinance to receive an allowance by reason of the fact that she is living in adultery must establish that she is leading a life of continuous adulterous conduct.

In Isabelahamy V. Perera C.W.Reporter Vol.111, p 294, it was held that the words "living in adultery "in section 4 meant a continuous of a life of adultery with some ascertained person or life of prostitution.

In Balasingham V, Kalaivany 1986 SLR 378 it was held, that so long as the marital tie subsists an order for maintenance made in favor of a wife will be cancelled only if:-

(1)The wife is guilty of a more or less continuous course of adulterous conduct and not merely isolated acts of adultery-there being a clear distinction between 'committing' adultery and 'living in adultery' which is what section 5 of the Maintenance Ordinance requires.

(2)The wife was living in adultery at or about the time of the application for cancellation of the order for maintenance.

The phrase 'living in adultery' has been construed in the same sense by the High Courts in India as well.

In Ma Thein V. Maung Mya Khin A.I.R 1937-Nagpur, 67 it was held that the words 'living in adultery' refers to course of guilty conduct and not to lapse from virtue. It was further observed in the said case that the word 'live' convey the idea of continuance, and consequently the phrase "living in adultery" refers to a course of guilty conduct and not to a single lapse from virtue.

In S.S.Manickam V. Arputha Bhavani Rajam C.L.J.1980 (1), Pandian, J observed that:-

"While the words 'is living in adultery' in sub-section (4) of section 125, Cr.P.C. would not take into it fold stray instances of lapses from virtue it would not also mean that the wife should be living in adultery on the date of the Petition. The proper interpretation would be that there should be proof of adulterous living shortly before or after the Petition, shortly being interpreted in a reasonable manner viewing it in the light of the facts of the case. ……The term 'living in adultery' has been the subject matter of discussion in several decisions of various High Courts. The present view taken by the Courts is that the expression 'living in adultery' is merely indicative of the principle that a single or occasional lapses from virtue is not sufficient reason for refusing maintenance.

Further in Ma Mya Khin V. N.N.Godenho A.I.R.1936 Rang 446, it was held that the words 'living in adultery' in s-488 (5) denoted a continuous course of conduct and not isolated acts of immorality. One or two lapses from virtue could be acts of adultery, but would be quite insufficient to show that the woman was living in adultery, which means that she must be living in the state of quasi-permanent union with the man with whom she is committing adultery. Further, it has been pointed out that there is a great distinction between the words 'committing adultery' and 'living in adultery' and that the ratio is that a solitary lapse from virtue, as distinguished from contumacious immoral conduct, should not be a ground for denying maintenance.

In Pushpawathy V. Santhirasegarampillai 75 N.L.R 353 where a husband against whom an order of maintenance had been made in favour of his wife sought the cancellation of the order on the ground that, about four years after the order was made, the wife gave birth to a child which was not his- it was held that the birth of the child did not, by itself, establish that the wife was living in adultery with someone. It only established that the wife had committed adultery with someone, which act might be a single lapse of virtue. This case could be clearly distinguished from the

facts of the case of Ma Thein V. Maung Mya Khin - the question was whether the applicant has been guilty of adultery and, if so, whether only once or more. There was evidence in this case to prove the fact that her child was begotten when the Respondent could not get access to her. There moreover, definite evidence on the record to prove that San Hla was seen going to her house and actually caught one night in her bed. The Court held that the wife must have been guilty of adultery on more than one occasion and therefore she was not entitled to any maintenance under section 488.

It was submitted on behalf of the Appellant that on the facts of the instant case, it is clear that the Applicant has committed adultery on a number of occasions with her Brother-in-Law one Rajakaruna.

It was contended on behalf of the Appellant that there was clear evidence on the adulterous conduct of the Applicant that she was carrying on with one Rajakaruna who is the Brother-in-Law of the Applicant. It was the position of the Counsel for the Appellant that the Appellant's mother D.M.Karunawathie has given evidence of three instances where an inference of committing adultery could be gathered. One Sameera M.Rathnayake too has given evidence on behalf of the Appellant to show a separate instance an inference of committing adultery could be gathered. The evidence given by D.M.Kalubanda show further three instances an inference of committing adultery could be gathered. It was the contention of the Counsel for the Appellant that looking at all these pieces of evidence the learned Magistrate of Monaragala was satisfied that the Applicant was guilty of committing adultery.

The Learned High Court Judge has come to a finding that although there is evidence to show that the Applicant-Respondent has committed adultery at some stage, the evidence shows that the parties had lived

together and no cogent evidence to prove that the Applicant was living in adultery at the time the application was made for maintenance.

According to Karunawathie the mother of the Appellant-Respondent she has seen the Applicant and the said Rajakaruna twice inside the matrimonial home and once inside a room together. The evidence of this witness shows that she did not like Rajakaruna coming into the house in the absence of the Appellant. She has stated that she could not remember the exact date of the incident. It is clear that the incident actually has happened long before the separation of the parties. According to the evidence of the case the parties continued to live together as husband and wife till December 2010.

The witness Sameera had seen the Applicant and another person walking together from a devala area in the year 2010. He has further stated that he did not inform about the said incident to the Appellant till the year 2011. He has not stated anything else other than stating that he was surprised to see them coming together from a place like that.

The other witness D.M Kalubanda who gave evidence on behalf of the Appellant-Respondent has stated that he had seen the Applicant and the said Rajakaruna travelling together on a motor cycle on three occasions. During cross-examination he has stated that he couldn't remember exact dates but probably that was in the year 2007. It is admitted the parties married on July 2009 and therefore it is very clear that the said incident had taken place before the marriage.

The Learned High Court Judge has clearly analysed the evidence given by the said witnesses and has come to the conclusion that he is satisfied that the Applicant has committed adultery. But the Learned High Court Judge has very clearly held that just before the time the said application was filed by the Applicant there was evidence to prove that the parties were living together and there is no evidence to prove that the Applicant

was living in adultery as contemplated in section 4 of the Maintenance Act.

In Ebert V. Ebert 22 N.L.R 312 it was held that:-

“It is not possible to lay down any general rule, or to attempt to define what circumstances would be sufficient and what would be insufficient upon which to infer the fact of adultery. Each case must depend on its particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts which of necessity are as various as the modifications and combinations of events in actual life.”

In the instant case the Learned High Court Judge has held that the Appellant has failed to lead cogent evidence to prove that the Applicant is “living in adultery”.

The learned Magistrate has held that there is evidence to show that the Applicant is not only guilty of committing adultery, but also that the Applicant is living in adultery. The Learned High court judge in his impugned judgment agreed with the conclusion reached by the learned Magistrate only to the extent that there is evidence to show that the Applicant had at one stage had somewhat an adulterous relationship with her Brother-in-Law. The Learned High Court Judge has held that the evidence in this case established that the Applicant was living with the Appellant in the matrimonial home thereafter and that there is no evidence to prove that she was “living in adultery” immediately prior to or after the date of application. There must be proof not only of the wife’s adulterous conduct but also of such adulterous conduct at or about the time the application is made. This Court cannot agree with the submissions made by the Counsel for the Appellant that there is clear evidence that the Applicant has committed adultery on number of occasions with the aforementioned Rajakaruna.

In my opinion, the Appellant had to prove by leading cogent evidence that the Applicant had committed not one or two acts of adultery, but pursued a course of conduct amounting to "living in adultery". The Appellant attempted to show three isolated incidents to convince Court the Applicant has committed adultery on three occasions. Such isolated incidents are insufficient to get the advantage of the proviso of the section 2(1) of the Maintenance Act. One has to be mindful of the fact that all three witnesses who gave evidence in this case on behalf of the Appellant-Respondent are the relatives of the Appellant-Respondent. One happens to be his own mother. None of the witnesses had given direct evidence regarding sexual intercourse. And it is clear none of the said incidents have contributed to breakdown of the marriage. In my opinion the Appellant has failed to lead cogent evidence and prove that the Applicant was "living in adultery" as contemplated in section 2(1) of the Maintenance Act No. 37 of 1999. The appellant has failed to satisfy court that the Applicant was "living in adultery" or in other words that she is leading a life of continuous adulterous conduct.

The Appellant himself admitted the fact that till 5th December 2010 parties were living together and subsequent to an incident which occurred on that date they were separated. Admittedly the reason for the separation is not committing adultery by the Applicant but some other minor incident. In Reginahamy V. Johna 17 N.L.R 376 where the Magistrate has refused to make an order for maintenance because the applicant had one time been living in adultery, Pereira, J. held that if a husband chooses to let the marriage to remain in spite of adultery on the part of his wife, and his wife from choice or necessity returns to an honourable life, the husband's liabilities unquestionably revive.

Therefore I answer the two questions of law raised in this case in favour of the Applicant-Respondent. I see no reason to disturb the judgment of the Learned High Court Judge. I, therefore affirm the judgment of the

Learned High Court Judge of Avissawella dated 19.03.2015. The appeal is dismissed with costs.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PCJ.

I agree.

JUDGE OF THE SUPTEME COURT

P.S.JAYAWARDENA, 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 application under Section 31 D D(1) of the Industrial Disputes Act as amended by Act No. 32 of 1990

SC/Appeal No 03/10

Special Leave to Appeal

Application No. 187/2009

High Court Kandy Case No.

HC Appeal 44/2008

LT.Kandy Case No. 3/118/2003

National Institute of Co-operative Development

Polgolla

Respondent-Appellant- Petitioner-Appellant

-Vs-

VimalJayathilake Wijesekara

Nikathenna, Puwakdheniya

Kegalle

Applicant-Respondent-Respondent-Respondent

Before : Sisira J. De Abrew, J

Upaly Abeyrathne, J &

Anil Gooneratne, J

Counsel : - Rajeev Goonathilleke,SSC for the

Respondent-Appellant-Petitioner-Appellant

Manohara de Silva,PC with AravindaWijesurendra for Applicant-Respondent-Respondent-Respondent

Argued on : 23rd November 2016

Written submission

Tendered on : 27.9.2010 by the Respondent-Appellant

15.12.2016 by the Applicant-Respondent

Decided on : 15.2.2017

Sisira J De Abrew

The Applicant –Respondent-Respondent- Respondent (hereinafter referred to as the Applicant-Respondent) filed an application in the Labour Tribunal seeking, inter alia, that he be appointed as a Grade I lecturer with effect from 21.9.2001; that he be paid back wages from 21.9.2001; that he be paid reasonable compensation. The learned President of the Labour Tribunal after inquiry decided that the services of the Applicant-Respondent have been unjustifiably terminated by the Respondent-Appellant-Petitioner-Appellant (hereinafter referred to as the Respondent-Appellant) and ordered Rs.217,200/- as compensation in lieu of reinstatement. Being aggrieved by the said order of the learned President of the Labour Tribunal, both parties preferred appeals to the High Court and the learned High Court Judge by his judgment dated 23.7.2009, set aside the order of the learned President of the Labour Tribunal and ordered that the Applicant-Respondent be reinstated with back wages. Being aggrieved by the said judgment of the High Court, the Respondent-Appellant has appealed to this court. This court, by its order

dated 15.1.2010, granted leave to appeal on questions of law stated in paragraphs 10(i) to 10(v) of the Petition of Appeal dated 26.8.2009 which are set out below.

I. Whether the application to the Labour Tribunal, Kandy, by the Respondent was prescribed (time barred)

II. Whether the Labour Tribunal, Kandy, had jurisdiction to hear and determine this matter.

III. Whether Section 23 of the National Institute of Co-operative Development (Incorporation) Act No 1 of 2001 applies to the contract of employment of the Respondent dated 25.02.1982 (Folio 170 of annexure "X")

IV. Whether the Petitioner was the employer of the Respondent.

V. Without Prejudice to the above, whether the issuing of the notice of Vacation of Post on the Respondent, amounts to an action of termination of employment by the Petitioner in terms of Section 31B (1) of the Industrial Disputes Act No. 43 of 1950 as amended.

Learned PC for the Applicant-Respondent on 27.7.2010 in this court had taken up the following preliminary objection to the maintainability of this appeal. It is as follows:

"Learned PC Submitted that the appeal had been filed on the basis that the Respondent-Appellant was not the employer of the Applicant-Respondent. Learned PC submitted that the Respondent-Appellant would therefore not have status in terms of Section 31DD(1) of the Industrial Disputes Act as

amended by Act No.32 of 1990 in so far as a right of appeal thereby conferred to workman, trade union or an employer."

Learned PC at the hearing before us stressing his preliminary objection submitted that since the Respondent-Appellant takes up the position that he is not the employer of the Applicant-Respondent, he could not have preferred this appeal to this court in terms of Section 31DD(1) of the Industrial Disputes Act, and that only a workman, trade union or an employer could appeal against an order of a High Court made in the exercise of its appellate jurisdiction in relation to an order of a Labour Tribunal. Before I deal with the said preliminary objection, I would like to consider whether the Labour Tribunal could have entertained the application of the Applicant-Respondent. Learned SSC submitted that the Applicant-Respondent was a public servant and was not an employee of the Respondent-Appellant. I would like to consider whether the Applicant-Respondent was a public servant at the time of his termination of services. In considering the said question the following facts are relevant.

The Secretary to the Ministry of Food and Co-operative by his letter dated 25.2.1982 appointed the Applicant-Respondent as a lecturer of the Co-operative Development School at Polgolla with effect from 15.6.1981. This is the letter of appointment of the Applicant-Respondent. According to the said letter of appointment, the said post is permanent and he is entitled to his pension (vide page 200 of the brief). The said facts alone demonstrate that the Applicant-Respondent has been appointed as a public servant. On a request made by the Deputy Minister of Urban Development, Constructions and Public Utilities, the Applicant-Respondent was released to the above

Ministry and the Secretary to the Ministry of Urban Development, Constructions and Public Utilities by his letter dated 23.11.2000 (vide page 166 of the brief) appointed the Applicant-Respondent as Public Relation Officer of the Deputy Minister of the said Ministry with effect from 9.11.2000. The Secretary to the Ministry of Urban Development, Constructions and Public Utilities by his letter dated 1.10.2001 addressed to Commissioner of Co-operative Development released the Applicant-Respondent from the said Ministry with effect from 21.9.2001. A copy of the said letter was also sent to the Applicant-Respondent. But the Applicant-Respondent failed to report to the Department of Co-operative Development. In view of his failure to report back to the Department of Co-operative Development, he was served with a vacation of post notice dated 9.11.2001 by the Commissioner of Co-operative Development. It is therefore seen that the Applicant-Respondent by the said notice was informed that he had vacated post with effect from 21.9.2001 (vide page 152 of the brief). The Applicant-Respondent appealed to the Public Service Commission against the said notice of vacation of post. The Public Service Commission after considering his appeal, by order dated 21.1.2003, converted the said vacation of post to a compulsory retirement (vide page 142 of the brief).

If the Applicant-Respondent is not a public servant why did he appeal to the Public Service Commission? The Applicant-Respondent, by his own appeal to the Public Service Commission, has accepted that he is a public servant.

Considering all the aforementioned matters, I hold that at the time the Applicant-Respondent was sent on vacation of post, he was a public servant.

Section 49 of the Industrial Disputes Act No 43 of 1950 (as amended) reads as follows. "Nothing in this Act shall apply to or in relation to the State or the Government in its capacity as employer, or to or in relation to a workman in the employment of the State or the Government."

It is therefore seen that if a workman is a public servant, he cannot move the Labour Tribunal for redress and the Labour Tribunal has no jurisdiction to entertain an application of a public servant when his services were terminated. In the present case I hold that the Applicant-Respondent was a public servant at the time he was sent on vacation of post; that he is not entitled to file an application for relief for termination of his services; that the Labour Tribunal did not have jurisdiction to entertain his application; and that the Labour Tribunal should have dismissed his application in limine. The 2nd question of law is as follows.

"Whether the Labour Tribunal Kandy had jurisdiction to hear and determine this matter."

In view of the conclusion reached above, I answer this question of law as follows. "The Labour Tribunal Kandy did not have jurisdiction to hear and determine this matter."

In view of the conclusion reached above, the other questions of law do not arise for consideration. I have earlier held that the Labour Tribunal did not have jurisdiction to hear and determine the application and that the Labour Tribunal should have dismissed the application filed by the Applicant-Respondent in limine. For the above reasons, I dismiss the application of the Applicant-Respondent filed in the Labour Tribunal Kandy.

In view of the above conclusion reached by me, I hold that there is no merit in the preliminary objection and reject the same.

For the aforementioned reasons, I set aside the judgment of the High Court Judge dated 23.7.2009 and the order of the Labour Tribunal 24.1.2008. I allow the appeal. Having considered the facts of this case, I do not make an order for costs.

Appeal allowed

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 for Leave to Appeal in terms of Article 154P of the Constitution in the exercise of its jurisdiction granted by Section 5 A of the High Court of the Provinces (Special Provisions) Act No. 1990 as amended by Act No.54 of 2006.

1. Subramaniam Jegatheeswaran and wife
2. Jegatheeswari both of Sellapillaiyar Kovilady, Polikandy.

1st and 2nd Defendants-Appellants-Petitioners.

Vs

S.C. Appeal No. 8/2013
Application No. 120/12

HCCA/JAF No. 58/09
DC Pt. Pedro Case No. 17869/L

1. Vaithilingam Rameswara Iyer and Wife
2. Krishnavimarosa both of Manthigai Amman Kovilady, Puloly.

Plaintiffs-Respondents-Respondents

3. Vaithilanga Kurukkal Sundareswara Kurukkal Manthigai Amman Kovilady, Puloly

3rd Defendant –Respondent-Respondents

BEFORE	**:**	**K. SRIPAVAN, C.J.,** **S. E. WANASUNDERA, P.C., J.,** **PRIYANTHA JAYAWARDENA, P.C. J.**
COUNSEL	**:**	Ms. J. Arulananthan for the Defendants-Appellants-Appellants. Mano Devasagayam with M. Sathyendran for the Plantiffs-Respondents-Respondents
ARGUED ON	**:**	**08.08.2016**
DECIDED ON	**:**	**24.01.2017**

K. SRIPAVAN, C.J.

The Plaintiffs-Respondents-Respondents (hereinafter referred to as the "Plaintiffs) instituted this action against the First and Second Defendants-Appellants-Petitioners (hereinafter referred to as the "First and Second Defendants") and the Third Defendant-Respondent-Respondent (hereinafter referred to as the "Third Defendant") seeking, inter alia, a declaration that the Plaintiffs are entitled to the property morefully described in the Schedule to the Plaint dated 5th January 2001 (hereinafter referred to as the "Trust property") and the right of performing the Poojas of "Manthikai Amman Kovil".

The legal basis upon which the Plaintiffs claim that they are entitled to the Trust property and the right to perform Poojas of "Manthikai Amman Kovil" is by virtue of the Deed of Trust No. 8335 attested by R. Sathananthan, Notary Public dated 29th September 1995 by which rights were transferred to the Second Plaintiff by her father Sivasithampara Kurukkal. The action of the Plaintiffs was heard **ex-parte** and a judgment was entered in favour of the Plaintiffs. The First, Second and Third Defendants sought to vacate the ex-parte judgment under Section 86(2) of the Civil Procedure Code and the learned District Judge after an inquiry permitted the Defendants to file their answer.

The Defendants fled their answer dated 23rd July 2001 and took up the position that the Trust property referred to in the Schedule to the Plaint and the right to perform Poojas have already been transferred to the Second Defendant by her father on 15th September 1995 by virtue of a Deed of Appointment of Trustee No. 556 attested by Saba Raveendran, Notary Public.

The Parties relied on the Principal Trust Deed No. 6815 dated 21st December 1941 attested by V. Sendthirajasekeram, Notary Public, by virtue of which Sivasithampara Kurukkal, the father of the Second Plaintiff and the Second Defendant became the rightful owner of the Trust property and the right to perform Poojas at the "Mathikai Amman Kovil."

The District Court, by its judgment dated 22nd February 2005 held that Deed No. 8335 dated 29th September 1995 was a valid Deed in relation to the Trust property and the Pooja rights of the "Manthikai Amman Temple". The Defendants preferred an appeal to the Provincial High Court of

Civil Appeal of the Northern Province holden in Jaffna against the Judgment of the District Court. The Provincial High Court by its judgment dated 24th February 2012 dismissed the appeal. Hence,

the Defendants preferred an Appeal to this Court. This Court on 23rd January 2013, having heard the parties granted leave to appeal on the following question only :-

> *"Considering the nature of the action was it mandatory on the part of the original Plaintiffs (present Respondents) to resort to the provisions of Section 112(1)(i) of the Trusts Ordinance?"*

Section 112(1) of the Trusts Ordinance reads thus:-

> "*In any of the following cases namely:-*
>
> *(i) Where it is uncertain in whom title to any Trust property is vested; or*
>
> *(ii) Where a Trustee or any other person in whom the title to Trust property is vested has been required in writing to transfer the property by or on behalf of a person entitled to require such transfer, and has willfully referred or neglected to transfer the property for twenty right days after the date of requirement,*
>
> *the Court may make an order (in this Ordinance called a "vesting order") vesting the property in any such person in any such manner or to any such extent as the Court may direct".*

Learned Counsel for the First and Second Defendants' argued that the Civil Appellate High Court holden in Jaffna erred in holding that the Plaintiffs were entitled to vindicate their rights relating to the temple property by way of the "rei vindicatio" action without resorting to Section 112(1)(i) of the Trusts Ordinance relying on the case of *Tambiah* Vs. *Kasipillai* 42 N.L.R. 558. Counsel submitted that the said case is not an authority for the above position and only held that a party was "entitled to bring an action **rei vindicatio** in respect of the Trust property without having resort to Section 102 of the Trusts Ordinance. Counsel relied on the Judgment of *Karthigesu Amblavanar et al* Vs. *Subramaniam Kathiralvelu et al* 27 N.L.R. 15 at 22, where the Court noted that "the appropriate remedy for the settlement of the affairs of the temple would be a vesting order under Section 112 of the Trusts Ordinance."

In the case of *Rajammal* vs. *Balasubramaniyam* 61 N.L.R. 343, the Court noted that a vesting order would be granted in respect of the entire Trust property and not to a person who asserts a claim in respect of a part of it. This judgment referred to the cases of *Tambiah* Vs. *Kasipillai* 42 N.L.R. 558 and *Ambalavanar* Vs. *Somasundera Kurukkal* 48 N.L.R. 61.

In *Tambiah* Vs. *Kasipillai* 42 N.L.R. 558, the Plaintiff claiming to be the lawful hereditary trustee and manager of a Hindu Temple and its temporalities asked for a declaration that he is the lawful trustee and manager thereof on the ground it was uncertain in whom the legal title to the various properties comprising the temporalities vested. Kauneman J. at 561 observed as follows:-

> *"I hold that a claim to a vesting order may be asserted by an action, and that the present action is in order, so far it relates to a vesting order."*

The Court in the case *of Ambalavanar Vs. Somasundera Kurukka*l 48 N.L.R. 61 discussed the power to make vesting orders. Canekaratne, J. in *the course of the Judgment at page 64 noted as follows:-*

> *"The Court is also given power to make orders vesting Trust property by Section 102 Sub Section I(b) and 112 Sub Section (1). In the former case, it can make a decree vesting any properties in the trustees. In the latter case, an order vesting the property in such person as the Court may direct a vesting order. The former Section is of limited application; the action in which this relief is sought must be one instituted by five or more persons who are interested in a religious trust and have complied with the conditions of sub section 3. Section 162 is a part of the Chapter headed "Miscellaneous" . It is a general section and its application is not confined to any particular classes of persons. This Section makes provision for two cases. Any person who can prove the essentials required by Part 1 or Part 2* ***is entitled to come to District Court and request the Court to make a "vesting order".*** (emphasis added).

The prayer of the Plaint in this application involves a dispute as to the persons on whom the Trust property vested. The reliefs sought by the Plaintiffs are as follows:-

(a) For a judgment that the Plaintiffs are entitled to the property described in the Schedule to the Plaint **AND** to the right of performing Poojas of "Manthikai Amman Kovil" situated in that property by virtue of Deed No. 8335 attested by R. Sathananthan, Notary Public on 29th September 1995.

(b) For a declaration that Deed No. 556 attested by Saba Ravendran, Notary Public on 15th September 1995 in favour of First and the Second Defendants, is null and void

(c) For an Order that the Third Defendant be directed to hand over the Keys of the "Manthikai Amman Kovil" to the Plaintiffs to perform the Poojas with effect from 1st November 2001.

The Civil Appellate High Court of the Northern Province holden in Jaffna by its judgment dated 24th February 2012 re-iterated that the Plaintiffs instituted this action in the District Court against the

defendants praying for judgment, inter alia, that the Plaintiffs under Deed bearing No. 8335 are entitled to the **land (Trust property)** and to do the Poojas for the "Manthikai Amman Kovil". (Emphasis added).

Thus, the Plaintiffs in an uncertain situation as to the title to the property when seeking a declaration that they be ordered entitled to the Trust property and to the right to perform Poojas, must in the first instance pray for a vesting order in terms of Section 112 of the Trusts Ordinance. Though the Plaintiffs in their written submissions state that they are asking for a declaration in terms of Deed N. 8335 dated 29th September 1995 only for the right to perform Poojas at the "Manithikai Amman Kovil" as trustees the prayer to the plaint filed in the District Court clearly and unequivocally show that they vindicate their rights to the "Trust property" as Trustees. When the Plaintiffs claiming as Trustees institute an action to safeguard or assert rights to the Trust property and the question at issue is whether the title to the Trust property is vested in the Plaintiffs or in the Defendants, the Plaintiffs are not entitled to maintain the action without first obtaining a vesting order under Section 112 of the Trusts Ordinance. (Vide *Thamotherampillai* Vs. *Ramalingam* 34 N.L.R. 359).

I therefore answer the question of law on which leave was granted in the affirmative. It is a well settled principle of law that the rights of parties must be determined as at the date of the action. As at the date of the action, the Plaintiffs have failed to obtain a vesting order under Section 112 of the Trusts Ordinance. For these reasons, I set aside the judgments of the District Court and the Civil Appellate High Court and direct that the Plaintiffs action be dismissed in all the circumstances without costs.

CHIEF JUSTICE.

E. WANASUNDERA, P.C., J.,

I agree.

JUDGE OF THE SUPREME COURT.

PRIYANTHA JAYAWARDENE,PC., J.

I agree.

JUDGE OF THE SUPREME COURT.

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

S.C. Appeal No. 8/2016
S.C (HC) CALA No. 5/2016
WP/HCCA/COL/119/2015
D.C. Colombo Case No. 45/13/DRE

Nadaraja Rajendra
No. 40, Dr. E.A. Cooray Mawatha,
Colombo 6.

PLAINTIFF

Vs.

Thevathasan Sritharan
No. 8/4, Vivekananda Avenue,
Colombo 6.

DEFENDANT

AND BETWEEN

Nadaraja Rajendra
No. 40, Dr. E.A. Cooray Mawatha,
Colombo 6.

PLAINTIFF-PETITIONER

Vs.

Thevathasan Sritharan
No. 8/4, Vivekananda Avenue,
Colombo 6.

DEFENDANT-RESPONDENT

AND BETWEEN

Thevathasan Sritharan
No. 8/4, Vivekananda Avenue,
Colombo 6.

DEFENDANT-RESPONDENT-PETITIONR

Vs.

Nadaraja Rajendra
No. 40, Dr. E.A. Cooray Mawatha,
Colombo 6.

PLAINTIFF-PETITIONER-RESPONDENT

AND NOW BETWEEN

Thevathasan Sritharan
No. 8/4, Vivekananda Avenue,
Colombo 6.

DEFENDANT-RESPONDENT-PETITIONER-APPELLANT

Vs.

Nadaraja Rajendra
No. 40, Dr. E.A. Cooray Mawatha,
Colombo 6.

PLAINTIFF-PETITIONER-RESPONDENT-RESPONDENT

BEFORE: S.E. Wanasundera P.C. J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: Nihal Jayamanne P.C. with Noorani Amarasinghe
For Defendant-Respondent-Petitioner-Appellant

S. Ruthiramoorthy for Plaintiff-Petitioner-Respondent-Respondent
Instructed by Sujeewa S. tissera

ARGUED ON: 11.07.2017

DECIDED ON: 09.10.2017

GOONERATNE J.

This was a rent and ejectment case, wherein the Plaintiff-Petitioner-Respondent (hereinafter referred to as the Plaintiff) sought to eject the Defendant-Respondent-Petitioner-Petitioner (hereinafter referred to as the Defendant) from the premises described in the 3rd schedule to the Plaint. Defendant filed answer and sought a dismissal of the action. It is recorded that on 23.03.2015 parties arrived at a settlement. The settlement is found at document A3 of the brief. In short the settlement was for the Defendant to purchase the property in dispute for Rs. 12 million on or before 28.09.2015 having been satisfied of title to the property. However in the event the Defendant defaults, writ to issue without notice. Then on 08.05.2015 the case came up in the District Court and the Defendant on that day informed court that he is satisfied with title to the property in dispute.

Chronological order of events should be kept in mind as the facts from the point of calling the case on 28.09.2015 the date relevant to the settlement, onwards, tends to unnecessarily confuse the issue. In paragraph 5 of the Petition of Appeal it is pleaded that the Defendant on 28.09.2015 sought

one week's time to pay the Rs. 12 million to Plaintiff. District Court granted time till 05.10.2015. In this regard document A5, A6 & A8 would be relevant as a point is emphasised by the Defendant that on the application for time to pay. District Court granted time till 05.10.2015 and it is wrongfully recorded that Plaintiff sought time to pay. "සමනයට පැමිනිල්ල දින පතයි". "සමතය අවසන් වරට", (vide A6).

The material available suggest that the Plaintiff filed a Leave to Appeal Application in the Civil Appellate High Court against the Order of the District Judge dated 28.09.2015 (granting time to pay the Rs. 12 million). The said Leave to Appeal Application was made to the Civil Appellate High Court on the footing that the District Judge misdirected himself by granting time as aforesaid and failed to appreciate that the terms of settlement cannot be unilaterally altered and could be altered only with consent of parties. This matter was taken up in the High Court on 02.10.2015 but after hearing parties High Court did not set aside the order of 28.09.2015 but made order as follows and (A7) simply stated to send the case back to the District Court to take appropriate steps. In order to understand what the High Court Judges in his Order stated it is necessary to incorporate same in this Order.

Counsel for both parties were briefly heard.

The defendant has filed this application for leave to appeal against the purported order of the District Judge dated 28.09.2015 which appears in journal entry No. 15. The part of the journal entry in the District Judge's handwriting when translated into English reads as follows: "Plaintiff moves for a date for settlement. Settlement finally 5.10.2015". Counsel for the defendant also admits that what is recorded is incorrect. It is the defendant, not the plaintiff, who has asked for a date to make the payment in terms of the settlement already recorded, which was due on that day. Therefore "Plaintiff moves for a date for settlement" is entirely wrong. Then "Settlement finally 5.10.2015" is also wrong because admittedly settlement had already been recorded.

Counsel for the plaintiff emphatically emphasises that when the defendant moved for a date for payment, he objected to that application, but it has not been recorded. Counsel says that if the defendant fails to make the payment on or before 28.09.2015, according to clause 4 of the settlement recorded on 23.03.2015 in open court and signed by the parties, the plaintiff is entitled to all the reliefs sought for in the plaint. Counsel for the defendant says defendant moved for one week's time to make the payment.

What is recorded by the District Judge in journal entry No. 15 is incorrect, may be due to the fact that the case came up before him (a new judge) for the first time on 28.09.2015.

Send a copy of these proceedings to the District Court forthwith to take appropriate steps.

Defendant takes the position that the Order of the District Judge wherein it is stated "සමතය අවසන් වරට" stands and in view of A7 the High Court did not set aside the Order of 28.09.2015.

As per the Order of 28.09.2015 the matter was called in the District Court on 05.10.2015. The Defendant party offered the 12 million in cash to the Plaintiff but the Plaintiff did not accept the 12 million and took up the position that in terms of the settlement between parties that on 28.09.2015 if the moneys were not paid as aforesaid and as such the Plaintiff has a right to take out writ against the Defendant, as the Defendant acted contrary to the terms of settlement. Based on submissions the District Judge made Order on 08.10.2o15 permitting the Plaintiff to act according to the terms of settlement and take out writ as per the terms of settlement (vide A8 & A9). Subsequently the Civil Appellate High Court by Order of A17 dated 18.12.2015, dismissed the application of the Defendant dated 12.10.2015 without costs.

The Supreme Court on 18.01.2016 granted Leave to Appeal against the Order made by the Civil Appellate High Court by A17 dated 18.12.2015. However the journal entry of 18.10.2016 does not refer to the question of law on which leave was granted.

As such this court will consider the questions pleaded at paragraph 20 of the Petition of Appeal as follows: 20 (i), 20 (ii) & 20 (iii) are answered as follows.

20(1) In view of the orders made by the High Court and District Court on 18.10.2015 and 08.10.2015 respectively question is answered in the negative.

Terms of settlement could not have been altered unilaterally. Defendant need to comply with the terms of settlement between parties as the final date to pay the sum of Rs. 12 million was on 28.09.2015. Plaintiff never consented to grant further time for settlement.

In view of above and the views expressed by all the courts connected to this application the rest of the questions are answered in the negative.

It is a common ground that the Defendant failed to act as per the terms of settlement and pay the sum of Rs. 12 million on or before 28.09.2015. In the event if payment was not duly paid as above, Plaintiff as per the terms of settlement would be entitled to take out writ and entitled to the relief as per the prayer to the plaint. Though the Defendant party has right along attempted to unnecessarily confuse the matter the simple way to look at this case is that there was settlement for which both parties agreed and in breach of such agreement plaintiff would be entitled to relief and take out the writ as agreed between parties. This is in fact the crux of matter as explained by a very comprehensive order dated 18.12.2015 of the Civil Appellate High Court. I see no basis to interfere with that Order of the High Court. (Order of the High Court dated 02.10.2015 very correctly explain the correct position in this case).

I have also perused the Order of the learned District Judge of 08.10.2015. In that Order trial Judge refer to the factually incorrect statement highlighted by the High Court to be relevant, i.e settlement finally on 05.10.2015. This statement of the trial Judge is totally incorrect as the terms of settlement were previously entered and there is no question of extending the date for settlement. Defendant seems to be attempting to make use of this incorrect and factually incorrect statement. To be more precise and give more clarity to the issue I incorporate the following paragraph from the learned District Judge's Order of 08.10.2015.

වර්ෂ 2015.03.23 වන දින දෙපර්ශවයේ එකගත්වයෙන් වාර්තා කල සමථ කොන්දේසි ප්‍රකාරව සළකා බැලීමේ දී "වර්ෂ 2015.09.28 දින සමථයකට පැමිණිල්ල දින පතයි. සමථය අවසන් වරට 05.10.2015" යනුවෙන් තබා ඇති සටහන ගරු සිවිල් අභියාචනා මහාධිකරණ විනිසුරු තුමා සිය නියෝගයේ ප්‍රකාශ කර ඇති ආකාරයටම අතීශයින් වැරදි සහගත ය. එය සිද්ධිමය කරුණු වරදවා දැක්වීම හේතුවෙන් සිදුකර ඇති නියෝගයක් බව කිව යුතු නැත. මෙම නඩුවේ සමථය පුර්ණ වශයෙන් වාර්තා කර ඊට එකගව දෙපාර්ශ්වය නඩු වර්ථාවට අත්සන් කර ඇත. පෙර දින එනම් වර්ෂ 2015.09.28 දිනට නියමිතව ඇත්තේ එකී සමථය ප්‍රකාරව පාර්ශ්වකරුවන් විසින් ඉටු කල යුතු කාර්යයන් ඉටු කිරීම සදහාය. නමුත් එදින සමථය ප්‍රකාරව විත්තිකාර වගඋත්තරකරු ක්‍රියා කර නැත. ඒ අනුව වර්ෂ 2015.03.23 වන දින වාර්තා කල සමථ

කොන්දේසිවල 4 වන ඡේදය අනුව කටයුතු කිරීමට පැමිණිලිකරුට නිත්‍යානුකූල හිමිකම් ලැබී ඇත.

In the above circumstances I affirm the Order of the High Court dated 18.12.2005 and the learned District Judge's Order of 08.10.2015. I dismiss the Petition of Appeal of the Defendant-Respondent-Petitioner-Petitioner dated 04.01.2016 with costs.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera 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 L ANKA

S.C. Appeal No. 10/2013
SC/HCCA/LA/511/2012
HCCA Kegalle 831/2011
D.C. Kegalle 6932/L

In the matter of an Application for Leave to Appeal under and in terms of Article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5c of the High Court of Provinces (Special Provision) Act No, 54 of 2006

Jayasinghe Appuhamilage Anura
Jayasinghe Ambawela of
No. 58, Edwin Wijerathna Mawatha,
Kegalle.

PLAINTIFF

Vs.

Liyanage Shanthapriya Lalith Kumara
Liyanage of
No. 50, Edwin Wijerathna Mawatha,
Kegalle.

DEFENDANT

AND

Jayasinghe Appuhamilage Anura
Jayasinghe Ambawela of
No. 58, Edwin Wijerathna Mawatha,
Kegalle.

PLAINTIFF-APPELLANT

Vs.

Liyanage Shanthapriya Lalith Kumara
Liyanage of
No. 50, Edwin Wijerathna Mawatha,
Kegalle.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Liyanage Shanthapriya Lalith Kumara
Liyanage of
No. 50, Edwin Wijerathna Mawatha,
Kegalle.

DEFENDANT-RESPONDENT-PETITIONER

Vs.

Jayasinghe Appuhamilage Anura
Jayasinghe Ambawela of
No. 58, Edwin Wijerathna Mawatha,
Kegalle.

PLAINTIFF-APPELLANT-RESPONDENT

BEFORE: Priyasath Dep P.C., C.J.,
B. P. Aluwihare P.C., J. &
Anil Gooneratne J.

COUNSEL: Nuwan Bopage with Lahiru Welgama and
Kennady Kodikara for the Defendant-Respondent-Petitioner

M.S.A. Saheed with A.M. Hussain for the
Plaintiff-Appellant-Respondent

WRITTEN SUBMISSIONS OF THE PETITIONER FILED ON:
04.04.2013

WRITTEN SUBMISSIONS OF THE RESPONDENT FILED ON:
24.04.2013

ARGUED ON: 21.02.2017

DECIDED ON: 20.03.2017

GOONERATNE J.

This was an action for a declaration of title to lot 21 shown in plan No. 2036 of 25.07.1965 (P8) of Surveyor Baddewela, by which the larger land called Raddala Estate was subdivided into 46 lots. The material placed before this court indicates that the said lot 21 which is the disputed small portion of land is about 2 ½ perches. It would be necessary to understand the facts of this case as the Plaintiff and Defendant both claim lot 21, the above small portion of land (strip of land).

Plaintiff purchased lot 20 by deed No. 1107 (iv2) of 19.02.1985. It is stated that Plaintiff built a house on it. It is the Plaintiff's case that on purchase of lot 20 he erected a fence and possessed it within his boundaries. It is also stated by Plaintiff that he also purchased lot 21 the disputed lot by deed P2 No. 1524 of 19.03.1997. Plaintiff amalgamated the two lots and possessed both lots as the same land. On purchase lot 21 Plaintiff removed the barbed wire and the fence on the eastern boundaries of lot 20. (keeping some old trees) to have access to lot 21. What the Plaintiff complained of that point of time is that the

Plaintiff being a Bank Office was away from the land in dispute on 06.02.2003 to 07.02.2003, and during his absence the Defendant illegally erected a new fence on the eastern boundary of Plaintiff's lot No. 20, which covered the disputed lot No. 21. In short what has happened as urged by the Plaintiff is that the fence he removed as above was erected by the Defendant on the eastern boundary of Plaintiff's lot No. 20 to prevent the Plaintiff enjoying both lots 21 and 20.

Both the Defendant and Plaintiff are owing adjoining lots to each other. Defendant own lot 22 in plan 2036. Defendant claim lot 22 on the pedigree relied by him. The Defendants claim to lot 21 is not on a deed but based on prescription.

The learned District Judge delivered Judgment on 21.01.2011 dismissing Plaintiff's action. Being aggrieved by the said Judgment the Plaintiff lodged an appeal to the Civil Appellate High Court of Kegalle and the High Court allowed the Appeal and set aside the Judgement of the District Court. Supreme Court granted leave on about 23.01.2013 on the questions of law contained in paragraph 12(i) (iii) & (iv) of the petition dated 21.11.2012. The said questions reads thus:

(i) The said judgment is contrary to law and evidence placed before District Court of Kegalle.

(iii) Their Lordship Judges of Civil Appellate High Court of Sabaragamuwa erred in law in failing to appreciate the fact that the Respondents own evidence and documents are detrimental to his case and thus he has failed to prove his case.

(iv) Their Lordship Judges of Civil Appellate High Court of Sabaragamuwa failed to evaluate the prescriptive title of the Petitioner.

The Defendant-Petitioner emphasise the fact that the Defendant-Petitioner and his predecessors in title have possessed both lots 21 and 22 together and attempts to convey that they possessed for over 15 years. It is also submitted that the Court Commissioner's evidence prove that the fence between lots 20 and 21 is more than 10 years and considerable part of lot 21 falls within lot 22. In the written submissions of the Defendant-Petitioner there is one whole paragraph explaining the conduct of the Plaintiff. (pg. 6) I note the same but to decide on the question of law on which leave was granted such conduct would not take the case anywhere to prove prescription. Defendant-Petitioner's position is that title began from deed No. 494 of 23.08.1965. According to the said deed western boundary of the schedule of the said deed is lot 72 and is not lot 21 but lot 20. Therefore by deed No. 7316 of 23.01.1973 the Petitioner's father purchased lot 22 and even in the said deed the western boundary is lot 20. Further all the subsequent deeds relied by the Defendant

includes the same schedule. The above seems to be the line of argument advanced by the Defendant-Petitioner.

I note a very interesting and a relevant point highlighted by the Civil Appellate High Court. There is in relation to issue No. 51 which is answered in the affirmative i.e if issues raised by the Defendant have to be answered in favour of the Defendant the plaint should be dismissed. The plaint has not been dismissed but the learned District Judge has pronounced a Judgment by partitioning lot 21 between the parties to the suit. This being an action for a declaration of title, either Judgment should be entered in favour of the Plaintiff, if title is established by Plaintiff and if not to dismiss the action. This point alone is sufficient to set aside the Judgment of the District Court. Learned trial Judge, instead of dismissing the action has allotted lots 3, 4, 6 & 7 to the Defendant, and lot 5 to the Plaintiff. Such a ruling could be made in a partition suit and not in an action for declaration of title.

Both parties admitted plan No. 2036 which consists of lots 19 – 22 marked P1. This plan consists of only 4 lots, which is part of plan 2036 which is described as the mother plan P8. Parties do not dispute this position. I agree with the submissions of learned counsel for Plaintiff-Respondent that plan 2036 consists of lots 20 to 23. According to these plans western boundary of

Defendant lot 22 is the disputed lot 21 but Defendant's title deeds 1V1 and 1V6 states lot 20 as the western boundary of lot 22. Learned District Judge has not appreciated this fact. I also note that western boundary in deeds 1V1 and 1V6 are contradictory with Defendant's documents 1V4 and 1V5. Trial Judge in his Judgment states that the boundaries in the deeds of the Defendant is problematic (ගැටලු සහගතයි). Having said so, this court is unable to fathom as to how Judgment was entered in favour of the Defendant party. If the Defendant has prescribed to the particular lot 21 it need to be proved as per Section 3 of the Prescription Ordinance. Mere possession would not suffice. *Pathmasiri and Another Vs. Baby and Another 2006 (1) SLR 35*. It is the adverse possession that should be established. Where is the evidence to prove adverse possession for 10 years? Evidence of Plaintiff was that Defendant forcibly erected the fence on the western boundary of lot 21 on 06.02.2003 and 07.02.2003. If that be so it would become adverse from 06.02.2003 or 07.02.2003 by forcible erection of fence, on the western boundary to lot 21. Plaintiff instituted action on 02.06.2003 which is shortly after the above erection of the fence. Therefore the period of 10 years cannot be contemplated or computed in this background.

Upon a consideration of all material placed before this court. I am unable to interfere with the Judgment of the Civil Appellate High Court. The three questions of law are answered in favour of the Plaintiff as 'No'. As such I proceed to dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C.,

I agree.

CHIEF JUSTICE

B. P. Aluwihare

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 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 11/2016

CHC/233/2013/MR

Western Refrigeration (Private) Limited,

7/B, Panna Lal Silk Mills Compound,

78, LBS Marg, Bhandup (West),

Mumbai-400076, Maharashtra,

India.

Plaintiff

Vs.

State Bank of India,

16, Sir Baron Jayathilake Mawatha,

Post Box No. 93, Colombo 1,

Sri Lanka.

Defendant

AND BETWEEN

State Bank of India,

16, Sir Baron Jayathilake Mawatha,

Post Box No. 93, Colombo 1,

Sri Lanka.

Defendant Appellant

Vs.

Western Refrigeration (Private) Limited,
7/B, Panna Lal Silk Mills Compound,
78, LBS Marg, Bhandup (West),
Mumbai-400076, Maharashtra,
India.

Plaintiff Respondent

AND NOW BETWEEN

Western Refrigeration (Private) Limited,
7/B, Panna Lal Silk Mills Compound,
78, LBS Marg, Bhandup (West),
Mumbai-400076, Maharashtra,
India.

Plaintiff Respondent Appellant

Vs.

State Bank of India,
16, Sir Baron Jayathilake Mawatha,
Post Box No. 93, Colombo 1,
Sri Lanka.

Defendant Petitioner Respondent

BEFORE : PRIYANTHA JAYAWARDENA, PC, J.
UPALY ABEYRATHNE, J.
NALIN PERERA, J.

COUNSEL	:	Gamini Marapana PC with U. Wickremasinghe for the Plaintiff Respondent Appellant Milinda Jayathilake for the Defendant Petitioner Respondent
WRITTEN SUBMISSION ON:		06.05.2016 (Plaintiff Respondent Appellant) 06.05.2016 (Defendant Appellant Respondents)
ARGUED ON	:	02.03.2017
DECIDED ON	:	01.06.2017

UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) instituted an action in the Commercial High Court of Colombo against the Defendant Petitioner Respondent (hereinafter referred to as the Respondent) seeking inter alia a declaration that the corporate guarantee dated 14th January, 2008, furnished by the Appellant (Plaintiff) Company to the Respondent (Defendant) is *void ab initio* and *Non-Est* (does not exist). The Respondent filed the answer denying the averments contained in the plaint and praying for a dismissal of the Appellant's action. Furthermore, the Respondent in his answer, set out a claim in reconvention and sought reliefs as prayed for in prayer (b) and (c) of the answer.

Thereafter the Respondent by way of a Petition dated 22.08.2014 has made an application under Section 416 of the Civil Procedure Code seeking inter alia an order directing the Appellant to furnish a sum of Rs. 2,600,000/= as security.

The Respondent has calculated the said amount of security on the basis that in the event the Appellant's action being dismissed and an order being made for the Respondent to pay costs on the basis as set out in paragraphs 5 and 6 of the said Petition, the costs will amount to a minimum of approximately Rs. 1,100,000/- and, in addition, incidental expenses would amount to at least a sum of Rs. 1,500,000/-.

The Appellant, in his Statement of Objections, has taken up the position that the Respondent has made the said application with the intention of oppressing and causing undue harassment and inconvenience to the Appellant and the costs prayed for by the Respondent is excessive and not reasonable considering the circumstances of the case.

The learned High Court Judge after hearing evidence of an employee of the Respondent Bank has made the order dated 10th of December, 2015, directing the Appellant to deposit a sum of RS. 1,250,000/- as security for costs in terms of Section 416 of the Civil Procedure Code, on or before 01.02.2016.

Being aggrieved by the said order, the Appellant preferred an application seeking leave to appeal to this court and leave to appeal was granted on the following questions of law set out in paragraph 9 of the Petition dated 29.12.2015;

9. 1. Has the learned High Court Judge erred in law in arbitrarily granting a sum of Rs. 1.25 Million as security for costs without considering Section 417A of the Civil Procedure Code?

2. Has the learned High Court Judge erred in law in clearly ignoring the amounts to be awarded as costs that were stipulated by the gazette marked DP1?

3. Has the learned High Court Judge clearly ignored the provisions in Section 214 of the Civil Procedure Code with regard to taxed costs?

4. Has the learned High Court Judge erred in law by awarding an excessive amount as security of costs for the Respondent?

5. Has the learned High Court Judge misconstrued the provisions of Section 416 of the Civil Procedure Code and the applicable case law?

The learned President Counsel for the Appellant submitted that the amount claimed by the Respondents as costs of litigation had been simply estimated by the representatives of the Respondent and the Respondent had not made any attempt to have the amount taxed by the Registrar of the court. He further submitted that in terms Section 416 of the Civil Procedure Code the court has the discretion to make such an order and it should not be made as a matter of course and such an order should not be made to oppress the Appellant.

Section 416 of the Civil Procedure Code reads thus;

> 416. If at the institution, or at any subsequent stage, of an action it appears the court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing outside Sri Lanka, the court may in its discretion, and either of its own

> motion or on the application of any defendants, order the plaintiff or plaintiffs, within a time to be fixed by the order, to give security for the payments of all costs incurred and likely to be incurred by any defendants.

This Section clearly stipulates that 'the court may in its discretion make order to give security for the payments of all costs incurred and likely to be incurred by the defendant. In doing so the court should not make such an order to oppress the Plaintiff.

In the case of Scott vs. Mohamadu (1914) 18 NLR 53 it was held that "An order under section 416 of the Civil Procedure Code requiring a plaintiff in an action who resides out of the jurisdiction of the Court to give security for the payment of the defendant's costs may be made on an ex-parte application. An order for security under section 416 or section 417 of the Code should not be made as a matter of course. The Court in the exercise of its discretion should be satisfied that the aid of either section is not being oppressively invoked by the party moving."

In the said case Pereira J observed that "As regards the merits of the appeal, the order of the District Judge does not appear to be what may be called a considered order, because he has given no reasons for it. Indeed, the respondent's counsel expressed his belief that orders under sections 416 and 417 of the Code were usually made by District Courts as a matter of course. If that is the practice, the sooner it is discontinued the better. The provision of section 416 or 417 may in many cases be oppressively invoked by a defendant. A discretion no doubt is given to the Court, but the exercise of it should be sound and reasonable."

In the case of *Senanayake vs. De Croos* - (1940) 41 NLR 189 the court observed that "Section 416 is general in its terms and it is desirable that in

applying it, the Court should proceed in the exercise of its discretion on definite principles. Litigants would otherwise be encouraged to make applications of this nature in the great majority of cases. In making his order the Judge appears to have been influenced by the poverty of the plaintiffs which he stresses. But the poverty of a plaintiff is a misfortune, not a fault; and he will not be compelled to give security merely because he is a pauper. That, at any rate, is a principle on which Courts in England act. *Cowell v. Taylor [31 Ch. D. 34.]*; Cook *v. Whellock [24 Q. B. D. 658.]; Rhodes v. Dawson [16 Q. B. D. 548.]*.

In the case of Alahakon Vs. Tampo (2002) 3 SLR 299 the Supreme Court observed that “Two questions arise. Did the circumstances justify the exercise of that discretion, and, if so, was the amount ordered reasonable? Learned counsel for the defendant sought to justify the order of the Court of Appeal on the basis that it was common knowledge that in a matter of this nature legal fees would exceed Rs. 10,000 for a day at the trial, and would range from Rs. 30,000 to Rs. 50,000 for each appeal. On the assumption that 15 to 20 dates of trial would be required, he submitted that Rs. 300,000 was a fair assessment. He also contended that an order under section 416 could only be made once, that thereafter the Judge was functus, and accordingly, the Judge must assess the costs likely to be incurred assuming the maximum number of dates of trial, two appeals, and even a possible retrial. This would be an oppressive use of section 416, resulting in a possible denial of the plaintiff's right to his day in court. The power conferred by section 416 is one to which section 4 of the Interpretation Ordinance (cap. 2) applies, and may be exercised, from time to time, as the interests of justice require; the Judge is not bound to estimate all likely costs in one attempt. I will assume that section 416 does extend to costs of appeal, although I doubt this. I cannot agree with learned counsel that "incurred" costs must be construed as meaning or including all costs

actually incurred. It is "security" which is required to be furnished, in order to create a fund from which an order for costs made by the court could be satisfied, if such costs are not directly paid by the plaintiff. Accordingly, "incurred" costs means that amount of costs which the court may finally award, regardless of what the party may actually spend. Counsel conceded that, having regard to the amounts prescribed in the second schedule to the Code, costs awarded by the trial court could not exceed Rs. 40,000; and that even if costs in appeal were included, a sum of Rs. 70,000 would still be on the high side. The Court of Appeal was clearly wrong in ordering a prohibitively higher amount".

On other hand in Section 417A of the Civil Procedure Code contained express prohibition against awarding of payment of security for costs a sum exceeding the aggregate of the sum stipulated in subsections (a) and (b). Section 417A reads thus;

> 417 A. The security for payment of costs fixed by order made under Section 416 or 417 shall in no case exceed the aggregate of the following:
>
> (a) The total costs that can be ordered in an action of that category, at the rate prescribed for the purpose of Section 214; and
>
> (b) Five hundred thousand rupees to meet incidental expenses, such as expenses that may be incurred in procuring the evidence and attendance of witnesses living abroad.

Section 214 0f the code reads thus;

> 214. All bills of costs, whether between party and parties, or between registered attorney and client shall be taxed by the registrar of the court in either case according to such rates as may be prescribed. If

> either party is dissatisfied with this taxation, the matter in dispute shall be referred to the court for its decision, and the decision of the court (except when it is the decision of the Court of Appeal) be liable to an appeal to the Court of Appeal.

Hence, it is crystal clear that in terms of Section 417A (b) the court has no discretion to exceed the amount prescribed therein, in making order in relation to the incidental expenses, such as expenses that may be incurred in procuring the evidence and attendance of witnesses living abroad. It should be an amount within five hundred thousand rupees. It is clear that the security for payment of costs for incidental expense should not exceed five hundred thousand rupees under any circumstances.

The next question to be dealt with is regarding the cost that can be awarded under Section 417A (a). It seems that the security for payment of costs under this subsection has to be made at the rate prescribed under Section 214 of the Code. According to Section 214 the bill of costs has to be taxed by the Registrar of the court according to the rates prescribed for the purpose. Therefore, in the present case before us, it is imperative on the part of the Respondent to initially have the Registrar of the court to tax the total costs as estimated by the Respondent in terms of Section 214 of the Code. Under the said category, the Respondent in paragraph 7 of his petition dated 22.08.2014, has sought costs of Rs. 1,100,000/-.

In paragraph 11 of the said petition the Respondent has averred that the affidavit of Mr. K. C. M. Perera, the Deputy Manager (credit) of the Respondent Bank, has filed with the said petition. The Respondent, with the said affidavit dated 13.03.2015, has produced a gazette notification extraordinary bearing No 994/7 dated 24.09.1997 containing Regulations made by the Acting

Minister in charge of the subject under Section 840 of the Civil Procedure Code read with Section 214 of the said Code marked as 'DP 1'. Said Regulations has been cited therein as 'the Civil Procedure (Costs) Regulations, 1977'.

In paragraph 13 of the said affidavit, it is averred that if the costs estimated to Rs. 1,100,000/- are taxed at the prescribed rate for Taxing Costs set out in the said regulations (marked 'DP 1') made under Section 214 of the Civil Procedure Code for an Action exceeding Rs. 2,000,000/- in value, such taxed costs will be as follows at the specified rate;

(a) For drafting of pleadings and appearance in court up to the date of trial Rs. 20,000/-,
(b) For steps in preparation for trial (including listing of witnesses and documents and summons to witnesses) Rs. 7,500/-,
(c) For Appearance at the trial, on the basis of eight dates estimated by the Respondent: Rs. 7,500/ × 8 = Rs. 60,000/-,
(d) For written submissions Rs. 7,500/-,
(e) For two incidental applications: Rs. 10,000/ × 2 = Rs. 20,000/-.

According to the Respondent's own estimate according to the said Regulations marked 'DP 1' the total amount of the security for payment of costs in terms of Section 417A (a) shall be Rs. 115,000/-. The Respondent's contention was that the aforesaid rates of taxing of costs which set out in the said Regulations made on 22nd September 1997 came to effect approximately 18 years ago, therefore it is just and equitable to enable the Respondent to recover taxed costs in line with current actual costs. I am not inclined to agree with the contention of the Respondent as the law on the matter in issue is crystal clear.

Even the learned President Counsel for the Respondent, in paragraph 74 of his written submissions tendered to the Commercial High Court dated 09.09.2015 has conceded that on account of costs which have been incurred as prayed for and likely to be incurred as provided for by Section 416 and the corresponding taxed costs for the actual costs as referred to in Section 417A (a) is Rs. 115000/- and the maximum sum which may be ordered as security for incidental expenses, in terms of Section 417A (b) is Rs. 500,000/. I regret to note that the learned High Court Judge has failed to consider the above paragraph of the written submission tendered to court by the learned President Counsel for the Respondent.

The relevant Sections 416 and 417A has been judicially interpreted by this Court. It has been held that an order for security for payment of costs should not be made as a matter of course and that one of the considerations to which the Court should direct its attention is whether claiming security for the payment of costs has been selected by the party in order to harass the opposing party or to make the recovery of costs difficult to him.

Another matter which should be most carefully considered is whether the provisions of section 416 had been oppressively invoked by the Respondent, to which the learned High Court Judge appears to have absolutely not directed his attention. I am satisfied that the learned High Court Judge has erroneously exercised his discretion and hence the said order is erred in law.

In the said circumstances, I hold that in terms of Section 416 and 417A to be read with Section 214 of the Civil Procedure Code and the Regulations marked DP 1, the Respondent is entitled to an order from court directing the Appellant to deposit a sum of Rs. 115,000/-, maximum of costs, likely to be

incurred by the Respondent and also a sum of Rs. 500,000/- to meet the incidental expenses which also is the maximum amount that could be claimed under that category. The Appellant is directed to deposit the said amount of Rs. 115,000/- and Rs. 500,000/- to the credit of the case within one month from the date of pronounce of this order in the Commercial High Court holden in Colombo. In the circumstances the order of the learned Commercial High Court Judge dated 10.12.2015 is hereby set aside and the appeal of the Appellant is allowed with costs. The Registrar of this court is directed to send the main record to the Commercial High Court holden in Colombo. Learned High Court Judge is directed to hear and conclude the matter expeditiously according to law.

Appeal allowed.

Judge of the Supreme Court

PRIYANTHA JAYAWARDENA, 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 SRI LANKA

In the matter of an application for Special leave to appeal in The Supreme Court under Article 128 of the Constitution.

Batagala Dona Dharmaratne Manike

Accused-Appellant- Appellant

SC Appeal 13/2016
Supreme Court (SPL) LA 57/2015
CA/15/2012
HC/ Kegalle 2577/2007

Vs,

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

Respondent-Respondent

Before: **Priyasath Dep PC CJ**
Anil Goonaratne J
Vijith K. Malalgoda PC J

Counsel: Dr. Ranjith Fernando for Accused -Appellant- Appellant

Shanaka Wijesinghe DSG for the Attorney General

Argued on: 29.08.2017
Decided on: 15.12.2017

Vijith K. Malalgoda PC J

Accused Appellant Appellant Batagala Dona Dharmarathne Menike (herein after referred to as the Appellant) was Indicted before the High Court of Kegalle for committing the murder of one Prasanna Rajapakse by throwing Acid at him on 7th February 2006. After trial before the High Court Judge without a Jury, the Appellant was convicted of the Indictment and was sentenced to death. The Appellant appealed against the said conviction and sentence to the Court of Appeal, and the Court of Appeal by its order dated 12.03.2015 set aside the conviction for murder and the sentence imposed by the High Court and convicted the Appellant for Culpable Homicide not amounting to murder under section 297 of the Penal Code. Based on the above conviction the Appellant was imposed a sentence of 15 years Rigorous Imprisonment with a fine of Rs. 10,000/- and a default term of six months simple imprisonment.

Being dissatisfied with the above conviction and sentence the Appellant had come before the Supreme Court by way of Special Leave to Appeal. When this matter was supported for special leave, after considering the material placed before court, this court had granted special leave on the following questions of law,

a) Did the Court of Appeal err by sentencing Accused-Appellant-Appellant to 15 years Rigorous Imprisonment when in fact, on the basis of the judgment of the Court of Appeal the culpability would have been under the 2nd limb of section 297 of the Penal Code which relates to “knowledge” carrying a maximum term of 10 years Rigorous Imprisonment
b) Did the Court of Appeal err by failing to address its mind to section 333 (5) of the CCP Act No 15 of 1979 as to whether a direction should be given considering the period of incarceration of the Accused-Appellant- Appellant after conviction till the judgment of the Court of Appeal …… which aspect had in fact being brought to the Notice of the Court of Appeal

As submitted above the Appellant was convicted of murder by the Learned High Court Judge and when the Court of Appeal decided to set aside the said conviction and sentence, the Court of

Appeal concluded that, "when there is an intention to cause bodily injury likely to cause death which is in the 2nd clause of section 293 and the injury caused is not necessarily results in death in the ordinary cause of nature such an act comes within the first part of section 297 of the Penal Code" and convicted the Appellant for Culpable Homicide not amounting to murder under section 297 of the Penal Code.

When considering the above observation made by the Court of Appeal, in convicting the Appellant for Culpable Homicide not amounting to murder under the 1st part of section 297 of the Penal Code it is clear that the Court of Appeal was mindful of the 2nd and 3rd clauses of section 293 and decided that the circumstances of the case in hand, fit in to clause 2 but not the clause 3.

However our attention was drawn to the following passage of the Court of Appeal Judgment by the Learned Counsel, who represented the Appellant,

> "In answering these questions what this court could apply is the evidence available with regard to the previous conduct and the subsequent conduct of the Accused-Appellant. The Accused-Appellant may not have come out with the whole truth in her evidence, but she has accepted the fact that she threw acid at the deceased. She too had received injuries as she had not taken any precautions for her protection. Wasantha says that the Accused-Appellant called him while he was sleeping in his house and said she threw acid at the deceased and he was lying there, go and see. Any prudent man would not accept that this series of her acts are acts performed by a person having the intention of killing another. She may have acted on cumulative provocation, still for all, it cannot be counted as sudden provocation. But the question here is that whether the Accused-Appellant had the knowledge that her act would definitely lead to the death of this person. It is evident that the Accused-Appellant who was a mother of a teenage girl, had been under outrage due to the feeling that the act of the deceased detrimanted herself respect. Therefore under those circumstances, the answer of this court to the 3rd question raised above is that the Accused-Appellant had no knowledge that her act would result definitely in the death of the deceased."

and submitted that according to the above observation by the Court of Appeal, the culpability of the Appellant cannot be under the 1st part but it has to be under the 2nd part to

section 297 of the Penal Code which refers to an act done with the knowledge that it is likely to cause death.

However I cannot agree with the above position taken up on behalf of the Appellant before this court. As observed by me the position taken up by the Court of Appeal was that the act committed by the Appellant will not come under clause 1 of section 293 but it does not mean that the said act will not come under clause 2 of section 293.

When deciding whether the said conclusion by the Court of Appeal had reached correctly, it is important to consider the circumstances under which the alleged offence took place and the extent to which the above evidence was considered by the Court of Appeal.

As revealed from the evidence placed before the trial court the Appellant was a married woman with two children and residing at Gurudeniya in Kegalle. The deceased who had an illicit affair with the Accused, when her husband, who was a mason, was away from their house, had stopped the said affair on advice of the others about eight months ago, but had visited the house of the Accused on the day in question.

According to the evidence of the mother of the deceased, her son had left the house around 8.30 pm informing that he is going to the boutique. The next important item of evidence comes from the evidence of Chandana who is a neighbor of the Appellant. According to his evidence, on the day in questioned around 9.00 pm while he was asleep at his house, he heard the Accused calling for help. When he went towards her house, the Accused told her "මම අරකට ඇසිඩ් ගැහුවා එහා පැත්තේ වැටිලා ඉන්නවා ගිහිල්ලා බලන්න"

The witness got frightened to see what is was and therefore called another neighbor who works in the police.

However later he got to know that his friend Wasantha's brother had received injuries and helped Wasantha to remove the injured to the hospital. This witness along with Wasantha and Tharanga took the injured to the hospital in a three-wheeler and on their way to the hospital the injured told them that he went to the house of the Appellant on her request but when he went she scolded her for spreading some rumours and later threw acid at him.

As further observed by this court, the dying deposition made by the deceased, was corroborated by several other witnesses including the mother of the deceased. According to the evidence of witness Gunawathy Jayalath who is the mother of the deceased, her son who went to the boutique around 8.30 pm had returned home around 9.30 pm and told her that, he went to the Accused's house since she wanted him to come there, but when he went she scolded him and threw acid at him. Witness had observed burnt injuries on the body of the deceased and steps were taken to take the injured to the hospital.

Prosecution in this case had relied on five dying depositions made by the deceased including one made to the police. As revealed above, the deceased's version with regard to the incident where he received injuries is uncontradicted and according to him, the reason for him to visit the Appellant during that night was due to her invitation, but when he went, the Appellant scolded him for spreading rumours and threw acid at him.

However as correctly analyzed in the judgment of the Court of Appeal, the Accused was not ready with the acid in order to throw at the deceased, but had taken it from the adjoining house. After throwing acid, she had gone to the neighbor, and informed him as to what happened and requested the neighbor to see what has happened to the injured. In the teeth of the said evidence, the Court of Appeal had ruled out the possibility of identifying the offence under clause 1 of section 293 of the Penal Code.

When considering whether the act committed by the Appellant comes within clause 2 or 3 of section 293 and to rule out any possibility under limbs 2, 3 or 4 of section 294 of the Penal Code, the Court of Appeal was guided by a decision by H.N.G. Fernando CJ in the case of ***Somapala V. The Queen 72 New Law Reports 121***. As observed by us, the decision in the case of Somapala V. The Queen had been correctly considered in the present case and the Court of Appeal had sighted with approval the following passages of the said judgment in their decision;

> "The 3rd limb of section 294 postulates one element which is also present in the second clause of section 293, namely, the element of the intention to cause bodily injury; but whereas the offence of culpable homicide is committed, as stated in the second clause of section 293, when there is intention to cause bodily injury likely to cause death, the offence is one of murder under 3rd limb of section 294 only when the intended injury is

> sufficient in the ordinary course of nature to cause death. In our opinion, it is this 3rd limb of section 294 which principally corresponds to the second clause of section 293; and (as is to be expected) every intention contemplated in the latter second clause is not also contemplated in the former 3rd limb. An injury which is only likely to cause death is one in respect of which there is no certainty that death will ensure, whereas the injury referred to in the 3rd limb of section 294 is one which is certain or nearly certain to result in death if there is no medical or surgical intervention. This comparison satisfies us that the object of the Legislature was to distinguish between the cases of culpable homicide defined in the second clause of section 293, and to provide in the 3rd limb of section 294 that only the graver cases (as just explained) will be cause of murder. If this was not the object of the Legislature, then there would be no substantial difference between culpable homicide as defined in the second clause of section 293 and murder as defined in the 3rd limb of section 294. It will be seen also that if the object of the 2nd limb of section 294 was to adopt more or less completely the second clause of section 293, then the 3rd limb of section 294 would be very nearly superfluous."

His Lordship has further stated in the said judgment that

> "There is evidence also of a similar design in the 4th limb of section 294; knowledge, that an act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, is knowledge, not merely of the likelihood of causing death, but of the high probability of causing death or injury likely to cause death; so that many cases which fall within the third clause of section 293 will not be under within the meaning of the 4th limb of section 294."

In the said case of Somapala V. The Queen, it is not only clause 2 of section 293 of the Penal Code, but also clause 3 of section 293 with its corresponding limb in section 294 had been considered and it is clear that the Court of Appeal was properly guided by the said decision and therefore I see no reason to interfere with the decision of the Court of Appeal when the Court of Appeal concluded,

> "That the framework of this case is the remainder when the section 294 is taken off the section 293. It is further clarified, when the facts of this case are substituted for the

> explanation 2 of section 293, since any one of the 4 limbs in section 294 are not found among those facts, what we find here is not a murder, but a culpable homicide not amounting to murder. When there is an intention to cause bodily injury likely to cause death, which is in the 2nd clause of section 293 and the injury caused is not necessarily results in death in the ordinary cause of nature such an act comes within the first part of section 297 of the Penal Code."

The second ground of Appeal of the Appellant was based on section 333 (5) of the Code of Criminal Procedure Act No 15 of 1979.

The said sub section 5 of section 333 reads as follows;

> "The time during which an Appellant, pending the determination of his appeal is admitted to bail and (subject to any directions which the Court of Appeal may give to the contrary on any appeal) the time during which the Appellant if in custody is specially treated as an Appellant under this section, shall not count as part of any term of imprisonment under his sentence; and any imprisonment of the Appellant whether it is under the sentence imposed by the High Court or Court of Appeal shall subject to the directions or order of the Court of Appeal be deemed to be resumed or to being to run, as the case requires, if the Appellant is in custody, as from the day on which the appeal is determined and, if he is not in custody, as from the day on which he is received into prison under the sentence."

When going through the above provisions, it is clear, that the time spent in custody pending the decision of the appeal from the Court of Appeal, shall not counts as part of any term of imprisonment subject to one exception to the effect that "subject to any direction which the Court of Appeal may give to the contrary on any Appeal" and as observed by me, the said direction the Court of Appeal may give is the discretion of the Court considering the circumstances under which the court decides the Appeal which is before them.

As observed by me, the appellant was convicted for the indictment and sentenced to death by the High Court. In Appeal, the Court of Appeal had correctly analyzed the evidence available in the said case and set-aside the above convictions and sentence and replaced it with a conviction for culpable homicide not amounting murder under part one of the section 297 of the Penal Code. As

further observed by me, part one of section 297 of the Penal Code had provided a sentence which may extend to twenty years and shall also liable to a fine.

When imposing the sentence, the Court of Appeal had decided to impose a jail sentence of 15 years with a fine as referred to in this judgment. When deciding the said term, the court was mindful of the circumstances under which the offence committed, the allocutus made by the Appellant and all other matters relevant and should have been considered when imposing a sentence. The Appellant had not complained against the jail term imposed but the complaint before this court, is the failure by the Court of Appeal to use its discretion under 333 (5) and make order to begin the sentence from the date of conviction by the High Court. In this regard the Appellant had submitted that she had to serve a jail term of 18 years, but as observed in sub section 5 of section 333, the period the Appellant was in remand pending the disposal of the Appeal cannot be considered as a part of the sentence.

As discussed above, the Court of Appeal when imposing the sentence, was mindful of all these aspects and had decided to impose a sentence 5 years less than the maximum sentence the court could impose for the offence the Appellant was convicted. The Court of Appeal had arrived at the said decision, giving due consideration to the matters placed before the Court of Appeal and therefore I see no reason to interfere with the sentence imposed on the Appellant.

For the reasons setout above I am not inclined to interfere with the findings of the Court of Appeal I therefore make order dismissing this Appeal.

Appeal dismissed. Conviction and Sentence affirmed.

Judge of the Supreme Court

Priyasath Dep PC CJ

I agree,

Chief Justice

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. 15/2012
SC (HCCA) LA No. 456/2011
HCCA Sabaragamuwa (Ratnapura)
Appeal No. 77/2009
D.C. Pelmadulla Case No. 20/L

Rev. Bengamuwe Dhammadinna Thero
Purana Rajamaha Viharaya
Pelmadulla.

PLAINTIFF

Vs.

1. Pallage Karunaratna Perera
   No. 79, Ratnapura Road,
   Pelmadulla.

2. D. P. Kariyawasam
   No. 79, Ratnapura Road,
   Pelmadulla.

DEFENDANTS

AND BETWEEN

1. Pallage Karunaratna Perera
   No. 79, Ratnapura Road,
   Pelmadulla.

1st DEFENDANT-APPELLANT

Vs.

Rev. Bengamuwe Dhammadinna Thero
Purana Rajamaha Viharaya
Pelmadulla.

PLAINTIFF-RESPONDENT

2. D. P. Kariyawasa
No. 79, Ratnapura Road,
Pelmadulla.

2nd DEFENDANT-RRSPONDENT

AND NOW BETWEEN

Rev. Bengamuwe Dhammadinna Thero
Purana Rajamaha Viharaya
Pelmadulla.

PLAINTIFF-RESPONDENT-APPELLANT

1. Pallage Karunaratna Perera
No. 79, Ratnapura Road,
Pelmadulla.

1st DEFENDANT-APPELLANT-RESPONDENT

2. D. P. Kariyawasa
No. 79, Ratnapura Road,
Pelmadulla.

2nd DEFENDANT-RRSPONDENT-RESPONDENT

BEFORE: S.E. Wanasundera P.C., J.
Anil Gooneratne J. &
Prasanna S. Jayawardena P.C., J

COUNSEL: B.O.P. Jayawardena with Oshada Rodrigo and
Nirosha Wickramasinghe for the Plaintiff-Respondent-Appellant

Z.A. Ameen Hussain instructed by Hussain Ahamed
For the 1st Defendant-Appellant-Respondent

ARGUED ON: 26.01.2017

WRITTEN SUBMISSIONS TENDERED ON:
05.03.2012 (by Plaintiff-Respondent-Appellant)
28.03.2012 (by 1st Defendant-Appellant-Respondent)

DECIDED ON: 14.03.2017

GOONERATNE J.

This was an action filed by the Plaintiff-Respondent-Appellant against the 1st Defendant-Appellant-Respondent and the 2nd Defendant-Respondent-Respondent for a declaration of title to the property described in the schedule to the Plaint, ejectment of the Defendants and for a declaration that the Defendant occupy the land described in the schedule under Leave and Licence of Plaintiff. It is the case of the Plaintiff that the 1st Defendant entered the disputed premises with the Leave and Licence of the predecessor of the Appellant, namely Rev. Mudduwe Pagnasekera Thero with a promise that he would not alienate possession of the property to a third party and vacant possession would be handed over on request. However at a subsequent stage

1st Defendant denied the Appellant's (Plaintiff's) title illegally and leased the property to the 2nd Defendant-Respondent on lease Bond No. 19489 of 16.10.2002. 2nd Defendant did not file answer and trial proceeded ex-parte against him. However learned District Judge held with the Plaintiff by Judgment of 07.05.2009 and granted relief prayed for in the plaint. The 1st Defendant aggrieved by the said Judgment, appealed to the Civil Appellate High Court, and that court allowed the appeal on 04.10.2011 and set aside the Judgment of the District Court.

Supreme Court on 24.01.2012 granted Leave to Appeal on the following questions of law which revolve on law of fideicommissum.

(i) Have the learned High Court Judges erred in law in concluding that the conditions imposed in the deed bearing No. 1341 (P2) do not create a fideicommissum.

(ii) Have the learned High Court Judges erred in law in not considering the provisions of the abolition of fideicommissum Act No.20 of 1972.

At the trial before the District Court the corpus was admitted and execution of lease Bond referred to above No. 19489 of 16.10.2002, was also admitted. Parties proceeded to trial on 16 issues. Plaintiff-Respondent-Appellant had adduced documentary evidence in support of his case of title and possession of the corpus. Plaintiff-Respondent-Appellant leading in evidence produced documents P1 to P12 and closed the case of the Plaintiff. The

Defendant did not lead any evidence. I also find that on perusal of the proceedings several documents produced by the Plaintiff party, had not been objected to by the Defendant. Learned District Judge has answered all issues raised by the Plaintiff, in favour of the Plaintiff.

In the submissions of learned counsel for Plaintiff-Respondent-Appellant he takes up the position that the documentary evidence led on behalf of the Appellant was neither challenged nor rebutted by the 1st Defendant-Appellant-Respondent. At the trial Appellant produced deed P1 No. 4143 dated 27.10.2000 in respect of his title. By deed P1 the Appellant acquires title to the property from his teacher Rev. Mudduwe Pagnasekera Thero. The said Rev. Pagnasekera Thero acquired title from his teacher Haldanduwana Dhammarakkhitha Thero by deed of gift No. 1341 of 25.03.1964 produced as P2 at the trial. The subject matter of this case is depicted as P3 in the survey plan No. 5759 dated 14.09.2005. Appellant also had produced documents marked P4, P5, P7 & P8 to establish his predecessor's title and possession, to the property in dispute. A document marked P6 was produced and led at the trial. This document was produced by the Appellant to establish the fact that the 1st Defendant-Appellant-Respondent entered the property in dispute as a tenant under Appellant's predecessor who was the Viharadhipathi of the relevant time.

Document P6 like the other documents were never challenged at the trial. It is also alleged by the Plaintiff-Respondent-Appellant that the 1st Defendant-Respondent in violation of lease document P6, wrongfully executed deed of lease No. 19489 of 16.10.2002 (P9) and alienated possession of the premises to the 2nd Defendant-Respondent.

Learned counsel for the 1st Defendant-Appellant-Respondent's position was that under and in terms of the deed of gift no. 1341 and marked and produced as P2, (High Court brief refer to it as P8) the title of the donor Rev. Dhammarakkitha Thero did not pass to the donee Rev. Mudduwe Pagnasekera Thero but with his demise (donor) title vested with the temple. He further argued that in view of the conditions imposed in the said deed, Rev. Mudduwe Pagnasekera Thero could not have conveyed title of the corpus to the Plaintiff by the deed No. 4143. I also note the portion dealing with this argument as contained in the written submissions of the 1st Defendant-Appellant-Respondent. It was submitted that the case is a case of declaration of title and the Appellant has failed to discharge that burden. In the chain of title pleaded by the Appellant in deed P2 (No. 1341) given by the donor Dhammarakkhitha Thero title did not pass to the donee Rev. Pagnasekera Thero. It is repeated that with the demise of Rev. Dhammarakkhitha Thero title vested in temple (Pelmadulla Purana Vihara Rajaman Viharaya), in view of the conditions

appearing in the said deed. As such Rev. Mudduwe Pagnasekera Thero could not have conveyed title by deed No. 4143 (P1) to Plaintiff.

In any event the important question of law revolve on the point, whether deed P2 No. 1341 create a fideicommissum, and the effect of the abolition of fideicommissum Act No. 20 of 1972. My attention has been drawn to the case of *Pablina Vs. Karunaratne 50 NLR 169 at pg. 170*. Held for creation of 'fideicommissum' the language used must clearly show.

(1) That the gift is not absolute to the donee.
(2) Who are the person to be benefited.
(3) When are they to benefit.

In another well-known text, *'Laws of Ceylon – Walter Perera* deals with fideicommissum. I find variety of views and several expression of this topic are considered. I note the following:

The writer states no satisfactory test appears to be available to be applied to the question whether any particular words in a particular document have the effect of creating a fideicommissum and the best course perhaps, is to give summaries of the different decision which the Supreme Court has pronounced.

At pgs. 436/437

A provision in a will that the property "shall forever remain unsold and undivided, and the profits thereof be divided among the heirs collectively" was held to amount to a fidei commissum, the word "heirs" not necessarily meaning the children of the testator. Similarly, provision that the survivor should possess the common estate as he or she pleases, and that after the death of both, whatever is left should be divided among the children, constitutes a fideicommissum as to the residue. The survivor can alienate or encumber the property, but he or she should not needlessly spend, give away, or squander the estate in prejudice of the heirs on whom it is entailed. Under the Roman-Dutch Law it must not, in any case, be diminished by more than three-fourths.

A gift of land to A comprising a provision that the land "shall be possessed and enjoyed only by A, her children and their children in perpetuity, but shall not be sold, mortgaged, or gifted to anyone," was held to create a valid fideicommissum. .....

No set form of words is necessary for creating a valid fideicommissum. Prohibition of alienation out of the family coupled with a clear indication of the person to whom the property, in the event of alienation, is to go over, constitutes a good fideicommissum without formal words. So also in the case of Vansanden v. Mack, it was held by Bonser C.J that no special words were necessary to create a fideicommissum, but effect was to be given to the intention of the testator, if it could be collected from any expressions in the instrument that he intended to create a fideicommissum. In the same case Browne A.J. was of opinion that the expression "my children and their descendants" different in nowise from "my children and my descendants"; and it was also held by the court that whatever had been the intention of the testator as to the creation of a fideicommissum, where the will had been construed by the parties as if the testator had impressed a fideicommissum on the property, and such construction had formed the basis of family arrangements for a long period, it should not be disturbed. .....

The following words in a will – "I hereby direct that and his posterity (paramparawe) should possess the following lands, & c. Except such possession, there lands or any part thereof shall not be sold, mortgaged, or made over in any other manner or seized for his debt" were held to create a fideicommissum. The word paramparawe was interpreted to mean lineal descendants of the testator. It was further held in this case that in construing a will the intention of the testator was of paramount importance, and where the intention to name a fidei commissary was expressed, or might be gathered by necessary implication from the language of the will, a fideicommissum was constituted. No particular form of words was necessary to create it, and in cases of doubt the inclination of the court was not to put any burden upon the inheritance.

Principles of Ceylon Law - Hon. H.W. Tambiah Q.C
Pg. 320.

The view taken is that in the case of a fideicommissum by deed there is a contract. The persons to whom the obligation is due are the creditors during the pendency of the condition, a principle which is contrary to the rule obtaining in the case of legacies. This concept is based on the principle that a person who makes a stipulation subject to a condition, transmits the expectation under the contract to his heirs if he dies before the fulfilment of the condition (Voet 36.1.67; Magregor 1.4.5; Mohamed Bhai v. Silva (1911) 14 N.L.R 193; Thiagarajah v. Thiagarajah (1921) 22 N.L.R 433; Balkis v. Perera (1927) 29 N.L.R 284; Ariyasathumma v. Retnasingham (1946) 47 N.L.R 180.

The learned District Judge has arrived at his conclusion based on deed P1 and P2. That P1 is a deed of transfer, and deed P2 is a deed of gift. The question of a fideicommissum was not an issue before the original court. There is no doubt that the 1st Defendant was a lessee of the Plaintiff. As such the law would not permit the 1st Defendant to contest Plaintiff's title. Material made available suggest that the 1st Defendant in violation of lease document P6

wrongfully/illegally executed deed of lease P9 and alienated possession of the premises to the 2nd Defendant. Learned District Judge has carefully considered the above position. I do not think the Judgment of the learned District Judge could be faulted in any respect as the Judgment had been delivered based on the issues raised before the original court.

The learned High Court Judge considered the position of a fideicommissum and reject the position of the Plaintiff-Respondent-Appellant and state deed P2 does not create a fideicommissum as P2 does not pass title on the demise of Dhammarakkhitha Thero and the subject property becomes sanghika property. On this aspect the authorities referred to above express the view that no satisfactory test could be utilised to decide on the fideicommissum but one has to gather such intention from the words used in the deed.

Therefore the views expressed by the learned High Court Judge cannot be considered as a test to be applied and adhered to determine whether deed P2 created a fideicommissum. P2 no doubt suggest that the gift is not absolute to the donee, and the donee would benefit by deed P2 during his life time. P2 deed executed in the year 1964, contains a prohibition on the donee to mortgage or provide P2 as security or any alienation. There are some important features in a fideicommissum, which suggest continuation of possession from one to another on the demise of the donee.

I am in agreement with the submissions of the learned counsel for Plaintiff-Respondent-Appellant that deed P2 create a fideicommissum but with the enactment of, abolition of fideicommissum and Entails Act No.20 of 1972 the fideicommissum becomes ineffective and the donee in deed P2 becomes the absolute owner of the property without any encumbrances. By the said Enactment the fideicommissum or any restraint or alienation, limit or curtailment got wiped out and the donee would get title and no other named in the deed would acquire title (Section 2 and 4 of the Act No. 20 of 1972).

Upon a consideration of all the facts and circumstances discussed above, I set aside the Judgment of the High Court and affirm the Judgment of the learned District Judge. I answer the two questions of law on which leave was granted as 'Yes'. In the creation of a fideicommissum it is not necessary to use special language or an adoption of a particular form. What is required is the manifestation of an intention to create it, and the presence of a condition or happening of an event for fideicommissum to take effect. There should be a clear indication as to who will benefit. Deed P2 fulfil all above, requirements.

The words used in deed P2 is clear. There is nothing wrong in expressing the view that the property in dispute should be considered as

pudgalika property. As such I set aside the Judgment of the High Court and allow this appeal with costs.

Appeal allowed.

JUDGE OF THE SUPREME COURT

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

I agree.

JUDGE OF THE SUPREME COURT

Prasanna S. Jayawardena P.C., J.

I agree

JUDGE OF THE SUPREME COURT

SC.Appeal No. 22/2016

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. 22/2016

SC.HCLA.No. 42/2014
HC.Appeal No. HC.ALT. 37/2012
LT.Colombo Case No. LT/32/RM/82/2009

Ceylon Bank Employees Union,
No.20, Temple Road,
Colombo-10

on behalf of

K.L.S. Mendis.

Applicant

-Vs-

Hatton National Bank, PLC,
Head Office,
Colombo-10.

Respondent

AND BETWEEN

K.L.S. Mendis,
No. 28, St. Peters Lane,
Moratuwella,
Moratuwa.

Applicant-Appellant

-Vs-

Hatton National Bank, PLC,
Head Office,
Colombo-10.

Respondent-Respondent

AND NOW BETWEEN

K.L.S. Mendis,
No. 28, St. Peters Lane,
Moratuwella,
Moratuwa.

Applicant-Appellant-Petitioner

-Vs-

Hatton National Bank, PLC,
Head Office,
Colombo-10.

Respondent-Respondent-Respondent

Before: **Sisira. J de Abrew, J**

Nalin Perera, J &

Vijith K. Malalgoda, PC, J

Counsel: Shantha Jayawardena for the Applicant-Appellant-Petitioner-Appellant.

Shammil J. Perera PC with Duthika Perera for the Respondent-Respondent-Respondent-Respondent.

Argued &
Decided on: 02.10.2017

Sisira J. de Abrew, J

Heard both counsel in support of their respective cases. In this case Ceylon Bank Employees Union filed a case in the Labour Tribunal on behalf of Mrs. K.L.S. Mendis who was an employee of the Hatton National Bank alleging that her services were unjustifiably terminated by the Bank.

Learned President of the Labour Tribunal after inquiry dismissed the said application of the Bank Union . The application was filed in the Labour Tribunal by the Ceylon Bank Employees Union on behalf of Mrs. K.L.S.Mendis.

Being aggrieved by the said order of the Labour Tribunal, Mrs. K.L.S. Mendis (hereinafter referred to as the Applicant-Appellant) appealed to the High Court. The High Court by its order dated 26.05.2014 dismissed the appeal of the Applicant-Appellant. Being aggrieved by the said judgment, the Applicant-Appellant has appealed to this Court. This Court by its order dated 03.02.2016 granted leave to appeal on the questions of law set out in paragraphs 8 (a,b,c and d) of the Petition of appeal dated 03.07.2014 which are set out below.

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 wrong in law and fact in holding that the termination of the Petitioner's service was justified ?

b) 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 wrong in law and fact in holding that the Petitioner is guilty of the charges levelled against her ?

c) 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 unjust and inequitable ?

d) Did the High Court of the Western Province (Holden in Colombo) err in law by holding that the termination of the Petitioner's service was justified ?

In addition to the said questions of law, the learned counsel appearing for the Respondent-Respondent-Respondent (hereinafter referred to as the Respondent-Respondent) raised the following question of law which is set out below. " In any event can the Petitioner maintain this application in the light of the fact that the evidence led by the Respondent with regard to the charges set out in the charge sheet have not been contradicted in the evidence before the Labour Tribunal."

The case for the Applicant-Appellant was that Mrs. K.L.S. Mendis who was a typist attached to the Hatton National Bank committed certain frauds. During the course of the investigation by the Audit Officer, said Mrs. Mendis has admitted the fraud committed by her. However she was exonerated by the domestic inquiry held by the Bank. Learned counsel for the Applicant-Appellant contends that the termination of her services was not justified especially when she was exonerated by the inquiring officer who conducted the disciplinary inquiry. However the Bank relied upon the admission signed by Mrs. Mendis which was produced as R31. The most important charge that must be considered in this case is that Mrs. Mendis being a Bank typist transferred Rs. 73,000/- from the account of one Jayasinghe to the account of Mrs. Mendis's husband (Mr. Mendis). This transaction had taken place on 15.07.2005. Later said Mrs. Mendis transferred Rs. 73,000/- from her account to Mr. Jayasinghe's account. The Bank has considered R31. In R31, Mrs. Mendis has admitted the offences committed by her. But she takes up the position that it was taken under duress. The charge No. 5 in R31 is important. She has, in R31, admitted that she transferred Rs. 73,000/- from Jayasinghe's account to her husband's account and later she transferred the said amount from her account to Jayasinghe's account. This was an admission by her. If she takes up the

position that the above matters are false and R31 was obtained under duress, she could have produced statements of accounts relating to her and her husband and disproved the above facts. But she has not produced the said documents. Therefore her allegation that the above facts are false and R31 was obtained under duress cannot be accepted. The Bank relying on the said document marked R31 terminated the services of Mrs. Mendis. The argument on behalf of the Applicant-Appellant is that Mrs. Mendis transferred Rs. 73,000/- from her account to Jayasinghe's account as there was a transaction between Jayasinghe and Mr. Mendis. But it is important to note that although learned counsel takes up the said argument, Mr. Mendis who is the husband of Mrs. Mendis did not give evidence at the inquiry to prove that there was a transaction between him and Jayasinghe.

When we consider the above matters, there is sufficient evidence to prove that she had engaged in misconduct in the Bank service. If a Bank employee commits misconduct whilst being employed in Bank service, it is not proper for the Bank to keep such a person in the bank service. The Bank has come to the conclusion that it is not proper for the Bank to keep Mrs. Mendis in the bank service and decided to dismiss her.

When we consider all the above matters, we feel that the termination of Mrs. Mendis by the bank is justified on the ground that the Bank has lost confidence. When we consider all the above matters, I feel that there are no reasons to interfere with the judgment of the learned High Court Judge.

Considering all these matters, we answer the questions of law raised by the Applicant-Appellant in the negative. The questions of law raised by the Respondent-Respondent does not arise for consideration. For the above reasons, we affirm the judgment of the High Court dated 26.05.2014 and dismiss this appeal.

Considering the facts of this case we do not make an order for costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Nalin Perera, J

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, 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 application for Leave to Appeal to the Supreme Court against Judgment dated 19/07/2013 delivered by the High Court of the Western Province (exercising civil appellate jurisdiction at Colombo) in appeal WP/HCCA/COL/39/2005(F) D.C. Colombo Case No. 22148/MR.

SC. Appeal No. 27/2014

SC. HC. CA. LA. No. 353/2013
WP/HCCA/COL/39/2005(F)
D.C. Colombo Case No. 22148/MR

IN THE DISTRICT COURT

Loku Yaddehige Ruwan Kulunuguna,

Of No. 244/1,
Jaya Mawatha,
Makola.

Plaintiff

Vs.

Scanwell Customs Brokers (Pvt.) Ltd.,
Of No. 3/2,
No. 15, Galle Face Terrace,
Colombo 03.

Defendant

IN THE HIGH COURT

Scanwell Customs Brokers (Pvt.) Ltd.,
Of No. 3/2,
No. 15, Galle Face Terrace,
Colombo 03.

Defendant-Appellant

Vs.

Loku Yaddehige Ruwan Kulunuguna,
Of No. 244/1,
Jaya Mawatha,
Makola.

Plaintiff-Respondent

AND NOW BETWEEN
IN THE SUPREME COURT

Loku Yaddehige Ruwan Kulunuguna,
Of No. 244/1,
Jaya Mawatha,
Makola.

Plaintiff-Respondent-Petitioner

Vs.

Scanwell Customs Brokers (Pvt.) Ltd.,
Of No. 3/2,
No. 15, Galle Face Terrace,
Colombo 03.

But presently at:

Scanwell Customs Brokers Pvt. Ltd.,
No. 67/1, Hudson Road,
Colombo 03.
Defendant-Appellant-Respondent

Loku Yaddehige Ruwan Kulunuguna,
Of No. 244/1,
Jaya Mawatha,
Makola.
Plaintiff-Respondent-Appellant

Vs.

Scanwell Customs Brokers (Pvt.) Ltd.,
Of No. 3/2,
No. 15, Galle Face Terrace,
Colombo 03.
Defendant-Appellant-Respondent

Before : Sisira J. De Abrew, J.
Anil Gooneratne, J. &
K. T. Chitrasiri, J.

Counsel : Sudarshani Cooray for the Plaintiff-Respondent-Appellant
Kamran Aziz with Maduka Perera for the Defendant-Appellant-Respondent.

Written Submission
tendered on: 23.5.2016 by the Plaintiff-respondent-Appellant
18.5.2016 by the Defendant-Appellant-Respondent

Argued on : 05.10.2016

Decided on : 25.1.2017

Sisira J De Abrew

This is an appeal by the Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff-Appellant) against the judgment of the Civil Appellate High Court (hereinafter referred to as the High Court) dated 19.7.2013 wherein the Judges of the said High Court set aside the judgment of the District Judge dated 2.2.2005. The learned District Judge delivered the judgment in favour of the Plaintiff-Appellant. This court by its order dated 24.2.2014, granted leave to appeal on the questions of law set out in paragraphs 13(a),(g),(h),(i) and (j) of the Petition dated 29.8.2013 which are set out below.

1. Has the High Court without consideration of the evidence led, come to findings of fact contrary to the findings of fact arrived at by the learned trial Judge, particularly in regard to whether it was the defendant who hired the lorry through its wharf clerk, or it was Dong A Lanka (Pvt) Ltd, who hired the lorry from the Plaintiff through their agent or broker who is the Defendant?
2. Has the High Court erred in failing to appreciate that the contract entered into by the Defendant required making payment to the Plaintiff at an hourly rate, and it was not for the Plaintiff but for the Defendant to have taken steps to demount the container and terminate the hire and stop the

running up of hire charges at the hourly rate?

3. Has the High Court failed to appreciate that when the alteration in the hourly rate from Rs.60 to Rs.85 was communicated by letter dated 24.9.1998, produced marked P3 (PPg65-66), the Defendant did not, either by its reply letter dated29.9.1998, produced marked P4 (p67), or otherwise object to the increase in the hourly rate but acquiesced in the increase?
4. Has the High Court erred in holding that the contract of hiring become impossible of performance by the Defendant and therefore became frustrated when the container which had been mounted on to the Plaintiff's lorry, but not the lorry itself, was detained by the Sri Lanka Customs and the Foreshore Police?
5. Did the High Court err in holding that monies had been paid to the Plaintiff by Dong. A. Lanka (Pvt) Ltd when there was no evidence to prove it?

Facts of this case may be briefly summarized as follows. Padmashantha who is the wharf clerk of the Defendant-Appellant-Respondent (hereinafter referred to as the Defendant-Respondent) on 7.5.1998 requested Niroshan who is the driver of lorry No27-1339 belongs to the Plaintiff-Appellant to transport a container which was at the Colombo Port to the premises of a company called Dong. A. Lanka (Pvt) Ltd at Waliweriya. Niroshan on behalf of the Plaintiff-Appellant agreed to the request at the rate of Rs.60 per hour. As per the said agreement Niroshan took the lorry to Colombo Port and on steps taken by the Defendant-Respondent the container was loaded on to the lorry. Thereafter said Niroshan drove the lorry from the place where the container was mounted to the lorry to the customs clearance point. The custom officers and the officers attached to the Port did not permit the container to be taken away as the custom duties and port charges had

not been paid with regard to the said container. This incident took place on 7.5.1998. As the Defendant-Respondent did not pay the said charges Niroshan had to park the lorry with the container at the Port of Colombo. Niroshan ultimately, on 30.6.2008, complained to the Foreshore Police Station against the Defendant-Respondent stating the above facts and seeking a direction on the Defendant-Respondent to pay his charges. Padmashantha who was apparently summoned by the police made a statement on 3.7.1998 to the police. The Defendant-Respondent or any other witness did not give evidence at the trial. The learned District Judge after trial entered judgment in favour of the Plaintiff-Appellant. Being aggrieved by the said judgment, the Defendant-Respondent appealed to the High Court and the High Court set aside the judgment of the learned District Judge. Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellant has appealed to this court. Learned counsel for the Defendant-Respondent tried to contend that there was no contract between the Plaintiff-Appellant and the Defendant-Respondent; that if there was any contract that was between the Plaintiff-Appellant and Dong. A. Lanka (Pvt) Ltd which is the owner of the container; and that the Defendant-Respondent was only acting as an agent of Dong. A. Lanka (Pvt) Ltd. I now advert to this contention. The Plaintiff-Appellant by letter dated 24.9.1998 marked P3, demanded Rs.159,540/- from the Manager of the Defendant-Respondent regarding the said contract. The Plaintiff-Appellant, in the said letter, whilst giving the details of charges due from the Defendant-Respondent, stated that the Defendant-Respondent, in settlement of the charges, had made two payments. One such payment was an advance of Rs.16,500/- paid until 6.7.1998 and the other payment was an advance of Rs.90,000/- paid on 6.7.1988. The Defendant-Respondent, in his letter dated 29.9.1998 marked P4, did not deny the said payments. The said evidence clearly

demonstrates that there was a contract between the Plaintiff-Appellant and the Defendant-Respondent. Learned counsel for the Defendant-Respondent drawing our attention to page 103 of the brief, tried to contend that the payment of Rs.90,000/- had been made by Dong. A. Lanka (Pvt) Ltd and not by the Defendant-Respondent. But when suggestion was made to Niroshan during the cross-examination the said amount of Rs.90,000/- was paid by Dong. A. Lanka (Pvt) Ltd, he clearly denied it. Therefore I cannot accept the said contention and reject it. When I consider all the above matters, I reject the contention that there was no contract between the Plaintiff-Appellant and the Defendant-Respondent.

Learned counsel for the Defendant-Respondent next tried to contend that the Defendant-Respondent was not liable to pay custom and Port dues as the container does not belong to the Defendant-Respondent. I now advert to this contention. The request of the Defendant-Respondent to Niroshan was to transport the container from Colombo Port to Waliweriya. When Padmashantha on behalf of the Defendant-Respondent made the above request to Noroshan, it is implied that he had cleared all the encumbrances regarding the container and would pay any charges that are due to be paid. Therefore I reject the said contention. Further it is interesting to note the following statement in the letter of the Defendant-Respondent marked P4 dated 19.9.1998. "Our company made all the arrangements with customs and a forklift was brought to commence demounting." What does it indicate? If the Defendant-Respondent did not have any interest in the container, why did it make the above arrangements? This shows that the Defendant-Respondent had undertaken to get the container released from the Port and the Customs Department. As I pointed out earlier when Padmashantha made the request to Niroshan, it is implied that he had cleared all the encumbrances regarding the container and that Niroshan could transport the

container in his lorry without any problem. Thus the Defendant-Respondent cannot take up the position that he is not responsible for the breach of contract since the custom and port dues had not been paid by Dong. A. Lanka (Pvt) Ltd. The Plaintiff-Appellant cannot be expected to bear damages due to nonpayment of custom and port charges. If the said charges were paid by the Defendant-Respondent, Niroshan the driver of the lorry could have, without any problem, taken the container to Waliweriya. Under these circumstances, it is not possible for learned counsel for the Defendant-Respondent to argue that the Plaintiff-Appellant could have unloaded the container and gone. It has to be noted here that the Defendant-Respondent in his letter marked P4 admitted that a forklift was brought to commence demounting. This shows that the driver on his own could not have demounted the container and a forklift was necessary for this purpose. Further one should not forget that the contract was to transport the container from Colombo Port to Waliweriya and that when the Custom and Port Authority officers, at the custom clearance point, did not permit the lorry with the container to go out, the journey to go to Waliweriya had already begun. The lorry was stopped at the Customs Clearance Point as the custom and port charges had not been paid. When I consider all the above matters, I reject the above contention of learned counsel for the Defendant-Respondent and I further hold that the container could not be taken out from the premises of Colombo Port due to the fault of the Defendant-Respondent.

Learned counsel next contended that the contract could not be performed as it was frustrated. To support his contention he relied on the judgment in the case of Taylor Vs Caldwell? The decision in the Taylor Vs Caldwell is found in the book titled ‘The Law of Contracts by CG Weeramanthry’ Vol. 11 page 789’ which reads as follows:

"In Taylor Vs Caldwell the defendants had agreed to give the plaintiff the use of a music hall for the purpose of a concert. Before the day of performance the music hall was destroyed by fire and Taylor sued Caldwell for damages for breach of the contract which Caldwell, through no fault of his own, was no longer able to perform. It was held that the contract was not held to be construed as an absolute contract but subject to an implied condition that impossibility of performance resulting from destruction of the subject matter terminated the obligation to perform, where the destruction did not proceed from any fault on the part of the contractor."

In the present case the container or the lorry was not destroyed. When I consider the facts of this case, I hold that the contract was not frustrated and that the judicial decision in the above case has no application to the present case.

Learned counsel for the Defendant-Respondent relied on the following passage of the book titled 'The Law of Contracts by CG Weeramanthry' Vol. 11 page 787 "…the civil law reads into a contract an implied condition that performance will be expected only if it is possible.." In the present case, was the performance of the contract impossible? This question will have to be answered in the negative because if the custom and port charges were paid by the Defendant-Respondent, the Plaintiff-Appellant would have transported the container from Colombo Port to Waliweriya. I therefore hold that the above legal principle does not apply to the present case. In my view, learned High Court Judges have fallen into grave error when they decided that the contract had been frustrated.

Learned counsel for the Defendant-Respondent however contended that if at all the contract between the Defendant-Respondent and the Plaintiff-Appellant

was to pay 60 per hour. But the Plaintiff-Appellant has charged Rs.85/- per hour with effect from 12.6.1988. Therefore the Defendant-Respondent is not liable to pay Rs.85/- per hour. I now advert to this contention. It has to be noted here that the contract between the parties was to transport to the container from Colombo Port to Waliweriya on 7.5.1998. If the Defendant-Respondent had paid necessary custom and port charges, the contract would have been performed on the same day. As I have pointed out earlier, the contract could not be performed due to the fault of the Defendant-Respondent. When the Plaintiff-Appellant quoted charges, the said charges were the charges prevailing at that time. No one can expect the same charges to be quoted one month after 7.5.1988. Therefore it is difficult to contend that enhancement of charges one month after the original quotation is unreasonable. In fact the Defendant-Respondent did not give evidence challenging the above enhancement of charges. When I consider the above matters, I am unable to agree with the above contention of learned counsel for the Defendant-Respondent.

Learned counsel for the Defendant-Respondent next contended that the Plaintiff-Appellant had failed to mitigate the loss that occurred as a result of the breach of the contract. He contended that the driver of the Plaintiff-Appellant could have offloaded the container and come from Colombo Port. But it must be remembered here that what was mounted to the lorry was a container. As I have pointed out earlier, the Defendant-Respondent had admitted that a forklift was necessary to demount the container from the lorry. This shows that he had impliedly admitted that a forklift was necessary to demount the container from the lorry. The above facts demonstrate that the driver of the lorry just could not offload the container. If he offloaded the container on his own, the goods in the container would have got damaged. From the above facts it can be safely

concluded that the contract could not be performed due to the fault of the Defendant-Respondent. When I consider the aforementioned matters, I cannot agree with the contention of learned counsel for the Defendant-Respondent.

For the above reasons, I hold that the learned High Court Judges have fallen into grave error when they set aside the judgment of the learned District Judge. In my view the learned District Judge was correct when he decided the case in favour of the Plaintiff-Appellant.

The first question of law is as follows.

> Has the High Court without consideration of the evidence led, come to findings of fact contrary to the findings of fact arrived at by the learned trial Judge, particularly in regard to whether it was the defendant who hired the lorry through its wharf clerk, or it was Dong A Lanka (Pvt) Ltd, who hired the lorry from the Plaintiff through their agent or broker who is the Defendant? I answer this question as follows: It was the defendant who hired the lorry through its wharf clerk.

The 2nd question of law is as follows.

> Has the High Court erred in failing to appreciate that the contract entered into by the Defendant required making payment to the Plaintiff at an hourly rate, and it was not for the Plaintiff but for the Defendant to have taken steps to demount the container and terminate the hire and stop the running up of hire charges at the hourly rate? I answer this question as follows: The contract entered into between the parties required making payment to the Plaintiff at an hourly rate. It was for the Defendant to have taken steps to demount the container.

The 3rd and 5th questions of law are answered in the affirmative.

I answer the 4th question of law as follows. The contract was not frustrated.

For the above reasons, I set aside the judgment of the High Court and affirm the judgment of the learned District Judge. I allow the appeal. The Plaintiff-Appellant is entitled to costs of all three courts

Appeal allowed.

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 No. 30/2015

S.C (Spl) LA No. 113/2014
Court of Appeal No. CA 132/99 (F)
D.C Homagama Case No.3291/CD

In the matter of an Application for Special Leave to Appeal made in terms of Article 128 of the Constitution of Sri Lanka and the Supreme Court Rules thereof.

Talagalage Punchi Singho
No. 251, Seelammala Mawatha,
Oruwala South,
Athurugiriya.

PLAINTIFF

Vs.

Ratnayake Mudiyanselage Bandara Menike
No. 64/C, Vidyala Mawatha,
Oruwala.

DEFENDANT

AND

Ratnayake Mudiyanselage Bandara Menike
No. 64/C, Vidyala Mawatha,
Oruwala.

DEFENDANT-APPELLANT

Vs.

Talagalage Punchi Singho
No. 251, Seelammala Mawatha,
Oruwala South,
Athurugiriya.
(Deceased)

PLAINTIFF-RESPONDENT

Thalagalage Wijeratna
No. 251, Seelammala Mawatha,
Oruwala South,
Athurugiriya.

SUBSTITUTED-PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Thalagalage Wijeratna
No. 251, Seelammala Mawatha,
Oruwala South,
Athurugiriya.

SUBSTITUTED-PLAINTIFF-RESPONDENT-APPELLANT

Vs.

Ratnayake Mudiyanselage Bandara Menike
No. 64/C, Vidyala Mawathqa,
Oruwala.

DEFENDANT-APPELLANT-RESPONDENT

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

COUNSEL: Chathura Galhena With Ms.Manoja Gunawardana
for the Substituted Plaintiff-Respondent-Appellant

Pulasthi Hewamanne with Ms. C. Hettiarachchi
for the Defendant-Appellant-Respondent
on behalf of the Legal Aid Commission.

ARGUED ON: 02.10.2017

WRITTEN SUBMISSION OF THE DEFENDANT-APPELLANT-RESPONDENT FILED ON:

24.07.2015

WRITTEN SUBMISSIONS OF THE SUBSTITUTED-PLAINTIFF-RESPONDENT-RESPONDENT FILED ON:

22.01.2016

DECIDED ON: 23.10.2017

GOONERATNE J.

This was an action filed in the District Court of Homagama pertaining to a case of revocation of a deed of gift by the Plaintiff-Respondent-Appellant, (now deceased) on the ground of ingratitude of the Defendant-Appellant-Respondent. The facts of this case reveal that the District Court held in favour of the Plaintiff-Respondent-Appellant but in appeal to the Court of Appeal the Appellate Court set aside the Judgment of the District Court and dismissed the action of the Plaintiff-Respondent-Appellant. The main issue as

stated in the Judgment of the Court of Appeal is on the question of credibility of the Plaintiff-Respondent-Appellant's evidence that transpired at the trial. However the Supreme Court granted Leave to Appeal on questions of law set out in paragraph 16 (i and iii) of the petition dated 19.07.2014. However the written submissions of the Plaintiff–Respondent-Appellant refer to three questions of law. In any event I would refer to all three questions which reads as follows:

(i) Did the court of Appeal misdirect itself on the concept of standard of proof required to establish gross ingratitude?

(ii) Did the Court of Appeal misdirect itself in analysing the evidence led and documents marked at the trial by the deceased Plaintiff?

(iii) Did the Court of Appeal err in entering the Judgment without dealing with the merits of the Judgment of the District Court.

Plaintiff-Respondent-Appellant was the owner of the land and premises described in the schedule to the plaint. Plaintiff-Respondent-Appellant became the owner by deed P1 dated 18.08.54 from which he derived ownership from his mother. The Defendant-Appellant-Respondent was a lessee of the Plaintiff-Respondent-Appellant from the year 1992. The Defendant-Appellant-Respondent had taken care of the Plaintiff-Respondent-Appellant during the period she was a lessee and looked after him when he was sick and promised to do so even in the future. On that basis the Plaintiff-Respondent-Appellant gifted

an undivided share of 10 perches of the land in dispute inclusive of the house situated therein to the Defendant-Appellant-Respondent by deed P2 of 22.05.1995. However subsequently the Defendant-Appellant-Respondent breached the above undertaking within a few days after the execution of deed P2, and as such Plaintiff-Respondent-Appellant filed action on the basis of gross ingratitude by the Defendant-Appellant-Respondent, to have the deed of gift to her revoked.

Deed of Gift P2 though irrevocable could be revoked for gross ingratitude under Roman Dutch Law gifts inter vivos are as a rule irrevocable, Voet 39.5.4 except for such cases as ingratitude. 17 NLR 507. The question of ingratitude is a question of fact. It could vary with the circumstances of each case. I do agree with the views of the learned Judge of the Court of Appeal that gratitude is a form of mind which has to be inferred from the donee's conduct, and such an attitude of mind will be indicated either by a single act or a series of acts.

In a case of this nature bare assertions of being assaulted by a person alone will not suffice. Gross ingratitude should be proved with certainty and with sound evidence. If a party is able to prove gross ingratitude would deprive a person of a property right. In the case in hand the oral testimony of

the Plaintiff-Respondent-Appellant will diminish in its value due to the statement made to the police by the Plaintiff.

In the statements marked and produced in court as P3 does not implicate the Defendant-Appellant-Respondent. It is one Piyasena who had hit the Plaintiff (Defendant's husband). I agree with the views expressed on this statement by the Court of Appeal. If the statement contradict or is an omission to the oral testimony it is unsafe for a court to act upon it. Especially when gross ingratitude has to be established. The second complaint to the police by the Plaintiff-Respondent-Appellant dated 26.07.1995, there is no mention of the Defendant-Appellant-Respondent. The other complaint to the police is produced marked P4 dated 23.06.1997. This statement is a belated statement made to the police, subsequent to filing action by the Plaintiff-Respondent-Appellant. No court will consider its application and consequences since value of such statement will greatly diminish due to delay and that being an after thought. This statement no doubt implicates the Defendant-Appellant-Respondent. That is only a wilful attempt on the part of the Plaintiff-Respondent-Appellant to harm the Defendant and project Defendants ingratitude. It cannot be relied upon in the circumstances of the case in hand. Evidence Ordinance recognise the rule of impeaching credit of witness by other

evidence. It could be done by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

In this background it is also relevant to consider the evidence of the Defendant-Respondent-Appellant. It is Defendant's evidence that she was a tenant of Plaintiff from 1987. Defendant-Respondent-Appellant had helped the Plaintiff-Appellant-Respondent and as such he gifted 10 perches of the land with the house to her. Defendant testify that she expended her money and built a well, toilet and a room for Plaintiff-Appellant-Respondent (proceeding of 25.09.1998). Defendant-Respondent-Appellant emphasis that she never ill-treated the Plaintiff. It is the explanation of the Defendant that Plaintiff sought to revoke deed P2 as she married the Plaintiff's cousin. As regards the injuries of Plaintiff the Defendant testified that the Plaintiff very frequently travelled about at night by bicycle. Defendant-Respondent-Appellant also states in evidence that she will continue to look after the Plaintiff-Appellant-Respondent.

Slight acts of ingratitude are insufficient to revoke a deed of gift 1992 (2) SLR 180. I have to state that a Court of law has to consider the totality of evidence led and arrive at a conclusion. It is not correct to give your mind only to certain items of evidence. The material placed before court does not make it possible to interfere with the Court of Appeal Judgement. Therefore I affirm the Judgment of the Court of Appeal, and dismiss this appeal without costs. The

questions of law are answered in the negative in favour of the Defendant-Appellant-Respondent.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

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

I agree.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C., J.

I agree.

JUDGE OF THE SUPREEM COURT

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

SC. Appeal 34/2015

SC (SPL) LA Application No. 59/2014
CA Appeal No. CA 33/2008
HC Hambantota Case No. 363/2006

In an Application for Special Leave to Appeal under Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as Amended read with Articles 128 & 154P 3(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Kattadige Amarasena

ACCUSED

AND BETWEEN

Kattadige Amarasena

ACCUSED-APPELLANT

Vs.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Kattadige Amarasena

ACCUSED-APPELLANT-APPELLANT

Vs.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT-RESPONDENT-RESPONDENT

BEFORE: Priyasath Dep P.C., C.J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: R. Arsecularatne P.C. for Accused-Appellant-Petitioner
Warantha Bandaa P.C., A.S.G.
for Complainant-Respondent-Respondent

ARGUED ON: 04.10.2017

DECIDED ON: 13.12.2017

GOONERATNE J.

In this case the Accused is charged for having murdered his wife on or about 20.11.2005 in very close proximity to the Tangalle Police Station. Accused-Appellant is an Attorney-at-Law. In the course of the trial before the High Court the Accused-Appellant had pleaded the mitigatory plea of grave and sudden provocation, but the State Counsel refused to accept such a plea and the trial proceeded and ultimately the accused was found guilty of murder and sentenced to death. The accused being aggrieved of the conviction and sentence appealed to the Court of Appeal. However as referred to in the submissions of

the State, in the Court of Appeal learned counsel for the accused confined the case to the availability of a mitigating plea of continuing cumulative provocation. The Court of Appeal rejected the plea and affirmed the conviction and sentence.

Supreme Court on 19.02.2015 granted Special Leave to Appeal on questions (a) and (b) set out in paragraph 25 of the petition.

It reads thus:

(a) Whether their Lordships of the Court of Appeal erred in law by holding that the entertainment of a murderous intention disentitles the Petitioner to the mitigatory plea of grave and sudden provocation contained in exception 1 of Section 294 of the Penal Code.

(b) Whether their Lordships of the Court of Appeal erred in law by holding the fact that the Petitioner after being provoked by the words "උඹ කොහොම හරි හිරේට යවලා පස්ස බලන්නේ" ("I will only look behind after sending you to jail") the Petitioner going to purchase a knife disentitles him to the mitigatory plea of grave and sudden provocation set out in exception one (1) of Section 294 of the Penal Code.

Learned President's Counsel for the accused raised another question of law, as follows:

"Whether the accused was entitled to the plea of cumulative provocation having regard to the facts that preceded the incident.

The learned President's Counsel in his submissions states there is no disagreement between the prosecution and the defence that the accused

caused the injuries to his deceased wife on the day of the incident on the evidence of the eye witnesses.

The facts of this case, as gathered from the available material are as follows. The Appellant was an Attorney-at-Law practising in Walasmulla Courts. The Appellant married the deceased in the year 2001 and had a child by that marriage. They resided at the parental house till about May 2003 and thereafter the Appellant purchased a land and built a two storied house at Middeniya in the name of his wife. There is evidence to the effect that a person called Upul Shantha Wijesinghe alia 'Sudha' was employed as a driver by the Appellant. The said Wijesinghe was a relative of the deceased. It is alleged that the deceased had an affair with the said driver. By 2004 the Appellant gave up his practice as a lawyer and got employed at an estate in Hiniduma as Assistant Superintendent, leaving his wife and children at Hallmilla, Ketiya, in the parental house of the deceased.

In or about May 2005 the Appellant had returned from the workplace to find that the deceased wife and child was missing from the parental house and the brother of the deceased had made a complaint to the Middeniya Police. Appellant was informed that his wife had gone to Urubokka and was living with the said driver and continued the illicit affair with him. Later

on the deceased wife returned to the parental house but there were altercations between the two and continued to live at the parental house.

I will at this point of the Judgment get on to the incident. The learned President's Counsel for the Accused-Appellant states in the written submissions that there is no disagreement between the prosecution and the defence, as regards the injuries caused to the deceased.

In the dock statement the accused inter alia state that the deceased informed over the telephone that a complaint would be lodged in the Middeniya Police regarding the transfer of the house. Accused pleaded with the deceased that he be left alone without harassing him. In order to give more clarity to this I would incorporate the words stated therein as follows:

ඉන්පසුව මම 2005.11.20 වන දින ඉරිදා ඇය දුරකතන ඇමතුමක් ලාබා දුන්නා ඊට පෙර දින කීහිපයකට මත්තෙන් ඇයට ඉරිදා දිනය වන විට මිද්දෙනිය පොලිසියේ පැමිණිල්ලක් දානවා ගේ පවරා ගැණිම සම්බන්ධයෙන් කියලා. ඉන්පසු මම ඇයට දැනුම් දුන්නා මට කරදර කරන්න එපා පාඩුවේ මට ඉන්න දෙන්න නියලා. ඇය ඒ කිසිම දෙයක් අහන පාටක් පේන්න තිබුනේ නැහැ.

Thereafter the accused borrowed a motor cycle from a friend and proceeded to the Middeniya police station. The police informed the accused that she did not come to the Middeniya police but advised him that it is possible that she had gone to the Tangalle police. Accused left for Tangalle and at the Tangalle police he was told that a complaint would be lodged. As such the

accused pleaded with the deceased not to make any complaint and that he would give anything to her provided the accused is left alone. Deceased replied "උඹ කොහොම හරී හිරේට යවලා පස්ස බලන්නේ" (as stated in the dock statement).

It is also necessary to consider material evidence of the few witnesses who gave evidence at the trial.

Witness Jayawickrema who runs a grocery shop stated that the accused borrowed a motor cycle to go to the Middeniya Police Station.

Nimal Karunaratne Officer-In-Charge of the Middeniya Police states maintenance case filed by the deceased was pending. There was a problem regarding the deceased's house, and such house was to be transferred to some other person. Witness advised the deceased to file a civil suit. On the day of the incident the deceased met him to lodge a complaint regarding a land dispute. Witness advised the deceased to complain to the Tangalle Police relating to a fraudulent deed.

Witness Samarasena a vendor of iron goods states accused went pass the shop and turned the motor cycle towards the shop. Thereafter the accused purchased a knife. Accused bargained with the witness to reduce the price. The knife was priced at Rs. 275/- but sold to the accused for Rs. 250/-. Witness Priyantha a three wheeler driver who parks the three wheeler at a park

near the Tangalle hospital. He heard the cries of a woman shouting "මෙන්න මිනී මරනවා". Then the witness went towards the scene of the crime. He saw a woman walking in front of a man and the man held her and turned her, and the man cut her with a knife near the ear. The woman fell and the man dealt two further blows with the knife. The woman was carrying a baby and an umbrella. This witness identified the accused at an identification parade.

Inspector Mahagedera of the Tangalle Police states the deceased came to make a complaint to the Fraud Bureau against the accused. Sub Inspector Dayaratne and WPC Kanthi stated that they heard some one making cries that "මම එකී මැරුවා එල්ලුම් ගස් හතේ ගියත් කමක් නැහැ. W.P.C Kanthi states she saw the accused coming into the police station with hands raised.

I observe that the above utterances were made by the accused which are spontaneous and contemporaneous statements. At that point of making the utterances accused was not a suspect, and statements made in the air. Res Gestae – Sec 6 of the Evidence Ordinance. Facts, which, though not in issue, are so connected with a fact in issue as to form part of same transection, are relevant, closeness of the connection between the fact sought to be proved and the fact in issue 42 NLR 244; R Vs. Iyasamy Wijeratnam (1941) 22 CLW 1). This is a group of facts so connected together, as to be referred to by a single legal name, as a 'crime' (1964) 67 NLR 8; (1931) 34 NLR 19. The utterances are

admissions by the accused and made immediately after the occurrence R. Vs. Herashamy (1946) 47 NLR 83;

Our Penal Code more particularly Sec 294 Exception (1) of the Code Contemplates (a) offender deprived of self control (b) By grave and sudden provocation, and cause the death of the person who provoked the offender. Penal Code does not refer to cumulative provocation. But our courts seems to have dealt with the question of 'cumulative provocation in some decided cases. One such case is Premalal Vs. A.G. This could be look at as a development in law in that area. But it is also possible to argue otherwise. The question is whether such a plea goes beyond the provisions of the Penal Code. Whatever it may be in the oral and written submissions on behalf of the Accused-Appellant-Appellant following have been urged on the footing that the Court of Appeal erred in law by failing to consider the following facts.

(a) The fact that the deceased was having an illicit love affair with Upul Susantha Wijesinghe alias Suddha
(b) The deceased on or about 12.05.2005 eloped with the said Upul Susantha Wijesinghe alis Suddha and her brother, Mahinda Kithsiri Ekanayake made a complaint to the Middeniay Police in that regard on 18.05.2005 (V1) and the Petitioner too made a complaint to the Middeniya Police in that regard on 20.05.2005 (V2).
(c) The fact that the deceased and the Petitioner were subjected to a binding over order to observe peace by the Police, under Sec. 81 of the Criminal Procedure Code, in or about May 2005.

(d) The fact that the deceased and her paramour, the said Upul Susantha Wijesinghe alia Suddha were parties to the abduction of the Petitioner on or about 20.07.2005 in respect of which incident, Case No. MC Walasmulla 96961 was pending at the time of the instant incident on 20.11.2005.

(e) The fact that there was a maintenance case pending in the Magistrate Court of Walasmulla, filed by the deceased against the Petitioner in which case the Petitioner challenged the paternity of the deceased's child.

(f) The fact that on 28.10.2005, the Petitioner had made a complaint that there are death threats against him from the deceased and the said Upul Susantha Wijesinghe (V3) and

(g) The fact that on 11.09.2005, the Petitioner has made a complaint against the deceased and Upul Susantha Wijesinghe for the theft of the electricity meter, a cut out and the water meter in his Middeniya house (V4).

The above suggest the ill-feeling between the accused and the deceased. No doubt the above items at (a) to (g) spread over a period of time. In normal circumstances between estranged married couples such allegations may be prevalent. The question is whether (a) to (g) above could be considered in a plea of cumulative provocation, to bring the case within culpable homicide not amounting to murder? In A.G Vs. John Perera 54 NLR 265 vividly describe what is required in a case of this nature.

Where the mitigatory plea of grave and sudden provocation is taken under Exception 1 to Section 294 of the Penal Code, the accused must show that the kind of provocation

actually given was the kind of provocation which the jury as reasonable men would regard as sufficiently grave to mitigate the actual killing of the deceased person.

"The words 'grave' and 'sudden' are both of them relative terms and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation; otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon".

The question is whether words uttered by the deceased (as in the dock statement) provoked the accused gravely and suddenly and the accused lost his self-control. Can a reasonable man in the same class likely to lose his self-control as a result of provocation? No other witness heard what was uttered by the deceased. "උඹ කොහොම හරි හිරේට යවලා පස්ස බලන්නේ". It is apparent from the dock statement that he went to the police initially to prevent the deceased making a statement against him regarding a forgery of a deed, which was the main issue, in this murder case. The dock statement of the accused explains the position very clearly. Accused stated "මම උත්සහ කලේ මාව අපහසු තාවයට පත්කරන එක මාව විනාශ කරන එක වලක්වා ගන්න". Notwithstanding (a) to (g) above on which the accused relies to establish his plea, by the above statement of the deceased as contained in the dock statement, it could be assumed that accused tried his best to prevent the deceased wife making a statement against the accused based on a forgery of a deed which deed in fact was in the name of the deceased's wife. This could well destroy the accused

professional career, as an Attorney-at-Law. Even criminal proceedings could be initiated.

I agree with the learned Additional Solicitor General that it is the point at which the accused premeditated the murder of the accused. I also agree that the complainant of forgery is extraneous to the incidents that arose consequent to the illicit affair. As such (a) to (g) above explains only the ill-feelings between the accused and the deceased wife. It is somewhat a prestige battle at a very low level between husband and wife. The illicit affair between the accused driver and the deceased wife was the earliest stage of this episode. Over the years it matured and a fact well known to others in the village, including the police. The incidents in (a) to (g) are separate to the act of alleged forgery. The murderous intention was entertained by the accused only at the point of the deceased wife making a complaint to the police and the above utterance by the deceased. Further if one were to argue from the point of view of the accused party, I wish to observe that from the time the deceased wife made utterances in the police station which is somewhat of a threat to the accused he would have been easily provoked with such utterance of the deceased wife and then and there or spontaneously could have reached and attacked her. In the case in hand it was not so. Assuming the accused was provoked, but the stabbing took place

very much later. It was more than sufficient time to cool down. As such the plea of cumulative provocation was in any event not available to the accused.

I note that the accused prepared himself to commit the act of murder as he went to the Tangalle town to purchase a knife for which he bargained for the price, with the vendor. By that time the murderous intention was entertained by the accused, and consequently attacked the deceased wife with a deadly weapon (knife).

A formidable deadly weapon which was a knife was used by the accused. Use of such a weapon and having cut the deceased near the ear itself demonstrate the accused murderous intention. Deceased wife fell with the first blow with the knife and having fallen further blows were dealt by the deceased. This would further fortify the murderous intention of the accused. In this regard I refer to the text "*The Law of Crimes" 18th Ed by Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore Pg. 724, Chapter XVI*

> 'Imminently dangerous.' - Where it is clear that the act by which the death is caused is so imminently dangerous that the accused must be presumed to have known that it would, in all probability, cause death or such bodily injury as is likely to cause death, then unless he can meet this presumption, his offence will be culpable homicide, and it would be murder unless he can bring it under one of the exceptions? Thus a man who strikes at the back of another a violent blow with a formidable weapon must be taken to know that he is doing an act imminently dangerous to the life of the person at whom he strikes and that a probable result of his act will be to cause that person's death. Similarly, if a man strikes another in the throat with a knife he must have known that the blow is so imminently dangerous that it must in all probability cause death

and the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

Can the accused rely on the plea of grave and sudden provocation and the plea of cumulative provocation? Was he deprived of his self-control. I would refer to the above text which lay down certain guide lines.

At pg. 272..

> The test to see whether the accused acted under grave and sudden provocation is whether the provocation given was in the circumstances of the case likely to cause a normal reasonable man to loose control of himself to the extent of inflicting the injury or injuries that he did inflict. In *Mancini v. Director of Public Prosecutions* Viscount Simon laid down – "It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death ... The test to be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to make into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter." In another case Lord Simon said: "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm is negatived. Consequently, where the provocation inspires an actual intention to kill, or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very

special exception has been rocognised viz. the actual finding of a spouse, in the act of adultery."

In all the facts and circumstances of the case in hand it is not possible to conclude that the accused was provoked and thereby caused by a sudden and temporary loss of self control. Mere abusive words cannot amount to grave and sudden provocation. In the context of the case in hand the provocation was not sufficient to deprive a reasonable man of his self control. There was no immediate impulse of provocation. Murderous intention would be further fortified by the accused purchasing a knife. No reasonable man would do so, and it was done according to a plan to murder the deceased wife and the accused entertained a murderous intention, and committed murder. There is no justification to bring the case within exception (1) of Section 294 of the Penal Code. Questions of law are answered in the negative. Therefor both Judgements of the High Court and Court of Appeal are affirmed. This appeal is dismissed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep. P.C., 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 in terms of Sections 5 and 6 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 to be read with Chapter LVIII of the Civil Procedure Code.

SC/ CHC/ 35/2009

HC/ Civil/186/2006 (1)

W. A. H. Weerasinghe,
"Dambuwa Walawwa",
Radawana Road,
Yakkala.

Plaintiff

Vs

Peoples Bank,
No 75, Sir Chittamplam A. Gardiner Mawatha,
Colombo 2.

AND NOW BETWEEN

Peoples Bank,
No 75, Sir Chittamplam A. Gardiner Mawatha,
Colombo 2.

Defendant Appellant

Vs.

W. A. H. Weerasinghe,
"Dambuwa Walawwa",
Radawana Road, Yakkala.

Plaintiff Respondent

BEFORE	:	SISIRA J. DE ABREW, J. UPALY ABEYRATHNE, J. K. T. CHITRASIRI, J.
COUNSEL	:	S.A. Parathalingam PC with Kushan De Alwis PC, and Kawshalya Nawaratne for the Defendant Appellant M. H. M. Morais for the Plaintiff Respondent
WRITTEN SUBMISSION ON:		03.10.2012 (Defendant Appellant) 13.08.2012 (Plaintiff Respondent)
ARGUED ON	:	18.01.2017
DECIDED ON	:	07.04.2017

UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted the action against the Defendant Appellant (hereinafter referred to as the Appellant) in the District Court of Gampaha seeking a judgment directing the Appellant bank to credit a sum of Rs. 17.5 million together with the interest thereon to the Respondent's joint savings account at the Appellant Bank's,

Gampaha Branch. As averred in the plaint the facts relevant to the case can be briefly summarised as follows;

On 06.11.1998 the Respondent and a person by the name D. M. Peiris had opened a joint savings account bearing No 00262071327831 at the Gampaha branch of the Appellant's Bank by depositing a sum of Rs. 54,000,000/- (Fifty-Four Million). Thereafter, on 16.11.1998 and 09.12.1998, the Respondent together with the said D. M. Peiris had withdrawn the sums of Rs. 5,000,000/- and Rs. 7,500,000/- from the said joint account respectively. Said D. M. Peiris had died on 30.11.2000.

The Respondent specifically averred that excluding the said two withdrawal of money from the said joint savings account, said Peiris, prior to his death, had not withdrawn any money from the said bank account. On 07.01.1999, the Respondent was informed by one H. S. Perera who was an employee of the Gampaha branch that he had received a letter from said D. M. Peiris requesting to withdraw a sum of Rs. 20,000,000/-. Consequent to the said information, the Respondent had met immediately the Manager of the Gampaha branch and he had been informed that, said Peiris, by his letter dated 15.11.1998, had requested the Gampaha branch to transfer a sum of Rs. 17,500,000/- from the said joint savings account to an account opened at the Headquarters' branch of the Appellant Bank.

The Respondent has averred that said D. M. Peiris, prior to his death, had not opened an account at the Headquarters' branch of the Appellant bank and said Peiris by a letter dated 08.01.1999 had informed the said facts to the Manager of the Gampaha branch. He has further averred that the senior manager of the Headquarters branch by a letter dated 26.02.1999 and also the Regional Head Office by a letter dated 28.02.2001 had informed the Respondent that his

complaint is being investigated and the Respondent would be informed of the outcome of the said investigation.

On 13.01.1999, the Respondent had lodged a complaint at the Criminal Investigation Department (CID) and the CID had instituted the action bearing No. 54871/B in the Magistrate's Court of Gampaha. On 14.07 1999, the learned Magistrate had directed the Examiner of Questioned Documents (EQD) to examine the signature of said D. M. Peiris on the cheques and documentation pertaining to this matter and also a similar incident of withdrawal of money from an account held by said Peiris in Hong Kong and Shanghai Banking Corporation (HSBC) and to submit a report to the court. According to the report of the EQD dated 30.11.1999 the signatures on the letters dates 15.11.1998 and 07.01.1999 differed to that of said Peiris's signature.

The Respondent in their pleadings has averred that the procedure followed by Gampaha branch of Appellant's bank in transferring a sum of Rs. 17.5 million from the joint account to an account claimed to be opened by said Peiris at Headquarters branch, had been negligent, unsatisfactory and against the banking practice and principles.

The Respondent has further averred that the name of the said D. M. Peiris was not in the pass book of the said account claimed to be opened by said Peiris at the Headquarters branch of the Appellant's bank and said Peiris had never disclosed the Respondent as to who the partner of the said joint saving account was or about an account opened at the Headquarters branch.

The case proceeded to trial on 25 issues. During the pendency of the trial before the District Court of Gampaha objections had been raised on the jurisdiction of the District Court to hear and conclude the case and upon an appeal

from the order of the learned District Judge on the issue of jurisdiction, the Court of Appeal had directed to transfer the case to the Commercial High Court holden at Colombo. The Commercial High Court has delivered a judgment in favour of the Respondent. Being aggrieved by the said judgment dated 25.09.2009 the Appellant has appealed to this court. In paragraph 10 (a) (b) and (c) of the petition of appeal dated 20.11.2009 the Appellant has set out the following questions of law for the consideration of this court.

10 (a) Has the learned Commercial High Court Judge misdirected herself in law in holding that the claim and the cause of action had arisen out of a breach/violation of a written contract?

(b) Has the leaned trial judge erred in law in holding that there is a written contract between the plaintiff and the defendant in existence notwithstanding that no such agreement had been produced in court or the existence of such written agreement had been recorded as an admission between the parties?

(c) In any event, has the learned Judge erred in law in holding that the cause of action of the Plaintiff Respondent is not prescribed in law?

I now deal with the question of prescription. The learned counsel for the Appellant submitted that at the trial the Respondent had testified that he came to know about the alleged transfer of monies in a sum of Rs. 17,500,000/- had been taken place on 07.01.1999 and the Manager informed him that the entire amount would be paid back to them. Also, the Respondent has admitted that the action had been instituted on 20th 0f May 2002, 03 years after the alleged transfer of money.

In this regard the Appellant relied upon the Section 9 and 10 of the Prescription Ordinance No. 22 of 1871. Sections 9 and 10 of the Prescription Ordinance read thus;

> 9. No action shall be maintainable for any loss, injury or damage unless the same shall be commenced within two years from the time when the cause of action shall have arisen.
>
> 10. No action shall be maintainable in respect of any cause of action not herein before expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued.

On the other hand, the Respondent contended that the cause of action falls within the ambit of Section 6 of the Prescription Ordinance and in terms of said Section, the action of the Respondent against the Appellant is not prescribed in law. Section 6 of the Prescription Ordinance reads thus;

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

It is clearly seen from Section 6 of the Prescription Ordinance that certain agreements which are in writing, are covered by the provisions contained therein. Such agreements are as follows;

- A deed for establishing a partnership,
- Any promissory note or bill of exchange,
- Any written promise, contract, bargain or agreement,
- Other written security not falling within the description of instrument set forth in Section 5,

It is seen from the aforesaid circumstances that the requirement in terms of Section 6 is that the instrument in question should be in writing and if not such transaction will not fall within the scope of Section 6 of the Prescription Ordinance.

The Appellant had admitted the said joint account the Respondent had with the Appellant bank at Gampaha branch and on 06.11.1998, they deposited a sum of Rs. 54,000,000/- (Fifty-Four Million) to the credit of the said account. Also, admitted as averred by the Respondent, the withdrawal of money from the said account at two occasions by the Respondent and said D. M. Peiris.

In banking transactions, the word "deposit" means a customer crediting money into an account maintained at a bank and the word "withdrawal" means debiting money of account maintained at a bank. From a legal and financial accounting viewpoint, the word "deposit" is used by the banking industry in financial statements to describe the liability owed by the bank to its depositor, and not the funds that the bank holds as a result of the deposit, although shown as assets of the bank. Subject to the limitations imposed by the terms and conditions of such account, the account holder (customer) retains the right to have the

deposited money repaid on demand made by him. The terms and conditions may specify the methods by which a customer may move to withdraw out of the account, e.g., by cash, cheque, transferring, or other method. According to the bank procedure money deposited into an account with a bank remain as an amount that the bank has borrowed from its depositor and thereby has contractually obliged itself to repay the customer according to the terms of the agreement.

In the case of Perera vs. John Appuhamy (1950) 51 NLR 308 (43 CLW 58) it was held that "Where in a deed of sale there is a recital that the full consideration has been paid and there is no statement in the attestation from which any promise or undertaking on the part of the vendor can be gathered, an action brought to recover an alleged balance of the consideration is prescribed in three years. The cause of action, in such a case, arises not upon a written contract but upon a simple money debt." Nagalingam J. observed that "Before it could be said that the action falls under section 6 of the Ordinance, it must be shown that the action is based upon a written promise or contract."

In the above context, I hold that the cause of action of the Respondent falls within the ambit of Section 6 of the Prescription Ordinance and therefore the learned High Court Judge is correct in holding that the cause of action of the Plaintiff Respondent is not prescribed in law.

At the trial the parties had admitted that the Plaintiff Respondent along with one D. M. Peiris had opened a joint savings account No. 00262071327831 at the People's Bank Regional Office, Gampaha, on 06.11.1998 and deposited a sum of Rs. 54,000,000/- (Fifty-Four Million) and thereafter they had withdrawn a sum of Rs 5, 000,000/- (Five Million) on 16.11.1998 and a sum of

Rs. 7,500,000/- (Seven decimal Five Million) on 09.12.1998 from the said savings account.

Subsequent to the said two transactions the Appellant Bank had transferred a sum of Rs 17,500,000/- from the said joint account at the Gampaha Branch to an account of said D. M. Peiris maintained at the Head Quarters Branch of the Appellant's Bank. The Plaintiff Respondent averred that said transfer of money has been done unsatisfactorily and negligently and against the accepted bank practice by the Appellant. At the trial the Appellant had not led any evidence to establish that the bank had not acted unsatisfactorily and negligently and against the accepted banking practices in transferring the money from the Respondents account to an account opened at the Head Quarters Branch of the Appellant's bank.

The Respondent has led evidence and has produced documents through the witnesses to prove the facts that;

- On 06.11.1998 the Respondent and a person called D. M. Peiris had opened a joint savings account bearing No 00262071327831 at the Gampaha branch of the Appellant's Bank by depositing a sum of Rs. 54,000,000/- (Fifty-Four Million),
- On 16.11.1998 and 09.12.1998, the Respondent together with the said D. M. Peiris had withdrawn the sums of Rs. 5,000,000/- and Rs. 7,500,000/- from the said joint account respectively,
- Said D. M. Peiris had died on 30.11.2000
- Prior to his death, said D. M. Peiris had not opened an account at the Headquarters' branch of the Appellant bank,
- Acting upon a letter dated 15.11.1998, the Gampaha branch had transferred a sum of Rs. 17,500,000/- from the said joint savings

account to an account opened at the Headquarters' branch of the Appellant Bank,

- Said letter dated 15.11.1998 had not been sent by said D. M. Peiris,
- According to the report of the EQD dated 30.11.1999 the signatures on the said letter dated 15.11.1998 and also a letter dated 07.01.1999 differed to that of said D. M. Peiris's signature,
- In evidence the Respondent has stated that when he received information about the fraud on 07.01.1999, he met the Manager of the Gampaha branch of the Appellant's bank and the Manager consoled him by stating that the total amount would be paid to him.

The Appellant has not made any attempt to contradict the evidence led by the Respondent or to deny the said position by leading evidence on his behalf. Evidence should have been led to establish that the bank acted satisfactorily and diligently and according to the accepted banking practices in transferring the money from the Respondents' account to an account opened at the Head Quarters Branch of the Appellant's bank. It is well accepted practice in banking transactions to compare the signatures of customers, who are dealing with the bank, with the signature placed on the specimen signature card maintained by the bank. Hence the Appellant must establish that its officers followed the said practice by comparing the alleged signature of said D. M. Peiris with the signature he had placed on the specimen signature card. But the Appellant has not made any attempt to call the bank officers who were responsible to the transfer of money, in order to prove that they compared the signatures of the author of the letters produced marked P 6 and P 8 with the signature placed on the specimen signature card marked P 8a in order to identify the genuineness of the said documents.

Furthermore, the signature card P 8a dated 06.11.1998 contained specific instructions that "do not pay money without the approval of the Senior Manager". The Appellant has not made any attempt to prove that the officers who dealt with the task of transferring of money obtained the approval of the Senior Manager prior to transferring of money to the Head Quarters Branch. Thereby the Appellant has failed to prove that the Appellant bank has acted satisfactorily and diligently and according to the accepted banking practices.

In the absence of such evidence against the position established by the Respondent at the trial, the balance of probabilities is in favour of the Respondent. In the circumstances, I see no error in the judgment of the learned High Court Judge in holding in favour of the Respondent. Hence, I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court

SISIRA J. DE ABREW, J.

I agree.

Judge of the Supreme Court

K.T. CHITRASIRI J.

I had the opportunity of reading the draft judgment of Upaly Abeyrathne J and I have no reason to disagree with his decision to dismiss this appeal. Having read the draft judgment, I thought it is necessary to express my views as well on the questions of law that are to

be answered by this Court. Basically, those questions of law have two limbs and they are as follows.

- Whether there was any breach/violation of the terms and conditions of **a written contract**? and
- Whether the cause of action of the plaintiff is prescribed?

Contention of the learned President's Counsel for the defendant-appellant was that; unless the plaintiff-respondent establishes an existence of a written agreement between the parties, he could not have maintained this action since it is the Section 6 of the Prescription Ordinance that allows filing action within 6 years when counted from the date on which the cause of action has arisen. Such a contention was advanced since the date of filing of this action is a date after 3 years from the date on which the cause of action had alleged to have arisen.

In the plaint filed on 21st May 2002, it is stated that the plaintiff-respondent and one D.M. Pieris had opened and maintained a joint account in Gampaha branch of the appellant bank namely, the Peoples Bank since 06.11.1998. Authority to withdraw money from the said account had been given to both the plaintiff-respondent and to D.M. Pieris. Accordingly, those two individuals had withdrawn different sums of moneys from that account from time to time.

On 07.01.1999, the appellant had received information to the effect that a request had been made to transfer Rs.17.5 million to an account alleged to have been opened by D.M. Pieris who is now deceased, at the headquarter branch of the same People's Bank, from his joint account held and maintained at the Gampaha branch. Upon receiving the said

information, plaintiff-respondent had made several inquiries from the authorities concerned and finally he had made a complaint to the police as to the opening of the account at the head quarter branch by D.M.Peiris. Accordingly,the police have reported facts in this regard to the Magistrate's Court of Gampaha. In the Magistrate's Court of Gampaha, an EQD Report had been called for, to ascertain the correctness of the signature of D.M. Pieris in order to find out whether D.M. Pieris has in fact opened the aforesaid account at the headquarter branch. Examiner of Questioned Document, by the letter marked 'P5' has reported that it is not the signature of D.M. Peiris which is found in the mandate that was used to open the said account at the headquarter branch. Assistant EQD S.A.Batakandage who has signed the report has testified in court in support of this fact. The aforesaid mandate which was examined by the EQD had been marked in evidence as 'X1', 'X2' and 'X3'. Accordingly, it was found that the account to which the aforesaid Rs.17.5 million had been transferred was not opened by D.M. Pieris. Therefore, it is manifestly clear that a fraud had been committed when making the application to open the account at the headquarter branch. Accordingly, the transfer of funds to the said account which had been opened fraudulently at the headquarter branch becomes an illegal act.

I will now look at the issue of prescription in the light of the aforesaid fraudulent act that surfaced with the production of the EQD report marked P5. This EQD report is date 30.11.1999 and is found at page 237 in the appeal brief. In that context, the law is that commencement of the period of prescription begins on the day of such a fraudulent act came into existence or in the case of concealed fraud until there is knowledge of the fraud or until the party defrauded might by due diligence have come to know of it. In this regard, I will refer to

Porf.Weeramantry's comments found in his book "The Law of Contracts". [at para 863] In that book, he states thus:

> *"Prescription does not run in the case of concealed fraud until there is knowledge of the fraud or until the party defrauded might by due diligence have come to know of it."*

In support of his view, Prof.Weeramantry has quoted the decision in **Kirthisinghe V. Perera [23 NLR 279]**

Facts and circumstances of this case show that the plaintiff has filed action within three years from the date he came to know of the fraudulent act that was committed when opening the account at the headquarter branch. It is the account to which the moneys were transferred from the Gampaha bank account jointly maintained by the plaintiff-respondent and D.M.Peiris. Therefore, the plaintiff-respondent is entitled to file action within 3 years from 30.11.1999, in accordance with Section 10 of the Prescription Ordinance. Accordingly, it is clear that the cause of action of the plaintiff-respondent has not prescribed.

In the circumstances, it is incorrect to contend that the plaintiff should establish an existence of a written agreement to escape the defence of prescription. More particularly, it is illegal to transfer funds into an account which had been opened fraudulently. For the reasons set out above, I answer all the questions of law in favour of the plaintiff-respondent.

Accordingly, as Abeyrathne J. has held, this appeal should stand dismissed with costs.

K.T.CHITRASIRI J.

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

Dinayadura Kanakaratne,
Dolikanda,
Boossa.
Defendant-Respondent-Respondent-Appellant

S.C. Appeal 36/12
S. C. (SPL) LA 2/2011
C.A. Appeal No.669/95(F)
D.C. Galle No. 10146/P **-VS. -**

1. Wasalage Gunawathie,
   Kendala,
   Boossa.
   Plaintiff-Respondent-Respondent-Respondent

2. Dedimuni Kamani Sriyalatha De Silva,
   Rubberwatte,
   Kapumulla,
   Rathgama.
   Petitioner-Appellant-Respondent (Deceased)

   Loku Liyaage Shiromi De Zoysa,
   Rubberwatte,
   Kapumulla,
   Rathgama..
   Substituted Petitioner-Appellant-Respondent

BEFORE : SISIRA J DE ABREW J.
ANIL GOONARATNE J.
K.T.CHITRASIRI J.

COUNSEL : D.M.G.Dissanayake with B.C.Balasuriya for the Defendant-Respondent-Respondent-Appellant

S.S.Sahabandu P.C. with Saliya Mathew instructed by Nirma Karunarathne for the substituted Petitione-Appellant-Respondent

ARGUED ON : 11.11.2016

WRITTEN SUBMISSIONS ON : 16.12.2016 by the Defendant-Appellant
16.12.2016 by the Petitioner-Respondent

DECIDED ON : 17.03.2017

Chitrasiri J

This is an Appeal filed by the Defendant-Respondent-Respondent-Appellant challenging the Judgment dated 29th November 2010 of the Court of Appeal. Decision of the Court of Appeal was to set aside the Interlocutory Decree dated 3rd May 1995, entered by the learned District Judge in Galle. This Court, upon considering the application for leave, granted Special Leave to proceed on the 14th February 2012, on the following question of Law:

> *"Has the Court of Appeal overlooked the vital fact that the Interlocutory Order in issue was made having adjudicated the 2nd Respondent's application for intervention and that, there was no right of appeal against such an Order?"*

The 2nd Respondent mentioned in the aforesaid question of law is the Petitioner-Appellant-Respondent namely D.Kamani Sriyalatha De Silva (hereinafter referred to as the Petitioner). She made the application dated 07.11.1991 which was amended subsequently by the petition dated 20.05.1993, to have her intervened to the case and then to become a defendant to this action filed by the plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff). That application for intervention was dismissed by the learned District Judge stating that no such application could be entertained since the Interlocutory Decree had already been entered, by the time the application for intervention was made. Learned District Judge in her order dated 03.05.1995 also has highlighted the finality attached to such a decree, in support of her findings.

Therefore, it is clear that the aforesaid question of law had been framed to determine the right of a person to challenge the finality of an Interlocutory Decree entered, under and in terms of the Partition Law No.21 of 1977 as amended. To find the answer to this issue, it is necessary look at the entire scheme of the Partition Law.

Section 26 as well as Section 48 of the Partition Law confers finality to Interlocutory Decrees entered in a partition action. Accordingly, such a decree

becomes good and sufficient evidence of the title of any person as to any right, share or interest awarded to him and it will be considered as final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, in the land to which such a Decree relates. However, such finality would operate subject to the matters referred to in Section 48 of the Partition Law particularly to the matters in sub section 4 thereof. Therefore, it is clear that an Interlocutory Decree entered in a partition action binds the whole world subject to the matters referred to in Section 48 of the Partition law.

Aforesaid Section 48(4) of the Partition Law enumerates the instances whereby an Interlocutory Decree could be amended, modified or set aside in order to establish a right, title or interest claimed by a party, to the land subject to a partition action. Those instances are:

- **When a party** to a Partition action has not been served with summons; or
- **When a party** being a minor or a person of unsound mind, has not been duly represented by a guardian *ad litem*; or
- **When a party** who has duly filed his statement of claim and registered his address, fails to appear at the trial.

The above provisions in the Partition law show that only a party to a partition action is entitled to make an application under Section 48(4) of the

Partition law. Admittedly, the Petitioner had not been added as a party in the plaint filed by the plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff) and only the plaintiff and the defendant were remained as parties to the action until the interlocutory decree was entered. It had been entered on 21.03.1991, allocating 1/18th share of the corpus to the plaintiff and the balance 17/18 shares to the defendant. It was so decided at a time the petitioner was not a party to the action.

The petitioner made her application to intervene to the action by her petition dated 07.11.1991. Then it became an application made after entering the Interlocutory Decree. Therefore, on the face of it, the petitioner had no right to make an application under Section 48(4) of the Partition law, to establish her rights to the land. Indeed, it is the rationale behind the decision of the learned District Judge.

When such finality is attached to an interlocutory decree, it is important and necessary, to ensure that all the steps that are to be taken before the decree is entered are compiled with in strict sense. Therefore, if the steps that are to be taken prior to the entry of the Interlocutory Decree had not been followed, then it becomes grave violation of the law. In such a situation, the provisions relating to the procedure to be adopted before entering the interlocutory decree

are to be considered as mandatory. Violation of such mandatory provisions may even become committing fraud as far as the Partition law is concerned depending on the facts and circumstances of each case. If such a fraud is established, it is the duty of the Court to nullify the effect of an Interlocutory Decree notwithstanding the finality attached to Interlocutory Decrees.

Moreover, appellate courts are permitted to look at the issue as to the finality of decrees entered in a partition action under the proviso to Section 48(3) of the Partition Law in order to see the ends of justice. It gives power to the Appellate Court to exercise its revisionary power in order to make an order preventing injustice being caused to a person affected by an Interlocutory Decree. It reads as follows:

> *48(3) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.*
>
> ***The powers of the Supreme Court by way of revision, and restitutio in integrum shall not be affected by the provisions of this subsection.***
>
> (emphasis added)

At this stage, it is relevant to refer to the following decision as well since it highlights the importance of the duty, casts upon a judge who decides

a partition action. Privy Council, in the case of Mather Vs. Thamotharam Pillai [6 NLR 246] stated thus:

> *"As collusion between parties to a partition action is always possible, and as in such a suit, the parties get their title from the decree of the court awarding them a definite piece of land, and as a decree for partition under section 9 of the ordinance is good and conclusive against all persons whomsoever, whatever their rights may be, whether they are parties to the suit or not, it appears to me that no loophole should be allowed to a judge by which he can avoid performing the duty cast expressly upon him by Ordinance."*

In the case of Mohamedaly Adamjee Vs. Hadad Sadeen [58 NLR 217] it was held as follows:

> *"The facts of each case will indicate the manner in which the judge can best carry out his duty and their Lordships would not attempt to lay down a complete course of procedure for the trial judge to follow in every case."*
>
> *"The trial judge should also investigate in sufficient detail the question of possession."*

Furthermore, when looking at the scheme of the Partition Law, it is significant to note that its provisions are specifically designed to ensure making every person who has any interest to the land, a party to a partition action. That is why steps, such as affixing notices on the land, beating of tom

toms, and giving notice by the surveyor himself, to the parties who claim rights when surveying the land are made mandatory.

Section 5 of the Partition Law too refers to such a requirement that is to be performed by the plaintiff and it stipulates thus:

> *5. The plaintiff in a partition action shall include in his plaint as parties to the action all persons who, whether in actual possession or not, to his knowledge are entitled or claim to be entitled-*
>
> *(a) to any right, share or interest to, of, or in the land to which the action relates, whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, life interest, or otherwise, or*
>
> *(b) to any improvements made or effected on or to the land:*

Admittedly, the Plaintiff has failed to make the petitioner, a party to the action. The only defendant who was made, as a party to the case, up to the time the interlocutory decree was entered was the appellant D. Kanakaratne. Neither the plaintiff nor the Defendant-Appellant had taken steps to make the petitioner a party despite the fact that she had been living on this land since her birth up to now having built a dwelling house on the land. Her parents had been living there even before the petitioner was born. Her mother was the person who gifted the property in question to the petitioner by the Deed

marked P2, which had been executed on 11th September 1964. Even thereafter she had continued to possess the land though several transactions affecting this land had taken place afterwards affecting this land.

In the Affidavit filed by the Petitioner Sriyalatha, she has stated that she had been living on this land since the day she was born. (vide Paragraph 2 of the Affidavit dated 20th May 1993). She also has stated that neither the Plaintiff nor the Defendant Kanakaratne had any possession of the land at any given time. The said averment of the Petitioner Sriyalatha had not been disputed in the objections dated 21st October 1993 filed by the Plaintiff when she filed the counter objections to the application dated 20th May 1993 of the Petitioner. Moreover, the Court Commissioner who carried out the preliminary survey has stated that the Petitioner Sriyalatha had claimed the buildings and the entire plantation found on the land when he surveyed the land on the 27th August 1989. Therefore, it is abundantly clear that the Petitioner Sriyalatha had been living on the land for a long period, having possessed the plantation found thereon. Despite such a physical possession by the petitioner, the plaintiff has failed to make her a party to the action as required by Section 5 of the Partition Law. Certainly, it is a grave violation of

Section 5 of the said Law. I believe such failure of the plaintiff amounts committing fraud on the petitioner.

Section 16(3) of the Partition law also stipulates that the Surveyor who was commissioned to survey the land shall serve notices to the persons who make a claim at the time he surveyed the land, requesting them to be present in Court in order to support their respective claims. In this instance, the surveyor has failed to serve such a notice to the Petitioner Sriyalatha at the time she made her claim before the commissioner, to entire improvements found thereon. It is a gross violation of Section 16(3) of the Partition Law. Issuing notices through courts at a subsequent time cannot cure the said violation of the Court Commissioner.

Sansoni C J in Siriwardena Vs. Jayasumana [59 NLR 400 at 401] stressed the importance of serving summons, having quoted the following statement of Greene M R in the case of Craig Vs. Kanseen. [1943 (1) A E R 108].

> *"Failure to serve process, the service of process is required as a failure which goes to the root of our conceptions of the correct procedure in legislation. To say that an order of that kind is to be treated as a merely irregularity and not something affected as fundamental rise is in my*

opinion that cannot be sustained. This failure also adds to many failures in this case."

In the circumstances, it is clear that the plaintiff has failed to follow the procedure referred to in the Partition Law, which I have described as mandatory. Hence, this is a fit case for the appellate court to act under the proviso to Section 48(3) of the Partition law and then to make appropriate orders preventing any miscarriage of justice being caused to the petitioner Sriyalatha. It may have been the reason for the Court of Appeal to set aside the Interlocutory Decree entered by the learned District Judge though it is not recorded in those words.

In the circumstances, I am of the opinion that the learned District Judge has failed to consider the matters referred to hereinbefore in the manner as required by the Partition Law, when she made the Order refusing the application for intervention made by the Petitioner Sriyalatha in her Petition dated 20th May 1993. Accordingly, I do not see any error on the part of the Court of Appeal reversing the said judgment of the learned District Judge. For the reasons set out above, I affirm the Judgment dated 29th November 2010 of the Court of Appeal. Learned District Judge is directed to comply with the

directions given in the aforesaid judgment of the Court of Appeal. No party is entitled to the costs of this appeal.

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

Dona Padma Priyanthi Senanayake
No. 48/3 Kottagewatta Road
Battaramula

Plaintiff-Appellant-Appellant

SC Appeal No. 41/2015
CA No. 399/99(F)

Vs.

1. H.G. Chamika Jayantha
   No. 494/1, Udumulla Road
   Battaramulla

2. Leelawathi Siriwardena
   2nd Floor, Cycle Bazaar Building
   Galle Road,
   Bambalapitiya

3. H.D. Susila Anuruddhika
   No. 494, Udumulla Road
   Battaramulla.

Defendant-Respondent-Respondent

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

In the matter of an Appeal to the Supreme Court under section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read together with section 6 thereof and sections 754(1) read together with sections 755(3) and 758 of the Civil Procedure Code.

Mohamed Woleed Mohamed Zawahir
No. 103, Sirikulam Watta
Mallawapitiya.

Plaintiff-Appellant

SC CHC Appeal No. 37/2008
HC (Civil No. 44/2007 MR

Vs.

Amana Takaful Company Limited
"Amana House"
No. 550 , R.A. De Mel Mawatha
Colombo 03

Head Office,
Baddhaloka Mawatha
Colombo 4.

Defendant-Respondent

Before : Priyasath Dep, PC., C J.
S.E. Wanasundera PC., J.
Sisira J. de Abrew, J.
Priyantha Jayawardana PC.
Upaly Abeyrathne, J.
Anil Gooneratne, J.
K.T. Chitrasiri, J.

Counsel : Rohan Sahabandu ,PC with Ms. Hasitha Amarasinghe for the Plaintiff-Appellant-Appellant in SC Appeal No. 41/2015

Rasika Dissnayake with Rajith Hathurusinghe for the 1st Defendant-Respondent-Respondent in SC Appeal No. 41/2015.

Niranjan de Silva with Pravi Karunaratne and Nadine Puvimanasinghe for Plaintiff-Appellant in SC CHC Appeal No. 37/2008.

K. Kanag Iswaran , PC with K.M. Basheer Ahmed for Defendant-Respondent in SC CHC Appeal No. 37/2008

Argued on : 06.10.2016

Written Submissions : 11.11.2016 &
Filed on : 15.12.2016

Decided on : 04.08.2017

Priyasath Dep, PC, CJ.

SC Appeal No.41/2015 and SC/CHC Appeal 37/2008 were taken up together as the questions of law raised in both cases are identical and it was decided to deliver a single judgment.

SC Appeal No. 41/2015

The Plaintiff instituted action on 03-10-1995 against the Defendant in the District Court of Colombo in Case No. 17633/L to demarcate the boundary. The case was taken up for trial and the court recorded the issues raised by the parties. The Defendant moved to take up issues Nos. 7-11 as preliminary issues. The learned District Judge decided to try issue No. 7 as a preliminary issue.

It is the position of the Defendants that the Plaintiff had failed to comply with section 40 (d) of the Civil Procedure Code when he failed to state in the plaint as to where and when the cause of action arose. The learned District Judge upheld the preliminary objections raised by the Defendants and dismissed the Plaintiff's action on 12.05.1999.

The Plaintiff appealed against the judgement to the Court of Appeal . When this matter was taken up for hearing in the Court of Appeal, the Defendants took up the position that the order made by the District Court is an interlocutory order and proper remedy to challenge the decision of the District Court is by way of a leave to appeal application and not by way of an appeal. Both parties made oral submissions and also filed written submissions.

It is the position of the Plaintiff that the order made by the District Judge is a final judgement. The Learned Counsel for the Petitioner submitted that when the District Judge delivered the judgement on 12.05.1999, Siriwardana vs. Air Ceylon Ltd. (1984) (1) SLR 286 had a binding effect and according to that judgement the order rejecting the plaint could be interpreted as a final judgement. Therefore, remedy is by way of an appeal.

However the case of Ranjith vs. Karunawathi which was decided in 1998 and reported in (1998) 3 SLR 232 is in conflict with Siriwardana vs. Air Ceylon Ltd. (supra) as it adopted a different approach. The learned Counsel for the Plaintiff submitted that Rajendra Chettiar vs. Narayanan Chettiar [2011] BALR 25 and[2011] 2 SLR 70 (decision of a bench consist of five judges) which was decided in 2010 has no application to this case as this case was instituted in 1995 and decided in 1999 and the appeal was filed in the same year. The Court of Appeal rejected the submissions of the learned Counsel for the Plaintiff and dismissed the Appeal on the basis that the order dismissing the action for failure to comply with section 40(d) of the Civil Procedure Code is an interlocutory order.

Being aggrieved by the order of the Court of Appeal, Plaintiff-Appellant-Petitioner filed this leave to appeal application seeking leave on following questions of law.

1. Is the impugn order an interlocutory order or a final order?

2. Is the impugn judgement decided on 12.5. 1999 and Chettiar case was decided 10.6.2010 and the case law permitted the Plaintiff to appeal against the said order, could it be said that the appeal is misconceived in law?

3. Did the ratio in Chettiar case have a retrospective effect, to apply to judgments decided in 1999, when Chettiar case was decided in 2010 a decade later, when during that period of 10 years, the procedure followed was not the procedure enunciated in Chettiar 's case?

4. In any event Chettiar's case specially laid down that to appeal against an order as in the instant case, the procedure under section 754 (1) should be followed?

This special leave to appeal was supported on 02.03.2015 and the Court granted leave on the following question of law only:-

' Was the judgment in Rajendran Chettiyar vs. Narayan Chettiyar relied on by the Court of Appeal wrongly decided'

When this matter was taken up for hearing the Learned President Counsel for the Appellant Rohan Sahabandu submitted that *i*n order to decide the question of law it is necessary to re-examine or review the rationale or the approach adopted in Chettiar vs Chettiar case which is a decision of a bench comprising five judges and move that a numerically higher bench to be constituted. The docket was submitted to the Hon. Chief Justice who constitutes a bench comprising seven judges to hear this appeal

When this matter was taken up for hearing on 05-09-2016 Kanag -Iswaran PC who is appearing in SC CHC 37/2008 raised a preliminary objection stating that a judgment given by the Supreme Court cannot be reviewed by another bench.

Rohan Shabandu PC moved for time to reply to the preliminary objection and the appeal was refixed for hearing 06-10-2006. The learned President Counsel who is appearing for the Appellant moved to raise the 2nd question of law which reads thus:

" Whether the decision enunciated in Chettiyar vs. Chettiyar reported in [2011] 2 SLR 70 deciding that the application approach test should be preferred over the order approach test in deciding whether an order is a final or interlocutory order in civil proceedings be revisited in this appeal".

The learned Counsel for the Respondent in SC 41/2015 did not object to the raising of the 2nd issue. The appeal was taken up for hearing and oral submissions concluded. The parties were permitted to file written submissions and accordingly parties filed their written submissions.

The learned President Counsel for the Appellant submitted that to determine whether the judgment or order is a final judgment or interlocutory or not the proper approach that

should be adopted is the order approach and not the application approach adopted by the judgments in Ranjith vs Kusumawathi (supra) and Chettiar vs Chettiar (supra).

When deciding whether the order or judgment is a final judgment or interlocutory order our courts were throughout influenced by the judgments of the English Courts. The Courts of England adopted two different approaches from time to time.

Sir John Donaldson MR in White v. Brunton[1984] 2 ALL ER pp 606-608 referred to these approaches as the order approach and the application approach.

The order approach was adopted In Shubrook v.Tufnell, (1882) 9QBD621, [1881-8] ALL ER Rep 180 where Jessel, MR and Lindely, LJ held that an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory, depended on the nature and the effect of the order made.

In Salaman v. Warnar & others , the Court of Appeal consisting of Lord Esher, MR, Fry and Lopes, LJJ. adopted the application approach and held that a 'final order' is one made on such an application or proceeding that, for whichever side the order was given, it will, if it stands, finally determine the matter in litigation.

In the above s case the Court held that an order made under Order xxv,, rr2 and 3 before the trial dismissing an action upon the hearing of a point of law raised by the Defendant that the statement of claim does not disclose a cause of action is not a final order within order lviii, r.3.

Thus according to Salaman vs Warner (supra) the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not the order itself.

In Bozson v Altrincham Urban District Council,(1903) 1 KB 547,548,549 (C.A.)the Court of Appeal consisting of Earl of Halsbury, Lord Alverstorn, CJ, and Jeune P. reverted to the order approach.

Rohan Shabandu PC who is appearing for the Appellant submitted that the proper approach is the order approach which was adopted by Sharvananda J (then he was) in Siriwardena Vs Air Ceylon (supra) and not the application Approach adopted in Ranjith vs Kusumawathi (supra) and Chettiar vs Chettiar. (However it is to be noted that nowhere in the judgment in Siriwardena vs.Air Ceylon there is an indication that Sharvananda J adopted the order approach.)

It is appropriate at this stage to refer to the cases of Siriwardene vs Air Ceylon (supra,) Ranjith vs Kusumawathi (supra) and Chettiar vs Chettiar(supra) to consider as to how this question was addressed and conclusions reached in those cases.

Siriwardana Vs. Air Ceylon Limited [1984] 3 Sr LR 286

In this case the Plaintiff obtained an exparte judgment against the Defendant and the decree was entered. The Defendant filed an application under section 189 of the Civil Procedure Code to amend the judgment and decree and accordingly the District Court by its order dated 10.05.82 amended the decree. The Plaintiff moved the Court of Appeal for leave to appeal against the order under section 754(1) of the Civil Procedure Code.

At the hearing of the application for leave, the Counsel for the Defendant-Respondent opposed the application of the Plaintiff on the ground that the order dated 10.05.82 made by the District Judge was a 'final order' having the effect of a final judgement under section 754(5) of the Civil Procedure Code , and that an appeal lay direct to the Court of Appeal under section 754(1) not with the leave of court, first had and obtained, in terms of section 754(2) of the Civil Procedure Code. He submitted that the application for leave to appeal was misconceived.

The Counsel for the Plaintiff contended that the order of the District Judge dated 10.5.82 was not a 'Judgement' but an "order" within the meaning of section 754(2) read with 754(5) of the Civil Procedure Code.

The Court of Appeal by its order dated 09.07.82 upheld the objection of the Counsel for the Defendant -Respondent and held that that the order made amending the Judgment and decree was a final order from which an appeal lay direct to that court under section 754(1) of the C.P.C. and refused with costs the application for leave to appeal.

The Plaintiff-Appellant has with the leave from this Court preferred this appeal against the order of the Court of Appeal dated 9.7.82 refusing his application for leave to appeal. The question that arose for determination is whether the order of the District Judge dated 10.5.82, amending the judgement and decree dated 13.03.80 is a "judgement" within the meaning of section 754(1) and 754(5) of the C.P.C. or and "order" within the meaning of section 754(2) and section 754(5) of the C.P.C.

It is appropriate at this stage to refer to section 754 of the Civil Procedure Code.

" 754(1) Any person who shall be dissatisfied with any judgement, 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 judgement 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) …

(4) ….

(5) Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter-

> "judgement" means any judgement or order having the effect of a final judgement 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 judgement"

In this case the Court had to consider whether the amending of the judgment and decree under section 189 of the Civil Procedure Code is a judgment under section 754(1) or an order under section 754(2) of the Civil Procedure Code..

On this point Sharvananda J (as he then was) considered several English cases and judgements of the Privy Council which he referred to as guiding light followed by our Courts.
In Salaman Vs. Warner,(supra) , a question arose as to whether the order in question was a final order or an interlocutory one, Lord Esher M.R. laid down the test for determining the question as follows:

> " The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision which ever way it is given, will if it stands finally dispose of the matter in dispute, I think that for the purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute , but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory".

In Bozson v. Altrincham Urban District Council(supra) an order was made in an action brought to recover damages for breach of contract, that the question of liability and breach of contract only was to be tried and that the rest of the case if any, was to go to an official referee. The trial Judge held that there was no binding contract between the parties and made an order dismissing the action. The question arose whether the order was a final or interlocutory order, for the purpose of appeal.

Lord Alverstone, C.J. then proceeded to lay down the proper test in the following words "It seems to me that the real test for determining this question ought to be this: Does the judgement or order as made, finally dispose of the rights of the parties ? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion an interlocutory order" the Earl of Halsbury also took the view that the order appealed from was a final order.

Swinfen Eady L.J. , in Isaac & Sons v. Salbstein (1916) 2 K.B. 139,147 reviewed all the earlier authorities and approved the test of finality stated by Lord Alverstone C.J. as putting the matter on the true foundation that what must be looked at is the order under appeal and whether it finally dispose of the rights of the parties.

Sharvananda J (as he then was) referred to several Privy Council cases which followed the test set down in Bozson's case. They are: Ramchand Manjimal v Goverdhandas

Vishandas Ratanchand and others,, AIR 1920 P.C. 86,87 and Abdul Rahman and others v Cassim &Sons, AIR 1933 P.C. 58. 60

In the case of Ramachand Manjimal v. Goverdhandas Vishandas Ratanchand (supra) The question that arose is whether order refusing the stay was a final order or not. Viscount Cave in his judgement referred to the test laid down in Bozson's case (supra) and observed as follows:

> "The effect of those and other judgements is that an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the courts in the ordinary way. "

In Abdul Rahman and others v Cassim &Sons (supra) cited the judgment in of Ramachand Manjimal v. Goverdhandas Vishandas Ratanchand (supra)with approval and held:

> "The effect of the Order from which it is here sought to appeal was not to dispose finally the rights of the parties. It no doubt decided an important and even a vital issue in the case, but it leaves the suit alive and provided for its trial in the ordinary way." It must be an order finally disposing of the rights of the parties.

Sharvananda J (as he then was) in Siriwardena Air Ceylon referred to the above cases with approval and proceeded to adopt test laid down in Bozsons case and held:

1) It must be an order finally disposing of the rights of the parties

2) The order cannot be treated to be a final order if the suit or action is still left a live suit or action for the purpose of determining the rights and liabilities of the parties in the ordinary way.

3) The finality of the order must be determined in relation to the suit.

4) The mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case is not enough to make an order, a final one.

Sharvananda J stated that in his view the word "Judgement" in 754(1) read with 754(5) of the C.P.C. has been used in the sense of a final determination of the rights of the parties in the proceedings, and comprised final orders besides the final declaration or determination of rights of parties which culminates in the entering of a decree in terms of section 188 of the CP.C. It is not restricted to the judgement referred to in section 184 of the CPC it is much wider.

Ranjit v. Kusumawathie and others [1998] 3 Sri L.R 233

This is partition action where the original 4th Defendant having filed his statement of claim failed to appear at the trial and the evidence was led for the Plaintiff, other parties been absent the judgement and the interlocutory decree were entered accordingly. The original 4th Defendant applied to the trial Court, in terms of sub section 48(4)(a)(iv) of the Partition Law, for special leave which permits a defaulting party to make an application to enter the case. The application for special leave was rejected by the District Court. The appellant then preferred an appeal to the Court of Appeal against the order, in terms of subsection 754(1) of the Civil Procedure Code as if that order made by the District Court was a "judgement". The Court of Appeal rejected the appeal on the basis that what was appealed from was an "order" within the meaning of subsection 754(2) of the CPC and that therefore an appeal could lie only with leave of the Court of Appeal first had and obtained. This appeal relates to that rejection.

The main issue is whether the refusal of the Application made under section 48 (4) (a) (iv) is a judgment contemplated under section 754 (1) or an order under 754 (2) of the Civil Procedure Code.

Dheerarathne J in his judgment referred to two virtually alternating tests that is the 'order' approach and 'application' approach adopted by different judges from time to time in the UK to determine what final orders and interlocutory orders were. He referred to several English cases which adopted the order approach as well as application approach.

The order approach was adopted in Shubrook v.Tufnell, where Jessel, MR and Lindely, LJ. held that an order is final if it finally determines the matter in litigation. Thus the issue of final and interlocutory, depended on the nature of the order made.

The application approach was adopted in Salaman v. Warnar & others (supra). It was held that the final order is one made on such application or proceeding that, for whichever side the order was given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not the order itself.

In Bozson v Altrincham Urban District Council, the Court of Appeal consisting of Earl of Halsbury, Lord Alverstorn, CJ, and Jeune P. reverted to the order approach.

In Salter Rex & Co. v. Gosh, Lord Denning, MR considered both approaches and he held that the application approach is the correct approach. He stated that:" There is a note in the Supreme Court Practice 1970 under RSC Ord 59, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In Standard Discount Co. v.. La Grange and Salaman v. Warner (supra) Lord Esher MR said that the test was the nature of the application to the court and not to the nature of the order which the court eventually made. But in Bozson v. Altrincham Urban District Council (supra) the court said that the test was the nature of the order as made. Lord Alverstone, CJ. said that test is; " ……that the test is whether the judgement or order, as made, finally dispose of the rights of the parties". Lord Alverstone, CJ was

right in logic , but Lord Esher MR was right in experience. Lord Esher, MR's test has always been applied in practice . For instance, an appeal from a judgement under RSC Ord 14(even apart from the new rule) has always been regarded as interlocutory and notice of appeal has to be lodged within 14 days . An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution – every such order is regarded as interlocutory; see Hunt v. Allied Bakeries Ltd. So I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial not to the order made."

Dheerarathne in his judgment stated that:
" A party to a partition action making an application in terms of subsection 48(4) (a) (iv) in order to establish his right, title or interest, has two hurdles to surmount . First he has to satisfy court, in terms of subsection (c) that (i) having filed his statement of claim and registered his address, he failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and (ii) that he had a prima facie right, title or interest in the corpus, and (iii) that such right , title or interest has been extinguished or such party has been otherwise prejudicially affected by the interlocutory decree. Then only the court will grant special leave. After granting special leave , in terms of subsection (d), the court will settle in the form of issues the questions of fact and law arising from the pleadings relevant to the claim and then appoint a day for trial and determination of the issues. The second hurdle the party has to surmount is the determination of those issues by court after trial, in terms of subsection (e).

The order appealed from is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have finally determined the litigation?. Far from that, even if the order was given in favour of the appellant, he has to face the second hurdle, namely the trial to vindicate his claim"

Dheerarathne J followed the judgments of Lord Esher in Salaman vs Warner (supra), and Lord Denning's judgment in Salter Rex vs Gosh (supra) which adopted the application approach and held that the order appealed from is not a "judgement" within the meaning of subsections 754(1) and 754(5) of the CPC. The appeal was dismissed.

S.Rajendra Chettiar and others v. S.Narayanan Chettiar [2011] BALR 25, [2011] 2 SLR 70

The Plaintiff instituted action in the District Court of Colombo in case No. 428/T against the Trustees of the Hindu Temple known as "Kathirvelayuthan Swami Kovil" in terms of section 101 of the Trustees Ordinance.The 2nd and 3rd Appellants and later the1st and 4th Respondent by way of motions, brought to the attention of court that the Plaintiff's action is barred by positive rule of law and that the plaint ought to be rejected and the plaintiff's action be dismissed in limine under section 46(2) of the Civil Procedure Code. The Learned Additional District Judge upheld the preliminary objections and dismissed the action of the plaintiff.

The Plaintiff filed a leave to appeal application in terms of section 754(2) of the Civil Procedure Code. The learned Counsel for the Defendants raised a preliminary objection that the Plaintiff is not entitled to maintain the leave to appeal application, as the order dated 14.05.2008 is an order having the effect of a judgement and that the application of the Plaintiff seeking leave to appeal in terms of section 754 (2) of the Civil Procedure Code is misconceived in law.

The Provincial High Court of Civil Appeal held that the order dated 14.5.2008 of the District Judge is an interlocutory order and that in view of the test laid down by Sharvananda, J (as he then was) in Siriwardana v Air Ceylon Ltd.(supra), the order of the learned Additional District Judge was not an order having the effect of a Final Order. The Provincial High Court of Civil Appeal further held that the order made in terms of section 46 of the Civil Procedure Code, the rights of the parties have not yet been considered and therefore the rights of the parties have not been determined. Further under section 46(2) of the Civil Procedure Code the plaintiff is not precluded from presenting a fresh plain in respect of the same cause of action.

The Defendant Appellants filed a leave to appeal Application and obtained leave. The main question that has to be determined is whether the order made under section 46(1) of the Civil Procedure Code dismissing the action is a judgement contemplated under 754(1) or an order under 754(2).

At the time of granting leave there were two decisions of this court by numerically equal benches of this court , namely, Siriwardana v. Air Ceylon Ltd (supra) and Ranjit v. Kusumawathi (supra). In Siriwardana v Air Ceylon Sharvananda J. (as he then was) according to Dheerarathne J adopted what is known as the 'order' approach whereas in Ranjith v. Kusumawathi (supra) Dheerarathne J adopted the application approach. In view of different approaches adopted by two numerically equal benches, on an application made by the Learned Counsel a direction was given to the Registrar to refer this matter to His Lordship the Chief Justice. His Lordship the Chief Justice nominated a bench comprising 5 judges which proceeded to hear this case. The bench presided over by Shirani Bandaranayake, J (as she then was) considered all the cases referred to in the judgements in Siriwardana v Air Ceylon and Ranjith v. Kusumawathi.

When the matter was argued before the bench, the learned Counsel for the Appellants submitted that there can be only one judgement in an action that is under section 184 read with section 217 of the Civil Procedure Code and that judgement is considered as a final judgement. The orders having the effect of final judgement are the orders made under sections 387 and 388 in summery proceedings. All other orders are interlocutory orders contemplated under section 754(2) of the Civil Procedure Code.

Shirani Bandaranayake J.(as she then was) emphasized the fact that the interpretation given to judgement or order in section 754(5) applies only to appeals and revisions. The phrase " notwithstanding anything to the contrary in this ordinance for the purpose of this chapter" confirms this position.

Shirani Bandaranayake J (as she then was) did not follow the order approach adopted in Shubrook v Tufnel (supra) and Bozson v. Altrinchan Urban District Council (Supra). Shirani Bandaranayake J. cited with approval the judgements of Lord Esher MR in Standard Discount Co. v. La Grange(supra) and Salaman v Warner (supra), which adopted the application approach which was cited with approval by Lord J. Denning Salter Rex and Co. v. Gosh (supra).

According to the facts in this case action was dismissed under section 46(2) of the Civil Procedure Code for not complying with the positive rule of law. The merits of the case were not considered and the rights and liabilities of the parties were not determined. The case was dismissed purely on a procedural defect. Further in terms of Salaman v Warner if the decision is given in either way the case should be finally determined. But in this case objections were upheld and the action was dismissed. On the other hand if the objection were overruled case would have proceed to trial. Therefore it was held that the dismissal of the action is not a final order or a judgment.

The question of law to be determined.

In cases before us the question of law that has to be determine is whether the dismissal of actions are final judgments coming under section 754 (1) or orders made in the course of the action under 754 (2) of the Civil Procedure Code.

The section 754(1) refers to preferring of an appeal against a judgment pronounced by an original court in any civil action proceeding or matter whereas 754(2) refers to a leave to appeal application to be filed in respect an order.

It is advisable to refer to section 754(5) which interprets what is a final judgment and an order. The subsection reads thus:

"Notwithstanding anything to the contrary in this Ordinance, for the purpose of this chapter:

"judgement" means any judgement or order having the effect of a final judgement 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 judgement"

According to this interpretation section, appeals could be filed in respect of judgments or orders which are final judgements. In respect of other orders which are not final and considered as interlocutory orders leave to appeal applications have to be filed. In view of this definition it appears that judgements fall into two categories. Similarly orders also fall into two categories.

(A) Judgements which are final judgements
(B) Judgements which are not final.
(C) Orders which area final judgements

(D) Orders which are interlocutory orders.

Therefore appeal could be filed in respect of judgements or orders which are final. In respect of other orders leave has to be first obtained. Therefore it appears that finality of the judgement or order that matters and not the name given as judgement or order.

In AG v. Piyasena 63 NLR pages 489 -501 dealing with orders of discharge and acquittal it was held that what is material is not the use of the language but the effect of the order. In a criminal case if a person is acquitted and if tried again, the accused could plead autrofois acquit similar to res judicata in a civil case. The acquittal is made on the merits of the case unlike an order of discharge. Therefore, one has to consider the nature and the effect of the judgement or order in determining whether it is a final order or a judgement. The issue is whether judgement or order finally determined the rights and liabilities of the parties.

At this stage it is appropriate to refer to section 184 of the Civil Procedure Code dealing with judgment and decree which reads thus:

184 (1) The Court, upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard either in person or by their respective counsel or registered attorneys (or recognized agents), shall, after consultation with the assessors (if any), pronounce judgement in open court, either at once or on some future day, of which notice shall be given to the parties or their registered attorneys at the termination of the trial.

There is no doubt that a judgment delivered under section 184 is a final judgment. It is given after considering the merits of the case and decides the rights and liabilities of the parties.

In Siriwardana v Air Ceylon (supra) leave to appeal application was filed against an amended judgement and decree entered under section 189 of the Civil Procedure Code. It was argued that there cannot be two judgments in a case. The amended judgement cannot be considered as a judgement. However, Sharvananda, J rejected that argument and held that "the amended judgment supersedes the earlier judgment made under section 184 and finally disposes of the rights of the parties, leaving nothing to be done for the purpose of determining the rights and liabilities of the parties''.

In Chettiar v Chettiar (Supra) the learned President Counsel for the Appellant submitted that there could be only one judgement in a case and the other orders are which are not final are all incidental orders. He submitted that "order having the effect of a final judgement" is only applicable in cases where no judgements are given and those are cases which are instituted under summery procedure. The counsel's contention is that the term judgements would mean judgements and decrees entered in terms of section 184 read with 217 of the Civil Procedure Code. The orders having the effect of a final judgement are in terms of section 387 and 388 of the Civil Procedure Code given under summery procedure. All other orders are considered as interlocutory orders.

The question that arises is what are the orders considered as final judgments. The orders made under summary procedure under sections 387 and 389, execution proceedings as held in Usoofs case (supra) and similar orders deciding finally the rights of the parties could be considered as final judgments. The orders made in the course of a civil action, proceeding or matter are considered as interlocutory orders.

In Usoof v. the National Bank of India (1958) 60 NLR 381 at 383 Sansoni J stated that" I do not see why there cannot be a final order or judgement even in execution proceedings, whether those proceedings are between the parties to the action or not; and so far that the judgement debtors in this case are concerned, they have, by the judgement of this court, finally lost their rights in the mortgaged property, and the execution proceedings are no longer live proceedings".

The court further held that the judgement of the Supreme Court dismissing an appeal from the order of the District Court refusing to set aside the sale of a property in execution of a mortgage decree is a "final judgement" within the meaning of Rule 1A of the schedule to the Appeals (Privy Council) Ordinance

In Ex parte Moore In Re Faithful 1885 QBD VOL XIV 627 ,632, the Earl of Selborne, L.C., expounded the meaning of final judgement in the following words:

> "To constitute an order a final judgement nothing more is necessary than that there should be a proper litis contestatio, and a final adjudication between the parties to it on the merits

In two cases before us orders are made in respect of points of law raised by the parties. If the preliminary objections were rejected cases would have proceeded to trial. In both case at the time of dismissal rights of the parties were not determined.

In order to decide whether a order is a final judgment or not. it is my considered view that the proper approach is the approach adopted by lord Esher in Salaman vs Warner (supra) which was cited with approval by Lord Denning in Salter Rex vs Gosh (supra).It stated:

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

Therefore orders given in both cases are interlocutory orders and the proper course of action is to file leave to appeal application under section 754 (2) and not preferring and appeals under section 754(1)of the Civil Procedure Code.

Judgments

SC Appeal No.41/2015

In the case the Plaintiff's action was dismissed as the Plaintiff failed to aver in the plaint when and where the cause of action arose and thereby failed to comply with an imperative provision of the law. At the time of dismissal the rights and liabilities of the parties were not considered or determined .

The Plaintiff filed an appeal against the order under sec 754(1) of the Civil Procedure Code. The Defendants took up the position that dismissal of action under section 46 of the Civil Procedure Code is an order made under 754(2) of the Civil Procedure Code and the Plaintiff has no right of appeal as the said order is an interlocutory order and not a judgment. The Court of Appeal upheld the preliminary objection and dismissed the appeal. Against this order the Plaintiff-Appellant-Appellant filed a Leave to appeal application and obtained leave. We affirmed the Judgment of the Court of Appeal and dismissed the Appeal. No Costs.

SC CHC Appeal 37/2008

The Plaintiff-Appellant filed case No. HC (Civil) 44/07/MR in the High Court of Western Province (exercising Civil Jurisdiction) known as Commercial High Court of Colombo against the Defendant-Respondent to enforce a Fire Insurance Contract entered into between the Defendant and claiming Rs. 5,350,000/- from the Defendant as compensation for damages caused to his stock in trade of his business due to a fire on 1st January 2006.

In the Answer the Defendant took up the position that;

i. The Plaintiff has failed to institute this action within three months of the date of rejection of the clam by the Defendant as required by clause 13 of the Fire Insurance Contract.

ii. The Plaintiff has failed to institute the said action within twelve months of the fire as required by clause 20 of the Fire Insurance Contract.

iii. The Plaintiff's action is time barred by clause 13 and 20 of the said Fire Insurance Contract.

iv. Therefore the Plaintiff action is prescribed and should be dismissed in limine.

The parties framed issues and the preliminary issues No 10 and 14 pertaining to prescription was taken up first. The Learned High Court Judge decided issue No. 10

to14 in favour of the Defendant and held that the Plaintiff's action is time barred under Clause 13 and 20 of the Fire Insurance Contract and the cause of action was prescribed. The Plaintiff's action was dismissed.

Being aggrieved by the said Order of the High Court Judge the Plaintiff-Appellant filed an appeal to this Court. It is the position of the Plaintiff-Appellant that section 6 of the Prescription Ordinance prevails over the clauses in Fire Insurance Contract.

The learned Counsel for the Defendant-Respondent raised a preliminary objection to the effect that the Plaintiff should have invoked the jurisdiction of the Court by way of a Leave to Appeal application and not by way of a final appeal. He submitted that Chettiar Vs. Chettiar reported in [2011] BALR page 25 and also report in [2011] 2 SLR page 70 is applicable to this case. However, Learned Counsel for the Plaintiff-Appellant submitted that judgement in Chettiar Vs. Chettiar was not delivered at the time the order was made in this case and he submitted that this an appropriate case to review the principle enunciated in Chettiar Vs. Chettiar.

In this case the High Court exercising Civil Jurisdiction commonly known as Commercial High Court upheld a preliminary objection and dismissed the plaint on the basis that the action is prescribed. The Plaintiff Appellant filed an appeal instead of a leave to appeal application. We hold that the order made by the High Court is an interlocutory order and the Plaintiff should have filed a leave to Appeal Application under section 754 (2) instead of filing an appeal under section 754 (1) of the Civil Procedure Code. We dismissed the Appeal. No. Cost.

Chief Justice

S.E. Wanasundera, PC J
I agree

Judge of the Supreme Court

Sisira J. de Abrew, J.
I agree

Judge of the Supreme Court

Priyantha Jayawardene, PC, J
I agree

Judge of the Supreme Court

Upaly Abeyrathne, J
I agree

Judge of the Supreme Court

Anil Gooneratne, 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

Supreme Court: SC (SPL)LA 181/11
Court of Appeal:CA(PHC)APN45/11
Provincial High Court of Sabaragamuwa
sitting in Embilipitiya Case No. RA 24/2009
M.C Embilipitiya Case No: 11982
Supreme Court Appeal No.43/2012

M.H.Harison
Officer in Charge
Police Station Kuttigala,
Kuttigala

Complainant

1. Baranaduge Asanka
   No.635, Kachchigala
   Thunkama
2. Baranaduge Samantha Gunasiri
   705, Kachchigala,
   Thunkama

Accused

G.Susantha
No.19/A, Siyambalape South
Siyambalape

Claimant Registered Owner

In the matter of a Revision application in terms of Article 138 of the constitution read with High Court (Special Provisions) Act No.19 of 1990

Ceylinco Leasing Corporation Limited
Of No.97, Hyde Park Corner,
Colombo 02
Now Head office at
No.283, R.A.De Mel Mawatha
Colombo 03.

Claimant Absolute Owner

Ceylinco Leasing Corporation Limited
Of No.97, Hyde Park Corner,
Colombo 02
Now Head office at
No.283, R.A.De Mel Mawatha
Colombo 03.

Claimant Absolute Owner Petitioner

Vs

1. M.H.Harison
   Officer in Charge
   Police Station Kuttigala,
   Kuttigala

   Complainant Respondent

2. Baranaduge Asanka
   No.635, Kachchigala
   Thunkama

3. Baranaduge Samantha Gunasiri
   705, Kachchigala,
   Thunkama

   Accused Respondents

4. G.Susantha
No.19/A, Siyambalape South
Siyambalape

Claimant Registered Owner Respondent

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

Respondent

Ceylinco Leasing Corporation Limited
Of No.97, Hyde Park Corner,
Colombo 02
Now Head office at
No.283, R.A.De Mel Mawatha
Colombo 03.

Claimant Absolute Owner Petitioner
Vs

1. M.H.Harison
Officer in Charge
Police Station Kuttigala,
Kuttigala

Complainant Respondent Respondent

2. Baranaduge Asanka
No.635, Kachchigala
Thunkama

3. Baranaduge Samantha Gunasiri
705, Kachchigala,
Thunkama

Accused Respondents Respondent

4. G.Susantha
No.19/A, Siyambalape South
Siyambalape

Claimant Registered Owner
Respondent- Respondent

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

Respondent- Respondent

AND NOW BETWEEN
In the matter of an application for Special Leave to Appeal under Article 128(2) of the Constitution

Ceylinco Leasing Corporation Limited
Of No.97, Hyde Park Corner,
Colombo 02
Now Head office at
No.283, R.A.De Mel Mawatha
Colombo 03.

Claimant Absolute Owner Petitioner
Petitioner- Petitioner

Vs

1. M.H.Harison
Officer in Charge
Police Station Kuttigala,
Kuttigala

Complainant Respondent- Respondent
Respondent

2. Baranaduge Asanka
No.635, Kachchigala
Thunkama

3. Baranaduge Samantha Guanasiri
705, Kachchigala,
Thunkama

Accused Respondent- Respondent[-Respondents

4. G.Susantha
No.19/A, Siyambalape South
Siyambalape

Claimant Registered Owner Respondent
Respondent - Respondent

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

Respondent -Respondent -Respondent

BEFORE: Buwaneka.Aluwihare, PC J.
Priyantha Jayawardena, PC, J. &
Anil Gooneratne, J.

COUNSEL: Javed Mansoor for the Claimant-Absolute Owner-Petitioner-Petitioner-Petitioner instructed by Damayanthi Kasthuriarachchi
A.R.H.Bary, SSC for the Attorney General.

WRITTEN SUBMISSIONS
FILED ON: 30.03.2012, 13.03.2014 (by Claimant-Absolute Owner-Petitioner-Petitioner-Petitioner)
15.11.2013 (by Respondent-Respondent-Respondent)

ARGUED ON: 08.12.2016

DECIDED ON: 07.12.2017

ALUWIHARE, PC, J:

In this matter Court granted special leave to appeal on the following questions of law:

(i) Does the word 'owned' referred to in Section 40 of the Forest Ordinance (Prior to its amendments) exclude an absolute owner?

(ii) Is the narrow interpretation given by the Court of Appeal to the word 'owned' in Section 40 of the Forest Ordinance (prior to the amendment) directly in conflict with Section 433A of the Criminal Procedure Code?

Background

The Accused-Respondent-Respondent-Respondents (hereinafter referred to as the Accused) were charged before the Magistrate's Court of Embilipitiya for violating provisions of the Forest Ordinance, allegedly transported timber without a valid permit in the lorry bearing registration number WP LB 9935.

When the matter was taken up before the said Magistrate's Court on 7.10.2008, both accused pleaded guilty and the Magistrate having proceeded to convict them, had imposed a fine of Rs.10,000 on each of the accused.

As the lorry alleged to have been used in the illicit transportation of timber also had been taken into custody, the Magistrate made further order fixing an inquiry, in order to decide as to whether the lorry concerned should be forfeited under the provisions of the Forest Ordinance.

At the inquiry, an Executive Officer of the Ceylinco Leasing Corporation Ltd,(hereinafter referred to as Ceylinco Leasing) the present claimant- absolute

owner-Petitioner-Petitioner-Petitioner (hereinafter referred to as the absolute owner) giving evidence stated, that the registered owner of the lorry G.Susantha had entered into a hire purchase agreement with Ceylinco Leasing in 2006. The witness made an application to the court to have the vehicle released to the absolute owner, Ceylinco Leasing, stating that the registered owner had gone overseas after the detection of this case and further that he had defaulted in the payment of installments. The application to desist from forfeiture was made on the basis that Ceylinco Leasing, as the absolute owner, had taken all reasonable precautions to prevent the lorry concerned being used for any illegal activity.

The Magistrate while holding, that at the time relevant to the case, it was the registered owner who had possession of the vehicle and it was incumbent on the registered owner to satisfy court that he had taken all reasonable precautions to prevent the lorry being used for any illegal activity, proceeded to make order forfeiting the lorry to the State in terms of Section 40 of the Forest Ordinance. The order of forfeiture by the magistrate had been affirmed by the Provincial High Court of Embilipitiya in exercising its revisionary jurisdiction, mainly on the same grounds averred to by the learned magistrate.

Aggrieved by the order made by the High Court, the Appellant invoked the revisionary jurisdiction of the Court of Appeal and when the matter was supported for notice, by its reasoned-out order, the Court of Appeal refused to issue notice on the Respondents.

The gravamen of Ceylinco Leasing, the present Appellant's complaint is, that the Court of Appeal, did not consider the "absolute owner", in the instant case Ceylinco Leasing, as the 'owner' of the lorry concerned for the purposes of Section 40 of the Forest Ordinance (as it stood before the amendment) .

At the outset I wish to refer to the significance of Section 40 of the Forest Ordinance.

Forest Ordinance No.16 of 1907, is described in its long title as "an Ordinance to consolidate and amend the law relating to forests and felling and transport of timber". Some of the provisions of the Act reflects the choice of policy, in the instant case it is undoubtedly designed with a view to protect the environment.

Large scale deforestation has resulted in an ecological imbalance and which has impacted adversely on the environment and threatens the very survival of all living beings. It is a known fact that illicit felling of trees in forests has for long been a major threat to the dwindling forest cover in the country. The legislative response has been the extensive provisions enacted to regulate the transit of timber and forest produce under the provisions of the Forest Ordinance.

Section 40 of the Forest Ordinance provides for the confiscation of the conveyance used to transport the illicit timber and the provision to my mind is intended to strike at the means of transportation by providing for the confiscation of the conveyance used to transport the illicit timber, and is both a logical and legal response to the problem of illicit felling. Even in the instant case the two persons who were charged happened to be the driver of the lorry and another person who had been seated next to the driver. Although they were in physical possession of the illicit timber, may have been employees of the "owner" of the lorry. Thus not much deterrence is achieved by imposing punishment on the persons who were in actual physical possession of illicit timber, when in most cases, the owner is behind the illegal operation.

The term "owner" of the conveyance for the purpose of Section 40 of the Forest Ordinance must be interpreted so as to ensure that the objective of the legislature is achieved and not render nugatory.

The plain reading of section 40 gives the impression that forfeiture provided in terms of the said section is by operation of law, contingent upon the court finding the accused guilty. This court however in the case of *Manawadu Vs. The Attorney General* 1987 2 SLR 30 held that the owner of a lorry, who is not a party to the case is entitled to be heard on the question of forfeiture of the vehicle. The jurisprudence created in the case of Manawadu (supra) had been followed since then and now it has become trite law that the owner must be afforded an opportunity to be heard before an order of forfeiture is made under section 40 of the Forest Ordinance.

The issue that needs to be considered is whether the "absolute owner" can be considered as the "owner" for the purpose of the section 40 of the Forest Ordinance. At the hearing of this appeal the learned counsel for the Appellant relying on the decision of Manawadu Vs. Attorney General (supra) contended, as observed by Justice Sharvananda (as he was then), that section 40 of the Forest Ordinance as amended, was not intended to deprive an owner of his vehicle, used by the offender in committing the forest offence without his (owner's) knowledge and without his participation. His Lordship did not make a distinction as to the meaning of the word "owner" in the judgment, understandably so as the term "absolute owner" crept in to our law by an amendment to the Criminal Procedure Code only in 1990, three years after the case of Manawadu(supra) was decided.

The only definition that was available to the term owner is section 16 of the Motor Traffic Act which states:

> *"Any person who for the time being is* ***the registered owner,*** *shall for the purpose of any proceedings under this Act, be* ***deemed to be the owner*** *of that motor vehicle"*
> *(emphasis added)*

It was further contended on behalf of the Appellant that the word "owner" includes the absolute owner as well, for the purposes of section 40 of the Forest Ordinance.

In this context the learned counsel for the Appellant referred to section 433A of the Code of Criminal Procedure Act no.15 of 1979 as amended.

Section 433A reads as follows:
"In the case of a vehicle let under a hire purchase or leasing agreement the person registered as the absolute owner of such vehicle under the Motor Traffic Act (Chapter 203) shall be deemed to be the person entitled to possession of such vehicle for the purpose of this Chapter".

Although not relevant in deciding the issues in this case, reference must be made to the amendment to the Forest Ordinance that was brought in 2009 by Act No.65 of 2009 which made Section 433A of the Criminal Procedure Code non-applicable to instances where the accused is found guilty or the persons accused plead guilty to the charges. The amendment is as follows:

> 40B. The provisions of subsections (1) and (2) of section 433A of the Code of Criminal Procedure Act, No. 15 of 1979, as amended by Act, No. 12 of 1990, shall not apply to or in relation to any person who pleads guilty to, or is found guilty of a forest offence."

The amendment referred to has no application to the instant case for the reason that the incident germane to the present application is anterior to the amendment and in that context, one could argue, the applicability apart, Section 433A was in force when the inquiry relating to confiscation of the lorry was held.

Two matters of significant relevance have to be taken into consideration in deciding the issue raised on behalf of the Appellant, i.e., application of Section 433A.

One is the applicability of the provisions of the Code of Criminal Procedure Act in relation to a 'forfeiture inquiry' under Section 40 of the Forest Ordinance and the other is, whether Section 433A has an application, when the issue before court is to decide whether an order of forfeiture should be made, as oppose to deciding who is entitled to possession.

Section 5 of the Criminal Procedure Code stipulates that:

> All offences -
>
> (a) Under the Penal Code,
>
> (b) Under any other law, unless otherwise specially provided for in that law or any other law, Shall be investigated, inquired into, tried and otherwise dealt with according to the provision of this Code (emphasis added).

Thus, the application of the provisions of the Code of Criminal Procedure Act is qualified in that the provisions of the Code of Criminal Procedure would not have any application if a law carries special provision in relation to a particular aspect.

In my view Section 40 of the Forest Ordinance is a stand-alone provision which is triggered when a person accused of an offence under the Forest Ordinance is convicted and can be applied and dealt with, without recourse to the provisions of the Code of Criminal Procedure.

Secondly, Section 433A is a provision applicable when dealing with disposal of property by a Magistrate and a process which does not require the Magistrate to determine the "ownership" of the property. Provisions of Chapter XXXVIII of the Code of Criminal Procedure focuses on delivering the property to the person who is entitled to possession of such property.

It would be pertinent to note that in the instant case the magistrate in fact had acted under section 433A of the Code and had correctly released the possession of the vehicle to the absolute owner the present Appellant on 2.09.2008 on a bond. This order, the magistrate had made, in terms of Chapter XXXVIII of the Code, which deals with disposal of productions.

In contradistinction, Section 40 of the Forest Ordinance requires the Magistrate to decide as to why the vehicle should not be forfeited, once the person accused of the offence is convicted.

Reginald F Dias in his book 'A commentary on the Ceylon Criminal Procedure Code' Vol II at page 1166, commenting on the chapter XL of the then Criminal Procedure Code that dealt with disposal of property (the Chapter in the present Code is XXXVIII) states that "the word 'disposal' does not include confiscation or forfeiture, and goes on to say a provision of adjective law cannot authorize an encroachment on the legal rights of the owner of the property. As held in the case of ***R v Ran Menika 28 N.L.R*** **348.** "forfeiture is a punishment. Apart from section 417 (of the Criminal Procedure Code), which authorizes

destruction of property in certain cases, the provisions of Chapter XL. give powers to **regulate the possession of property.** (emphasis added) Justice Dalton went on to hold that "… the better authority appears to be that "disposal" does not include confiscation or forfeiture, as a provision of adjective law cannot authorize an encroachment on the legal rights of the owner of the property."

As such I hold that the interpretation given by the Court of Appeal to Section 40 of the Forest Ordinance is not in conflict with Section 433A of the Criminal Procedure Code. When the agreement is entered upon between the Leasing Company (the absolute owner) and the Registered owner, the Leasing Company loses not only the possession of the vehicle but also control of the vehicle as well and as to how and when the vehicle is used is entirely in the hands of the registered owner.

The learned counsel for the Appellant contended that under our common law the absolute owner is the real owner of the vehicle and referred to the text, Roman Dutch Law by Professor R.W. Lee where it has defined ownership to be; Dominion or ownership is the relation protected by law in which a man stands to a thing which he may (a) possess (b) use and enjoy (c)alienate.

It is to be noted that the absolute owner neither has possession nor the ability to use and enjoy the vehicle and in a leasing agreement the absolute owner voluntarily parts with the possession and thereby loses control over the vehicle. In my view the word "owner" as it occurs in Section 40 of the Forest Ordinance cannot be considered in isolation applying purely legal definition of the term "owner" but must be given a purposive interpretation taking into account the intention of the legislature.

As referred to earlier the objective the legislature intended to achieve was to increase the severity of punishment in respect of vehicles used for transportation. Justice Siva Selliah in the case of *Manawadu v. O.I.C Police Station Udupussellewa* 1985 2 S.L.R 261 held that "A consideration of all these enactments and amendments establish the need, found by the legislature to increase the severity of punishment in respect of vehicles used for transport timber and other forest produce without a valid permit"

This issue was considered by Justice Dep (as he then was) in the case of *Range Forest Officer Ampara Vs. Orient Financial Services Corporation Ltd. SC Appeal120/2011* – Supreme Court Minutes of 10.12.2013 and his Lordship held

> *"When it comes to showing cause as to why the vehicle should not be confiscated, only the person who is in possession and control of the vehicle could give evidence to the effect that the offence was committed without his knowledge and he had taken necessary steps to prevent the commission of the offence of transportation."*

By merely having a clause in small print in the (lease) agreement that the registered owner of the vehicle is required to comply with and confirm to all Rules, Regulations and laws, in my view is not adequate to prevent the commission of offences. All what the officer from the leasing company said at the inquiry was that the Company had instructed the lessee to act within the law at all times.

Having considered the foregoing, I hold that, for the purposes of Section 40 of the Forest Ordinance, the owner who has the possession and the control of the vehicle should be considered as the 'owner' of the vehicle.

I hold that the Court of Appeal was not in error in holding that the 'absolute owner' ought not to be considered as 'owner' of the vehicle given the facts and circumstances of this case. I further hold that the interpretation given by the Court Of Appeal to the word 'owned' is not in conflict with Section 433A of the Code of Criminal Procedure Act.

Accordingly, I answer both questions of law on which leave was granted in the negative and affirm the order made by the Court of Appeal in this matter.

The Appeal is dismissed and under the circumstances, I order no costs.

JUDGE OF THE SUPREME COURT.

JUSTICE PRIYANTHA JAYAWARDENA P.C

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

S.C Appeal No. 43/2017

SC HCCALA 197/2016
SP/HCCA/RAT/22/2011(F)
D.C. Embilipitiya Case No. 8587/Land

1. Beauty Ramani Ratnaweera

2. Olokku Patabendige Amarasena

Both of "Amara", Morakatiara,
Nakulugamuwa.

PLAINTIFFS

Vs.

1. Amarakoon Kankanamge Sugunawathie
2. Dhammika Munasinghe

Both of opposite O.P. Rice Mills,
Kiralawalkatuwa. Embilipitiya.

DEFENDANTS

AND

1. Beauty Ramani Ratnaweera
2. Olokku Patabendige Amarasena

(DECEASED)

2A. Olokku Patabendige Yenika Gayani

Both of "Amara", Morakatiara,
Nakulugamuwa.

PLAINTIFFS-APPELLANTS

Vs.

1. Amarakoon Kankanamge Sugunawathie
2. Dhammika Munasinghe

Both of opposite O.P. Rice Mills,
Kiralawalkatuwa. Embilipitiya.

DEFENDANTS-RESPONDENTS

AND NOW BETWEEN

1. Amarakoon Kankanamge Sugunawathie
2. Dhammika Munasinghe

Both of opposite O.P. Rice Mills,
Kiralawalkatuwa. Embilipitiya.

DEFENDANTS-RESPONDENTS-PETITIONERS

Vs.

3. Beauty Ramani Ratnaweera
4. Olokku Patabendige Amarasena

2A. Olokku Patabendige Yenika Gayani

Both of "Amara", Morakatiara,
Nakulugamuwa.

PLAINTIFFS-APPELLANTS-RESPONDENTS

BEFORE: Sisira J. de Abrew J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: Rohan Sahabandu P.C. for Defendants-Respondents-Petitioners

Chandrasiri De Silva with Nadeera Weerasinghe
for Plaintiffs-Appellants-Respondents

ARGUED ON: 16.10.2017

DECIDED ON: 22.11.2017

GOONERATNE J.

This was an action filed in the District Court of Embilipitiya for a declaration of title in favour of the 1st Plaintiff, to the land described in the schedule to the plaint, and ejectment of the Defendants/damages in a sum of Rs. 30,000/-. As pleaded in the plaint the original owner was one K. V. Wanigatillake. On 19.08.1973 by Deed No. 1255, the original owner transferred the land to the 2nd Plaintiff. On 05.09.1981 by Deed of gift No 2779, 2nd Plaintiff gifted the land in question to the 1st Plaintiff. It is pleaded in the plaint that they built a house in the said land and had been operating a rise mill but later on they closed down the rice mill. Thereafter the Defendants with the leave and licence of the Plaintiff, occupied a room (කඩකාමරය) in the said premises. Plaintiff aver in the plaint that the Defendants requested that the house and property be sold to them. Plaintiff's agreed to sell the house and property for a sum of Rs.

7,00000/- and permitted the Defendants to reside in the property until they obtain a Bank loan and purchase the property, in dispute.

The Defendants, however did not purchase the property as agreed between parties, and continued to reside in breach of the above undertaking. In paragraph 11 of the plaint it is averred that the Defendants disputed the title of the Plaintiff to the property in dispute and threatened the Plaintiffs that they would not quit the premises. Defendants whilst disputing title of the Plaintiffs, state that the land described in the schedule to the Defendants answer, belongs to the Land Reforms Commission. It is also pleaded that the land and premises described in paragraphs 4 and 5 of the plaint does not belong to the Plaintiff by the respective deeds referred to in the plaint.

Parties proceeded to trial on 22 issues. The Defendants have prayed for dismissal of the Plaintiff's action in their answer and for a declaration that the land described in the schedule to the Defendants' answer does not belong to the Plaintiffs. Defendants have also made a counter claim of Rs. 2,00000/-. The learned District Judge by his Judgment of 22.01.2017 dismissed the Plaintiff's action and also rejected the claim in reconvention of the Defendants. Plaintiffs appealed to the Civil Appellate High Court, and the High Court set aside the Judgment of the learned District Judge. This court on 28.02.2017 granted

Leave to Appeal on questions of law in sub paragraphs (a), (b) and (g) of paragraph 15 of the petition. It reads thus:

(a) Did Their Lordships err in law when they failed to appreciate that the corpus had not been identified properly?

(b) Did Their Lordships, err in law when they failed to appreciate correctly, that the Plaintiffs- Appellants-Respondents are the owners of the premises in question?

(g) Did Their Lordship, err in law when they failed to appreciate correctly that the Plaintiffs-Appellants-Respondents have also failed to prove the necessary ingredients of a Rei Vindicatio Action?

The material placed before this court suggest that the learned District Judge has considered the identity of the land in dispute with the schedule to deeds P1 to P2 and with survey plan 231 of 05.08.1973 of Surveyor S.K. Piyadasa, since the deeds in its schedule refer to Surveyor Piyadasa's plan. The schedules to the plaint refer to Surveyor L.S. Siribaddana's Plan No. 1442 of 30.07.1999. As such the question is whether land in deeds P1 and P2 refer to the same land described in the schedule to the plaint? District Judge also comments that no commission was taken to superimpose plan No. 231 on plan 1442 of Surveyor, Siribaddana. Further the Plaintiff have also failed to prove how the 10 perches land described in the schedule to the plaint come within the land described in the 1st schedule to the plaint and also title to the 10 perch land.

I have considered the Judgment of the learned High Court Judge in its entirety and the submissions made by learned counsel on either side. At the very outset I wish to observe that a licencee as the Defendant who entered the property in dispute with the leave and licence of Plaintiff cannot in law challenge the title of the owner of the property in suit, in this case the Plaintiff party. Plaintiffs terminated Defendant's licence by notice of 02.05.2004 (P6). Section 116 of the Evidence Ordinance on estoppal of tenant and licensee, has made provision in this regard. I refer to 52 NLR at 436

Under the common law all things may be the subject of the contract of letting and hiring whether they belong to the lessor or are the property of a third party since lease does not affect the ownership of the thing let (Voet 19.2.34); and if the tenant receives the undisturbed enjoyment of the premises he is liable for his corresponding obligations, and he is not allowed, when sued by his landlord, to set up the defence that the latter had no right to let the property to him (Voet 19.2.32); Clarke v. Nourse Mines. Section 116 of the Evidence Ordinance (Cap. 11) is based on this rule. It follows therefore that under the common law the plaintiff is, in relation to the defendant, the landlord of the premises as defined in s. 27, and the defendant is not entitled to deny the plaintiff's title as a ground for refusing to pay the 'rent or to give up possession.

In Pathirana Vs. Jayasundera 58 NLR 169 held a person who entered the premises as a lessee with permission of lessor cannot dispute the title of lessor.

The learned High Court Judges very correctly considered the un-contradicted evidence of Surveyor S. Siribaddana and plan 1442 (Pg. 92). In his evidence he states plan P4 No. 1442 was produced in court. His plan 1442 was prepared by using or utilising plan 231 of 05.08.1973 of S.k. Piyadasa. He also

states by the said plan the land has been subdivided to 14 lots. On either side of the land roads shown. In lot 14 a house is shown and subdivided to sell the lots. His plan P4 was accordingly prepared. High Court Judge observe that the evidence of licenced Surveyor remains unchallenged. The boundaries of land described in deeds P1 and P2 are identical with plan P4.

I observe that it would have been desirable to have superimposed plan 231 on plan P4. But Surveyor's evidence is convincing and a court could rely on such evidence as the Surveyer has shown a building on lot 14. The land and house to be 20 perches and with the subdivision 10 perches occupied by the Defendant are apparent. I see no basis to interfere with the findings of the High Court in this regard.

The learned High court Judge in his Judgment also state, though 26 years have lapsed, plan P4 is bounded from east and west by the old road and the new road. Extent of the land remains static. Surveyor Siribaddana's plan clearly demonstrate in his evidence as to identity of the land remained unchallenged. Further in compliance with Section 41 of the Civil Procedure Code the 2nd schedule of the plaint clearly refer to plan P4 (1442) referred to in the 1st schedule to the plaint. Shop premises is approximately 10 perches and situated within lot 14 which is 20 perches. Boundaries of the shop are given as from

north, east and south by the balance portion of lot 14. As such metes and bounds as required by Section 41 of the Code could be clearly identified.

The other matter is that all four boundaries of both plans (P4 & plan 231) are the same. Even the extent is the same. On behalf of the Defendant party much has been said about the land being owned (schedule of answer) by the Land Reform Commission. Defendant allege that a deed would be executed on her behalf by the LRC. But no such deed was produced at the trial. LRC plan was produced marked V8. However the LRC witness could not say whether the land I n plan V8 is the same as lot 14 of plan P4.

The questions of law (a), (b) & (g) are answered in the negative. Plaintiff-Respondent has identified the corpus and proved title to the land in dispute. There is no legal basis to interfere with the Judgment of the Civil Appellate High Court. I affirm the Judgment of the High Court. This appeal is dismissed without costs.

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

In the matter of an application for leave to appeal to the Supreme Court in terms of section 5C 1 of the High Court of the Provinces (Special Provisions) (Amendment) Act no 54 of 2006

Ranasinghe Pedige Lional Subhasinghe,
Kothwila Road,
Ehaliyagoda.

Plaintiff

SC Appeal 45/2015
SC/HC/CALA631/2014
SP/HCCA/LA 10/14
DC Avissawella M/26352/12

Vs, D.A.D. Engineering (Pvt) Ltd,
No. 215/84, Bandaragama Road,
Kesbewa, Piliyandala.

Defendant

And between

D.A.D. Engineering (Pvt) Ltd,
No. 215/84, Bandaragama Road,
Kesbewa, Piliyandala.

Defendant- Petitioner

Vs,

Ranasinghe Pedige Lional Subhasinghe,
Kothwila Road,
Ehaliyagoda.

Plaintiff-Respondent

And now between

D.A.D. Engineering (Pvt) Ltd,
No. 215/84, Bandaragama Road,
Kesbewa, Piliyandala.

Defendant-Petitioner-Appellant

Vs,

Ranasinghe Pedige Lional Subhasinghe,
Kothwila Road,
Ehaliyagoda.

Plaintiff- Respondent-Respondent

Before: **Sisira J. De. Abrew J**

Anil Goonaratne J

Vijith K. Malalgoda PC J

Counsel: Samantha Vithana with H. Mendis for the Defendant-Petitioner-Appellant

Plaintiff- Respondent-Respondent was absent and unrepresented.

Argued on: **31.08.2017**
Decided on: **15.12.2017**

Vijith K. Malalgoda PC J

Defendant-Petitioner-Appellant had filed an Application before the Supreme Court under section 5 (C) of the High Court of Provinces (Special Provisions) Act No 10 of 1996 as amended by Act No 54 of 2006 seeking leave to appeal against a decision by the High Court of Civil Appeal of the Western Province holden at Avissawella.

When the said Application for leave to appeal was supported, this court after considering the material placed, had granted the leave to appeal on the following questions of Law,

i. Has the Learned District Judge erred in Law in deciding that the Minister has no power to confer jurisdiction to the Provincial High Court of the Western Province sitting in

Colombo over disputes arising commercial transactions stipulated in the 1st schedule to the Act?

ii. Has the Learned District Judge erred in Law in deciding that District Courts have jurisdiction under section 5 of the Judicator Act No. 2 of 1978, in respect of matters set out in the 1st schedule of the High Court of Provinces (Special Provisions) Act No. 10 of 1996, too?

iii. Have the Learned High Court Judges of the Civil Appeal High Court erred in law in deciding that the Provincial High Court of the Western Province sitting in Colombo has no jurisdiction over this case?

iv. Have the Learned District Judge and the High Court Judges misdirected themselves in law and facts regarding the stipulated nature and the monetary value of the action and the exclusive jurisdiction of Provincial High Court of Western Province sitting in Colombo?

v. Have the Learned High Court Judges erred in law in deciding that the District Court of Avissawella has jurisdiction to hear and determine this case?

As revealed before us, the Plaintiff-Respondent-Respondent (herein after referred to as the Plaintiff) had filed an action before the District Court of Avissawella to recover sum of Rs. 4,712,059/- from the Defendant-Petitioner-Appellant (herein after referred to as the Defendant). According to the plaint filed before the District Court the Plaintiff had alleged that he has requested the Defendant to install a Timber Seasoning Plant at the timber mill belonging to him, but the Defendant had failed to install the said plant within the period agreed upon by him, causing a loss to the Plaintiff.

The said trial commenced before the District Judge of Avissawella after recording three admissions, 13 issues on behalf of the Plaintiff and 22 issues or behalf of the Defendant. In the said admissions entered before the District Court, both parties agreed that there was a commercial transaction

between the two parties with regard to supply and installing a timber seasoning plant at the premises of the Plaintiff.

Among the issues raised on behalf of the Defendant, the Defendant had raised a preliminary objection for want of jurisdiction and the said issue was recorded as the 14th issue before the District Court as follows,

> "Since the Plaintiff had valued the aforesaid action as Rs. 4712059/- and the transaction between the parties was a Commercial Transaction, can the Plaintiff maintain the action under section 2(1) of the High Court of Provinces Act No 10 of 1996 read with the provisions in the 1st schedule to the said Act."

Since the said issue was purely a question of law, both parties agreed before the District Court to first decide the said question of law with regard to the maintainability of the action.

The Learned District Judge who considered the said question of law with regard to the maintainability of the action had decided the said question in favour of the Plaintiff overruling the preliminary objection.

Being dissatisfied with the said decision of the Learned District Judge, the Defendant appealed to the High Court of the Civil Appeal holden in Avissawella and the Learned High Court Judges, after considering the said appeal had pronounced their judgment dismissing the Appeal.

The Defendant sought leave to Appeal from the said judgment of the High Court of Civil Appeal holden in Avissawella, to the Supreme Court and this Court had granted leave to appeal on the grounds of Appeal referred to above.

As observed by us, whilst considering the said legal objection raised by the Appellant, the High Court of Civil Appeal holden in Avissawella, held that the Commercial High Court of Colombo does not have jurisdiction over the cases island wide, under provisions of section 2(1) of the High Court of Provinces Act No 10 of 1996 and the District Court of Avissawella has got the jurisdiction to hear and determine the present case filed against the Appellant by the Respondent to recover sum of Rs. 4,712,059/- .

As further observed by this court, both parties to the District Court action, had recorded the following admissions during the District Court Trial,

1. That the Plaintiff had called for a quotation to purchase a timber seasoning machine from the Defendant and the Defendant had submitted a quotation
2. The said quotation was accepted by the plaintiff and order was placed with the Defendant to install a timber seasoning machine at the premises of the Plaintiff
3. As a security for the said transaction the Plaintiff had given a cheque for Rs. 250000/- to the Defendant, and since there was leasing facility for the full price of the transaction, the said cheque was returned by the Defendant to the Plaintiff

When considering the above admissions, it is clear that the transaction referred to in the Plaint before the District Court was a Commercial Transaction between the two parties and therefore case before the District Court was a case in the commercial nature.

The preliminary objection raised by the Appellant before the District Court was based on the provisions of the High Court of Provinces (Special Provisions) Act No 10 of 1996. I would now proceed to analyze the relevant legal provisions of the said Act.

Subsection (1) and (2) of section 2 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 reads as follows:

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

(2) Where an Order is made under subsection (1) in respect of a High Court established by Article 154P of the Constitution, the jurisdiction exercisable by such High Court under that subsection shall-

a) If such High Court is the High Court established for the Western Province, be exercised by that High Court sitting in Colombo and in any other place within the Western Province, as may be designated by the Minister, by Order published in the Gazette, with the concurrence of the Chief Justice:

Or

b) If such High Court is the High Court established for any other Province, be exercised by that High Court sitting in such place within that Province may be designated by the

Minister, by Order published in the Gazette, with the concurrence of the Chief Justice.

First schedule to the above act reads thus,

1) All actions where the cause of action has arisen out of commercial transactions (including causes of action relating to banking, the export or import of merchandise, services affreightment, insurance, mercantile agency, mercantile usage, and the construction of any mercantile document) is which the debt, damage or demand is for a sum exceeding One Million rupees or such other amount as may be fixed by the Minister from time to time, by Notification published in the Gazette, other than actions instituted under the Debt Recovery (Special Provinces) Act, No. 2 of 1990.
2) All applications and proceedings under sections 31, 51,131,210 and 211 of the Companies Act, No.17 of 1982.
3) All proceedings under the Code of Intellectual Property Act, No. 52 of 1979. (other than proceedings referred to in item 2 of the second schedule)

When considering the above provisions of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, it appears that every High Court established by Article 154P, shall have cognizance of and full power to hear and determine all actions, applications and proceedings specified in the 1st Schedule, subject to the provisions of section 2 (a) and (b) of the said Act. In other words the said section had provided to take up all cases based on Commercial Transactions comes within the 1st schedule, if the value of such case is over the amount decided by the minister, by the provincial High Court establish under Article 154P of the Constitution provided the Minister acting under section 2 (1), publishes an order designating such power with the provincial High Court.

As revealed before us the Minister acting under section 2 (1) of the said Act had published the Gazette Extra Ordinary 943/12 dated 01.10.1996 designating the High Court established under Article 154P for the Western Province with effect from 11.10.1996. Since the said Order refers only to the High Court established under Article 154P for the Western Province, this Court observes that the said designation is only applicable to sub-section 2 (a) to the section 2 of the High Court of Provinces (Special Provisions) Act No. 10 of 1996, which reads as follows;

> 2) Where an Order is made under subsection (1) in respect of a High Court established by Article 154P of the Constitution, the jurisdiction exercisable by such High Court under that subsection shall –
>
> a) If such High Court is High Court established for the Western Province, be exercised by that High Court sitting in Colombo and in any other place within the Western Province, as may be designated by the Minister, by Order published in the Gazette, with the concurrence of the Chief Justice.

Therefore it is clear that, the only High Court designated by the Minister to hear cases comes within the 1st Schedule of the High Court of Provinces (Special Provisions) Act, is the High Court established under Article 154P of the Constitution for the Western Province and the said High Court will only have jurisdiction to hear cases specified in the 1st schedule, if the party or parties Defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceedings under the Companies Act No. 17 of 1982 the registered office of the Company is situated, in the Western Province only.

It is further observed by this court that the jurisdiction assigned to a High Court by the High Court of Provinces (Special Provisions) Act No. 10 of 1996 is a special jurisdiction conferred upon such High

Court, under the said act and therefore the provisions of the said act will have to be strictly adhered to when the High Court is exercising the said special jurisdiction conferred on the said Court.

As revealed from the facts placed before us, the original plaint was filed by the Plaintiff, before the District Court of Avissawella against the Defendant to recover sum Rs. 4,712,059 with regard to the implementation of a Commercial Transaction. The said action was filed before the District Court on 27.01.2012. By Gazette Extra Ordinary 943/12 published by the Minister, on 01st October 1996, the amount referred to in the 1st schedule was increased from One Million to Three Million, for the purpose of filing cases before the High Court under section 2 of the High Court of Provinces (Special Provisions) Act.

As further observed by this court the value referred to above had been now increased to five million by Gazette Extra Ordinary 1759/35 dated 25.05.2012 but at the time relevant to the case in hand the value was considered as Rs. Three Million.

However as referred to above in this judgment, the jurisdiction conferred on the High Court of Western Province holden in Colombo is a special jurisdiction conferred upon the said court and therefore, it is the duty of this court to go through the facts very carefully before coming to any conclusion. In this regard I am more careful than in any other case, for the reason that the arguments in this case was taken, in the absence of one party i.e. the Plaintiff-Respondent-Respondent.

Even though it was not placed before us by the Defendant-Petitioner-Appellant, according to the Judgment of the District Court of Avissawella, it is revealed that the agreement referred to in the plaint was taken place in Ehaliyagoda which comes within the Sabaragamuwa Province and not within the Western Province. However District Court Jurisdiction of Ehaliyagoda had been Gazetted

under Avissawella which comes under Western Province, and that is why the District Court action was filed in Avissawella with regard to a Commercial Transaction taken place outside the Western Province, in Sabaragamuwa Province.

In my view the Minister's order published in Gazette Extra Ordinary 943/12 dated 01.10.1996 only relates to the Western Province and Section 2 (2)(a) of the High Court of Provinces (Special Provisions) Act No 10 of 1996 had only provided the High Court of Western Province holden in Colombo to hear cases based on Commercial Transactions over Three Million (value applicable to the present case) when the transaction referred to the said case, if the party or parties defendant to such action resides or reside, or the cause of action has arisen or the contract sought to be enforced was made in the Western Province only. In the absence of any material to say that any of the above had taken place within the Western Province, I am reluctant to agree with the argument placed before this court by the Learned Counsel for the Defendant-Petitioner-Appellant.

In the said circumstance I answer the questions of Law raised before this court in the negative and dismiss this appeal with costs.

Appeal is dismissed with costs.

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

TAD Hemasiri Gomis
No.71, Vihara Mawatha.
Singharamulla, Kelaniya

Applicant

SC Appeal No.47/2014
SC SPL LA No. 105/2012
HCCA Gampaha
Case No. 17/2010 LT
LT Wattala Case No. 31/060/2006

Vs

Kelaniya Co-operative Society Ltd.,
Biyagama Road,
Kelaniya.

Respondent

AND

TAD Hemasiri Gomis
No.71, Vihara Mawatha.
Singharamulla, Kelaniya

Applicant-Appellant

Vs

Kelaniya Co-operative Society Ltd.,
Biyagama Road,
Kelaniya.

Respondent-Respondent

AND NOW BETWEEN

TAD Hemasiri Gomis
No.71, Vihara Mawatha.
Singharamulla, Kelaniya

Applicant-Appellant-Petitioner-Appellant

Vs

Kelaniya Co-operative Society Ltd.,
Biyagama Road,
Kelaniya.

Respondent-Respondent-Respondent-Respondent

Before : Sisira J De Abrew J
Upaly Abeyratne J
Anil Gooneratne J

Counsel : Chatura Galhena for the Applicant-Appellant-Petitioner-Appellant
Vidura Gunaratne for the Respondent-Respondent-Respondent

Argued on : 10.1.2017

Decided on : 1.3.2017

Sisira J De Abrew J.

This is an appeal against the judgment of the learned High Court Judge dated 9.5.2012 wherein she affirmed the judgment of the learned President of the Labour

Tribunal. This Court by its order dated 20.3.2014, granted leave to appeal on the questions of law set out in paragraphs 16(2) and 16(3) of the Petition of Appeal dated 19.2.2013. They are as follows.

1. Did the Civil Appellate High Court misdirect itself by failing to give due consideration to the contents of the documents marked by the Respondent in relation to the duties of the Appellant?

2. Did the Civil Appellate High Court misdirect itself by failing to give due consideration to the hypothetical assumptions made by the learned President of the Labour Tribunal in relation to the procedure to be followed by the Applicant in performing his duties?

The Applicant-Appellant-Petitioner-Appellant (hereinafter referred to as the Applicant-Appellant) filed an application in the Labour Tribunal challenging his termination of services by the Respondent-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent-Respondent). The learned President of the Labour Tribunal dismissed his application and held that the termination was justified. Being aggrieved by the said judgment of the learned President of the Labour Tribunal, he appealed to the High Court and the learned High Court Judge affirmed the judgment of the learned President of the Labour Tribunal. Being aggrieved by the said judgment, he has appealed to this court. Facts of this case may be briefly summarized as follows. The Applicant-Appellant was the Internal Auditor of the Respondent-Respondent. There are two safes in the Wedamulla Rural Bank and it was the practice of the Rural Bank to keep one key of the main safe with the Manager of the said bank and the other key with the Peoples Bank branch in the area. Certain jewellery pawned to the Wedamulla Rural Bank disappeared from the main safe and it is alleged that the Manager of the

Wedamulla Rural Bank has committed theft on the said jewellery. The allegation levelled against the Applicant-Appellant was that he being the Internal Auditor of the Wedamulla Rural Bank did not conduct proper audit in the said bank and as a result of the said failure the Manager was able to commit theft on the said jewellery. The Applicant-Appellant in his evidence (page 216-217) has admitted that he did not have sufficient time to check the items in both safes. The main contention of learned counsel for the Applicant-Appellant was that there was no duty on the part of the Applicant-Appellant to check both safes and that therefore he could not be held responsible for failure to conduct proper audit. I now advert to this contention. It is to be noted here that the General Manager of the Respondent-Respondent by letter dated 15.1.2001 marked R20, has given instructions to the Applicant-Appellant to carry out sudden examinations of both safes and report whether the jewellery kept in the safes tally with the ledger in which pawned jewellery is entered (pawned jewellery ledger). In the 2nd paragraph of the same letter marked P20, the Applicant-Appellant had been further instructed to carry out sudden examinations of both safes before the end of the month. Learned counsel for the Applicant-Appellant referring to the said paragraph of the letter marked P20, contended that the said instructions were applicable only to the month of January 2001. But when I consider the entire contents of the said letter, I am unable to agree with the said contention. The Applicant-Appellant, in his evidence at page 217, admitted that he did not inspect the jewellery in the main safe.

When I consider all the above matters, I hold that the Applicant-Appellant had failed to discharge his duties as per instructions given to him and that as a result of the said failure certain jewellery pawned to the Wedamulla Rural Bank had disappeared from the safe. For the above reasons, I hold that the termination of services of the Applicant-Appellant by the Respondent- Respondent was justified.

For the aforementioned reasons, I affirm the judgment of the learned President of the Labour Tribunal and the learned High Court Judge and dismiss this appeal 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

In the matter of an Appeal in terms of Article 128(1) of the Constitution.

SC. Appeal 50/2013
High Court Matara No. 127/2011
M.C. Matara No. 39122

Officer in Charge,
Police Station,
Matara.

Complainant

Vs.

1. Mudugamuwa Hewage Gunasena,
2. Kankanamdurage Wimalawathie,
   Both of No 60, Samdale Farm,
   Tepudeniya.
3. Hawage Chaminda Sandamal,
4. Mudugamuwa Hewage Pathma Rangika,
   Both of Ipitawatta Galdola,
   Kotapola.
5. Mudugamuwa Hewage Lasanthi Shashikala,
   No. 60, Semdale Farm,
   Tepudeniya.

Accuseds

AND BETWEEN

Mudugamuwa Hewage Gunasena,
Both of No 60, Samdale Farm,
Tepudeniya.

1st Accused Appellant

Vs.

Officer in Charge
Police Station,
Akuressa.

Complainant Respondent

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

Respondent

2. Kankanamdurage Wimalawathie,
   No 60, Samdale Farm,
   Tepudeniya.
3. Hawage Chaminda Sandamal,
4. Mudugamuwa Hewage Pathma Rangika,
   Both of Ipitawatta Galdola,
   Kotapola.
5. Mudugamuwa Hewage Lasanthi Shashikala,
   No. 60, Semdale Farm,
   Tepudeniya.

Accused Respondents

AND NOW BETWEEN

Mudugamuwa Hewage Gunasena,
Both of No 60, Samdale Farm,
Tepudeniya.

1st Accused Appellant-Appellant

Vs.

Officer in Charge
Police Station,
Akuressa.

Complainant Respondent-Respondent

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

Respondent-Respondent

2. Kankanamdurage Wimalawathie,
   No 60, Samdale Farm,
   Tepudeniya.
3. Hawage Chaminda Sandamal,
4. Mudugamuwa Hewage Pathma Rangika,
   Both of Ipitawatta Galdola,
   Kotapola.
5. Mudugamuwa Hewage Lasanthi Shashikala,
   No. 60, Semdale Farm,
   Tepudeniya.

Accused Respondent-Respondents

BEFORE	:	PRIYASATH DEP, PC, J. (as he was then) UPALY ABEYRATHNE, J. ANIL GOONERATNE, J.
COUNSEL	:	L. Amarasinghe with Sriyani Manamperi for the 1st Accused Appellant-Appellant Madhawa Tennakoon SSC for the Respondent-Respondent
WRITTEN SUBMISSION ON:		13.07.2015 (the 1st Accused Appellant Appellant)
ARGUED ON	:	06.12.2016
DECIDED ON	:	01.08.2017

UPALY ABEYRATHNE, J.

The 1st Accused Appellant-Appellant (hereinafter referred to as the Appellant) preferred an appeal to the Provincial High Court of Matara against the conviction dated 27.07.2007 and sentence imposed upon the Accused by the learned Magistrate of Matara dated 07.09.2011. The High Court, by judgement dated 15.11.2012, has dismissed the said appeal and affirmed the conviction and the sentence. This appeal lies from the said judgment of the High Court.

According to the minute dated 27.05.2013 this court has directed the Appellant to file a proper petition of appeal together with all documents on or before 05.08.2013. But the Appellant has not complied with the said order of this court.

It is significant to note that, in the said petition of appeal to this court, the Appellant has not sought special leave to appeal from the said impugned judgment of the learned High Court judge in terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990. Furthermore, it is important to note that this court has not granted special leave to appeal.

At the hearing, the learned counsel for the Appellant submitted that leave to appeal to this court had been granted by the High Court. But the relevant proceedings of the High Court manifests that the said submission of the learned counsel for the Appellant is erroneous. The High Court proceedings dated 22.11.2012, indicates that the Appellant had tendered a petition of appeal and affidavit to the said High Court. Thereafter the said petition of appeal had been filed of record and the case record had been submitted to the learned High Court Judge by the office, seeking a suitable order. The learned High Court Judge had ordered to forward the case record to this court with the said petition of appeal and an affidavit filed by the Appellant dated 15.11.2012 and 16.11.2012 respectively, having a sub file kept at the High Court office. Said proceedings of the High Court manifests that the learned High Court Judge too, had not dealt with the matter of granting leave to appeal to the Supreme Court.

This appeal has been preferred against the said convictions and sentences imposed upon the Appellant and the 2nd to 5th Accused Respondent Respondents (hereinafter referred to as the 2nd to 5th Respondents) by the learned Magistrate of Matara. The Appellant and the 2nd to 5th Respondents in this case were convicted of committing unlawful assembly and causing simple hurt on two women named Hokandara Wannage Sirima Kanthi and Pathiranage Renuka Kumari, offences punishable under Section 140 and Section 314 to be read with Section 146 of the Penal Code and each of them was sentenced to a term of 03

months rigorous imprisonment suspended for 05 years and to pay a fine of Rs. 1500/- carrying a default term of 02 months simple imprisonment.

In convicting the Appellant and the 2nd to 5th Respondents, the learned Magistrate has analysed the evidence of prosecution witnesses number 01 to 05. Said witnesses No 1, 2 and 3 were the injured persons at the incident which on 29.05.2005. Medico-Legal Reports of the said injured persons had been produced marked P1 to P 3. The learned Magistrate had reached the conclusion that said Medico Legal Reports has corroborated the injuries received by the witnesses No 1 and 2. According to P 1 said Sirima Kanthi had received 03 injuries and W.P. Renuka had received one injury. The Appellant and the 5th Respondent had given evidence. The 2nd 3rd and 4th Respondents had remained silent on the dock.

The learned counsel for the Appellants submitted that the complainant has abused the judicial process to charge the Appellant and the 2nd to 5th Respondents for an offence punishable under Section 140 to be read with section 146 of the Penal Code. According to the evidence of the prosecution the Appellant and the 2nd to 5th Respondents were present at the time of throwing stones to injured persons and they had been properly seen and identified by the injured persons. Soon after the incident a complaint had been lodged at the police station and the injured persons had been admitted to the hospital. At the investigation, the police had observed about 10 to 12 pieces of metal fallen in the compound of the injured persons' house.

The Appellant and the 2nd to 5th Respondents were not able to create a reasonable doubt in the said evidence of the prosecution. The learned Magistrate has correctly analysed and evaluated the evidence led by the prosecution and also the evidence led for the defence. At the hearing of the appeal, the learned High Court Judge too, has gone through the said evidence and reached the conclusion

that the findings of the learned Magistrate should not be disturbed. In the circumstances, I see no reason to interfere with such findings of both courts.

The learned Magistrate has imposed on the Appellant and 2nd to 5th Respondents a term of 03 months rigorous imprisonment suspended for 05 years and to pay a fine of Rs. 1500/- carrying a default term of 02 months simple imprisonment.

It must be noted that, for offences under Section 314 and 140 of the Penal Code, a rigorous imprisonment cannot be imposed on an accused. It should be a simple imprisonment. Hence, I vary the said term of 03 months rigorous imprisonment and substitute in place of that a term of 03 months imprisonment suspended for 05 years. Subject to the said variation in the sentence I dismiss the appeal of the Appellant without costs.

Judge of the Supreme Court

PRIYASATH DEP, PC, CJ.

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 to the Honourable Supreme Court of the Democratic Socialist Republic of Sri Lanka

J B Dissanayake
No. 44/13, Dodandeniya
Matale

Plaintiff

SC Appeal 50/2014
CA 904/2000 (F)
DC Colombo 18292/MR

Vs

Seemasahitha Keells Tours
(Pudgalika) Samagama
Correct Name
Keells Tours (Private) Limited
No.429 Ferguson Road
Colombo 15

Defendant

AND BETWEEN

Seemasahitha Keells Tours
(Pudgalika) Samagama
Correct Name
Keells Tours (Private) Limited
No.429 Ferguson Road
Colombo 15

Defendant-Appellant

Vs

J B Dissanayake

No. 44/13, Dodandeniya
Matale

Plaintiff-Respondent

AND NOW BETWEEN

Seemasahitha Keells Tours
(Pudgalika) Samagama
Correct Name
Keells Tours (Private) Limited
No.429 Ferguson Road
Colombo 15

Defendant-Appellant- Appellant

Vs

J B Dissanayake
No. 44/13, Dodandeniya
Matale

Plaintiff-Respondent- Respondent

Before : Sisira J De Abrew J
Priyanthe Jayawardena PC J
Vijith Malalgoda PC J

Counsel : Harsha Soza PC Rajinda Perera with
for the Defendant-Appellant-Appellant

Shamir Zavahir for the Plaintiff-Respondent-Respondent

Argued on : 29.6.2017

Written Submission
Tendered on : 8.5.2014 by the Defendant-Appellant-Appellant

23.4.2015 by the Plaintiff-Respondent-Respondent

Decided on : 14.09. 2017

Sisira J De Abrew J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent filed action in the District Court to recover a sum of Rs.250,000/- as damages from the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant-Appellant) on the basis that the Defendant-Appellant violated the lease agreement entered between the Plaintiff-Respondent and the Defendant-Appellant. The learned District Judge, by judgment dated 13.11.2000, held in favour of the Plaintiff-Respondent. Being aggrieved by the said judgment the Defendant-Appellant appealed to the Court of Appeal. The Court of Appeal, by its judgment dated 7.5.2013, dismissed the appeal. Being aggrieved by the said judgment of the Court of Appeal, the Defendant-Appellant has appealed to this court. This Court, by its order dated 27.3.2014, granted leave to appeal on the questions of law set out in paragraphs 14(a),(b),(c),(d) and (e) of the petition of appeal dated 17.6.2013 which are set out below.

1. Has the Court of Appeal erred in failing to consider that there is acceptable evidence in this case which clearly shows that the Defendant has terminated the said Lease Agreement (P1) with one (1) calendar month's notice?

2. Has the Court of Appeal failed to consider that in terms of the provisions of the said lease Agreement (P1) written notice of termination is not necessary to validly terminate the said Lease Agreement (P1)?
3. Has the Court of Appeal erred in failing to appreciate that on the facts and circumstances of this case no damages are payable to the Plaintiff by the Defendant?

4. In any case, has the Court of Appeal erred in failing to appreciate that the maximum damages payable to the Plaintiff is a sum not exceeding Rupees Thirty Thousand [Rs.(LKR)30,000/=]?
5. Has the Court of Appeal erred in failing to consider that a clause permitting payment of the monthly lease rental in lieu of a calendar month's notice need not be expressly stipulated where a calendar month's notice is prescribed as a method of terminating that contract, and that no question of liquidated damages or penalty arises?

The facts of this case may be briefly summarized as follows. The Plaintiff-Respondent leased his vehicle No.32-6273 to the Defendant-Appellant for a period of two years commencing from 6.7.1995 to 5.7.1997. The monthly rental was Rs.30,000/- Clause 10 of the lease agreement reads as follows.

> *"One calendar months notice will be given to either party for handing back or withdrawal of the vehicle."*

It is therefore seen from the above clause that if the Defendant-Appellant wanted to give back the vehicle he has to give one months notice to the Plaintiff-Respondent and if the Plaintiff-Respondent wanted to withdraw the vehicle he too has to give one months notice to the Defendant-Appellant. The Plaintiff-Respondent, in his evidence states that on 6.10.1995, when he visited the office of the Defendant-Appellant, he was requested by the Defendant-Appellant to take back the vehicle. He claims that the Defendant-Appellant did not give him one months notice as stipulated in clause 10 of the lease agreement and that therefore the Defendant-Appellant has violated the lease agreement. The Defendant-Appellant claims that he, on 4.9.1995, gave one months notice to the Plaintiff-Respondent over the phone and that the Plaintiff-Respondent took the vehicle from

the custody of the Defendant-Appellant on 6.10.1995. He therefore claims that he had given one months notice as stipulated in clause 10 of the lease agreement. Samantha Rohan Jayasinghe, the Executive Officer of the Defendant-Appellant's company admitted in evidence that the Defendant-Appellant terminated the lease agreement (page 812 of the brief).

The most important question that must be decided in this case is whether the Defendant-Appellant terminated the lease agreement as per clause 10 of the lease agreement. Did the Defendant-Appellant give one month's notice before handing back the vehicle? I now advert to these questions. If the Defendant-Appellant gave one months notice as stipulated in clause 10 of the lease agreement, he should have raised an issue on this point. It has to be noted here that the Defendant-Appellant did not raise any issue on this point. Further when the Plaintiff-Respondent gave evidence, the Defendant-Appellant did not suggest to the witness that he (the Defendant-Appellant) gave notice over the phone on 4.9.1995. When I consider all the above matters I hold that the Defendant-Appellant had not given one months notice to the Plaintiff-Respondent as stated in clause 10 of the lease agreement and that the Defendant-Appellant had violated the lease agreement.

Learned President's Counsel for the Defendant-Appellant contended that even if the Defendant-Appellant violated the lease agreement, the Plaintiff-Respondent is only entitled to one month rental (Rs.30,000/-). I now advert to this contention. Is there any clause in the lease agreement that in the event of the lease agreement being violated by the Defendant-Appellant, the Plaintiff-Respondent is entitled only to Rs.30,000/-. This question has to be answered in the negative as there is no such clause in the lease agreement. For the above reasons, I reject the contention of learned President's Counsel for the Defendant-Appellant. When the Defendant-

Appellant terminated the lease agreement without notice to the Plaintiff-Respondent, he would suffer damages. The Plaintiff-Respondent has claimed Rs.250,000/- as damages. When considering damages it is important to consider a passage from the book titled 'The Law of Contracts by CG Weeramanthry Vol. 11 page 925' which reads as follows.

> *"The award of damages is based upon the general principle that a sum of money to be given in reparation of the damages suffered should, as nearly as possible, be the sum which will put the injured party in the position he would have enjoyed had he not sustained the wrong for which the award of damages is made, and that it should include both actual loss and loss of profit. Damages for breach of contract must, in other words, place the plaintiff, "so far as money can do it, in the same position as he would have been in had the contract been performed."*

When a party to a contract violates the contract, the innocent party cannot be allowed to suffer. The party violated the contract must pay damages to the innocent party to compensate the loss suffered by him as a result of the violation of the contract. In such a situation the court has the power to award compensation. I have elsewhere in this judgment held the Defendant-Appellant had violated the contract. Considering all these natters I hold that the Defendant-Appellant should pay compensation to the Plaintiff-Respondent. The Plaintiff-Respondent has claimed Rs.250,000/-. But he has failed to state any basis for the calculation of the above amount. When the above amount is considered, it appears that the Plaintiff-Respondent has not asked for compensation for the entire period of two years. When the Defendant-Appellant without any notice to the Plaintiff-Respondent requested him to take back the vehicle it was not possible for him to find a person

who would take the vehicle on rent or lease immediately. But it cannot be said that he would not be able to give the vehicle on rent or lease during the entire period of two years. In my view, rental for five months (Rs.30,000/-x5= Rs.150,000/-) would be justified. I therefore hold that the Plaintiff-Respondent is entitled to Rs.150,000/-. Subject to the above variation of the amount of compensation, I affirm the judgment of the Court of Appeal and dismiss the appeal of the Defendant-Appellant with costs. The learned District Judge is directed to amend the decree accordingly. In view of the conclusion reached above I answer the above questions of law in the negative.

Appeal dismissed

Judge of the Supreme Court.

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court.

Vijith Malalgoda PC J

I agree.

Judge of the Supreme Court.

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

SC Appeal No. 53/2011

SC/HCCA/LA Application No. 328/2010
HCCA Gampaha Case No.
WP/HCCA/GAM/218/03 (F)
DC Negombo Case No. 5155/L

Al Hareen Bin Ahamed
No. 700, Galle Road,
Colombo. 3

PLAINTIFF

Vs.

Mohamed Rafi Ismail Bin Hassan
No. 44/1, Wajira Lane,
Off Vajira Road,
Colombo 4.

DEFENDANT

AND

Mohamed Rafi Ismail Bin Hassan
No. 44/1, Vajira Lane,
Off Vajira Road,
Colombo 4.

DEFENDANT-APPELLANT

Vs.

Al Hareen Bin Ahamed
No. 700, Galle Road,
Colombo. 3

PLAINTIFF-RESPONDENT

AND NOW AND BETWEEN

Al Hareen Bin Ahamed
No. 700, Galle Road,
Colombo. 3

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Mohamed Rafi Ismail Bin Hassan
No. 44/1, Wajira Lane,
Off Vajira Road,
Colombo 4.

DEFENDANT-APPELLANT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.

Priyantha Jayawardena P.C., J &

Anil Gooneratne J.

COUNSEL: M.U.M. Ali Sabry P.C. with Shamith Fernando
for the Plaintiff-Respondent-Appellant

Dr. S.F.A. Cooray for the Defendant-Appellant-Respondent

ARGUED ON: 06.11.2017

WRITTEN SUBMISSIONS FILED ON:

20.06.2011 (By the Plaintiff-Respondent-Appellant)
30.08.2011 (By the Defendant-Appellant-Respondent

DECIDED ON: 29.11.2017

GOONERATNE J.

This is an action rei vindicatio. Plaintiff-Respondent-Appellant by his plaint dated 18.12.1995 prays for a declaration that the Plaintiff is the owner of lot 10 in plan No. 14/1959 and damages as prayed for in the plaint i.e until the Plaintiff-Respondent-Appellant is placed in possession of the said lot 10. The above plan was prepared by Surveyor Cross Dabarera in January 1959. Defendant-Appellant-Respondent prayed for a dismissal of the action. The action was filed in the District Court of Negombo. Parties proceeded to trial on 17 issues. It was admitted that estate called 'Sabadeeya' estate was owned by Ibrahim Bin Ahamed. The extent of the estate was 210 acres, 3 roods and 23 perches. It was also admitted that the said I. Bin Ahamed on or about 31.03.1931 sold the entire estate to Mohamed Ismail Bin Ibrahim by deed No. 1223.

Thereafter the said M.I. Bin Ibrahim gifted the said land to his 4 children including the Plaintiff's mother namely Sithy Rahima Binthi Mohamed Ismail. The co-owners being the above 4 children, according to the plaint amicably partitioned the said land and became entitled to a divided and defined portion of land in extent of 53 acres, 2 roods. The above Sithy Rahima Binthi Mohamed Ismail by deed of gift bearing No. 9431 of 29.09.1994 gifted 5 acres which is depicted as lot 10 in plan No. 14 of 17.01.1959 out of an extent of 52 acres and 2 roods to her son the Plaintiff in this action.

The said lot 10 is the subject matter of this suit. (described in schedule 'B' of plaint). Plaintiff's case is that his uncle Hassan Bin Ismail (brother of Plaintiff's mother) was in occupation of the said land gifted to him by his mother by deed No. 9431 with the permission, leave and licence of his mother to look after that portion of land. However the uncle Hassan Bin Ismail died on July 1993. Thereafter the Defendant the son of H. Bin Ismail continued to remain in occupation, on the same terms and conditions. Plaintiff's mother requested the Plaintiff to take over the said lot of land and she also terminated the leave and licence. Plaintiff called upon the Defendant to hand over possession but the Defendant failed to do so. As a result this action was filed.

The Defendant takes up the position that this is a case of prescription, among co-owners. Defendant's father was also a co-owner owning an undivided 1/4th share. It is also averred that lot 10 never existed as a separate land on the ground. Answer disclosed several deeds which had been executed after 1959 by co-owner of the larger land, disregarding plan 14/1959. Defendant also state that lot 10 was never possessed by Plaintiff or his predecessors in title. Lot 10 never existed as a separate block. Lot 10 was always possessed by Defendant and his predecessors in title. Lot 10 is part of the said divided portion possessed by the Defendant in lieu of his undivided shares. It is also stressed by the Defendant that plan P1 of Cross Dabarera was never signed by the co-

owners. No cross deeds executed in terms of the said plan P1 to end co-ownership. No evidence of boundary fences or boundary walls. As such it is argued on behalf of the Defendants that a commission was not taken by Defendants to show the boundaries or separate lots. P1 was never superimposed on a plan.

The learned District Judge held with the Plaintiff and entered Judgment in favour of the Plaintiff. However the High Court set aside the Judgment of the District Judge and dismissed the plaint. The Supreme Court on 05.05.2011 granted Leave to Appeal on questions set out in paragraph 16(a), (c) & (n). It reads thus:

(a) The said order is contrary to law, pleadings and evidence placed before their Lordships the Judges of the Provincial High Court for adjudication.

(c) Their Lordships the Judges of the Provincial High Court have failed to appreciate the fact that the subject matter had been divided and defined by virtue of the plan marked "පැ1" as far back as in 1959 and Deed of Gift bearing No. 9431 marked "පැ 10" had been executed based on the said plan and the Respondent has never disputed the said plan and or Deed of Gift.

(n) Their Lordships the Judges of the High Court have erred in law in interpreting and applying the provisions of Prescription Ordinance to the present case in that failed to appreciate that fact that all the parties to the amicable partition plan marked and produced as "පැ 1" had been possessing their portion exclusively since 1959.

The learned High Court Judges have not given their mind to the question of leave and licence granted to the Defendant and his father. Instead based on Defendant's submissions the High Court examined title to lot 10 of plan P1 and thought it fit to conclude on the provisions contained in Section 3 of the Prescription Ordinance, and to the question of their being no signatures on the plan P1 of the co-owners and the absence of a partition deed. Prior to all this there is a vital point to be considered i.e the question of leave and licence of the Defendant and his father. Plaintiff closed his case by leading in evidence documents marked P1 to P28, without any objection. I would emphasise the fact that letter P21, P22 and P23 were marked and produced in court and there was no objection to same and as such it is evidence in court for all purposes.

Letter P21 dated 2.11.1995 sent by an Attorney at Law on behalf of Plaintiff to Defendant refer to the fact that lot 10 in plan P1 was made by Mr. Croos Dabarera which lot was gifted to Plaintiff by his mother. This letter specifically state that the leave and licence granted to Defendant's father was terminated. In that letter it is stated that the mother requested the son (Plaintiff) to take over possession of lot 10. Letter P22 is from Plaintiff to Defendant which is self-explanatory. There again it is stated that Defendant's father was given this lot 10 to look after the said lot 10 with the permission of the mother of Plaintiff. P22 is a request to hand over possession. P23 is a police

complaint against the Defendant by the Plaintiff stating that the Defendant is in unauthorised occupation. This court is more than satisfied that the leave and licence given to Defendant's father and the Defendant had been terminated for all purposes of this case.

In plan P1 land was divided into 10 lots. Lot 10 is the subject matter of this dispute more fully described in schedule 'ඇ' of the plaint. The Surveyor Cross Dabarera was called by the Plaintiff to given evidence. He prepared P1 and P2. In cross-examination of Surveyor several positions were put to the Surveyor but the Surveyor testified that he went to the land in dispute on several occasions and saw the boundaries of the several lots on the ground. Evidence led at the trial reveal that the co-owners were gifted the land described in P1 may be undivided at the time the gift was made to them by their father but from 1959 onwards the co-owners amicably possessed as divided lots the land as described in P1. Hasan the father of the Defendant possessed the lot allotted to him as a divided portion of land and as a divided portion of the land he alienated his plot of land by deeds පැ11, පැ13, පැ14, පැ15,පැ16 & පැ26. The said deeds are all annexed to the court record. It reveal that the donor (Hassan) gifted all divided portions of the land to the several donees. As such I agree that divided separated portions were alienated by way of gift, by the said Hussan and also the Plaintiff's party. As the learned District Judge observes in his Judgment

Hassan or his son the Defendant is estopped in law and cannot get out of that position by their own conduct.

I observe that the co-owners in relation to deeds පැ11, පැ13, පැ14 &, පැ15 possessed the lots in question as separate lots of land. It is also relevant to note that the Defendant had admitted this position, and deeds පැ25 පැ26, පැ 27 &, පැ28 in cross-examination. As such the said co-owners dividedly and separately possessed there plots of land.

In the learned District Judge's Judgment he has dealt with so many primary facts. This court does not wish to interfere with same. Learned District Judge is entitled to form his own opinion on very many primary facts. Question of fact are such questions the Supreme Court or an Appellate Court would not unnecessarily overrule decisions of the lower court 1993(1) SLR 119; 20 NLR 332; 20 NLR 282; 1955 1 AER 583-4; 1955 1 AER 326.

The Defendant's father possessed lot 10 of plan P1 only as a licence. I have already dealt with this position. As such the Defendant cannot take up the position that he acquired prescriptive title to the land (lot 10) in question. Defendant argue that there was no partition among the co-owners. If that be so Defendant cannot take up the position that he had acquired prescriptive title against co-owners over an undivided land. This seems to be that the Defendant

is seeking to approbate and reprobate. Nor did the Defendant establish exclusive adverse possession, as regards his own rights.

I am unable to agree with the views expressed by the High Court by referring to several authorities that the co-owners have not signed the partition plan. If the parties concerned (co-owners) signed the partition plan it would have been very easy for all parties, but in the absence of such signatures, I cannot conclude the way the High Court Judges dealt with the case when there was sufficient oral and documentary evidence of the Plaintiff's party of amicable divisions of the land in dispute and separate and independent possession of same from the year 1959. The subsequent conduct of the co-owners and subsequent transfers of certain divided portion, out of the allocated share of land by the predecessors of parties and especially by Defendant's father by executing deeds පැ11, පැ13, පැ14, පැ15,පැ16 & පැ26 establish clearly of separate divided lots by the parties concerned. The Judgments cited by the learned High Court Judge have been applied to this case on an incorrect perspective. No doubt the Judgments cited is a guide to be only considered by a court of law. When there is full proof evidence with cogent reasons one has to consider the evidence led before the original court, which could be termed as the best evidence in the context and circumstances of the case in hand.

I refer to the case at *Dona Cecilia vs. Cecilia Perera and others 1987(1) SLR Pg. 235 (SC)*

Where a land is divided with the consent of all the co-owners but no cross conveyances are executed in respect of the lots, co-ownership terminates only after undisturbed, uninterrupted and exclusive possession of the divided lots for a period of over ten years

Where a land was divided in the presence of all the co-owners who acquiesced in the division and possessed their divided lots exclusively taking the produce thereof everything points to an intention to partition the land permanently and not just for convenience of possession and although the plan of division was not signed by the co-owners and no cross conveyances were executed, with ten years of such possession the co-owners would acquire prescriptive title to their respective lots. The successor to a co-owner could take on the period of possession of his predecessor in proving his prescriptive title.

The above well considered Judgment could be applicable to the facts of this case. Evidence transpired in the original court establish the fact that there had been an amicable partition between all previous co-owners of the land which consists of about 211 acres, 3 roods and 23 perches. Lot 10 of the said land was allocated to the mother of the Plaintiff who later on gifted same to her son the Plaintiff. Therefore I set aside the Judgment of the High Court. As such I answer the questions of law as 'Yes' in the affirmative.

Judgment of the learned District Judge is affirmed, and I set aside the Judgment of the High Court.

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare 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 appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 53/2013

SC/HCCA/LA/472/2012

SP/HC/CALA/899/2011

DC/Kegalle/3930/L

Nuwarapaksa Pedige Gunawathie,
Polwattewedagedara,
Meepitiya.

Plaintiff

Vs.

1. Nuwarapaksa Pedige Malani,
   Atabomulahena,
   Dampelgoda,
   Bossala.
2. Meragal Pedige Wimaladasa,
   Atabomulahena,
   Dampelgoda,
   Bossala.

Defendants

AND BETWEEN

1. Nuwarapaksa Pedige Malani,
   Atabomulahena,

Dampelgoda,
Bossala.

2. Meragal Pedige Wimaladasa,
Atabomulahena,
Dampelgoda,
Bossala.

Defendant Appellants

Vs.

Nuwarapaksa Pedige Gunawathie,
Polwattewedagedara,
Meepitiya.

Plaintiff Respondent

AND NOW BETWEEN

Nuwarapaksa Pedige Gunawathie,
Polwattewedagedara,
Meepitiya.

Plaintiff Respondent Appellant

Vs.

1. Nuwarapaksa Pedige Malani,
Atabomulahena,
Dampelgoda,
Bossala.

2. Meragal Pedige Wimaladasa,
Atabomulahena,
Dampelgoda,

Bossala.

Defendant Appellant Respondents

BEFORE	:	PRIYASATH DEP, PC, J. (as he was then) UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	M. S. A. Saheed with A. M. Hussain for the Plaintiff Respondent Appellant Dr. Sunil Cooray for the 1st & 2nd Defendant Appellant Respondents
WRITTEN SUBMISSION ON:		03.05.2013 Plaintiff Respondent Appellant 25.06.2013 Defendant Appellant Respondents
ARGUED ON	:	03.02.2016
DECIDED ON	:	01.08.2017

UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) has preferred this appeal from the judgment of the High Court of Civil Appeal of the Sabaragamuwa Province, holden at Kegalle dated 04.10.2012. By the said judgment, the High Court has set aside the judgment of the learned

Additional District Judge of Kegalle dated 29.08.2011, which was delivered in favour of the Plaintiff Appellant.

When the matter was supported for leave to appeal, this court has granted leave on the following questions of law raised by the Appellant and the Respondents respectively:

1. Whether the Civil Appellate High Court erred in law in holding that the 1st Defendant was a co-owner of the subject matter of the Action?
2. Whether the Plaintiff can maintain this action for the ejectment of the Defendant from an undivided 01 (one) acre out of a land of 07 (seven) acres in extent?

The Appellant has instituted the said action against the 1st and 2nd Defendant Appellant Respondents (hereinafter referred to as the Respondents) in the said District Court seeking declaration of title to the land described in the schedule to the plaint and ejectment of the Respondents therefrom. The Appellant has averred that her father Bandiya, the predecessor in title to the said land, by deed of gift bearing No 45595 dated 11.06.1984, gifted 01 acre of undivided land and the house standing thereon out of a land in extent of 07 acres subject to the life interest of said Bandiya and his wife. After the death of said Bandiya and his wife the Appellant became the sole owner of said 01 acre and lived there. She separated the land by a fence. On or about 12.05.1987, the Respondent having no title to the said land had forcibly entered in to possession of the said land.

The Respondents have filed their answer denying the averments contained in the plaint and praying for a dismissal of the Appellant's action. They have averred that they were living in the house on the said land permanently and

the Appellant's said title deed bearing No 45595 was a forged deed. They have further averred that the Appellant, after her marriage, did not live in the house on the said property. However, in their answer, the Respondents have not claimed title on deeds or by inherutance to the said land in dispute.

Prior to the trial of the case an inquiry had been held in to the application for interim injunction sought by the Appellant restraining the Respondents from interfering with the Appellant entering in to the said land in dispute and taking the produce of the said land. Accordingly, an interim injunction had been issued in favour of the Appellant.

The case has proceeded to trial on 19 issues. The Respondents have raised issues No 9 to 17. However, issues they have not challenged the said deed of gift bearing No 45595 in the said issues, which was referred to in their answer as a forged deed. The Appellant and her husband had given evidence at the trial. They had produced documents marked P 1 to P 8 inclusive of the said title deed No 45595 of the Appellant and also their marriage certificate to establish that the Appellant had gone on a binna marriage. The Respondents have not challenged the said binna marriage certificate too. In her evidence, the Appellant has stated that after the said marriage, she was living in her father's house put up on the said land in dispute with her husband. Later, her father gifted the said land to her by the said deed of gift bearing No 45595. Upon the death of her father, said Bandiya, the Respondents came to the said house in order to attend the funeral. After the funeral, she became unconscious very often due to a ghostly influence and therefor she moved to her husband's house situated at Meepitiya on 07.05. 1987 for medical treatment. Hence, she had requested the Respondents to stay in the said house to look after the house during her absence. On 12.05.1987, when she

returned to her said house subsequent to treatments she was chased out by the Respondents from the said house. Appellant's husband, Gunasinghe too has given evidence.

The Respondents have closed their case leading the evidence of the 1st Respondent Malani. They have not produced any documentary proof of the facts alleged by them. In her evidence, the Respondent has admitted that she had gone on a diga marriage whilst the Appellant had gone on a binna marriage. The 1st Respondent has further stated that after her marriage, in 1979, she came in to the occupation of the said house and the Appellant was residing at Meepitiya. Whilst taking the said position, the Respondent has admitted the extract of the electoral register produced marked P 8. According to P 8 her residence was at Dampella. She has further admitted that consequent to the death of her father said Bandiya the Appellant fell ill and went to Meepitiya for treatment and returned to the premises in dispute. Although the issue No 17 has been raised on prescriptive title, the 1st Respondent has not given evidence on that basis. The 1st Respondent whilst admitting her diga marriage has claimed the title of the said property on the basis of her binna marriage. She said that she is living in the said house in dispute with her father and she is entitled to the said property on inheritance.

In this regard, the Respondents should have adduced evidence to prove that the 1st Respondent had gone on a binna marriage and thereby she became entitled to her father's property on inheritance according to Kandiyan Law and therefore, she is a co-owner of the said property. However, the 1st Respondent has not produced her marriage certificate in her evidence to establish whether her marriage was binna or diga.

It is interesting to note that the 1st Respondent, in her evidence has admitted that she went on a diga marriage with Wimalaratne and moved in to occupation of said Wimalaratna's house. However, P 8, the extract of the electoral register indicated that she was residing at Dampella.

On the other hand, the Respondents having led evidence on the said basis have failed to raise issues on the said matters. Whether the 1st Respondent has regained binna rights has to be decided on evidence. It is not a pure question of law. Hence such matters should be raised at the trial stage. The Respondents have failed to do so. Therefore, the Respondents are not entitled to raise such matters for the first time in appeal.

In the case of Punchi Menike vs. Appuhamy (1917) 19 N.L.R. 358, De Sampayo J. said: " The point to be kept in view in all cases, I think, is that the essence of a diga marriage is the severance of the daughter from the father's family and her entry into that of the husband, and her consequent forfeiture of any share of the family property ; and the principle underlying the acquisition of binna rights, as I understand it, is that the daughter is re-admitted into the father's family and restored to her natural rights of inheritance. This of course is not a one-sided process; the father's family must intend or at least recognize the result."

Therefore, when there are no issues raised at the trial on the point urged for determination, this court cannot go in to such matters at the appeal stage. In the circumstances, the respondents' possession of the land in dispute has become unlawful. The Appellant, therefore, is entitled to a decree for declaration of title against the Respondents since the Respondents are remaining in the

possession of the land in dispute in the capacity of trespassers. Hence, I answer the said questions of law in favour of the Appellants.

Therefore, I set aside the said judgment of the learned High Court Judges dated 04.10.2012 and up hold the judgment of the learned Additional District Judge dated 29.08.2011. I allow the appeal of the Appellant with costs.

Appeal allowed.

Judge of the Supreme Court

PRIYASATH DEP, PC, CJ.

I agree.

Chief Justice

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court

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

Sumudu Sanjeevanee Nanayakkara
No.95, Cemetery Road, Mirihana
Nugegoda.

Plaintiff

SC Appeal 53/2017
SC/HCCA/LA 9/2016
WPHCCA/Col/ 184/2014/LA
DC Colombo DSP/70/2013

Vs

1. Hatton National Bank PLC,
No.479, TB Jayah Mawatha
Colombo10
Having a branch Office at No.63,
Moratuwa Road, Piliyandala.

2. Don Ashok Ranjan Vitharana
No.326/2 Pitakotte,
Kotte

Defendant

AND

Sumudu Sanjeevanee Nanayakkara
No.95, Cemetery Road, Mirihana
Nugegoda.

Plaintiff-Petitioner

Vs

1. Hatton National Bank PLC,

No.479, TB Jayah Mawatha
Colombo10
Having a branch Office at No.63,
Moratuwa Road, Piliyandala.

2. Don Ashok Ranjan Vitharana
No.326/2 Pitakotte,
Kotte
(DECEASED)

2a. Dona Sriyani Malkanthi Vitharana
2b. Dona Chandani Kamal Vitharana
2c. Dona Roshani Kumari Vitharana
2d. Don Sudantha Niroshan Vitharana

All of No.326/2, Pitakotte, Kotte
Defendant-Respondents

AND NOW BEWEEN

Sumudu Sanjeevanee Nanayakkara
No.95, Cemetery Road, Mirihana
Nugegoda.

Plaintiff-Petitioner-Appellant

Vs

1. Hatton National Bank PLC,
No.479, TB Jayah Mawatha
Colombo10
Having a branch Office at No.63,
Moratuwa Road, Piliyandala.

2a. Dona Sriyani Malkanthi Vitharana
2b. Dona Chandani Kamal Vitharana
2c. Dona Roshani Kumari Vitharana
2d. Don Sudantha Niroshan Vitharana

All of No.326/2, Pitakotte, Kotte

Defendant-Respondent-Respondents

Before : Sisira J De Abrew J
Anil Goonetratne J
NalinPerera J

Counsel : Kuwera de Zoysa with Niranjan de Silva and Pradhara Kotambage for the Plaintiff-Petitioner-Appellant
Priyantha Alagiyawanna for 1st Defendant-Respondent-Respondent

Written Submission
Tendered on : 25.4.2017 by the Plaintiff-Petitioner-Appellant
9.10.2017 by the 1st Defendant-Respondent-Respondent

Argued on : 17.10.2017

Decided on : 28.11.2017

Sisira J De Abrew J

Notices were sent by this court to the 2a to 2d Defendant-Respondent-Respondents on 20.1.2016 and 3.3.2016. But they have not responded to the said notices. The case was taken up for hearing on 17.10.2017.

The Plaintiff-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) has pleaded the following facts in her plaint. She was in need of Rs. 5 million in December 2009 to purchase a land. The 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Defendant Bank) was not willing to grant her a loan of five million as she did not have sufficient income to repay the loan. However the Manager of the Piliyandala branch of the 1st Defendant Bank informed the Plaintiff-Appellant and the 2nd Defendant-Respondent-Respondent (hereinafter referred to as the 2nd Defendant-Respondent) who is a friend of the

Plaintiff-Appellant that a loan of Rs.5 million could be granted to the 2nd Defendant-Respondent who had an acceptable income if the property of the Plaintiff-Appellant which is the property in suit was transferred to the 2nd Defendant-Respondent who would mortgage it to the 1st Defendant Bank. Thereafter, by deed No 4586 dated 14.12.2009 attested by V. Balasubramaniam, Notary Public, the Plaintiff-Appellant transferred the property in suit to the 2nd Defendant-Respondent; on the same day the 2nd Defendant-Respondent by Mortgage Deed No.616 dated 14.12.20019 attested by A.M.D.K Adikary Notary Public Mortgaged it to the 1st Defendant Bank; and the 1st Defendant Bank on14.12.2009 granted the loan of Rs.5 million to the 2nd Defendant-Respondent. The 1st Defendant Bank in their answer admits that Rs.5 million was released to the Plaintiff- Appellant. The Plaintiff-Appellant thereafter started repaying the loan by depositing loan installments in the 2nd Defendant-Respondent's bank account maintained with the 1st Defendant Bank. Later the Plaintiff-Appellant could not continue to deposit loan installments in the said account and the 1st Defendant Bank by resolution dated 6.12.2012 decided to act in terms Section 4 of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 and sell the property in suit by public auction. This resolution has been produced as P7(b). The Plaintiff-Appellant thereafter filed this action in the District Court of Colombo seeking, inter alia, an interim injunction preventing the 1st Defendant Bank and its servants from holding the public auction fixed for 22.4.2013 or any subsequent auction pursuant to the aforementioned resolution of the 1st Defendant Bank in relation to the property in suit pending hearing and final determination of this action. The above facts have been pleaded by the Plaintiff-Appellant in her plaint filed in the District Court.

The learned District Judge by his order dated 28.10.2014, refused to grant the said interim injunction. Being aggrieved by the said order of the learned District Judge, the Plaintiff- Appellant appealed to the Civil Appellate High Court 9hereinafter referred to as the High Court) and the said High Court by its order dated 27.11.2015 refused to grant leave to appeal. Being aggrieved by the said order of the High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 14.3.2017, granted leave to appeal on questions of law stated in paragraphs 13(c),(d),(f) and (g) of the petition of appeal dated 6.1.2016 which are set out below.

1. Did their Lordships of the Honourable Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate Jurisdiction and the learned Additional District Judge of Colombo err in Law in not envisaging that the special procedure contained in the recovery of loans by Banks (Special Provisions) Act No.4 of 1990 as amended cannot be invoked by the 1st Defendant Bank to auction the property in suit especially in light of the subsequent amending Acts to wit: Recovery of Loans by Banks (Special Provisions) (Amendments) Act No.1 of 2011 and Recovery of Loans by Banks (Special Provisions) (Amendment) Act No.19 of 2011 ?

2. Did their Lordships of the Honourable Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate Jurisdiction and the learned Additional District Judge of Colombo err in Law in not envisaging that the special procedure contained in the recovery of loans by Banks (Special Provisions) Act No.4 of 1990 as amended cannot be invoked by the 1st Defendant Bank to auction the property in suit to recover a sum of Rs.4,448,354.13/= ?

3. Did their Lordships of the Honourable Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate Jurisdiction and the learned Additional District Judge of Colombo err in Law in not envisaging the true meaning that the phrase **"Principal Amount"** referred to in Section 5A of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended **is not a Static amount and that a calculation is necessary to determine the "Principal amount borrowed due at the time of default" based on the loan installments already paid?**

4. Did their Lordships of the Honourable Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate Jurisdiction and the learned Additional District Judge of Colombo err in Law in **not envisaging that at the time of default the principal amount borrowed due and owing to the 1st Defendant Bank on the Loan granted was less than 5 Million Rupees?**

Learned counsel for the 1st Defendant Bank contended that the Plaintiff-Appellant has no status to file this case as the 1st Defendant Bank had granted the loan to the 2nd Defendant-Respondent. I now advert to this contention. Although the loan of Rs.5 million was granted to the 2nd Defendant-Respondent, the property in suit was transferred by the Plaintiff-Appellant on 14.12.2009 to the 2nd Defendant-Respondent who mortgaged it to the 1st Defendant Bank on the same day. Further the 1st Defendant Bank has admitted in paragraph 6 of their answer that the money amounting to Rs.5 million was released to the Plaintiff- Appellant. Learned President's Counsel for the Plaintiff-Appellant relying on the deed No.4586 and the Mortgaged bond No 616 contended that the 2nd Defendant-Respondent was holding the property in trust on behalf of the Plaintiff- Appellant.

When I consider all the above matter, I feel that there is merit in the contention of learned President's Counsel. Therefore I am not prepared to dismiss the appeal on the contention of learned counsel for the 1st Defendant Bank.

Learned President's Counsel for the Plaintiff-Appellant relying on section 5A of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended by Act No.1 of 2011 and Act No.19 of 2011 contended that if the remaining balance of the principal amount borrowed is less than Rs.5 million the bank could not sell the property mortgaged by public auction acting in terms of section 4 of the said Act. But learned counsel for the 1st Defendant Bank did not agree with this contention and contended that if the original amount of the loan granted to the borrower was Rs.5 million or above Rs.5 million, then the bank has the power to act in terms of section 4 of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 and sell the property mortgaged to the bank by public auction. I now advert to this contention. Section 5A of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended by Act No.1of 2011 reads as follows.

> *5A. (1) No action shall be initiated in terms of section 3 of the principal enactment for the recovery of any loan in respect of which default is made, nor shall any steps be taken in terms of section 4 or section 5 of the aforesaid Act, where the* ***amount*** *of such loan is less than rupees five million*
>
> *Provided however, at the time of default when calculating the* ***amount*** *due and owing to the Bank on the loan granted to such defaulter, the interest accrued on such loan and any penalty imposed thereon, shall not be taken into consideration.*

This Act came into operation on 28.11.2011. But by Act No.19 of 2011 which was certified on 31.3.2011 the word **'amount'** in the above section was replaced with words 'principal amount borrowed'. Therefore Section 5A the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended by Act No.1of 2011 and Act No.19 of 2011 reads as follows:

> 5A. (1) No action shall be initiated in terms of section 3 of the principal enactment for the recovery of any loan in respect of which default is made, nor shall any steps be taken in terms of section 4 or section 5 of the aforesaid Act, where the **principal amount borrowed** of such loan is less than rupees five million:
>
> Provided however, at the time of default when calculating the **principal amount borrowed** due and owing to the Bank on the loan granted to such defaulter, the interest accrued on such loan and any penalty imposed thereon, shall not be taken into consideration.

Before the enactment of Act No.19 of 2011, when the borrower of a loan was in default the bank had to calculate, at the time of default, **the amount** due and owing to the bank on the loan granted to the borrower. However the amount so calculated did not include the interest and any penalty imposed on the borrower. After the enactment of Act No.19 of 2011, the words 'at the time of default when calculating the **principal amount borrowed** due and owing to the bank' must be carefully considered. After the enactment of Act No.19 of 2011, when a borrower of a loan is in default, the bank has to calculate, at the time of default, the **principal amount borrowed** due and owing to the bank. Here again the amount so calculated did not include the interest and any penalty imposed on the borrower. What is meant by the phrase 'principal amount borrowed due and owing to the bank'? It means the balance of the principal amount borrowed. In other words it means the balance of the original amount of the loan granted to borrower. If this interpretation is not given there was no necessity to enact the Act No.19 of 2011.

If the contention of learned counsel for the 1st Defendant Bank is correct, then the property (mortgaged to the bank) of a person who did not pay any amount on a loan of Rs.4.9 million cannot be sold by the bank in public auction but the property (mortgaged to the bank) of a person whose balance is only 0.1million on a loan of Rs.10 million can be sold by bank in public auction because he had taken a loan of more than Rs.5 million. This means bigger defaulter's property is protected but not the small defaulter's property. Is this procedure reasonable? Can this kind of interpretation be given to Section 5A of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended by Act No.1of 2011 and Act No.19 of 2011? The answer should be in the negative. After considering all the aforementioned matters, I hold that prior to and after the enactment of Act No.19 of 2011, if the **original** amount of the loan granted was less than Rs.5 million, the bank cannot, in a case of default, sell the property mortgaged by public auction; and that after the enactment of Act No.19 of 2011, if the **balance** amount of the original amount of the loan is less than Rs. 5 million, the bank cannot, in a case of default, sell the property mortgaged by public auction in terms of Section 4 of the Act even if the original amount of the loan was Rs.5 million or above.

In the present case, the loan granted was Rs.5 million. The unpaid amount of the loan including interest according to the resolution is Rs. 4,448,354/13. Therefore the balance of the principal amount of the loan due and owing to the bank should necessarily be less than Rs.5 million. The 1st Defendant Bank has passed the resolution dated 6.12.2006 marked P7(b) to sell the property mortgaged to the bank by public auction. For the aforementioned reasons, I hold that the said resolution is not legal.

When I consider all the aforementioned matters, I am of the opinion that the Plaintiff-Appellant has put forward a strong prims facie case. Then should the court issue an interim Injunction? In Felix Dias Bandaranayake Vs State Film Corporation [1981] 2 SLR page 287 Justice Soza held:

> *"In deciding whether or not to grant an interim injunction the following sequential tests should be applied*
>
> *1. 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 serious question to be tried in relation to his legal rights and that the probabilities are that he will win.*
>
> *2. In whose favour is the balance of convenience-the main factor being the uncompensatable disadvantage or irreparable damage to either party?"*

Justice Soza at page 302 Observed as follows:

> *"In Sri Lanka we start off with a prim a 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."*

I have earlier pointed out that the resolution passed by the 1st Defendant Bank is not legal. Considering all the above matters, I hold that the Plaintiff-Appellant has put forward a strong prima facie case and that there is a serious question to be tried in relation to the rights of the Plaintiff-Appellant. For all the aforementioned reasons, I hold that the learned District Judge was wrong when he refused to grant the interim injunction as prayed for in paragraph (f) of the prayer to the plaint and the High Court was wrong when it dismissed the petition of appeal of the Plaintiff-

Appellant. For all the aforementioned reasons I set aside the order of the learned District Judge dated 28.10.2014 and the order of the High Court dated 27.11.2015 and grant relief prayed for in paragraph (f) of the prayer to the plaint. The learned District Judge is hereby directed to issue the interim injunction as prayed for in paragraph (f) of the prayer to the plaint.

In view of the conclusion reached above, I answer the above questions of law in favour of the Plaintiff-Appellant. For the above reasons, I allow the appeal. The Plaintiff-Appellant is entitled to the costs of all three courts.

Appeal allowed.

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.

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

SC. Appeal No. 55/2015

In the matter of an Application for Leave to Appeal against the Judgment dated 2014/11/05 delivered by the Civil Appellate High Court of the Western Province holden in Avissawella.

SC (HCCA)/LA/656/2014

WP/HCCA/AV/802/08 (F)

District Court of Pugoda 759/L

Piscal Kankanamalage Don Alfred Victor

Plaintiff-Appellant-Appellant

Vs.

01 Nekath Gamlath Ralalage Disa Nona

02 Maalimage Don Jayantha Pushpakumara

03 Maalimage Don Nishantha Pushpakumara

04 Maalimage Achala Shiromi

All of 277/A, Kusalawatta, Udakanampella, Pugoda.

05 Udage Arachchige Sarath Gamini of Pelpita, Pugoda

Defendants-Respondents-

Respondents

BEFORE : Sisira J De Abrew J

Ani Gooneratne J

Prasnna Jayawardena PC J

COUNSEL : C Sooriyaarchchi with C Ratnayaka for the Plaintiff-Appellants-Appellant

Kamal Suneth Perera for the Defendant-Respondent-Respondents.

Written Submissions of the Appellants filed on : 31/03/2015

Written Submissions of the Respondents filed on : 30/01/2015

ARGUED ON : 2.12.2016.

DECIDED ON : 15.2.2017

SISIRA J.DE ABREW J.

This is an appeal against the judgment of the Civil Appellate High Court wherein Judges of the said High Court affirmed the judgment of the learned

District Judge dated 3.8.2007. This court by its order dated 16.3.2015, granted leave to appeal on the following question of law.

"Did the High Court and the District Court err in law when prayer (b) of the Plaint was not granted on 3.8.2017 when deed No.1014 was produced in evidence?"

Facts of this case may be briefly summarized as follows.

Plaintiff-Appellant-Appellant (hereinafter referred to as the Plaintiff-Appellant) instituted action in the District Court of Pugoda against the Defendant-Respondent-Respondents (hereinafter referred to as the Defendant-Respondents) seeking a declaration (i) that deed No.1948 dated 2.6.1996 attested by Romesh Samarakkody Notary Public is a forged and invalid deed and (ii) that deed No.1014 dated 29.12.1994 attested by I M Wimalasena Notary Public is a valid deed. The Defendant-Respondents filed their answer. Both parties also raised issues. But the case was fixed for ex-parte trial as the Attorney-at-Law for the Defendant-Respondents informed court that he had not received instructions from his clients. At the ex-parte trial only the Plaintiff-Appellant gave evidence and closed his case. The learned District Judge by his judgment 3.8.2007, dismissed the case of the Plaintiff-Appellant. At the ex-parte trial the Plaintiff-Appellant did not produce the deed No.1948 referred to above although he challenged the validity of the said deed. The learned District Judge therefore dismissed the case of the Plaintiff-Appellant.

Learned counsel the Plaintiff-Appellant contended that the learned District Judge fell into grave error when he did not grant the prayer (b) of the Plaint. The Plaintiff-Appellant in prayer (b) of the Plaint, sought a declaration that the deed No.1014 was a valid deed. The deed was produced as P1 at the ex-parte trial. The deed No.1014 attested by I M Wimalasena was executed by the Registrar of the

District Court of Gampaha in compliance with the judgment and subsequent order of the District Court of Gampaha in case 33995/Money. A perusal of the said deed reveals that the official frank of the Registrar District Court Gampaha has been placed on deed No.1014. On the face of the said deed there do not appear to be any reasons to reject it. The contention of the Defendant-Respondents is that the Plaintiff-Appellant had failed to take steps in terms of Section 68 of the Evidence Ordinance to prove the said deed.

In Bandaranayake Vs Times of Ceylon [1995] 1SLR 22 this court held as follows:

> "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 an adjudication."

The most important question that must be decided is whether the learned District Judge considered prayer (b) of the Plaint. I now advert to this question. The learned District Judge at the beginning of his judgment states as follows: "The Plaintiff has filed this case to get a declaration that the deed No.1948 dated 2.6.1996 a forged deed." The learned District Judge has not stated, in his judgment, that the Plaintiff also seeks a declaration to the effect that deed No 1014 dated 29.12.1994 attested by IM Wimalasena is a valid deed. The learned District Judge has not given any decision with regard to the prayer (b) of the Plaint. On perusal of the judgment it appears that the learned District Judge has not at all considered the prayer (b) of the Plaint.

When I consider all the above matters, I am of the opinion that the learned District Judge was wrong when he failed to consider prayer (b) of the Plaint.

Therefore the judgment of the learned District Judge is wrong and cannot be permitted to stand. The learned Judges of the High Court have, by their judgment dated 5.11.2014, affirmed the judgment of the learned District Judge. Since the judgment of the learned District Judge is wrong, the judgment of the High Court too cannot be permitted to stand. For the above reasons, I set aside the judgment of the learned District Judge dated 3.8.2007, and the judgment of the High Court dated 5.11.2014 and direct the learned District Judge to rehear the ex-parte trial. For the above reasons, I answer the above question of law in the affirmative.

Judgments set aside.

Judge of the Supreme Court

Anil Gooneratne J

I agree.

Judge of the Supreme Court

Prasanna Jayawardena J

I agree.

Judge of the Supreme Court

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

Saramge Upul Wijayasiri de Alwis
No. 44/2, Old Kottawa Road,
Pannipitiya.

Plaintiff

Vs.

SC APPEAL No. 57/2014
SC(HC)CALA/481/2012
WP/HCCA/MT/65/09(F)
D.C. Mt. Lavinia case No.
1486/01/L

1. Rashdeen Casim
2. P.R. Boran
3. T.T.N. Casim
4. T.F. Boran

All of No. 50, Old Kottawa Road, Pannipitiya.

Defendants

AND BETWEEN

Saramge Upul Wijayasiri de Alwis
No. 44/2, Old Kottawa Road,
Pannipitiya.

Plaintiff-Appellant

Vs

1. Rashdeen Casim
2. P.R. Boran
3. T.T.N. Casim
4. T.F. Boran

All of No. 50, Old Kottawa Road, Pannipitiya.

Defendant-Respondents

AND

Saramge Upul Wijayasiri de Alwis
No. 44/2, Old Kottawa Road,
Pannipitiya.

Plaintiff-Appellant-Petitioner-Appellant

Vs.

1. Rashdeen Casim
2. P.R. Boran
3. T.T.N. Casim
4. T.F. Boran

All of No. 50, Old Kottawa Road, Pannipitiya.

Defendant-Respondent-Respondent-Respondents

Before: Sisira J De Abrew J

Upaly Abeyratne J &

Anil Gooneratne J

Counsel: Ranjan Suwandaratne for the Plaintiff-Appellant-Petitioner-Appellant

Ikram Mohamed President's Counsel with Taniya Marjan for the Defendant-Respondent- Respondent-Respondents

Written Submissions

tendered on : 17.6.2014 by the Plaintiff-Appellant-Petitioner-Appellant

25.7.2014 by the Defendant-Respondent-Respondent-Respondents

Argued on : 19.1.2017

Decided on : 22.6.2017

Sisira J De Abrew J

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) instituted action in the District Court of Mount Lavinia seeking a declaration that the Plaintiff-Appellant is entitled to a right of way over Lot No.4 in Plan No.3159 marked as P2 to gain access to the property described in the schedule to the plaint; that the said Lot No.4 is a road access provided only to gain access to Lot No.A1 and A2 of Plan No.5643 marked as P3; and that for a permanent injunction restraining the Defendant-Respondent-Respondent-Respondents (hereinafter referred to as the Defendant- Respondents) from entering and/or using the said road way shown as Lot 4 in Plan No.3159. The learned District Judge by his judgment dated 19.4.2009, dismissed the action of the Plaintiff-Appellant. Being aggrieved by the said judgment, the Plaintiff-Appellant appealed to the Civil Appellate High Court (hereinafter referred to as the High

Court) and the High Court, by its judgment dated 26.9.2012, 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 3.4.2014, granted leave to appeal on the following question of law.

"Whether the Plaintiff-Appellant who is entitled to a right of way without the soil right is entitled in law to obstruct the Defendant-Respondents who have no right of way to use the said road from using the same?"

It is undisputed that the Plaintiff-Appellant is entitled to use the right of way over Lot No.4 in Plan No.3159 (P2) but he has not got any soil right of the said right of way. The important question that must be decided is whether the Plaintiff-Appellant who is only entitled to use the right of way and has not got any soil right of the said right of way can obstruct or has a legal right to obstruct the Defendant-Respondent from using the said right of way. In finding an answer to this question it is important to consider a passage from a book titled 'Wille on Principles of South African Law page 224' which states thus:

> *"If a person unlawfully claims a servitude over land or claims greater rights under a servitude than it actually comprises, the owner of the land may bring an action against him, known as actio negatoria, for a declaration that his land is free from the servitude claimed, or free from the excessive burdens as the case may be (Voet 8.5.5). This action can be instituted by none but the owner of the land in question."*

The Court of Appeal in the case of Sapaarmadu Vs Melder [2004] 3 SLR 148 observed the following facts.

> *"The plaintiff-respondent instituted action for a declaration that the defendant-appellant is not entitled to use the road reservation. The plaintiff was not the owner of the land over which the road way exists.*
>
> The trial court gave judgment in favour of the plaintiff-respondent."

Court of Appeal held as follows:

> *"The plaintiff not being the owner of the land over which the road way exists cannot maintain the action. It is to be noted that the action has been filed on the basis that the defendant-appellant has no right to use the road: we are of the view that such an action can be filed only by a person who himself enjoys only a servitude."*

The Court of Appeal based the above decision on the basis of the above legal principle enunciated in the book titled 'Wille on Principles of South African Law page 224.'

Mr.Suwadaratne submitted that considering the urban development of this country the above judicial decisions should be changed. In my view if urban development is to be recognized the above legal principle enunciated in the book titled 'Wille on Principles of South African Law page 224'should be recognized as it prevents users of roadways who are not soil right owners from obstructing the other users of the roadways. When I consider the above matters, I am unable to agree with the contention of Mr.Suwadaratne. In view of the conclusion reached above, I answer the question law stated above in the following language.

The Plaintiff-Appellant who is entitled to a right of way without the soil right is **not** entitled in law to obstruct the Defendant-Respondents who have no right of way to use the said road, from using the same.

For the above reasons, I affirm the judgment of the High Court and dismiss this appeal 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

In the matter of an application for Special Leave to Appeal

SC/APPEAL No. 58/14

SC/SPL/LA/119/12

CA/607/1998/(F)

DC/Panadura/171/L

1.GalgamuwaKankanamlage Malani

2. GalgamuwaKankanamlage Sarath Dharmasiri both of No. 201, Pamunugama, Alubomulla.

Defendants-Appellants-Appellants

-Vs-

Habaragamuwage Dickson PeirisThilakapala of No. 201, Pamunugama, Alubomulla.

Plaintiff-Respondent-Respondent

BEFORE : EVA. WANASUNDERA, PC J.

SISIRA J. DE ABREW J. &

UPALY ABEYRATHNE, J.

COUNSEL : RohanSahabandu PC for theDefendants-

Appellants-Appellants.

Roshan Dayaratne with Thushari Hirimuthugoda for the Plaintiff-Respondent-Respondent.

Written Submissions

filed on : 03.06.2014 and 11.10.2016

by the Defendants-Appellants-Appellants

07.08.2014 by the Plaintiff-Respondent-Respondent

ARGUED ON : 25.10.2016.

DECIDED ON : 17.1.2017

SISIRA J. DE ABREW J.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) instituted action in the District Court of Panadura seeking a declaration of servitude for a ten feet wide road over the land of the Defendant-Appellant-Appellants (hereinafter referred to as the Defendant-Appellants) to access the Plaintiff-Respondent'house. In the alternative, the Plaintiff-Respondent sought the said road on the ground of necessity. The learned District Judge, by his judgment dated 11.6.1998, decided the case in favour of the Plaintiff-Respondent. On appeal

the Court of Appeal, by its judgment dated 31.5.2012 affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Court Appeal the Defendant-Appellants have appealed to this court. This court, by its order dated 28.4.2014, granted leave to appeal on the questions of law set out in paragraphs 20(a),(b),(c) and (d) of the petition of appeal dated 8.7.2012 which are stated below.

1. Was there a 10 feet wide right of access in existence for more than 10 years to obtain servitude over the land the 1st Defendant as shown as Lots 1 and 2 in plan 583?

2. Has the Plaintiff established the fact that he had used a 10 feet wide road access over the land of the 1st Defendant to obtain servitude?

3. Was there evidence to show that the Plaintiff has used a defined and distinct right of access of 10 feet wide without any disturbance or interruption to obtain a servitudinal right as claimed by prescription?

4. In the circumstances pleaded are the judgments of the Court of Appeal and the District Court correct and according to law?

The land of the Plaintiff-Respondent and the land of the Defendant-Appellants are adjoining lands. The Plaintiff-Respondent claims a road way over the land of the Defendant-Appellants. The Plaintiff-Respondent claims the said road way on the ground of necessity and servitude. I will first consider whether the Plaintiff-Respondent is entitled to the road way claimed on the ground of necessity. The Defendant-Appellants, at the trial, tried to establish that the Plaintiff-Respondent has an alternative foot path over the land of Asilin Perera. To prove this point the Defendant-Appellants called Y.B.K. Costa Licensed Surveyor who produced Plan No.2406 prepared by him. At the survey conducted by Y.B.K. Costa Licensed Surveyor, Defendant-Appellants have shown a foot path alleged to have been used by

the Plaintiff-Respondent. This foot path has been shown in the said plan by a dotted line leading to the cemetery road (the main road) from the land of the Plaintiff-Respondent over the land of Asilin Perera. However Y.B.K. Costa Licensed Surveyor in his report at page 232 has stated that he did not find such a footpath. Thus it appears that the attempt made by the Defendant-Appellants at the trial to prove that the Plaintiff-Respondent has an alternative road has not been successful. From the above facts it is clear that the Plaintiff-Respondent has no alternative road to have access to the main road and that if the road way over the land of the Defendant-Appellants is not granted, he will have no access to the main road. The Plaintiff-Respondent has taken up the position, at the trail, that he has no alternative road and that he is entitled to the road way over the land of the Defendant-Appellants on the ground of necessity. The most important question that must be considered is whether the Plaintiff-Respondent is entitled to a road way on the basis of necessity. I would like to consider certain judicial decision on this question. In Mohotti Appu Vs Wijewardene 60 NLR 46 Weerasooriya J held:

> *"A person can claim a way of necessity for the purpose of going from one land owned by him to another. The right of way will not be granted, if there is an alternative route to the one claimed although such route may be less convenient and involve a longer and more arduous journey."*

In Rosalin Fernando Vs Alwis 61 NLR 302 TS Fernando J held:

> *"that when a Court is called upon to decide a question of the grant of a right of way of necessity a proper test to be applied is whether the actual necessity of the case demands the grant of the right of way. In such a case it is not necessary that the plaintiff should establish that the way claimed is the only means of access from his land to the public road. If an alternative route is too*

difficult and inconvenient, the actual necessity of the case is the determining factor."

In Chandrasiri Vs Wickramasinghe 70 NLR 15 Thambiah J Held:

"A right of way of necessity cannot be granted if there is another though less convenient path along which access can be had to the public road."

I have earlier pointed put that the plaintiff-Respondent has no alternative road and if the road way over the land of the defendant-Appellant is not granted, he will have no access to the main road. When I consider the above matters, I hold that the Plaintiff-Respondent is entitled to the roadway on the ground of necessity. The Plaintiff-Respondent presently uses a 7 feet wide roadway over the land of Defendant-Appellants. Mr. Shabandu President's Counsel who appeared for the Defendant-Appellants at the hearing before us accepted that the Plaintiff-Respondent uses a 7 feet wide roadway over the land of Defendant-Appellants. He contended that granting of ten feet wide road over the land of Defendant-Appellants is unreasonable as it will affect the compound of Defendant-Appellants. I now advert to this question. Y.B.K. Costa Licensed Surveyor called by Defendant-Appellants admitted in evidence that if 10 feet wide road is given over the land of the Defendant-Appellants, a strip of 5 feet would be left for the compound. When I consider this evidence, I cannot agree with the above contention of Mr. Sahabandu.

When I consider all the above matters, I hold that the Plaintiff-Respondent is entitled to have a ten feet wide roadway over the land of the Defendant-Appellants. In my view, there are no grounds to disturb the judgments of the District Court and the Court Appeal.

In view of the conclusion reached above, the first three questions of law do not arise for consideration. In answering the 4th question of law, I would like to state here that the judgments of the District Court and the Court of Appeal are correct.

For the above reasons, I affirm the judgments of the District Court and the Court of Appeal and dismiss the appeal. However considering all the circumstances of this case, I do not make an order for costs.

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

S.C. Appeal 59/2014
SC/HCCA/LA No. 301/2011
NCP/HCCA/ARP No. 689/2009(F)
D.C. Polonnaruwa Case No. 10/P/2007

Liyanage Indrani Manel Charlotte
Watawala nee Perera

Of No. 462/12, Main Street, Negombo.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Ratnayake Mudiyanselage Jayatilleke
Bandara of No. 135, Thopawewa,
Polonnaruwa.

DEFENDANT-APPELLANT-RESPONDENT

Liyanage Anoma Kanthi Juliyana
Bamunuwatte nee Perera
Of No. 42/17, Dias Place, Panadura.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: Priyasath Dep P.C., J.
Anil Gooneratne J. &
Prasanna S. Jayawardena P.C., J

COUNSEL: Dr. Sunil Cooray for the Plaintiff-Respondent-Petitioner

Vijaya Niranjan Perera with Ms. Jeevani Perera
For the Defendant-Appellant-Respondent

ARGUED ON: 30.09.2016

DECIDED ON: 09.02.2017

GOONERATNE J.

This was a partition action filed in the District Court of Polonnaruwa on or about 18.07.1997. Plaintiff filed plaint against the 1st Defendant (Plaintiff's sister) 2nd and 3rd Defendants to partition a land described in the 3rd schedule to the plaint. Plaintiff-Respondent-Petitioners aver that the 3rd schedule refer to a divided portion of land from and out of the larger land called Dingirbanda–Hitapu-Watta which divided portion was said to be 5 Acres in extent within the boundaries given in the 3rd schedule. The larger land is described in the 1st schedule to the plaint in extent of 27 Acres and 15 Perches was owned on a crown grant.

The position of the Plaintiff-Respondent-Appellant was that the Plaintiff and 1st Defendant are sisters and they got title to the corpus to the land from their father Bonnie Perera on two separate deeds. It is urged that only the

two of them were the co-owners of the larger land and that the 2nd Defendant (son of 3rd Defendant) has no title whatsoever to the land in dispute but lived on the land in dispute. The 3rd Defendant was the wife or mistress of Wilson Singho who was the original lessee under Bonnie Perera. The learned District Judge held with the Plaintiff-Respondent-Petitioner on the points of contest raised in the action by the Plaintiff and the Defendant. As such the District Court Ordered the partition of the land in dispute between the Plaintiff and the 1st Defendant. Learned District Judge held against the 2nd and 3rd Defendants on their plea of prescriptive title. The 2nd and 3rd Defendants being aggrieved by the Judgment of the District Court appealed to the High Court. The High Court set aside the Judgment of the learned District Judge and ordered trial De Novo.

The Defendant-Appellant-Respondent support the Judgment of the learned High Court Judge. These Respondents reject the argument of the Petitioner that 5 Acres in extent of the land in schedule 3 of the plaint remained divided. It is an undivided portion of a larger land. Further they argue that mere separation of a portion and long continued possession thereof would not confer the possessor the benefit of prescriptive possession. It is further explained by reference to paragraph 5 of the plaint that there were other intestate heirs and co-owners. Those details not made known by the Petitioner. Defendant-Appellant-Respondent refer to the testamentary case (T/18) of late Gabriel

Wijesinghe Jayawardena where 11 children were made parties. Plaintiff admits this fact in evidence.

This court on 14.03.2014 granted Leave to Appeal on the following substantial question of law.

(1) Did the High Court err by holding that the identity of the corpus has not been proved for the reason that the extent of land sought to be partitioned is only 5 Acres but the land depicted in the preliminary plan is 6 Acres 2 Roods and 35 Perches?

(2) In any event did the High Court err in setting aside the Judgement of the District Court with respect to the question of the respective rights of parties?

Learned counsel for the Plaintiff-Respondent-Petitioner in his oral and written submissions argued that the High Court failed to consider whether the corpus for partition has been sufficiently identified by means of boundaries of the land, in terms of the decisions reported in 1989 (1) SLR 361 which followed the decision reported in 43 CLW 82.

I would like to consider the case of *Gabriel Perera Vs. Agnes Perera 43 CLW 82 held ..* in a deed the partition of land conveyed is clearly described and can precisely ascertained, a mere inconsistency as to the extent thereof should be treated as a mere falsa demonstratio not affecting that which is already sufficiently conveyed. This case is more on the question of interpretation

of the deed. In the appeal it was argued that the person who claims under the deed, the deed marked P2, describes the boundaries of the land correctly. Corpus confined to lot A & C. Party concerned who claim under deed P2 the entire extent of lot A which is 1 Rood and 2 Perches or only 1 Rood and 5 Perches. Lot A was 1 Rood and 22 Perches and not 1 Rood and 5 Perches as described in the deed P2. Rule envisaged was that a subsequent statement inconsistent in extent should be treated as mere falsa demonstratio not affecting that which is already sufficiently conveyed.

The above decision in 43 CLW. 82 was followed in *Yapa Vs. Dissanayake Sedera 1999 (1) SLR 361.* It is a case where in a deed the partition of land conveyed is clearly described and clearly ascertained a mere inconsistency as to extent should be treated as a mere falsa a demonstratio not affecting that which is sufficiently conveyed.

I do not think the above cases relied upon by the Plaintiff-Respondent-Petitioner could be equated to the case in hand, and the decision in the cases reported in 60 NLR 337, 61 NLR 352 and 1989 (2) SLR 105 could be read subject to, and in harmony with the principle accepted in the decisions reported in the above decided cases relied by the Petitioner.

The case in hand cannot be described in its extent as <u>a mere discrepancy</u> <u>in extent</u>. Learned High Court Judge very correctly observes (Pg.9)

that the extent of land referred to in the preliminary plan and the land sought to be partitioned in the schedule to the plaint differ in an extent of about 1 Acre 2 Roods and 35 Perches. Further the High Court Judge observes that the boundaries in plan 'X' shows certain differences and the Plaintiff party did not lead evidence to connect and explain such differences. I also wish to state that the two decided cases relied upon by the Plaintiff party do not refer to any provisions in the Partition Law. However the case reported in 1989 (2) SLR 105 Sopaya Silva and another Vs. Magilin Silva discuss in detail Sections 18(1) (a) (iii), 18(2), 19(2) of the Partition Law inclusive of discrepancy in extent of corpus with the corpus described in plaint and commission. Further the above Magilin's case consider the duty of commissioner – lis pendens natural justice so on and so forth. The case of *Sopaya Silva and another Vs. Magilin Silva* is a persuasive Judgment which is very relevant to the case in hand and follows the decided case of *Brumpy Appuhamy Vs. Morias Appuhamy 60 NLR 337.*

In this regard my views and that of the High Court which I concur with, are fortified by the Judgment of *Sansoni CJ. 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.

I also note and I am inclined to adopt the dicta in *Sopaya Silva and Another Vs. Magilin Silva S.N. Silva J.*

Held –

(1) It was not open to the District Judge to dismiss the case on the point of wrong registration of the lis pendens – a point on which there was no contest and no argument was heard. It is a violation of natural justice.

(2) The lis pendens being registered in the folios where the deeds of the land described in the plaint were registered was correctly registered.

(3) 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 as described in the plaint. The surveyor could have been examined 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.

(4) 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 s 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.

There is another matter that should be considered. In the manner pleaded and submitted to this court the 1st schedule in the plaint is in extent of 27 Acres and 15 perches, was owned on a Crown Grant in favour of Gabriel Wijesinghe Jayawardena in the year 1905. (P1) He died intestate in 1909 and his heirs were widow Elsie Wijesinghe Jayawardena and children. One of whom was Leopold Victor Stanley Jayawardena. Written submissions of Plaintiff-Respondent-Appellant does not disclose the names of the other children and the number of children. It is pleaded that the said Victor Stanley Jayawardena thereafter separated from and out of the said larger land called "Dingiriband – Hitapu-Watta" an extent of 13 Acres 2 Roods and 7 ½ perches which he possessed and became owner of land and described in plan No. 278 of 1944. The said extent is 13 Acres 2 Roods and 7 ½ perches is described in 2nd schedule. Plaint avers that the said Stanley sold and transferred an extent of 5 Acres to Liyanage Bonnie Perera. This is the way Plaintiff presents the case.

In the manner observed above there is something the original court should seriously consider. 2nd and 3rd Defendant-Appellant-Respondent takes up the position that the original owner Gabriel Wijesignhe Jayawardene had several

other children and the said Jayawardena's intestate estate was administered in D.C. Anuradhapura Case T/181 where all 11 children were named as Respondents in the testamentary case. The document P3 (letters of administration) was admitted by Plaintiff but as argued on behalf of 2nd and 3rd Defendant-Appellant-Plaintiff has deliberately refrained from making all the children parties. Original court should consider this position and decide its necessity and relevancy.

In the above facts and circumstances, I have no hesitation to affirm the Judgment of the learned High court Judge. The two questions of law are answered as 'No' in the negative.

Identity of the corpus is always an important and a relevant matter in a land case and more particularly in a partition suit. I also note the following from the Judgment of the learned High Court Judge which I concur.

"..... මෙම නඩුවේ මුලික පිඹුර සම්බන්ධයෙන් මිනින්දෝරුවරයා ද සාකිෂිකරුවකු වශයෙන් කැඳවා නැවත මෙම නඩුව මුල සිට විභාග කර තීන්දුවක් ලබා දීමට නියෝග ඕරීම වඩාත් සාධාරණ හා යුක්ති සහගත බවයි. ඒ අනුව මෙම නඩුව නැවත මුල සිට විභාග කිරීමට පොලොන්නරුව දිසා අධිකරණය වෙත යොමු කිරීමට තීරණය කරමු. මෙම නඩුව පැරණි නඩුවක් බැවින් නඩුව විභාග කර අවසන් කිරීමට පුර්වනාවයක් ලබාදිට යඅතු බවද කීරණය කරමු ....."

It is always safe to follow the statutory provisions contemplated by law. What is relevant and important had been suggested and the procedure to

be adopted are discussed in the case of *Sopaya Silva Vs. Magilin Silva.* Judgment of the learned High Court Judge is affirmed. This appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep 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

S.C Appeal No. 59/2016
SC Application No. SC/SPL/LA/120/2015
HC Appeal No. 29/2014
LT Application No. LT 26/123/2009

In the matter of an Application for Special Leave to Appeal/Leave to Appeal from a Judgment of the Provincial High Court of the Southern Province holden in Matara dated 3rd June 2015 (in Appeal No. 29/2014), in terms of the Industrial Disputes Act and the High Court of the Provinces (Special Provisions) Act No. 10 of 1990 read with the Rules of the Supreme Court.

Ceylon Estates Staffs' Union
(Lanka Wathu Sewa Sangamaya)
No. 6, Aloe Avenue, Colombo 3.
(On behalf of N C Kodituwakku)

APPLICANT

Vs.

1. The Superintendent
Belmont Tea Factory
Hulandawa Estate, Akuressa.

2. Namunukula Plantations PLC
No. 310, High Level Road,
Navinna, Maharagama.

RESPONDENTS

AND BETWEEN

Ceylon Estates Staffs' Union
(Lanka Wathu Sewa Sangamaya)
No. 6, Aloe Avenue, Colombo 3.
(On behalf of N C Kodituwakku)

APPLICANT-APPELLANT

Vs.

1. The Superintendent
Belmont Tea Factory
Hulandawa Estate, Akuressa.

2. Namunukula Plantations PLC
No. 310, High Level Road,
Navinna, Maharagama.

RESPONDENTS-RESPONDENTS

AND BETWEEN

1. The Superintendent
Belmont Tea Factory
Hulandawa Estate, Akuressa.

2. Namunukula Plantations PLC
No. 310, High Level Road,
Navinna, Maharagama.

RESPONDENTS-RESPONDENTS-APPELLANTS

Vs.

Ceylon Estates Staffs' Union
(Lanka Wathu Sewa Sangamaya)
No. 6, Aloe Avenue, Colombo 3.
(On behalf of N C Kodituwakku)

APPLICANT-APPELLANT-RESPONDENTS

BEFORE: Sisira J. de Abrew J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: Suren Fernando with K. Wickramanayake
For the Respondent-Respondent-Appellants

D.P.L.A.K. Perera for the Applicant-Appellant-Respondent

ARGUED ON: 07.03.2017

DECIDED ON: 31.03.2017

GOONERATNE J.

The Respondent-Respondent-Appellants challenge the Judgment dated 10.02.2014 of the Southern Provincial High Court Holden in Matara, by which Order the Labour Tribunal, Matara was reversed. The Labour Tribunal held with the Respondent-Respondent-Appellant (employer) that the termination of employment of Applicant-Appellant was justified. However the High Court reversed the Order and awarded compensation equivalent to five year's salary, but did not order reinstatement of the Applicant Employee.

The Supreme Court granted Leave to Appeal on the following questions of law, referred to in paragraph 14 of the petition.

(a) Did the learned Judge of the Provincial High Court fail to assess the evidence in deciding that the termination of the employment of the Applicant was not just, equitable and/or reasonable?

(b) Did the learned Judge of the Provincial High Court err in law in analysing and applying the applicable principle of the law of evidence and especially the burden of proof?

(e) Did the learned Judge of the Provincial High Court err in law in failing to properly analyse and apply the principles of law pertaining to loss of confidence?

(g) In any event did the learned High Court Judge err in law in failing to analyse and apply the applicable legal principles and/or evidence pertaining to mitigation of loss and calculation of compensation?

(h) In any event did the learned High Court Judge err in law in failing to recognise that the Applicant had not led satisfactory evidence to demonstrate that he had attempted to mitigate his losses and/or that he had suffered actual loss?

The Applicant employee was a Factory Tea Officer of the Belmont Tea Factory. He was interdicted by the Estate Superintendent on 20.07.2009 and thereafter his services were terminated on 10.11.2009 after a disciplinary inquiry. The reason for the employee's dismissal from service as stated by the learned High Court Judge was because there was a shortage of 791 kilograms of tea at a particular time and that the Applicant had not contested the said shortage nor gave any explanation for the shortage.

The learned High Court Judge concurred with the views expressed by the learned President of the Labour Tribunal on the following. The quantity of tea relevant to the shortage had been in the custody of the employee concerned and he had been negligent in his duties and had not acted in the manner as required by an experience officer. As such a substantial loss had been caused to the employer.

Perusal of the Judgment I also find that the High Court had been critical of the domestic inquiry, held by the employer. Further the learned High Court Judge observes that, the opportunity to provide an explanation had been deprived to the Employee –Applicant.

Whatever it may be the available material suggest that the Applicant had been negligent in the performance of his duties, which resulted in a loss to the employer. Therefore the principles relating to loss of confidence would apply. In any employment there is a certain amount of trust that is expected by an employee. When a loss of this nature takes place employer cannot continue employment of the employee. The only way out would be termination of services. In the case in hand it is unfortunate that the employee has lost opportunities to explain his bona fides. Nevertheless I am of the view that his termination of services in the circumstances is justified. The learned High Court Judges has awarded compensation. In these circumstances the

question is whether it is just and equitable to award compensation to an employee who worked for about 10 years.

I note the following case law on loss of confidence.

1. It has been judicially recognized that:

   "It seems to be that by reason of the part played by the applicant in two transactions which, to say the least, were questionable, he has clearly forfeited the confidence reposed in him as an employee of the Bank. In these circumstances, the Bank should not and cannot continue to employ him"
   Bank of Ceylon V. Manivasagasivam (1995) 2 Sri L.R. 79, 83

2. It has been unequivocally recognized that:
   "Whether the misconduct relates to the discharge of his duties in the bank or not, if it reflects on the bankman's honesty, it renders him unfit to serve in a bank and justifies dismissal".
   National Savings Bank v. Ceylon Bank Employees' Union (1982) 2 Sri L.R. 629, 632

In *Rumblan Vs. Ceylon Press Workers Union 75 NLR 575*

Where the dismissal of a workman who has caused continuing loss to his employer is justified, no compensation can be awarded to him by a Labour Tribunal.

Wataraka Multi-Purpose Co-operative Society Ltd. V. Wickremachandra 70 N.L.R.

Pg. 239.

When a workman's services are terminated by the employer on the ground of inefficiency, there is no burden on the employer to prove that he acted without malice in dismissing the workman. In such a case, if there was neither illegality nor any finding that the

dismissal for inefficiency was an unfair labour practice it is an error of law to award any compensation to the workman under section 33 (1) (d) of the Industrial Disputes Act.
70 N.L.R. 239..
In *Peiris Vs. Celtel Lanka Ltd. 2012(1) SLR at 179*

The concept of loss of confidence has been well expressed in the following terms:

"The contractual relationship as between employer and employee so far as it concerns a position of responsibility is founded essentially on the confidence one has in the other and in the event of incident which adversely effects that confidence the very foundation on which the contractual relationship is built should necessarily collapse .... Once this link in the chain of the contractual relationship .... snaps it would illogical or unreasonable to bind one party to fulfil his obligations towards the other. Otherwise it would really mean an employer being compelled to employ a person in a position of responsibility even though he has no confidence in the latter". (Vide Democratic Workers' Congress vs. De Mel and Wanigasekara.

The material furnished to this court no doubt suggests that the shortage or goods went missing whilst in the possession of the Applicant Employee. The learned High Court Judge as well as the President of the Labour Tribunal took the view that the Applicant Employee was responsible for the loss. The High Court Judge of course observes that there was insufficient material to pursue a criminal charge against the employee. However the standard of proof in the Labour Tribunal is not proof based on beyond reasonable doubt. Therefore this court takes the view that loss of confidence and misconduct are both matters that relate to loss of goods from the tea factory. As such as stated

in the above authorities the Employer cannot be bound to fulfil his obligations, in a case of this nature.

I have noted the submissions of the Applicant-Appellant-Respondent. The submissions no doubt support the order of the learned High Court Judge and merely express the views of the learned High Court Judge, and more particularly refer to the written submissions filed in the Matara High Court. Emphasis is on the question of there being no proof of any fraud or moral turpitude and there is no grave misconduct that warrants the termination of services.

The termination of services of an employee is a very grave punishment. In the case in hand I have already observed that there is loss of confidence of the employer. In these circumstances employer cannot continue to employ the Applicant-Employee. As stated by the learned High Court Judge loss could have been recovered from the employee at that point of time. These are matters that could have been considered but the Factory Tea Officer holds a key position in the industry and is responsible for running the Tea Estate efficiently and the employer is dependent on such an officer. As such the employer cannot continue to incur loses of this nature. If not the resulting position may give rise to a collapse of the industry.

In all the above circumstances this court takes the view that the termination of employment is justified in the circumstances of the case in hand, but having considered the position of either party, I do agree with the award of compensation by the High Court Judge, but the amount need to be varied, to a period of one (1) year based on the last salary (20,638x12).The questions of law are answered as follows:

(a) Yes

(b) Yes

(e) Yes

(g) No

(h) Yes

Subject to the above this appeal is partly allowed without 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

S.C. Appeal No. 61/2012

SC (HC) CALA 324/2011
HCCA/Rev/29/2009
D.C. Kandy Case No. 19989/MR

In the matter of an Application for Leave to Appeal against the Judgment dated 06.07.2011 pronounced by Civil Appellate High Court of the Central Province in Kandy in Application No. HC (Appeal) No. 29/2009 (Rev)

G. M. M. Majeed
No. 94/1, School Lane,
Galhinna.

1ST DEFENDANT-PETITIONER

Vs.
G.R.W.M. Weerakoone
No. 09, Colombo Street,
Kandy.

PLAINTIFF-RESPONDENT

Jayantha Fernando
29/9. Sri Pushpananda Mawatha,
Kandy.

2ND DEFENDANT-RESPONDENT

AND BETWEEN

G. M. M. Majeed
No. 94/1, School Lane,
Galhinna.

1ST DEFENDANT-PETITIONER-PETITIONER

Vs.

G.R.W.M. Weerakoone
No. 09, Colombo Street,
Kandy.

PLAINTIFF-RESPONDENT-RESPONDENT

Jayantha Fernando
29/9. Sri Pushpananda Mawatha,
Kandy.

2ND DEFENDANT-RESPONDENT-RESPONDENT

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

Anil Gooneratne J. &

Vijith K. Malalgoda P.C., J.

COUNSEL: Chula Bandara with Ms. Gayathri Kodagoda for the 1st Defendant-Petitioner-Appellant

Ranjan Suwandaratne P.C. with Yuwin Matugama
For the Plaintiff-Respondent-Respondent

ARGUED ON: 03.07.2017

WRITTEN SUBMISSIONS ON BEHALF OF THE 1ST DEFENDANT-PETITIONER-APPELLANT FILED ON:
25.04.2012

WRITTEN SUBMISSIONS ON BEHALF OF THE PLAINTIFF-RESPONDENT-RESPONDENT FILED ON:
01.06.2012

DECIDED ON: 14.09.2017

ANIL GOONERATNE J.

Plaintiff-Respondent instituted a money recovery action bearing No. 19989 in the District Court of Kandy against the 1st Defendant-Petitioner and the 2nd Defendant-Respondent praying for a Judgment, to recover a sum of Rs. 470,570/- from the 1st Defendant-Petitioner and the 2nd Defendant-Respondent and interest at 15% on the above sum and also for legal interest from the date of Judgment until settlement in full. On the trial date Defendants were absent an unrepresented. As such ex-parte evidence was led and judgment entered. An application to purge default under Section 86(2) of the Civil Procedure Code to the District Court, Kandy was made and refused after inquiry by the learned District Judge on 29.03.2006. The 1st Defendant-Petitioner as pleaded in the petition filed before this court, states the Revision Application filed in the Civil Appellate High Court, Kandy to set aside the ex-parte Judgment of 23.04.2009 was also refused by the Civil Appellate High Court, Kandy.

Supreme Court on or about 09.03.2012 granted leave to proceed on the following questions of law.

(1) Did the Honourable High Court Judges of the Civil Appellate High Court of Kandy err in law by confirming the ex-parte Judgment dated 23.04.2004 which was not supported by legal evidence?

(2) When the ex-parte Judgment lacks proper analysis of the evidence whether the court was justified in refusing the Revision Application to

canvass that Judgment on its merits, on the basis that there was delay on the part of the Petitioner?

(3) In view of the nature of the Judgment given by the District Court at the ex-parte trial is the Petitioner entitled to invoke the revisionary jurisdiction of the Civil Appellate High Court to canvass the correctness of the Judgment on its merits?

It is necessary to ascertain the facts of this case prior to examining the legal position. As stated above Plaintiff-Respondent instituted action on or about 21.09.1988 to recover a sum of Rs.470,570/-. The 1st Defendant-Petitioner and the 2nd Defendant-Respondent-Respondent filed a joint answer denying the averments in the plaint, and by way of a counter claim whilst praying for a dismissal of the Plaintiff's action included a claim of Rs. 550,000/- against the Plaintiff. On 29.01.1996 the case was fixed ex-parte, as the 1st Defendant-Petitioner-Petitioner and the 2nd Respondent-Respondent were absent and unrepresented. Thereafter an application was made to purge default, but was refused by the learned District Judge.

I also note the evidence led at the ex-parte trial. Plaintiff-Respondent-Respondent in his evidence state that he was a tenant of premises No 9, Colombo Street, Kandy since July 1980. Plaintiff produced P1 to prove that fact and P2 and P3 to show that his office was at that place. He also testified that on 11.07.1987 he observed that the roof of his office was removed and

Petitioner and the 2nd Defendant-Respondent-Respondent had entered the premises. To establish same produced exhibit P4 a statement to the police by 2nd Defendant-Respondent-Petitioner. Plaintiff being a surveyor and court commissioner stated that he lost his equipments, and plans and field notes. The 1st Defendant forcefully took over possession of the premises along with the 2nd Defendant-Respondent-Respondent which the Plaintiff-Respondent-Respondent occupied for a long period of time. This seems to be the evidence in brief.

The default inquiry was taken up on the first occasion, on 28.01.1997 and the learned District Judge made Order on 24.04.1997 and set aside the ex-parte Judgment. Thereafter the case was fixed for trial and had been put off on several days. On the 22nd trial date, again the 1st Defendant Petitioner and the 2nd Defendant was absent and unrepresented and for the second time case had been fixed ex-parte.

The 1st Defendant-Petitioner-Petitioner was granted Leave to Appeal on three questions of law and the relief sought from the Supreme Court is to set aside the Judgment dated 06.07.2011 of the Civil Appellate High Court of Kandy bearing No. Rev. 29/2009 and also to set aside the ex-parte Judgment dated 23.04.2004 of the District Court. Vide, sub paragraph (6) of the prayer to the petition. In the light of questions of law raised before us and the prayer to

the petition it is essential to examine the District Court Judgment of 23.04.2004 entered in favour of the Plaintiff-Respondent after an ex-parte trial.

The Judgment itself is a very brief Judgment. On perusing the relevant portion of the Judgment the trial Judge refer to documents P1 to P7 and state having produced these documents the Plaintiff closed his case. Further it is stated that on the evidence of the Plaintiff and the documents produced court is satisfied. Accordingly ex-parte judgment is entered in favour of the Plaintiff. It reads as follows:

.....පැමිණිලිකරුගේ සාක්ෂි මෙහෙයවා පැ 1 සිට පැ 7 දක්වා ලේකණ ඉදිරිපත් කරමින් නඩුව අවසන් කරන ලදි. එ අනුව පැමිණිලිකරුගේ සාක්ෂි සහ ලියවිලි මත සැහීමකට පත්වෙමි. පැමිණිල්ලේ ඉල්ලා ඇති පරිදි සහන ලබා ගැනිමටත, ඒකී ආකාරයෙන් නඩුව පැමිණිලිකරුට පාක්ෂිකව තීන්දුකරමි.

The trial Judge does not seem to have given his mind to the relief claimed and whether the Plaintiff is entitled to Judgment in fact and in law. Judge must arrive at a finding on relevant points after a process of hearing and adjudication. Trial Judge cannot apply a mechanical process and enter Judgment. Evidence led should be analysed and be satisfied that the Plaintiff is entitled for Judgment. Merely stating ‘satisfied’ with the evidence led will not amount to compliance with Sections 85(1) 84, 86 & 87 of the Civil Procedure Code.

It is necessary to consider the legality or the propriety of the ex-parte judgment. In such a brief judgment one cannot expect a proper adjudication of the dispute to have been considered. I cannot affirm or approve the ex-parte Judgment in the absence of an analysis of the evidence led at the trial. In all these circumstances the ex-parte Judgment of the District Court stands dismissed. Evidence led has not been judicially assessed and analysed.

I hold that the ex-parte Judgment is a nullity. The following decided case is on point and fortify my views.

In Mrs. *Sirimavo Bandaranaike Vs. Times of Ceylon Ltd. (1995) 1 SLR* at pgs. 36/37.

> Section 85(1) requires that the trial judge should be "satisfied" that the Plaintiff is entitled to the relief claimed. The Defendant's case is that if in fact he was not satisfied, or if on the evidence he could not reasonably have been satisfied, the error was so serious as to prejudice the substantial rights of the Defendant and to occasion a failure of justice. The question is whether entering an ex parte default judgment is a mere formality, or whether a hearing and a proper adjudication are necessary.
>
> The plain meaning of the word "satisfied" in section 85(1) is that the trial judge must reach findings on the relevant points after a process of hearing evidence and adjudication, and that he cannot give judgment for the plaintiff as a matter of course. It is unnecessary to rely on the Indian decisions cited by Mr. Seneviratne as I find that there are four other independent and compelling reasons for this interpretation: the immediate context of section 85(1), the basic principles of justice underlying the Code, the legislative history of this and similar provisions, and judicial decisions in regard to those provisions.
>
> Section 85(2) shows that a judge may award the plaintiff less than what is claimed if in his opinion the entirety of the relief cannot be granted. Obviously such

> an opinion can only be reached after hearing evidence and judicially assessing that evidence in relation to the ingredients of the Plaintiff's cause of action. Further, sections 84, 86 and 87 all refer to the judge being "satisfied" on a variety of matters: in every instance, such satisfaction is after adjudication upon evidence. It must be presumed that the word "satisfied" occurring in several sections in the same Chapter of the Code has the same meaning.

It is evident that the above decided case though discuss a variety of matters, emphasis the duty of court in an ex-parte trial and also jurisdiction of the Court of Appeal by way of revision to revise or vary an ex-parte trial. Both these points are equally important to the case in hand.

I would at this point of my Judgment wish to discuss the judgment of the Civil Appellate High Court, which court exercised its revisionary powers, and dismissed the Revision Application.

The revision application was filed to revise the ex-parte judgment dated 23.04.2004. Plaintiff-Respondent-Respondent was the tenant of the premises in question and the 1st Defendant-Petitioner was the owner of the premises along with some others.

The revision application was filed on or about 05.10.2009. By the revision application the ex-parte Judgment dated 23.04.2004 is challenged. The learned High Court Judge no doubt in a very comprehensive Judgment emphasis the fact that the appeal filed against the Order rejecting the application to purge default which was delivered by the High Court (prior to filing the revision

application) by Judgment dated 09.07.2009 was disclosed by the 1st Defendant-Petitioner in his petition but failed to disclose the fact whether such appeal was allowed or refused. It is the view of the learned High Court Judge, that the 1st Defendant-Petitioner ought to have disclosed that fact since revision applications are discretionary remedies. There is a lack of uberima fides by the 1st Defendant-Appellant, and cite the case of *Navarathnasingham Vs, Arumugam 1980 (2) SLR 1*. In such a situation court should be cautious and slow to permit such review. No doubt the party concerned enters into a contract with court and is bound to disclose all material facts. On that ground a revision application could have been rejected.

There is a duty cast on an Attorney-at-Law to disclose all material facts to court. This is a basic norm emanating from rules of the Supreme Court which has to be followed and respected.

The other matter considered by the High Court is the inordinate delay to file the revision application. There is a delay of 5 years and the failure to invoke the jurisdiction of the Supreme Court from Judgment of the High Court delivered on 09.07.2009. (on appeal)

Learned High Court Judge also state that exceptional circumstances cannot be found to exercise the revisionary jurisdiciton of court. There are numerous decided cases which state that exceptional circumstances need to be

established to invite the revisionary jurisdiction of court. Rustom Vs. Hapangama 1978/79 (1) SLR 352; Rasheed Alli Vs. Mohamed Alli 1981 (1) SLR 262.

The High Court Judgment based on the revision application, place more emphasis on lack of exceptional circumstances, albeit the 1st Defendant-Petitioner took up the position that the ex-parte Judgment is illegal. It is only a passing remark by the learned High Court Judge but the ex-parte Judgment has not been properly examined to decide on its propriety.

This court observes that as stated above the ex-parte Judgment is a nullity, which is earlier in time in this case and that is akin to a sound exceptional circumstances to exercise revisionary powers. The ex-parte Judgment being a nullity is a very fundamental issue. Nullity of Judgment will override and prevail over any other exceptional circumstances and as such a good ground to exercise the revisionary jurisdiction of court, notwithstanding any delay, etc.

The questions of law are answered as follows in favour of the Appellant.

(1) Yes
(2) No. The High Court was in error and it is not justified in refusing to the revisionary relief.
(3) Yes.

The case itself had been postponed by the original court on numerous occasions. The record bears that fact and it is not the function of the Apex Court to delve into that fact. All courts in the Island has to ensure due administration of Justice. Nothing flows from an illegal judgment. Mistakes do occur but illegality is paramount in the context of this case. I set aside both the ex-parte Judgment of 23.04.2004 and the High Court Judgment dated 06.07.2011, as per sub paragraph (b) of the petition and allow this appeal with costs fixed at Rs. 100,000/-

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

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

I agree.

JUDGE OF THE SUPREME COURT

Vijith Malalgoda P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

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

SC Appeal No.62/2013
SC/HCCA/LA Application No. 464/2012
SP/HCCA/GA/50/2004 (F)
D.C. Balapitiya Case No.1303/M

In the matter of an Appeal after obtaining Leave to Appeal.

BHADRA DE SILVA RAJAKARUNA
Uduvaragoda, Kahawa.

PLAINTIFF

VS.

1. **GENERAL MANAGER OF RAILWAYS**
   Sri Lanka Railway Department, Colombo.

2. **JAGAMUNI PIYASENA DE SILVA**
   No.263, Duwa Road, Akurala, Kahawa.

3. **HANDUNETTI LALITH WIJESUNDERA**
   Duwa Road, Akurala, Kahawa.

4. **HON. ATTORNEY GENERAL**
   Attorney General's Department, Colombo 12.

DEFENDANTS

AND BETWEEN

1. **GENERAL MANAGER OF RAILWAYS**
   Sri Lanka Railways Department, Colombo.

4. **HON. ATTORNEY GENERAL**
   Attorney General's Department, Colombo 12.

1st AND 4th DEFFENDANTS-APPELLANTS

VS.

BHADRA DE SILVA RAJAKARUNA
Uduvaragoda, Kahawa.
PLAINTIFF- RESPONDENT

2. JAGAMUNI PIYASENA DE SILVA
No.263, Duwa Road,
Akurala, Kahawa.

3. HANDUNETTI LALITH WIJESUNDERA
Duwa Road, Akurala, Kahawa.
DEFENDANTS-RESPONDENTS

2A. HENDADURA KANTHILATHA
No. 263, Samurdhi Mawatha,
Duwa Road, Akurala, Kahawa.

3A. KANAKKAHEWA JAYANTHI
No.260,Duwa Road,
Akurala, Kahawa.
SUBSTITUTED DEFENDANTS-RESPONDENTS

AND NOW BETWEEN

1. GENERAL MANAGER OF RAILWAYS
Sri Lanka Railways
Department, Colombo.

4. HON. ATTORNEY GENERAL
Attorney General's Department,
Colombo 12.
1st AND 4th DEFFENDANTS-APPELLANTS-PETITIONERS/APPELLANTS

VS.

BHADRA DE SILVA RAJAKARUNA
Uduvaragoda, Kahawa.

PLAINTIFF- RESPONDENT-RESPONDENT

2A. HENDADURA KANTHILATHA
No. 263, Samurdhi Mawatha,
Duwa Road, Akurala, Kahawa.

3A. KANAKKAHEWA JAYANTHI
No.260,Duwa Road,
Akurala, Kahawa.

SUBSTITUTED DEFENDANTS-RESPONDENTS-REPONDENTS

BEFORE:	Upaly Abeyrathne J. Anil Gooneratne J. Prasanna Jayawardena, PC. J
COUNSEL:	Viraj Dayaratne, Senior DSG with Ms. Sureka Ahmed, SC for the 1st and 4th Defendants-Appellants-Petitioners/Appellants. Hemasiri Withanachchi for the Plaintiff-Respondent-Respondent.
WRITTEN SUBMISSIONS FILED:	By the 1st and 4th Defendants-Appellants-Petitioner/Appellants on 13th May 2013. By the Plaintiff-Respondent-Respondent on 19th July 2013 and 10th March 2017.
ARGUED ON:	06th February 2017.
DECIDED ON:	01st August 2017.

Prasanna Jayawardena, PC, J.

Akurala is a village by the sea in the Galle District, lying between Ambalangoda to the North and Hikkaduwa to the South. Akurala has a small but idyllic beach. The Galle Road runs by this beach. Akurala village sprawls on the landside of Galle Road

in that area. At one end of the beach, there is a road which leads from Galle Road to the interior of the village. That road is named “Duwa Road”. A short distance along Duwa Road, about 200 meters from Galle Road, the Southern railway line crosses Duwa Road. Sri Lanka Railways identify that level crossing as ‘Level Crossing No. CL 78’. There are trees and lush undergrowth lining the road and the railway line in that area. There are also some houses. It is a verdant rural scene, typical of the coastal region of southern Sri Lanka.

A few minutes after 11pm on 19th August 1993, a tragedy shattered the silence and tranquility of the night at Level Crossing No. CL 78. An unscheduled train, travelling from Colombo towards Galle, crashed into a Mitsubishi Pajero driven by Mr.Senarath Rajakaruna. Mr. Rajakaruna had been at a house in Akurala, helping to organize a `homecoming’ ceremony to be held there on the next day. He had left that house a little before 11pm and was driving along Duwa Road heading towards Galle Road. He wanted to get to his `Mahagedera’, which was in the neighbouring village of Kahawa. Mr. Rajakaruna drove across Level Crossing No. CL 78. At that exact moment, the train reached the level crossing and crashed into the Mitsubishi Pajero. The vehicle was flung to a side and ended up resting against the disused railway platform at Akurala. Mr.Rajakaruna was badly injured. A crowd soon gathered, drawn by the loud crash of the train hitting the vehicle. Mr. Rajakaruna was taken to the Balapitiya Hospital. But, he had died by then.

At the time of his death, Mr.Rajakaruna was 40 years old and was an Attorney-at-Law. He had been an elected member of the Southern Provincial Council from 1988 till the term of the Council ended a few months prior to his death. He married his wife, Bhadra, in 1980 and they had a daughter of 9 years and a son of 7 years. The family lived in a rented house at Battaramulla. Since much of his practice as a lawyer was in the District Court of Balapitiya and the Courts in Galle and also due to his political activities in the Galle District, Mr.Rajakaruna was often in the Akurala area. In fact, that was his area of origin. He was well known in Akurala and his brother lived in the family’s `Mahagedera’ in Kahawa. The facts I have related up to now, are not in dispute.

On 11th August 1995, Ms. Bhadra Rajakaruna, the widow of Mr.Rajakaruna, filed this action in the District Court of Balapitiya against the 1st to 4th defendants claiming damages from them, jointly and severally, in a sum of Rs.5,000,000/- and legal interest thereon. The 1st defendant was the General Manager, Railways. Section 2 of the Railways Ordinance, which applies to Sri Lanka Railways, has statutorily created the office of ‘General Manager’, who is the principal officer of Sri Lanka Railways. Sections 32 to 34 of the Railways Ordinance require the General Manager, Railways to perform several duties and functions and exercise several powers with regard to level crossings. The 2nd and 3rd defendants [Jagamuni Piyasena De Silva and Handuneththi Lalith Wijesundera] performed the function of gatekeepers at Level Crossing No. CL 78. Since Sri Lanka Railways is a Government Department, the 4th defendant is the Hon. Attorney General, representing the State.

As set out in the plaint, the plaintiff's case, in brief, is that: the plaintiff is the widow of Mr. Rajakaruna and the mother of their two children; Sri Lanka Railways is a Government Department of which the 1st defendant was the principal officer; the 2nd and 3rd defendants were employees and/or agents of Sri Lanka Railways; in the performance of the duties as employees and/or agents of Sri Lanka Railways, the 2nd and 3rd defendants were required, at any time when a train was approaching Level Crossing No. 78, to close the gates installed across Duwa Road; however, the 2nd and 3rd defendant had negligently failed to close these gates at the time when the train crashed into the Mr. Rajakaruna's vehicle on 19th August 1993 and caused his death; further, the 1st defendant and the State had failed to fix any warning signs on Duwa Road to warn passersby of the level crossing; the 1st, 2nd, 3rd defendants and the State had negligently failed to perform their duty of ensuring that the gates were closed at any time when a train was approaching Level Crossing No. 78; thus, Mr. Rajakaruna's death was due to the negligence of the 1st, 2nd, 3rd defendants and the State; and, therefore, they are, jointly and severally, liable to pay a sum of Rs.5,000,000/- to the plaintiff, which is the loss she suffered as result of Mr. Rajakaruna's death.

The 1st defendant filed answer, *inter alia*, denying that the 2nd and 3rd defendants were employees of Sri Lanka Railways and claiming that the accident was caused by the negligence of the plaintiff's husband and not due to any negligence of the defendants. In their answer, the 2nd and 3rd defendants firmly asserted that they were employees of Sri Lanka Railways and denied that they had been negligent.

When the trial commenced, the occurrence of the collision between the train and Mr.Rajakaruna's vehicle and the fact that, Mr.Rajakaruna died as a result of the injuries he sustained, were admitted by all the parties. It was also admitted by all the parties that, gates had been installed at Level Crossing No. CL 78 for the purpose of preventing collisions by closing those gates when a train was approaching. The plaintiff raised twelve issues on the lines of the averments in the plaint. One of the issues raised by the plaintiff was specifically whether the State was vicariously liable for the negligent acts and omissions of the 2nd and 3rd defendants. The 1st and 4th defendant raised eight issues and the 2nd and 3rd defendants raised two issues.

The plaintiff gave evidence and produced the documents marked "පැ1" to "පැ28". In addition to the evidence related at the outset, the plaintiff said that Mr.Rajakaruna was a devoted and caring husband and father and that they had a happy home. She said Mr. Rajakaruna had a substantial monthly income and that he gave her a sum of Rs.20,000/- each month to meet expenses. She estimated the pecuniary loss caused to her as a result of his death, at Rs.5,000,000/-.

The plaintiff stated that, a few days after her husband's death, she had gone to the place where the collision occurred. She said the level crossing on Duwa Road was about 200 meters from Galle Road. There were metal gates on either side of Duwa Road at the level crossing and a gatekeeper's hut and, usually, a gatekeeper on duty there. There were no sign posts placed on Duwa Road to warn passersby of the

level crossing. She said the railway line in this area had two bends which prevented anyone from seeing the railway line beyond the two bends and described these two bends as dangerous bends - *"භයානක වංගු"* - . She also said there were houses and trees which obscured the view of the railway line in this area. She stated that, her husband's security officer, A.S.K. De Silva had been riding his motor cycle and following Mr. Rajakaruna's vehicle that night and that De Silva had seen the collision.

A.S.K. De Silva testified that, he had served as Mr. Rajakaruna's security officer when Mr. Rajakaruna was a member of the Southern Provincial Council and he had continued to serve as a security officer up to the time of Mr.Rajakaruna's death. De Silva said that, in the morning of 19th August 1993, Mr. Rajakaruna had attended the wedding of another security officer held at a house in Akurala and in the evening they had gone to the bridegroom's home, which was also in Akurala, to help organize the `homecoming' ceremony to be held the next day. Mr.Rajakaruna had left the bridegroom's home a little before 11pm as he wished to get back to his brother's house in Kahawa. Mr.Rajakaruna was driving his Mitsubishi Pajero. He had to drive along Duwa Road and reach Galle Road to get to Kahawa. The witness had his motor cycle with him and was, therefore, following Mr.Rajakaruna's vehicle. The gate at the level crossing on Duwa Road was *open* and Mr.Rajakaruna continued to drive his vehicle across the railway line. Just at the moment the vehicle was on the railway line, there was a loud noise and the witness saw a train hit the Mitsubishi Pajero, which was then flung off the railway line and on to the gate keeper's hut and then finally came to rest on the platform of the disused Akurala station. De Silva had left his motor cycle and run up to the vehicle. Mr.Rajakaruna had been unconscious. A large crowd had gathered. The witness and some others had taken Mr.Rajakaruna to the Balapitiya Hospital. But, by that time, Mr.Rajakaruna had died.

De Silva stated that, there were metal gates at Level Crossing No. CL 78 and that he knew that the 2nd and 3rd defendants, who also lived in Akurala, performed the duty of gatekeepers at this level crossing. The witness stated that, the 2nd and 3rd defendants had been on duty at the level crossing when Mr. Rajakaruna and the witness passed it on their way to the wedding on 19th August 1993 but that the 2nd and 3rd defendants were not at the level crossing when the collision occurred that same night. This witness also stated that, there were no sign posts placed on Duwa Road to warn passersby of the level crossing. He said that the bends in the railway line on either side of the level crossing obstructed the view of the railway line beyond the bends. Describing the bends in the railway line, he said, *"අම්බලන්ගොඩ පැත්තෙන් බැලුවොත් සිල්පර කොටන් උපරිම වශයෙන් 150ක් ගියහම වංගුවක් තිබෙනවා. එවැනිම වංගුවක් තිබෙනවා ගාල්ල පැත්තට"*. De Silva said these two bends were dangerous - *"දරුණු වංගු දෙකක්"* and also that, the view of the railway line was obscured by trees and vegetation.

The 1st and 4th defendants commenced their case by leading the evidence of the engine driver of the train which crashed into Mr.Rajakaruna's vehicle. This witness stated that he had been assigned the task of driving an unscheduled train from Colombo to Galle. The train was pulled by a power set, which he was driving. The

train reached Level Crossing No. CL 78 at about 11pm. He said that part of the railway line is known as the “Akurala Bend” [*“අකුරල වංගුව”*] and that there were gates across the road at this level crossing. The witness had applied the brakes and reduced the speed of the train before the bend and sounded the horn. The train was travelling at a speed of about 25 miles per hour [40 kilometers per hour]. As the train came around the bend, he saw a vehicle on the railway line, about 25-30 feet in front of the train. The vehicle had stopped for a moment on the railway line and then again proceeded across railway line. The train struck the vehicle a glancing blow. The train came to a stop about 125 feet from the level crossing. The witness applied the vacuum brakes and hand brakes and went to the level crossing. A crowd had gathered there and the driver of the vehicle had been taken to hospital.

When the engine driver was cross examined by learned Counsel appearing for the 3rd defendant, the witness stated that, the 3rd defendant was employed as a gatekeeper by Sri Lanka Railways – *vide:* the following evidence:

ප්‍ර: තමන්ට කියන්න පුළුවන්ද මේ විත්තිකාරයා රේල්වේ දෙපාර්තමේන්තුව යටතේ සේවය කරපු ආරක්ෂකයෙක් ?
උ: ඒ කාලේ බම්බු සේවා මුර සඳහා නොවේ ගේට්ටුවට මුර කාරයෝ පත් කරේ .
ප්‍ර: මේ විත්තිකාරයා රේල්වේ දෙපාර්තමේන්තුවෙන් පත් කරපු මුර කාරයෙක් ?
උ: ඔව්.

When the engine driver was cross examined by learned President’s Counsel appearing for the plaintiff, the witness stated that, he considered Level Crossing No. CL 78 to be a “protected crossing” [“ආරක්ෂිත හරස් පාරක් ”] as it had two metal gates installed by Sri Lanka Railways, gatekeepers and a gatekeeper’s hut. The witness stated that, when he reached the level crossing after the collision, the gates were open and that the gatekeepers could not be found. In fact, the Police Statement marked “**පැ**25” made by this witness a few days after the collision, also states that the gates were open and the gatekeepers could not be found. The witness stated that, the bends in the railway line were dangerous - *vide:* the following evidence:

ප්‍ර: තමන් කියන හැටියට ඔය ස්ථානය ගැන කල්පනා කර බැලුවාම ඔතැන බොහොම තද වංගුවක් තිබුණු ස්ථානය ?
උ: ඔව්.
and
ප්‍ර: මේක බොහොම භයානක වංගුවක් ?
උ: ඔව්.
ප්‍ර: පාර දෙපසේම විශාල වශයෙන් ගස් කොළන් වැවී තිබෙනවා ?
උ: ඔව්.

The Assistant Accountant of Sri Lanka Railways was called to testify on behalf of the 1st and 4th defendants in an attempt to establish that the 2nd and 3rd defendants were not employees of Sri Lanka Railways. However, the evidence of this witness, both in his evidence-in-chief and in cross examination, establishes that, Sri Lanka Railways had installed the gates and gatekeepers’ hut at Level Crossing No. CL 78 and

assigned the duties of gatekeepers to the 2nd and 3rd defendants and that, Sri Lanka Railways paid each of them a monthly payment of Rs.1,000/- for performing those duties, which were supervised by Sri Lanka Railways. It should also be mentioned here that, when the Assistant Accountant of Sri Lanka Railways was cross examined by learned counsel for the 2nd and 3rd defendants, letters issued to these defendants by a Foreman of Sri Lanka Railways stating that the 2nd and 3rd defendants had been assigned the duty of gatekeepers at this level crossing, have been marked "2වි1" and "3වි1". The fact that these documents were produced is recorded in the Proceedings of 03rd February 2003 and, further, these documents have been referred to in the written submissions filed by 1st and 4th defendants in the District Court. However, these documents are not in the appeal brief.

The 1st and 4th defendants also led the evidence of the District Inspector of Signals, Galle District of Sri Lanka Railways and the evidence of a police officer. The evidence of these two witnesses is not significant to this appeal.

The 2nd defendant gave evidence and stated that, in 1989, Sri Lanka Railways had appointed him to function as a gatekeeper at Level Crossing No. CL 78 and that he had carried out those duties from then onwards. He said a total of 6 gatekeepers had been appointed to carry out these duties at Level Crossing No. CL 78 and that they, usually, worked in 8 hour shifts. Sri Lanka Railways paid their wages and supervised their functions. The 2nd defendant described Level Crossing No. CL 78 as a dangerous place - "ගේට්ටුව දරුණුයි". He said that there were no sign boards to warn passersby of the level crossing. The 2nd defendant stated that, on 19th August 1993, he and the 3rd defendant had been on duty for 16 hours from 6am onwards until past 10pm since the other gatekeepers had not reported for duty. He said that, Sri Lanka Railways had equipped the gatekeepers' hut with a lamp, a clock and a green flag but that a telephone had not been installed in the gatekeepers' hut. The witness said the last scheduled train passed the level crossing at 10.20 pm that night when they were at the level crossing and that he did not expect any trains to arrive at night after that time. He said a short while later, he heard loud cries from his house which was close by and that he closed the gates across the road and tied them up with a rope and ran to his house. He said the 3rd defendant accompanied him. The 2nd defendant said his daughter had cut her foot and that he carried her to a relative's house to have the wound dressed and the 3rd defendant came with him. While they were there, they heard a loud crash and realised a train had hit a vehicle on the railway line. He said that a crowd had gathered there and that they were looking for the gatekeepers and threatening to kill them. The 2nd defendant said that he and the 3rd defendant feared for their lives and ran away and hid. He said that, Sri Lanka Railways had stopped their employment after the collision.

Finally, the 3rd defendant gave evidence. His evidence was much on the same lines as the evidence of the 2nd defendant. He also described the bends on the railway line at the area as being dangerous bends - "භයානක වංගු".

In his judgment, the learned trial judge first set out the cases of the parties and then considered the evidence of each witness, in some detail. Having done so, the learned judge applied the evidence to the issues and determined that, both the 2nd and 3rd defendants had negligently left their post at Level Crossing No. CL 78, leaving the gates across Duwa Road *open*. Thereafter, the learned judge took the view that, since Mr. Rajakaruna had seen the gates *open* when he drove up to the level crossing, he expected he could cross it safely and, therefore, had continued to drive on to the level crossing, when the train hit his vehicle, fatally injuring him. On this basis, the trial judge held that, Mr. Rajakaruna's death was caused solely due to the negligence of the 2nd and 3rd defendants. The District Court went on to hold that, the 2nd and 3rd defendants were employees of Sri Lanka Railways, which was a Government Department and that, therefore, the State and Sri Lanka Railways are vicariously liable for the damage caused by the negligence of the 2nd and 3rd defendants. The District Court quantified the pecuniary damage caused to the plaintiff as a result of the death of her husband, at a sum of Rs.3,500,000/- and entered judgment against the defendants in that sum, with legal interest thereon and costs.

The 1st and 4th defendants appealed to the Court of Appeal. In their petition of appeal, the 1st and 4th defendants claimed five grounds of appeal. These five grounds of appeal are all based on submissions that, the learned trial judge failed to correctly analyse the evidence and that the District Court has reached erroneous findings of fact. The appeal was later transferred to the Provincial High Court of Civil Appeal holden in Galle. During the pendency of the appeal, the 2nd and 3rd defendants died and their legal representatives were substituted in their place. In appeal, the High Court also examined the cases of the parties and analysed the evidence. Having done so, the learned High Court Judges agreed with the assessment of the evidence, the reasoning and conclusions reached by the trial judge and affirmed the judgment of the District Court.

The 1st and 4th defendants filed an application in this Court seeking leave to appeal from the judgment of the High Court. This Court has seen fit to grant the 1st and 4th defendants leave to appeal on all nine questions of law set out in their petition.

These questions of law, reproduced *verbatim*, are:

(i) Is the Judgment of the Civil Appellate High Court wrong or contrary to law ?

(ii) Did the Civil Appellate High Court err in law by not considering any of the grounds of appeal that were adverted to in the Petition of Appeal and the written submissions of the Petitioners ?

(iii) Did the Civil Appellate High Court err in law in not considering the fact that the judgment of the District Court of Balapitiya had been entered contrary to section 187 of the Civil Procedure Code ?

(iv) Did the Civil Appellate High Court err in law in not considering the failure of the learned Additional District Judge to evaluate and analyse and give weightage to the evidence in the case before him ?

(v) Did the Civil Appellate High Court misdirect itself with regard to the obligations and duties of motorists at crossings of road ?

(vi) Did the Civil Appellate High Court err in law in applying section 32 of the railways ordinance in the absence of supporting evidence to classify the relevant level crossing into the category stated in the aforesaid section ?

(vii) Did the Civil Appellate High Court err in law by imposing vicarious liability on the Petitioners in the absence of any supporting material for the same ?

(viii) Has the Civil Appellate High Court err in law by failing to consider whether there are negligence and / or contributory negligence on the part of the deceased, as it had come to a wrongful conclusion that the level crossing in issue was not a standard and regular one ?

(ix) Did the Civil Appellate High Court err by failing to appreciate the duty of care in this case ?

Upon leave to appeal being granted, learned counsel for the plaintiff framed the following question of law:

(x) Can the petitioners take up as a defence contributory negligence in a case where the victim has died ?

Questions of law no.s (i),(ii),(iv),(vi),(vii) and (viii) can be considered together since they all arise from and relate to the learned trial judge's analysis of evidence and to the resulting findings of fact of the District Court and, thereafter, the determinations of the High Court on these matters.

When considering these questions of law, this Court should keep in mind that, while an appellate court has ample jurisdiction to reverse or vary findings of fact by a trial judge, it is the trial judge who has heard and seen the witnesses testify and has firsthand knowledge of the course of trial and, therefore, the established principle is that, an appellate court is, usually, reluctant to disturb a trial judge's findings of facts unless there is good reason to do. Thus, De Silva CJ observed in ALWIS vs. FERNANDO [1993 1 SLR at p.122], *"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 COLLETTES vs. BANK OF CEYLON [1984 2 SLR 253], Sharvananda J, as he then was, identified *some* of the circumstances in which an appellate court would consider it necessary to revise findings of fact made by a trial judge and stated [at p. 264] *"Thus this court undoubtedly has the jurisdiction to revise the concurrent findings of fact reached by the lower court in appropriate cases. However, ordinarily*

it will not interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. *When the judgment of the lower court exhibits such shortcomings, this court not only may, but is under a duty to examine the supporting evidence and reverse the findings"*. As Ranasinghe J, as he then was, said in DE SILVA vs. SENEVIRATNE [1981 2 SLR 1at p. 17] quoting Lord Reid in BENMAX vs. AUSTIN MOTOR CO [1955 AC 370], where such errors are evident, an appellate court *"ought not to shrink from that task"* of correcting erroneous findings of fact by a trial judge. However, conversely, if such errors are not evident from the evidence and record, an appellate court would, usually, be disinclined to disturb a trial judge's findings of fact.

It is apparent that, questions of law no.s (i),(ii),(iv),(vi),(vii) and (viii) are wide in scope. They cover most of the matters in issue at the trial, including the manner in which the collision occurred and whether it occurred due to the negligence of any one or more of the parties and, further, whether one of the parties should be held liable for the negligence of another party. In these circumstances, answering these questions will necessitate a consideration of the entirety of the evidence in this case with regard to these key issues.

When doing so, it will be useful to first ascertain some facts with regard to the layout of Level Crossing No. CL 78. In this regard, firstly, it undisputed that, Duwa Road crosses the Southern railway line at Level Crossing No. CL 78. It has been shown that, that, Duwa Road was a tarred road maintained by the Hikkaduwa Pradeshiya Sabhawa and that there were many houses along this road and that the road was used by the public to travel to the interior of Akura village. It is not in dispute that, Sri Lanka Railways had installed gates across Duwa Road at Level Crossing No. CL 78 and also built a gatekeepers' hut at the location.

Secondly, in the light of the above evidence, it is clear that, Level Crossing No. CL 78 was a level crossing at which the railway line crossed a *"public carriage road"* as contemplated in section 32 of the Railways Ordinance. Further, since the gates here have been installed only across Duwa Road and not across the railway line, it is evident that these gates are of the type referred to in the *proviso* to section 32 which requires Sri Lanka Railways to maintain gates which will make Duwa Road impassable at all times when a train is passing Level Crossing No. CL 78. In these circumstances, the penultimate paragraph of section 32 places a duty on Sri Lanka Railways to ensure that these gates are moved to a position that makes the road impassable, when a train is passing the level crossing. In this connection, it should also be mentioned that, Level Crossing No. CL 78 cannot be regarded as a *"minor crossing"* as referred to in section 33 (1) of the Railways Ordinance since there is no evidence that, the Minister had declared it to be a *"minor crossing"* and nor is there any evidence that provision had been made for the gates to be padlocked as required by section 33 (2) if it had been a *"minor crossing"*. Further, Level Crossing

No. CL 78 cannot be an *"occupation crossing"* provided for the use of a private owner of a road as defined in section 34 (1), since it is across Duwa Road, which is a public road.

Thirdly, the evidence establishes that, the railway line on either side of Level Crossing No. CL 78 has bends on both sides of the level crossing and that there are trees, plants and houses on either side of the railway line and Duwa Road in this area. As a result of these features, an engine driver who is driving a train approaching Level Crossing No. CL 78, cannot have a clear view of the level crossing till the train is only a short distance away from it. Similarly, a driver of a vehicle travelling on Duwa Road towards Level Crossing No. CL 78, cannot see an approaching train until it is very close by. In fact, the witnesses at the trial, were in a chorus of agreement that, this was a perilous level crossing.

Next, in order to answer the aforesaid questions of law, I should examine what the evidence establishes with regard to the functions the 2nd and 3rd defendants performed at Level Crossing No. CL 78 and the relationship between Sri Lanka Railways and the 2nd and 3rd defendants. In this regard, the evidence clearly establishes that, from 1989 onwards, the 2nd and 3rd defendants were deployed by Sri Lanka Railways to operate the gates at Level Crossing No. CL 78. It is also clear that the performance of their duties was subject to supervision by Sri Lanka Railways, which paid these defendants a sum of Rs.1,000/- each month as remuneration for performing those duties. It is also in evidence that, Sri Lanka Railways provided the defendants with a gatekeepers' hut and some items of equipment. All this was said by the 2nd and 3rd defendants and was amply confirmed by the evidence of the officer from Accounts Department of Sri Lanka Railways and is also reflected in the evidence of the engine driver.

In the light of this clear evidence, the learned trial judge correctly held, and the High Court correctly affirmed, that the 2nd and 3rd defendants were employed by Sri Lanka Railways to perform the duties of gatekeepers. Although the trial judge should have called for and obtained the documents marked "2වි1" and "3වි1", his failure to do so does not negate the validity of his determination that, the 2nd and 3rd defendants were employees of Sri Lanka Railways.

The next question is to examine what the evidence was with regard to the collision which caused Mr.Rajakaruna's death and whether the evidence establishes that there was negligence on the part of Sri Lanka Railways *or* of the 2nd and 3rd defendants *or* of the engine driver *or* of Mr. Rajakaruna, which caused or contributed to causing the collision.

In this regard, it is obvious that, since the collision occurred on the level crossing, Mr.Rajakaruna's vehicle could not have been at that specific place unless the gates across Duwa Road were *open* to allow his vehicle to get on to the level crossing. Next, since the gates were open at the time of the collision, there are, logically, only two possibilities – *either* the gates were open when Mr. Rajakaruna drove up to the

level crossing and he tried to drive across it when the train hit his vehicle *or* the gates were closed and Mr. Rajakaruna got off his vehicle and opened the gates and then tried to drive across the level crossing, when the train hit his vehicle. It is, obviously, important to ascertain which of those scenarios took place in order to determine whose negligence caused the collision or contributed to causing it.

The witness, De Silva stated that, he was riding his motor cycle and following behind Mr. Rajakaruna's vehicle and he saw the gates were *open* when Mr. Rajakaruna drove up to Level Crossing No. CL 78. This witness's evidence is to the effect that, since the gates were open, Mr.Rajakaruna continued to drive on to the level crossing in his bid to cross it, when the train hit his vehicle. De Silva also says that, the gatekeepers were not at the level crossing and could not be found. This witness was cross examined extensively by learned State Counsel appearing for the 1st and 4th defendants and by learned counsel appearing for the 2nd and 3rd defendants. A reading of the proceedings shows that, the testimony of the witness remained consistent and unshaken during the lengthy cross examination.

On the other hand, the 2nd and 3rd defendants claim that, when they heard cries from the 2nd defendant's house, they first tied the gates closed with a rope and then ran to the house. In cross examination, some inconsistencies emerged between the testimony of the 2nd defendant and the testimony of the 3rd defendant, with regard to the events that occurred on the night of 19th August 1993.

The learned trial judge, who was required to consider the aforesaid conflicting testimony of De Silva on the one hand and testimony of the 2nd and 3rd defendants on the other hand, has accepted De Silva's evidence that, the gates were open when Mr.Rajakaruna's vehicle reached the level crossing. The trial judge has disbelieved the claims made by the 2nd and 3rd defendants that they tied the gates closed with a rope before leaving the level crossing. Describing the evidence of these two witnesses, the learned judge has said *"*මෙම සිද්ධිය සිදු වූ අවස්ථාවේදී ඔවුන් එම ස්ථානයේ නොසිටි බවත් දුම්රිය ගේට්ටුව හරහා ලණුවක් දමා ගැට ගසා පිටවී ගිය බවත්, පසුව එහි දුම්රිය අනතුරක් සිදු වූ බවට දැන ගන්නට ලැබුණු බවට සාක්ෂි ඉදිරිපත් කරයි. එම සාක්ෂි දැඩි සැක සහිත බවකි.*"*

Thus, the learned trial judge held that, the gates across Duwa Rad were *open* when Mr Rajakaruna approached them, since the 2nd and 3rd defendants had left the gates *open*. In reaching this finding of fact, the learned trial judge, who had the unique advantage of seeing and hearing all three of these witnesses and then assessing the veracity of their testimony, believed De Silva's testimony and disbelieved the claims of the 2nd and 3rd defendant.

In these circumstances, the High Court, when considering the appeal, was obliged to keep in mind the general rule that, an appellate court will attach particularly high value to a finding by a trial judge with regard to the veracity of a witness and be reluctant to reverse it, unless there are compelling reasons to do so. As Lord Loreburn observed in FRADD vs. BROWN & CO. LTD [20 NLR 282 at p. 282] with

regard to the value of a trial judge's assessment of a witness's veracity, "…..*in those circumstances, immense importance attaches, not only to the demeanour of the witnesses, but also in the course of the trial and the general impression left on the mind of the Judge present, 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 so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because 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, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance."*. In the same vein, Ranasinghe J, as he then was, stated in DE SILVA vs. SENEVIRATNE [at p.17], *" ….. where the trial judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration, and will be reversed only if it appears to the appellate Court that the trial judge failed to make full use of the `priceless advantage' given to him of seeing and listening to the witnesses giving viva voce evidence, and the appellate Court is convinced by the plainest consideration that it would be justified in doing so:"*. However, before getting back to the facts of this case, it should be reiterated here that, as mentioned earlier, where an appellate court is convinced, by compelling reasons which are seen from the evidence and the record, that the trial judge has been misled, either by the demeanour or by some other quality of a witness, into believing the false testimony of that witness, the appellate court would be bound to set aside an erroneous finding of fact based on the trial judge's misreading of the veracity of that witness. This must be so since the reality is that, as Lord Greene observed in YUILL vs. YUILL [1945 1 AER 183 at p.188] *"The most experienced judge may, albeit rarely, be deceived by a clever liar or led to form an unfavourable opinion of an honest witness ….."*.

In the present case, there was certainly no compelling reason apparent from the evidence and record which could have caused the High Court to disregard the assessment by the learned trial judge of the veracity of the evidence of De Silva *vis-à-vis* the evidence of the 2nd and 3rd defendants. Further, the learned trial judge's finding of fact that the gates had been left open, is in consonance with the totality of the evidence and, in fact, in their written submissions filed in the District Court, the 1st and 4th defendants have conceded that, *"It is very clear that the gate was opened at the time of the accident ….."*. Accordingly, the High Court has correctly affirmed the learned District Judge's determination that the gates had been left open.

The learned trial judge also held that the 2nd and 3rd defendants had abandoned their post at Level Crossing No. CL 78. This finding of fact is also correct since the 2nd and 3rd defendants themselves have said that, when they heard cries from the 2nd defendant's house, both of them left their post at the Level Crossing No. CL 78 and left it untended and did not return to their post even after they knew of the collision. The High Court has correctly affirmed this finding.

Next, it hardly needs to be said that, a gatekeeper at a level crossing which is equipped with gates that can be closed across the road, has the duty of closing those gates when a train is approaching and, thereby, preventing motor traffic on the road from crossing the railway line. It follows that, a gatekeeper who fails to perform that all important duty, may be held to be guilty of negligence. Thus, in NORTH EASTERN RAILWAY COMPANY vs. WANLESS [1874 7 LR HL 12], the House of Lords held that, where a railway company has installed gates which can be closed across a public highway at a level crossing, it is the duty of the railway company's servants to keep those gates closed when a train is approaching and that, the failure to close the gates is evidence of negligence on the part of the servants of the railway company. In STAPLEY vs. THE LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY [1865 1 LR Exchq. 21], the Court of Exchequer took the same view as did the Court of Appeal in LLOYD'S BANK vs. RAILWAY EXECUTIVE [1952 1 AER 1248].

Further, since they performed the duty of gatekeepers, *both* the 2nd and 3rd defendants should not have both left their post at the *same* time. If there was an emergency which compelled one of them to temporarily leave his post, the other should have stayed at the level crossing and been vigilant and ensured that the gates were closed when the train approached. The 2nd and 3rd defendants' failure to do so must also, undoubtedly, be regarded as negligence.

In the light of these circumstances, the learned trial judge correctly held that, the 2nd and 3rd defendants were guilty of negligence. The High Court has correctly affirmed that determination.

The learned trial judge went on to hold that, the collision was caused *solely* due to the aforesaid negligence of the 2nd and 3rd defendants since the learned judge was of the view that, when Mr. Rajakaruna saw the gates were *open*, he could reasonably expect that no train would pass by and it was safe to drive across Level Crossing No. CL 78. The learned trial judge considered that, in these circumstances, there was no negligence on the part of Mr. Rajakaruna. The learned judge did not consider that there had been any negligence on the part of the engine driver, either.

These determinations by the learned trial judge, which were affirmed by the High Court, require me to examine whether the District Court and High Court were correct when they held that the collision was caused *solely* due to the negligence of the 2nd and 3rd defendants *or* whether there has been negligence either on the part of Mr. Rajakaruna or the engine driver or both, which caused the collision or which was a contributory cause of the collision.

With regard to Mr. Rajakaruna, there is no doubt that, trains have an exclusive right to run on the railway line and a preferential right to proceed at level crossings where the railway line crosses a road or path used by other traffic and that a road user must exercise due care and caution when he approaches a level crossing– *vide:* WORTHINGTON vs. C.S.A.R. [1905 T.H.149] and DYER vs. S.A.R. [1933 AD 10]. Therefore, as Scoble states [Negligence in Delict 3rd ed. at 344], *"It is the primary duty of the road-user not to venture upon a level crossing until he has taken due*

precautions to satisfy himself that he may safely do so. In view of the potential danger of any crossing, and the preferential right of train, the duty is an extremely stringent one; no neglect by the Administration will absolve from it; and only in the most exceptional circumstances will any lesser standard than that of utmost care be tolerated.". However, it has to be kept in mind that, this statement by Scoble refers to the duty of care placed on road users at *unprotected* level crossings in South Africa at a time when it appears there was no statutory duty placed on the Railway Authority in South Africa to install gates at level crossings. In this regard, in WORTHINGTON vs. CENTRAL SOUTH AFRICAN RAILWAYS [at 151], Solomon J commented, *"There are no statutory obligations in this country, as there are in England, with regard to having gates at a crossing….."*.

In the present case, the position is significantly different since Sri Lanka Railways had installed gates at Level Crossing No. CL 78 and, as observed earlier, that appears to have been done in compliance with the requirements of section 32 of the Railways Ordinance which imposes specified statutory obligations upon Sri Lanka Railways with regard to level crossings across public carriageways. These obligations include a duty to ensure that these gates are moved to a position that makes the road impassable when a train passes the level crossing.

In these circumstances, road users who are aware that Sri Lanka Railways has installed and operates gates across Duwa Road at Level Crossing No. CL 78 and know, from past experience, that these gates are closed when a train is passing the level crossing, are entitled to reasonably expect that, when the gates are open, there is no danger of a train approaching and they can safely cross the railway line. It may even be said that, at this type of level crossing, open gates amount to an intimation made by Sri Lanka Railways to such road users that, a train is not approaching and that it is safe to cross the railway line.

Thus, in MERCER vs. SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE [1922 2 KB 549] the plaintiff was injured when he was hit by a train at a level crossing which the plaintiff had tried to cross because the gate, which was usually closed whenever a train was approaching, was kept open. The King's Bench held that, the failure to close the gate amounted to negligence on the part of the Railway Company. Lush J stated [at p.550],*"It was thus the practice of the railway company to keep the wicket gate always locked if a train is approaching, and only to have it unlocked when no train was approaching. On the occasion in question, owing to the neglect of the signalman, the gate was unlocked at a time when a train was approaching. To those who knew of the practice this was a tacit invitation to cross the line.".* In the same vein, in NORTH EASTERN RAILWAY COMPANY vs. WANLESS, Lord Cairns observed [at p. 15], *"It appears to me that the circumstance that the gates at this level crossing were open at this particular time, amounted to a statement, and a notice to the public, that the line at the time was safe for crossing….."*. Similarly, in STAPLEY vs. THE LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY, Channel B commented [at p. 27], *"Then, the carriage gate being open, and no gatekeeper present,, a foot passenger*

was invited by that state of things to pass across the line, and the conduct of the company, therefore, was, we think, evidence of negligence to go to the jury.". and Pollock CB said [at p.28], *"…. But the company by their conduct clearly intimated to him that no train was approaching ….."*.

In South Africa too, the duty of care placed on a road user at a level crossing which is *protected by gates*, was likely to be different if the road user was aware, from previous experience, that the practice was for the gates to be closed when a train was passing. Thus, with regard to the law in South Africa relating to level crossings which are protected by gates, Scoble states [at p.346], *"if the plaintiff could show that from previous experience he had concluded that the gates were always shut when a train was approaching, this would constitute an element to be taken into account when judging his conduct."*. For example, in MANCHO vs. S.A.R. [1928 AD 891], where the Railway Company usually deployed a man to warn passersby of an approaching train and the plaintiff's husband saw that there was no warning signal and crossed the railway line when he was hit by a train and died, it was held that, there was no negligence on his part.

With regard to Mr.Rajakaruna, as a motorist who had frequently driven on Duwa Road and being a person from that area, he would have known that Sri Lanka Railways had installed gates which were closed whenever a train is expected to pass Level Crossing No. CL 78. Therefore, when Mr. Rajakaruna saw the gates at this level crossing were *open*, he was entitled to assume that, train would not pass the level crossing at the time he drove on to the level crossing. It cannot be said that Mr. Rajakaruna should have reasonably foreseen that a train would pass when the gates were wide *open*. McKerron [7th ed. at p.60], referring to this type of situation, comments that, *"Speaking generally, a person is entitled to assume that others will act with due care in regard to his safety, and is therefore not bound to take precautions against the mere possibility of negligence on the part of another."* McKerron also observes, citing the decision in MANCHO vs. S.A.R., *"….. although the plaintiff may have acted in a manner which was prima facie dangerous and imprudent, he may have been so put off his guard that he was justified in assuming that he might safely act as he did."*.

Further, due to the bends in the railway line and trees, plants and houses, it is probable that Mr. Rajakaruna did not see the beam of light cast by the headlight of the train. Similarly, it is probable that, within the cocoon of his vehicle with the background noise of the engine of his vehicle and the sea which is close by, he could not hear the sound of the horn or of the train. The probability is also that, due to the layout of Level Crossing No. CL 78 and its surroundings, Mr. Rajakaruna could not see the train until it was too late for him to avoid the collision. In these circumstances, it cannot be said that, Mr. Rajakaruna was negligent when he tried to drive across Level Crossing No. CL 78 at a time when the gates across Duwa Road were *open*. Thus, the present case is not one in which the negligence of the road user had caused or contributed to causing the collision at the level crossing, as was the case in BUCHANAN vs. S.A.R [1915 N.P.D.95] and McRITCHIE vs. S.A.R [1918 NPD 311] cited by the 1st and 4th defendants or in the well known cases of

UNION GOVERNMENT vs. LEE [1927 AD 202 and JORDAAN vs. C.S.A.R. [1909 TS 465].

With regard to the engine driver, his duty of care in the present case was to approach the level crossing at a speed which is appropriate to the location, to sound the horn in a manner which gives adequate warning before approaching the level crossing and to keep a good look out over the railway line and its surroundings. ln WORTHINGTON vs. CENTRAL SOUTH AFRICAN RAILWAYS, Solomon J held that, an engine driver who approached a level crossing has a duty *"…..to give due and timely warning of its approach and also not to be travelling at such an excessive rate of speed that the warning it might give should be of no avail. What is an excessive speed and what is due warning must entirely depend on the special circumstance of each case."*. Similar views were expressed in England in CLIFF vs. MIDLAND RAILWAY COMPANY [1870 5 LR QB 258] and SMITH vs. LONDON MIDLAND & SCOTTISH RAILWAY [1948 SC 125]. In the present case, the evidence establishes that, the engine driver took these precautions and was not negligent.

Thus, the learned trial judge's determination that the collision was caused solely due to the negligence of the 2nd and 3rd defendants, was in conformity with the evidence. The High Court, has correctly affirmed that determination. Before moving on to the next issue, I should mention here that, the decision PERERA vs. C.G.R. [1988 2 CALR 139] which the 1st and 4th defendants appear to rely on, is not relevant to the present case since, in that case, the lorry driver who drove across the railway line ignored the warning given to him by the gatekeeper to stop and there were also other factors which established negligence on the part of the lorry driver.

Next, since it has been proved that, the 2nd and 3rd defendants were employees of that Sri Lanka Railways, it follows that, Sri Lanka Railways will be vicariously liable for loss and damages caused to any person as result of any negligent acts or omissions of the 2nd and 3rd defendants which are within the scope of their employment as gatekeepers. As Mckerron states [The Law of Delict, 7th ed. at p. 89], *" It is now settled law that a master is liable for the wrongs of his servants committed in the course of their employment, or, as it is commonly put, within the scope of their employment."*. Further, there can be no doubt that, since the 2nd and 3rd defendants were employed by Sri Lanka Railways to perform the duties of *gatekeepers* at Level Crossing No. CL 78, the negligent acts and omissions of the 2nd and 3rd defendants of keeping the gates open when a train was approaching and abandoning their post, were acts and omission which were within the scope of their employment. Therefore, the learned District Judge has correctly held that, Sri Lanka Railways and the State are vicariously liable for these negligent acts and omissions of the 2nd and 3rd defendants. The High Court, has correctly affirmed that determination.

It should also be mentioned that, since the train that crashed into Mr.Rajakaruna's car at about 11pm on 19th August 1993, was an unscheduled train which reached Level Crossing No. CL 78 more than half hour after the last scheduled train passed

that level crossing at about 10.20 pm, Sri Lanka Railways had a duty of care to inform the 2nd and 3rd defendants to expect the arrival of an unscheduled train at Level Crossing No. CL 78 at approximately 11pm. Sri Lanka Railways could have easily informed the 2nd and 3rd defendants by means of a message passed to them from the Kahawa Station or the Ambalangoda Station which are both close to Level Crossing No. CL 78. The failure of Sri Lanka Railways to so inform the 2nd and 3rd defendants, amounts to negligence. Further, it appears to me that, the failure on the part of Sri Lanka Railways to install a telephone in the gatekeepers' hut at Level Crossing No. CL 78, may also be regarded as negligence. It can be also said that, the failure on the part of Sri Lanka Railways to ensure that, two other gatekeepers took over from the 2nd and 3rd defendants who had worked for sixteen hours at a stretch by 10pm on 19th August 1993, also amounts to negligence. Next, the failure of Sri Lanka Railways to install warning signs on either side of Duwa Road before the level crossing, was negligent. Therefore, it can be said that, apart from Sri Lanka Railways being vicariously liable for the negligence of the 2nd and 3rd defendants which caused the death of Mr.Rajakaruna, Sri Lanka Railways is also directly liable by reason of its own negligence. Thus, in LLOYDS BANK vs. RAILWAY EXECUTIVE, the Railway Company's failure to adequately warn the public of the approach of trains, was held to amount to negligence on the part of the Railway Company.

For the reasons stated above, I hold that, the High Court correctly affirmed the learned trial judge's analysis of the evidence and findings of fact which are referred to in questions of law no.s (i), (ii), (iv), (vi),(vii) and (viii). There were *no* reasons evident from the record which would have justified the High Court setting aside those findings of fact of the trial judge. The High Court has also duly considered the grounds of appeal set out in the 1st and 4th defendants' petition of appeal. Therefore, questions of law no.s (i), (ii), (iv), (vi),(vii) and (viii) are answered in the negative.

Question of law no. (iii) raises the issue of whether the judgment of the District Court was not in accordance with the requirements of section 187 of the Civil Procedure Code. Section 187 requires that the judgment of a trial judge must concisely state the cases of the parties, the issues, the determinations of the Court on the issues and the reasons for the Court reaching those determinations. A perusal of the judgment of the learned District Judge establishes that, the requirements of section 187 have been fully met. The learned trial judge has stated the cases of the parties and examined and evaluated the evidence of each witness and the totality of the evidence. He has stated the issues and applied his determinations with regard to the evidence, to the issues. He has given reasons for his findings. This is certainly not an instance where the trial judge has given bare answers to the issues without stating his reasons for doing so or has failed to examine and evaluate the evidence germane to the issues or has failed to consider the totality of evidence or has simply recited the evidence and then said that he accepts the evidence of one party without giving reasons for doing so, as was the case in LUCIHAMY vs. CICILIYANAHAMY [59 NLR 214], MEERAMOHIDEEN vs. PATHUMMA [76 CLW 107] and WARNAKULA vs. JAYAWARDENA [1990 1 SLR 206] which have been cited by the

1st and 4th defendants. Therefore, question of law no. (iii) is answered in the negative.

Question of law no. (v) raises the specific issue of whether the learned High Court judges misdirected themselves with regard to the obligations and duties of Mr.Rajakaruna, as a driver of a vehicle, at a level crossing. Question of law no. (ix) raises a general question as to whether the learned High Court judges erred in their decision with regard to the duty of care placed on Mr. Rajakaruna, the 2nd and 3rd defendants, the engine driver and Sri Lanka Railways. These issues have been considered when answering questions of law no.s (i),(ii),(iv),(vi),(vii) and (viii). For the reasons set out earlier, questions of law no.s (iii) and (ix) are also answered in the negative.

Since all the questions of law raised by the 1st and 4th defendants have been answered in the negative, this appeal must be dismissed and there is no need for me to consider the question of law raised by the plaintiff.

Finally, the award of damages in a sum of Rs.3,500,000/- by the District Court, was affirmed by the High Court. The plaintiff has not, at any stage, in either the High Court or before us, taken up a position, that this sum was inadequate. Therefore, I refrain from looking into the adequacy of the damages that were awarded.

The judgment of the High Court is affirmed. Thus, the plaintiff-respondent-respondent is entitled to forthwith recover the sum of Rs.3,500,000/- with legal interest thereon and costs in the manner prayed for in the plaint, as awarded by the District Court, together with the costs awarded by the High Court. This appeal is dismissed with costs in a sum of Rs.150,000/- on account of the costs in this Court.

Judge of the Supreme Court

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 Appeal from a judgment of the Civil Appellate High Court of Avissawella.

SC APPEAL 66/16
SC/HCCA/LA/227/2015
WP/HCCA/AV/382/2008(F)
D.C. HOMAGAMA 598/P

Hewa Devage Raymond Karunathilake, No. 167,Jaya Mawatha, Oruwalpitiya, Athurugiriya.

Plaintiff

Vs

1. Suduwa Devage Nimal Somasiri
2. Suduwa Devage Sunil Pathmasiri
3. Suduwa Devage Nihal Jayasiri
4. SuduwaDevage Charlette Somalatha(deceased)
   All of Jaya Mawatha, Oruwalpitiya, Athurugiriya.

4A. Hewa Devage Lilani Fernando, Jaya Mawatha, Oruwalpitiya, Athurugiriya.

5. Suduwa Devage Lal Deepananda, No. 165, Jaya Mawatha, Oruwalpitiya, Athurugiriya.
6. Pathmulla Kankanamalage Gunathilake, No. 299/4, Godagama Road, Athurugiriya.
7. Hakmana Vithanage Kamalawathie, No. 299/1, Godagama Road, Athurugiriya.
8. Singakkuti Arachchige Wimalasena, No. 836/1, Athurugiriya Road, Homagama.
9. Dehipitiya Mirissage Ariyawansa, No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama.

10. Dehipitiya Mirissage Sedin, No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama.
11. Hewa Devage Dhammika Chandrasiri, No. 165, Jaya Mawatha, Athurugiriya.
12. Hewa Devage Sriyani Chandrika, No. 156/5, Abayasinghe Mawatha, Athurugiriya.
13. K.A.G.Lesli (deceased), No. 19, Abayasinghe Mawatha, Athurugiriya.

13 A. Kumarapril Arachchige Don Nagananda, Samagi Mawatha, Panagoda, Homagama.

Defendants

AND NOW

Hewa Devage Raymond Karunathilake, No. 167,Jaya Mawatha, Oruwalpitiya, Athurugiriya.

Plaintiff Appellant

Vs

1. Suduwa Devage Nimal Somasiri
2. Suduwa Devage Sunil Pathmasiri
3. Suduwa Devage Nihal Jayasiri
4. SuduwaDevage Charlette Somalatha(deceased) All of Jaya Mawatha, Oruwalpitiya, Athurugiriya.

4A. Hewa Devage Lilani Fernando, Jaya Mawatha, Oruwalpitiya, Athurugiriya.

5. Suduwa Devage Lal Deepananda, No. 165, Jaya Mawatha, Oruwalpitiya, Athurugiriya.
6. Pathmulla Kankanamalage Gunathilake, No. 299/4, Godagama Road, Athurugiriya.

7. Hakmana Vithanage Kamalawathie, No. 299/1, Godagama Road, Athurugiriya.
8. Singakkuti Arachchige Wimalasena, No. 836/1, Athurugiriya Road, Homagama.
9. Dehipitiya Mirissage Ariyawansa, No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama.
10. Dehipitiya Mirissage Sedin (deceased), No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama.

10 A. Egodahage Siripala Weerasiri Alwis Samarakoon, No. 671/4, Erawwala, Pannipitiya.

11. Hewa Devage Dhammika Chandrasiri, No. 165, Jaya Mawatha, Athurugiriya.
12. Hewa Devage Sriyani Chandrika, No. 156/5, Abayasinghe Mawatha, Athurugiriya.
13. K.A.G.Lesli (deceased), No. 19, Abayasinghe Mawatha, Athurugiriya.

13 A. Kumarapril Arachchige Don Nagananda, Samagi Mawatha, Panagoda, Homagama.

Defendants Respondents

AND NOW BETWEEN

Egodahage Siripala Weerasiri Alwis Samarakoon, No. 671/4, Erawwala, Pannipitiya.

10 A Defendant Respondent Petitioner

Vs

Hewa Devage Raymond Karunathilake, No. 167, Jaya Mawatha, Oruwalpitiya, Athurugiriya.

Plaintiff Appellant Respondent

1 A. Hewa Devage Dayawathie, No. 164/D,
Oruwalpitiya, Athurugiriya
2.Suduwa Devage Sunil Pathmasiri
3. Suduwa Devage Nihal Jayasiri
4A. Hewa Devage Lilani Fernando, Jaya Mawatha,
Oruwalpitiya, Athurugiriya.
5.Suduwa Devage Lal Deepananda, No. 165, Jaya Mawatha, Oruwalpitiya, Athurugiriya.
6. Pathmulla Kankanamalage Gunathilake, No. 299/4, Godagama Road, Athurugiriya.
7. Hakmana Vithanage Kamalawathie, No. 299/1, Godagama Road, Athurugiriya
8. Singakkuti Arachchige Wimalasena, No. 836/1, Athurugiriya Road, Homagama.
9. Denipitiya Mirissage Ariyawansa, No. 27, Nandana Udyanaya, Yahampath Mawatha, Maharagama.
11.Hewa Devage Dhammika Chandrasiri, No. 165, Jaya Mawatha, Athurugiriya.
12. Hewa Devage Sriyani Chandrika, No. 156/5, Abayatissa Mawatha, Athurugiriya.
13 A. Kumarapril Arachchige Don Nagananda, Samagi Mawatha, Panagoda, Homagama.

Defendants Respondents Respondents.

BEFORE : **S. EVA WANASUNDERA PCJ.,**
K. T. CHITRASIRI J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : Nihal Jayamanne PC with Ajith Munasinghe for the 10 A Defendant Respondent Appellant.

Walter Perera with Dhanapala Walgama for the Plaintiff Appellant Respondent.

ARGUED ON : 28.09.2017.

DECIDED ON : 27.11.2017.

S. EVA WANASUNDERA PCJ.

This Appeal arises from the judgment of the Civil Appellate High Court of Avissawella. The District Court of Homagama had given judgment **excluding a portion of the land sought to be partitioned from the corpus** that the Plaintiff had filed action to partition. The Civil Appellate High Court had overturned the judgment of the District Court and had further directed the District Court **to include in the corpus, the portion of land which was excluded** and further more to go through the pedigree and decide on the apportionment of the land.

At the stage of granting of leave to appeal sought by the 10 A Defendant Respondent Appellant, this Court has granted leave on the following questions of law:-

1. In the circumstances pleaded in the case and also in terms of the evidence adduced before Court, had the 10th Defendant established before Court the fact that Lot 2 in the Preliminary Plan is a separate and distinct land called Mahadeniya and not a portion of the land sought to be partitioned?

2. If the 10th Defendant has established before Court that, Lot 2 in the Preliminary Plan is separate land called Mahadeniya, should the said Lot 2 in the Preliminary Plan be excluded from the corpus?

3. In any event did the learned High Court Judge err in directing the learned Present District Judge to accept the corpus as shown in Preliminary Plan X and to give judgment on the evidence already led specially in view of the fact that the learned District Judge in his judgement having arrived upon a specific conclusion on the evidence led with regard to the same issue?

4. Did the learned High Court Judge err in not considering that the learned District Judge had given judgment on evidence already led?

The Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) filed the Partition Action in the District Court of Homagama in order to partition the land called " Idamkattiya" in extent of 4 Acres 1 Rood and 34.50 Perches morefully described in the second schedule to the Plaint. It is depicted in the Preliminary Plan bearing No. 3967 made by Court Commissioner Mervyn Samaranayake marked as X which is at pg. 111 of the Brief before this Court.

The 10A Defendant Respondent Appellant (hereinafter referred to as the 10 A Defendant) is the party who was substituted in the room and place of the deceased 10th Defendant in the District Court Partition Action. **The 10th Defendant was the only contesting party** before the trial Court. He filed a Statement of Claim and claimed that the pedigree set out by the Plaintiff does not apply to **Lot 2 in the Preliminary Plan No. 3967** marked as X ; that the said Lot 2 is called **Mahadeniya a**nd that the said Lot 2 had been separately possessed by the 10th Defendant and his predecessors in title as a **divided and defined portion of land** which **does not form part of the corpus** of the Patition Action. Accordingly, 10th Defendant prayed that the said **Lot 2 be excluded** from the corpus sought to be partitioned.

The issues of the 10th Defendant before the District Court were as follows:-

1. Has the land called Mahadeniya depicted in Plan No. 2055 dated 22.01.1930 been surveyed and shown by the Plaintiff in the proposed plan **improperly?**
2. Is the portion of land depicted in Plan No. 2055 depicted as Lot 2 in the Preliminary Plan?
3. Was the land called Mahadeniya in Plan No. 2055 owned and possessed by the 10th Defendant based on the deeds as stated in the statement of claim?
4. If any one , several or all of the above issues are answered in favour of the 10th Defendant, should the Lot 2 in the Preliminary Plan No. 3967 be excluded from the land proposed to be Partitioned in the case?

The Trial Judge delivered his judgment making **an order to exclude Lot 2 in Plan X** as claimed by the 10th Defendant. The Plaintiff appealed to the Civil Appellate High Court and the High Court set aside the judgment of the District Court and

directed the District Judge to **accept the corpus** and **to write the judgment again** after examination of the title of parties on the available evidence and enter judgment accordingly.

The 10th Defendant's position was that the land he possessed was Mahadeniya and it is described in the very old Plan No. 2055 dated 22.01.1930 made by H.D.de Silva Licensed Surveyor. A copy of the said Plan was marked in evidence as 10 V1. The said land in Plan No. 2055 was resurveyed in 1986 by Surveyor D.S.S. Kuruppu and the said Survey Plan No. 397 dated **01.01. 1986** was marked in evidence as 10 V 3. In this Plan No. 397, the Surveyor has specifically mentioned that the name of the Land is **Mahadeniya.**

The Court issued a commission to superimpose the said Plan 2055 on the corpus sought to be partitioned. The Preliminary Plan 3967 marked as X had been drawn in the course of this action in February, 1993 and the superimposition of Plan 397 on Plan 3967 marked X was done in May, 2000. The superimposed Plan and the Report dated 05.05.2000 were produced in Court and marked in evidence as 10 V 2 and 10 V 2A.

The Court Commissioner who has prepared this superimposed plan has given evidence before Court and explained matters well. He was cross examined by the counsel for the Plaintiff. The report annexed to the Plan was marked as 10 V 2A. In the report, the surveyor specifically states that the land depicted in Plan 2055 as well as in Plan 397 are **exactly the same as Lot 2** in the Preliminary Plan No. 3967 marked as X. He further states that the Suveyor General's first **Plan 87331** on which the Plaintiff has based the relief to partition the land has **no specific name of the land mentioned** therein at all.

The Plan 87331 is at page 324 of the Brief. It is marked as P 4. Perusing the said plan, I do not find any name of the land mentioned anywhere and the legend on the Plan 87331 reads in English language as " Plan of an Allotment of Land situated in the village of Athurugiriya in Palle Pattuwa of the Hewagam Korale in the District of Colombo, Western Province ". It is of an extent of 8A 3R 29P and the Plaintiff has moved to partition the **Western half** of the said land which is described as **just an allotment of land without a name** of an extent of **4A 1R**

35.25 P. Having gone through the Plaint of the Plaintiff and the Plan of the Plaintiff which is based on none other than a Surveyor General's Plan 87331, I hold that there exists **no name** of the land sought to be partitioned in the Plaint.

The other contention of the Plaintiff was that the 9th and 10th Defendants have no title to the land which is the subject matter of this case.

According to the evidence led by the 10th Defendant, Dehipitiya Mirissage Sedin, documents were produced by way of Deeds to support that **Lot 2 in the Preliminary Plan X** should be excluded from the corpus in the Plaint. Plan X was prepared by order of Court at the beginning of the District Court Case as the first step in the partition case. The document marked as **10 V 4** is a Deed conveyed by the executrix of the **Last Will No. 520** dated 26.01.1946 of Don Albert Alexander Pathberiya and his wife Gonsal Bothejuge Grace Harriette Boteju Pathberiya attested by D.S.Ganegoda Notary Public Colombo, which was **proved in the District Court** of Colombo in Testamentary Case No. **14656**. By that deed the executrix granted the land called **Mahadeniya** of an extent of 2A 2R 18P as shown in Plan No. **2055** dated 22.01.1930 as aforementioned to Don Harishchandra Pathberiya. Thereafter the said D.H.Pathberiya transferred the same land to Don Asoka Chandrakirthi by Deed 10V3. Later he transferred the same land to Don Kusumawathie Pathberiya by Deed 10V7 who in turn transferred the same land to the 10th Defendant, Denipitiya Mirissage Sedin.

Therefore it is quite clear from the deeds of the 10th Defendant that he has got title to Mahdeniya depicted in Plan 2055 which, when superimposed was exactly the same as Lot 2 in the Preliminary Plan X.

The Plaintiff in this case, namely Hewadewage Raymond Karunathilake has received title by Deed No. 483 dated 18.01.1989 from Hewa Hakuruge Basthian Fernando for the land morefully described in the Schedule thereto. It was marked in evidence by the Plaintiff marked as P 32. The Schedule in P 32 reads in Sinhalese as follows:

බස්නාහිර පළාතේ කොළඹ දිස්ත්‍රික්කයේ හේවාගම් කෝරළයේ පල්ලේ පත්තුවේ, අතුරුගිරිය යන ගම පිහිටි ඉඩම් කට්ටියට නියම වූ මායිම් බස්නාහිරට සහ උතුරටත් හිටපු මුදියන්සේ රාළහාම් නමින් බුක්ති විඳගෙන එන ඉඩමද ,නැගෙනහිරට ඔටුන්නට අයිතිය කියන ඉඩමද, වැසියන්ට අයිතිය දකුණට නොම්මර 87332 ප්ලෑන කඩදාසියට මැනි තිබෙන ඉඩමද යන මෙකි මායිම් ඇතුළත ඉඩමෙන් වැටී තිබෙන පාර සහ එම පාරට අයිතිව දම්වැල් පුරුක්

තිහක් පලල ඇති හරියේ ඉඩමක් අත්හැර අක්කර අටකුත් රූඩ් තුනකුත් පර්වස් විසිනවයක් විශාල වූ ඉඩමෙන් වැව් මහන්ඩියට ඇර තිබෙන නැගෙනහිර පැත්තේ, දෙකෙන් පංගුව අත්හැර බස්නාහිර පැත්තේ, ඉතුරු දෙකෙන් පංගුවෙන් දෙකෙන් පංගුවකින් නොබෙදාපු තුනෙන් දෙපංගුව යන දේපලවේ.

Therefore it is evident that in the Plaintiff's own deed by which he claims title the name of the land is **not even mentioned as** "Idam Kattiya".

Then again, it can be seen that the name of the land is not Idam Kattiya, when reading P33 which is the last document produced by the Plaintiff at page 490 of the Brief before this Court. P33 is the Deed No. 6509 dated 28.07.1919 to which the learned High Court Judges have referred to, in their Judgment. At page 1 of the Deed, the land is described with no name of any land , in Sinhalese as follows:

" කොළඹ දිස්ත්‍රික්කයේ හේවාගම් කොරළයේ පල්ලේ පත්තුවේ,දැඩිගමුව යන ගම පදිංචි හේවාදේවගේ සාදිලිස් ප්‍රනාන්දු වන මම වර්ෂ 1916 ක් වූ ජූලි මස 22 වැනි දින නොම්මර 29354 ලකුණු කොට ඩී.සී.ඩී.ඇස්.ජයතිලක කොළඹ දිස්ත්‍රික්කයේ ප්‍රසිද්ධ නොතාරිස් වරයා සහතික කල විකුණුම් කර ඔප්පුව පිට අයිතිව මා විසින් නිරවුල් ලෙස බුක්ති විඳගෙන එන බස්නාහිර පළාතේ කොළඹ දිස්ත්‍රික්කයේ හේවාගම් කෝරළයේ පල්ලේ පත්තුවේ අතුරුගිරිය යන නම තිබෙන ඉඩම් කට්ටියට මායිම්ව බස්නාහිරට සහ උතුරට හිටපු මහමුදියන්සේ රාළහාම් නමින් බුක්ති විඳ එන ඉඩමද, නැගෙනහිර ඔටුන්නට අයිතිව තිබී දැනට වැසියන් සන්තකව තිබෙන ඉඩමද දකුණට අංක.87332 සිතියමට මැනී තිබෙන ඉඩමද යන මායිම් තුල ඉඩමෙන් වැටී තිබෙන පාර සහ එම පාරට අයිති ආණ්ඩුවෙන් හැර තිබෙන දම්වැල් පුරුක් 30 ක් පළල ඇති හරියේ ඉඩමක් අත්හැර අක්කර අටකුත් රූඩ් තුනකුත් පර්වස් විසිනමයක් විශාලකම ඇති ඉඩමෙන් බස්නාහිර දෙස නොබෙදූ දෙකෙන් පංගුවෙන් දෙකෙන් පංගුවකින් තුනෙන් දෙපංගුවෙන් හයෙන් පංගු පහ සහ ,

However, I observe that in some of the other deeds written by different Notaries Public they have mentioned in the schedules of the deeds as if the name of the land is Idam Kattiya. It looks like that because there was no name of the land from which title was derived, the notaries have adopted the word Idam Kattiya as the name of the land. The Original Plan of the Surveyor General No. 87331 or the Plaintiff's own title Deed No. 483 to which I have referred to above does not have in the Schedule, any name of the land as Idam Kattiya.

Nonetheless, the Plaintiff has failed to prove that Mahadeniya is part of the so called land Idam Kattiya. There is no oral or documentary evidence whatsoever to that effect. The Plaintiff 's position is that there is no land called Mahadeniya and

the corpus of the partition case includes the land which the 10th Defendant claims in his Statement of Claim.

The learned High Court Judges had considered the evidence led before the trial judge in the same way as the trial judge had analyzed. The High Court had done the analysis, in 9 pages out of the 10 pages of their judgment and in the last paragraph of the 9th page of the judgment the High Court has stated as follows:
"on a perusal of Deed 10 V4 it appears that Alexander became entitled to the land by virtue of deed of transfer bearing No. 6509 dated 28.07.1919 marked as P33 at the trial. It is significant that the vendor of the said Deed P33 has transferred undivided 5/36 from the land called Idam Kattiya morefully described in the second schedule to the Plaint. **It is important to note that 10th Defendant in his evidence stated that he purchased a portion from the land sought to be partitioned**. " Having said so in the analysis of evidence , the High Court has erred in concluding that the land bought by the 10th Defendant should be included in the corpus to be partitioned.

It is clear from this analysis that the corpus to be partitioned as claimed by the Plaintiff , should not include the portion sold out of that land which has been inherited by others and finally reached the 10th Defendant. The final conclusion of the High Court Judge is quite wrong.

In P 33 at page 490 of the Brief the land is described as "අතුරුගිරීය යන ගම තිබෙන ඉඩම් කට්ටිය". In P5 the land has been described as " අතුරුගිරීය යන ගම තිබෙන ඉඩම් කට්ටිය **නිර්නාමික** ඉඩම් කට්ටිය වූ".

It is obvious that there is no land called 'Idamkattiya' as mentioned in the Plaint of the Plaintiff. It is the word used to describe " an allotment of land ".

I find that the High Court Judges have tried to look into the fact finding evidence leaving aside the analysis of the trial judge for no reason explained by them. It is trite law that the Appellate Courts should not interfere with the judgments of the trial court unless there is a grave legal discrepancy in the decision of the trial court or there is a grave error in the analysis of the evidence before the trial court. When the trial judge has gone through the evidence and the documents

which reveal facts pertinent to the matters to be decided on, the Appellate Court Judges should not disturb the factual findings of the trial judge.

In the case in hand, the evidence before the trial court was analyzed by the trial judge; the Preliminary Plan was prepared; the land was identified; the 10th Defendant's deeds were gone into and a superimposition of his land on the preliminary plan was done ; the reports of the surveyor was taken into account and finally decided that Mahadeniya was included within the land proposed to be partitioned by the Plaintiff and therefore the said land should be excluded. The Court sitting in Appeal should not disturb the said findings of fact concluded by the trial judge in the District Court.

In this instance, without stating that there is a grave error if any, in the analysis of the evidence, the High Court Judges sitting in Appeal have again tried to consider the evidence within the deeds. The High Court has disturbed the facts found to be correct by the District Judge. I hold that the Appeallate Judges have acted wrongly in this instance in view of the ratio decidendi in **Bandaranayake Vs Jagathsena and Others 1984, 2 SLR 397, Ceylon Cinema and Film Studio Employees Union Vs Liberty Cinema Ltd. 1994, 3 SLR 121 and Jayasuriya Vs Sri Lanka State Plantation Corporation 1995, 2 SLR 379.**

The Civil Appellate High Court Judges have failed to give reasons as to why the rationale given by the Distict Court Judge after the analysis of the facts on evidence before the trial court , should be varied or not accepted. The High Court has not set down any valid argument for having concluded that the present trial judge in the District Court should write another judgment taking the subject matter as the complete corpus as described in the Plaint and considering the evidence already led at the trial.

The Appellate Court Judges have moreover directed the District Court Judge to accept the Preliminary Plan X and write another judgment on the evidence available without delay. The High Court judges are totally in error when they directed the District Judge to write another judgment on the available evidence because that is what the trial judge has already done. I cannot agree with the submissions made by the Counsel for the Plaintiff who argued that the High Court was correct in its conclusion.

I answer the questions of law enumerated above in the affirmative in favour of the 10 A Defendant Respondent Appellant and against the Plaintiff Appellant Respondent. I set aside the judgment of the Civil Appellate High Court of Avissawella. I affirm the judgment of the District Court of Homagama.

This Appeal is allowed. However I order no costs.

Judge of the Supreme Court

K.T.Chitrasiri J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda 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 application for Leave to Appeal in terms of the Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 5c of the High Court of the Provinces (special Provisions Act No. 19 of 1990 as amended by the Act No. 54 of 2006.

SC. Appeal.67/2015
S.C.(H.C.C.A) LA.248/12
WP/HCCA/Kalutara03/2005 (F)
D.C Horana 365/L

Eliyadura Osman Weerasena Silva,
No.4/3, Train Houses, Modera
Moratuwa.

Plaintiff

VS.

EliyaduraPadmaRanjani,
No.126, Batuwita,
Gonapola Junction.

Defendant

AND

Eliyadura Padma Ranjani,
No.126, Batuwita,
Gonapola junction.

Defendant-Appellant

Vs.

Eliyadura Osman Weerasena Silva
No.4/3, Tain Houses, Modara,
Moratuwa.

Plaintiff-Respondent

AND NOW

Eliyadura Padma Ranjani,
No.126, Batuwita,
Gonapola junction.

Defendant-Appellant-Petitioner
Vs.

Eliyadura Osman Weerasena Silva,
No.4/3, Train Houses, Modera
Moratuwa.

Plaintiff-Respondent-Respondent

BEFORE: **B.P.ALUWIHARE, PC, J,**
PRIYANTHA JAYAWARDENA, J &
ANIL GOONERATNE, J.

COUNSEL: Yasas de Silva for the Defendant-Appellant-Appellant.
E.B.Atapattu with PrasanjeewaPattiarachchi instructed by Ms. P. Weerasekera for the Plaintiff-Respondent-Respondent

WRITTEN SUBMISSIONS: 10.04.2015 20.04.2016 by the Appellant
09.05.2016 by the Plaintiff-Respondent-Respondent

ARGUED ON: 12.05.2017.

DECIDED ON: 14.12.2017

ALUWIHARE, PC, J:
The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) in a *rei-vindicatio* action filed before the District Court of Horana, inter alia sought:

(a) a declaration that the Plaintiff is the owner of the land, the subject matter to this application, and

(b) an order for the ejectment of the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant) therefrom.

This court granted leave to appeal on the questions of law referred to in sub-paragraphs (a), (b), (c) and (g) of paragraph 23 of the Petition of the Petitioner which are reproduced below:

(a) Whether the said judgement of their Lordship's of the Civil Appellate High Court is contrary to the law and material placed at the trial?

(b) Whether their Lordships have erred in law by failing to consider that the Respondent has not proved the necessary requirement to obtain a judgement of a *rei-vindicatio* action?

(C) Whether their Lordships have erred in law by failing to consider that the Respondent has not properly identified and proved the land in issue and in that event, he was not entitled to obtain a judgement in his favour?

(g) Whether their Lordshipshave erred in law by holding that the Petitioner has failed to prove her case, as in a *rei-vindicatio*action, the burden is entirely on the Plaintiff?

At the conclusion of the trial before the District Court, the learned District Judge held with the Plaintiff and aggrieved by the said judgement, the Defendant appealed to the High Court of Civil Appeals (Kalutara). The learned Judges of the High Court, affirmed the judgement of the learned District Judge and accordingly the appeal of the Defendant was dismissed.

The present appeal arises from the judgement of the High Court of Civil Appeals.

Background:

According to the Plaint, in the year 1954, the property in suit had been granted toone Diyaneris Silva by way of a crown grant (P4) under the Land Development Ordinance. Said Diyaneris Silva nominated his son Edwin Silva as his successor and had effected the registration of the said nominee as well (P3). Edwin Silva had died in the year 1997 and his wife also had passed away thereafter. In terms of Section 72 of the Land Development Ordinance, the Plaintiff who happened to be the eldest surviving son of Edwin Silva,became entitled to the property in suit and the same had been registered with the Divisional Secretary's office under reference LDO 753. After the death of Edwin Silva in 1977, the Defendant who happened to be a younger sister of the Plaintiff, had come into occupation of a building that stood on this property which had been used for religious activities, according to the Plaintiff. The Plaintiff, in 2001, by a letter

sent through his attorney, had requested the Defendant to quit the property and to have vacant possession handed over to the Plaintiff.

The Defendant in her answer had taken up the position that the property in suit was allotted to Diyaneris Silva by the District Court of Kalutara consequent to a partition decree in case No. 9646.

It was the position of the Defendant that Edwin Silva inherited the property in question after the death of his father Diyaneris Silva. After the death of Edwin Silva, the Defendant being a child of Edwin Silva, inherited the property. In addition, the Defendant also had taken up the position that she was in possession of the property for a period of 42 years and she claimed prescriptive title to the property as well.

When the matter was taken up for hearing the learned counsel for the Defendant submitted that both the judgment of the learned District Judge as well as the judgment of the High Court of Civil Appeals cannot be sustained for the following reasons:

(1) The Plaintiff had failed to establish title to the impugned property.
(2) The Plaintiff had failed to comply with the requirements of Section 41 of the Civil Procedure Code.
(3) The Plaintiff had failed to discharge the burden of proof he is required to meet in accordance with the law.
(4) The judgement of the District Court is erroneous in fact and in law.

With regard to the failure on the part of the Plaintiff to establish the title to the property, it was argued, that although he relied on a State grant the evidence adduced by the Plaintiff is not clear enough to show that the Plaintiff is in fact the owner of the impugned property.

At the commencement of the trial, the corpus was admitted by the parties. The Plaintiff had led the evidence of the Land Officer attached to the relevant Divisional Secretariat, who had testified to the effect that in 1954 under the Crown grant P1, a land in extent of 1 Acre, 1 Rood and 11 Perches had been granted to Diyaneris Silva and the witness also marked in evidence the relevant plan (P2) depicting the land that was granted to the said grantee. The Land Officer conceded that the land described in the grant P1 and the Plan P2 is one and the same land that is referred to in the schedule to the plaint. The witness also admitted that Diyaneris Silva had nominated his son Edwin Silva as the successor and that the nomination had been registered (P4). Thereafter the title of the impugned property had been transferred to Osman Weerasena Silva, the Plaintiff, in terms of Section 72 of the Land Development Ordinance consequent to a decision taken by the Provincial Commissioner of Lands, which had been forwarded for registration to the Registrar of Lands and the registration had been effected by the Registrar of Lands. At one point the Plaintiff had requested that the land be divided among his male siblings, but due to the protest by the Defendant, on the basis that the impugned property is private land, the Land Officer had not carried out that request, but had advised the parties to resolve the dispute through a court of law.

It is also significant that steps had been taken to have the disputed property surveyed through the surveyor attached to the Divisional

Secretariat and the surveyor had confirmed the disputed property is the same as the land referred to in the grant P1.

The evidence given by this witness remains unassailed and I see no infirmities in the testimony of this witness to disbelieve him or to have it rejected and quite rightly the learned District Judge had acted on his testimony which establishes that the impugned property is a crown grant.

The next issue is the succession of the impugned property after the death of Edwin Silva. It is common ground that Edwin Silva had not nominated a successor. As such, it was the position of the Land Officer that in terms of Section 72 of the Land Development Ordinance the Plaintiff was nominated.

I shall advert to the evidence given by the Land Officer in this regard. His evidence was that the title of the impugned property had been handed over to Osman Weerasena Silva (the Plaintiff) in terms of Section 72 of the Land Development Ordinance as per the decision of the Provincial Commissioner of Lands and the said decision had been conveyed to the Registrar of Lands by the letter, P5 which says the perfected schedules are forwarded for the purpose of the transfer of title to Osman Weerasena Silva (the Plaintiff) of the land referred to in the grant No.3242, under the provisions of the Land Development Ordinance.

It was the position of the Land Officer that the transfer of the title of the grant was made under Section 72 of the Land Development Ordinance, which deals with the succession upon death of the life-holder.

Section 72 of the Land Development Ordinance; -

72. (1) Upon the death of the life-holder of a holding the nominated successor, if any, shall succeed to the holding-

(2) If **no successor has been nominated** or if the nominated successor fails to succeed, the title to the holding **shall devolve as prescribed by the rules in the Third Schedule.** (emphasis added)

For ease of Reference Schedule 3 of the Land Development Ordinance is reproduced to below:

THIRD SCHEDULE

RULES

1. (a) The groups of relatives from which a successor may be nominated for the purposes of section 51 shall be as set out in the subjoined table.

(b) Title to a holding for the purposes of section 72 shall **devolve on one only** of the relatives of the permit-holder or owner **in the order of priority in which they are respectively mentioned in the subjoined table,** the older being preferred to the younger where there are more relatives than one in any group.

Table

(i) Sons.	(vii) Brothers.
(ii) Daughters.	(viii) Sisters.
(iii) Grandsons.	(ix) Uncles.
(iv)granddaughters	(x) Aunts.
(v) Father.	(xi) Nephews.
(vi) Mother.	(xii) Nieces.

In this rule, " relative " means a relative by blood and not by marriage.

2. Where in any group of relatives mentioned in the table subjoined to rule 1 there are two or more persons of the same age who are equally entitled and willing to succeed, the Government Agent may nominate one of such persons to succeed to the holding. Such decision of the Government Agent shall be final.

** 4. If any relative on whom the title to a holding devolves under the provisions of these rules is unwilling to succeed to such holding, the title thereto shall devolve upon the relative who is next entitled to succeed under the provisions of rule 1. (**Emphasis is mine**)

From the above schedule, it is clear that for the purposes of Section 72, title devolves on only one relative of the permit holder in the order of priority, referred to in the third schedule. Furthermore,the sons of the permit holder have priority over his or her other relatives and the Plaintiff happened to be the eldest living son at the relevant time as his sole elder brother had passed away. Death of the elder brother was acknowledged by the Defendant in her evidence.

The Defendant in her evidence stated that her grandfather became entitled to the impugned property consequent to a partition decree and her father inherited the land after the death of her grandfather. In answer to court she had said that she was told by her father that her grandfather transferred the property on a title deed, but the defendant failed to either give details of the deed or to produce the deed during the trial.

Record Keeper of the District Court of Kalutara also had given evidence on behalf of the Defendant and produced, the court record in case No.9646 D.C. Kalutara and that both Diyaneris Silva and his wife had been allotted 9/96 of the corpus. There is no evidence, however, to say that there is any nexus between the corpus of the said partition case and the impugned property of the case before us.

On the material referred to above, one cannot fault the finding of the learned District Judge that the Plaintiff had proved his title to the property in suit.

The second issue raised on behalf of the Defendant Appellant, was that the Plaintiff had not complied with Section 41 of the Civil

Procedure Code. It was contended on behalf of the Appellant that the evidence led at the trial showed that another sister of the parties was also residing within the corpus and as such Plaintiff is not the only possessor of the impugned land. It was argued on this basis that the Plaintiff ought to have referred to the specific portion of land he is claiming.

It is to be noted that there is no evidence to say that there is a dispute as to the possession or title of the impugned property between the Plaintiff and the other sister of the Plaintiff who is also in possession of a portion of the land or that she also has put forward a claim to the impugned property. From the evidence led at the trial it appears that the said sister is in possession with leave and license of the Plaintiff, thus I hold that there is no non-compliance with Section 41 of the Civil Procedure Code on the part of the Plaintiff.

The third issue raised on behalf of the Defendant Appellant was that the Plaintiff had not discharged the burden of proving title. I have already discussed the evidence placed by the Plaintiff with regard to the title and I see no reason to reiterate them. It is abundantly clear from the documents produced and from the oral testimony, the devolution of title commencing from the original grantee Diyaneris Silva to his son Edwin Silva and from him to his eldest surviving son, the present Plaintiff, which had been regularized by the authorities as reflected in documents marked P4 and P5. According to the evidence of the Land Officer, the surveyor attached to the Divisional Secretariat having surveyed the impugned property, had confirmed that it is the same land as in grant given under R3242 to Diyaneris Silva. Thus, I am of the view that there is no doubt with regard to the identity of the corpus. This evidence in my view is relevant and admissible in terms

of Section 35 of the Evidence Ordinance, the surveyor being a public servant and an entry made with regard to what he performed in the discharge of his official duty.

As a fourth point of argument the Defendant-Appellant contended that the learned District Judge had erred both in fact and in law, and drew the attention of the court to an admission purported to have been recorded and the learned counsel contended that no such admission had been recorded.

It was submitted that the learned District Judge had referred to an admission in his judgment to the effect that, both parties agree that the Defendant is residing in the impugned property, and it was contended that no such an admission was recorded by the parties.

The admission that was recorded is as follows:

"චිත්තිකාරිය නෙරපීමට ඉල්ලා සිටින ඉඩමේ පිහිටීම සහ පැමිණිලිකරුගේ පදිංචිය මෙම අධිකරණ බලසීමාව තුල බව පිලිගනී"

I have considered the evidence led in the case and it is common ground that the Defendant is residing in a building used for religious activities within the corpus. The Plaintiff had said that the Defendant attended their father's funeral and continued to occupy the building referred to. The Defendant's position was that from her childhood, she was residing in the building. As such I am of the view that no prejudice had been caused to either party by reference to the purported admission by the learned District Judge.

Upon consideration of the above, I cannot fault either the learned District Judge with regard to the findings, he had arrived at orthe Judges of the High Court of Civil Appeals in holding that the learned District Judge was correct. Accordingly, I answer the three questions of law on which leave was granted in the negative.

The appeal is dismissed and the Plaintiff-Respondent-Respondent will be entitled to costs here and also costsin the High Court of Civil Appeals.

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA.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

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 / 69/2007

CALA/ 283/2003

DC Colombo No/19597/MR

Uralaliyanage Caroline Perera,

Dewala Road,

Pamunuwa,

Maharagama.

Plaintiff

Vs.

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant

AND

Uralaliyanage Caroline Perera,

Dewala Road,

Pamunuwa, Maharagama.

Plaintiff petitioner

Vs.

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant Respondent

AND

Uralaliyanage Caroline Perera,

Dewala Road,

Pamunuwa,

Maharagama.

Plaintiff Petitioner-Petitioner

Vs.

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant Respondent-Respondent

AND

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant Respondent-Respondent Petitioner

Vs.

Uralaliyanage Caroline Perera (dead),

K. M. C. Perera

Dewala Road,

Pamunuwa,

Maharagama.

Substituted Plaintiff Petitioner-Petitioner Respondent

AND NOW BETWEEN

Uralaliyanage Caroline Perera (dead),

K. M. C. Perera (dead)

Kalubowilage Prema Kumara Perera,

Dewala Road,

Pamunuwa,

Maharagama.

1A. Substituted Plaintiff Petitioner-Petitioner Respondent Appellant

Vs

People's Bank,

Sir Chittampalam Gardiner Mawatha,

Colombo 2.

Defendant Respondent-Respondent Petitioner Respondent

BEFORE	:	BUWANEKA ALUWIHARE, PC, J. UPALY ABEYRATHNE, J. K. T. CHITRASIRI, J.
COUNSEL	:	M.C. Jayaratne with M.C.J. Bandara and Nelanthi Abeyrathne for the 1A Substituted Plaintiff Petitioner-Petitioner Respondent Appellant Manohara De Silva PC for the Defendant Respondent- Respondent Petitioner Respondent
WRITTEN SUBMISSION ON:		29.03.201 (1A substituted Plaintiff Petitioner-Petitioner Respondent Appellant) 17.06.2016 (Defendant Respondent-Respondent Petitioner Respondent)
ARGUED ON	:	05.12.2016
DECIDED ON	:	01.08.2017

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the Court of Appeal dated 23.07.2007. By the said judgment the Court of Appeal has set aside the order of the learned Additional District Judge of Colombo dated 17.07.2013. Also, the Court of Appeal has granted leave to appeal to this court from the said judgment dated 23.07.2007 on the following questions of law;

1. Is the learned trial judge empowered to entertain and to hold an inquiry into an application seeking to set aside an order made by the same court under Section 87(3) of the Civil Procedure Code – (in the case in hand the order dated 02.07.2002)?
2. Whether the proper remedy available to a party dissatisfied with an order of the District Court made in terms of Section 87(3) of the Civil Procedure Code, is by way of an Appeal?

The Plaintiff instituted an action against the Defendant Respondent-Respondent Petitioner Respondent (hereinafter referred to as the Respondent) in the District Court Colombo seeking *interalia* to recover a sum of Rs 9,700,000/- as damages. Subsequent to the answer filed by the Respondent, the case has been fixed for trial on 02.04.2001. On the said trial date, since both the Plaintiff and her Attorney on record were absent, the action of the plaintiff had been dismissed.

Thereafter the Plaintiff had made an application in terms of Section 87(3) of the Civil Procedure Code seeking to vacate the said order of dismissal. In the said application, in order to purge default, the Plaintiff had averred that on 19.09.2000, the learned Additional District Judge sitting in court No 2, having delivered the order which was due on the said date, fixed the matter for trial on 01.12.2000. On 01.12.2000, as the Attorney at Law of the Plaintiff was indisposed, the learned Additional District Judge sitting in court No 2 had re-fixed the matter for trial on 02.04.2001. On 02.04.2001, the Attorney at Law for the Plaintiff was present in court in court No 2, but the case was not called for the trial in the said court. Thereafter the Attorney at Law checked up on the notice board and found that the said case number was not in the list of cases list in court No 2 but had been included in the list of cases listed in court No 3. Thereafter the Attorney at Law of the Plaintiff had attended court No 3 and discovered that on 02.04.2001, the

plaintiff's case had been called and dismissed for want of appearance. The Plaintiff pleaded that the default in appearance on the said date i.e. 02.04.2001, was due to the said change of court No 2 to court No 3.

The Respondent has filed a statement of objections and thereafter the matter has been fixed for inquiry on 02.07.2002. On the said date of inquiry too, the Plaintiff and her Attorney at Law were not present in court and for the said reason the said application to purge default has been dismissed with costs fixed at Rs 20,000/-.

Thereafter the Plaintiff has filed a second application, by way of a petition dated 12.07.2002 supported with an affidavit, seeking to vacate the said order of learned Additional District Judge dated 02.07.2002 and for the restoration of the first application to purge default for hearing on the ground that the Plaintiff Attorney at Law had taken down a wrong date in his diary. Accordingly, the said second application too had been fixed for an inquiry.

Subsequently, an affidavit dated 06.11.2002 has been filed seeking to substitute one K. M. C. Perera in place of the Appellant. In the said affidavit, he averred that he was the widower of the said Appellant, Uralaliyanage Caroline Perera. He had further stated that Uralaliyanage Caroline Perera, the Appellant, had died on 16th August 2002 and he is the widower of the said Appellant. On the said basis, he sought for an order for substitution in place of the Appellant. Although the said affidavit had been filed by the Applicant claiming to be the widower of the Appellant, he had failed to produce the marriage certificate of the Appellant in order to establish that he is the legal representative of the deceased as required in terms of Section 395 of the Civil Procedure Code.

On the other hand, having made such application to court for substitution, the said Applicant, by way of two motions dated 14.11.2002 and 03.01.2003 respectively, had made an application to support the application for substitution and to support the application to set aside the order of dismissal of the Appellant's action. In fact, the said Applicant had no *locus standi* to file the said motion dated 03.01.2003 seeking to support the application to set aside the order of dismissal of the Appellant's action, because, prior to the making of the said application by way of the said motion, he had not been substituted in place of the deceased Appellant.

It appears that the said two motions had been filed on 14.11.2002 and 03.01.2003 respectively, after the death of the Appellant on 16.08.2002. But the Appellant's name appears as a living person in the caption of the said two motions. However, the said application for substitution of K. M. C. Perera in place of the Appellant had been taken up for support and thereafter parties had filed their written submissions. The learned Additional District had thereafter delivered the impugned order dated 17.07.2003 substituting said K. M. C. Perera in place of the deceased Appellant and setting aside the said order of dismissal of the action dated 02.04,2001 and, also, re-fixing the case for trial on 12.11.2003.

It is clear from the said impugned order dated 17.07.2003, that the learned Additional District Judge had dealt with the said order dated 02.04.2001 whilst dealing with the application for substitution. The matter before the District Court was the application for substitution. Nevertheless, the learned Additional District Judge, without considering the application for substitution, has dealt with the order of dismissal of the case without giving the opposing party an opportunity to present their objections to the application to purge default.

On the other hand, as I mentioned above, the Appellant's application to vacate the said order dated 02.04.2001 had already been dismissed by the learned Additional District Judge of the same court, by the order dated 02.07.2002. As the Court of Appeal has correctly observed, the District Court lacks jurisdiction to deal with the said order dated 02.04.2001, an order which was dealt with by the order dated 02.07.2002. Hence the said impugned order made by the learned Additional District Judge dated 17.07.2003 has the effect of an order made by the same District Court exercising the revisionary jurisdiction. Hence, I hold that such an order is in excess of power of the District Court.

In the circumstances, I see no reason to interfere with the Judgment of the Court of Appeal dated 23.07.2007. Therefore, I dismiss the instant appeal of the Appellant with cost.

Appeal dismissed.

Judge of the Supreme Court

BUWANEKA ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

K.T.CHITRASIRI, J.

I had the opportunity of reading the judgment written by Upaly Abeyrathne J and I am inclined to agree with His Lordship's conclusions found therein. However, I thought it would be useful if I elaborate further on the questions of law raised in this appeal. The two questions of law advanced by the appellant read as follows:

1. Is the learned trial judge empowered to entertain and to hold an inquiry into an application seeking to set aside an order made by the same court under Section 87(3) of the Civil Procedure Code? [In the case in hand, the order dated 02.07.2002]

2. Whether the proper remedy available to a party dissatisfied with an order of the District Court made in terms of Section 87(3) of the Civil Procedure Code, is by way of an appeal?

These two questions pose two different situations. One is whether the court has the power/right to vary or annul an order made earlier by the same court and the other is whether an appeal could be lodged upon an order being made under Section 87(3) of the Civil Procedure Code pursuant to a default to appear in court by the plaintiff. I will first advert to the first question of law referred to above.

It is established and well settled law that the court which makes a specific order, on an issue raised whilst the pendency or at the conclusion of the inquiry or trial in a civil suit, cannot be vacated or varied by the same court unless clear provision in law is found permitting to do so. The general rule is that a decision of a court cannot be revisited. A very early decision in this regard is from the English Court of Appeal in, ***in re*** **St. Nazaire Co. (1879), 12 Ch. D. 88.**

The basis for it was that the power to rehear is vested with the appellate courts. In our procedural law, Section 189 of the Civil Procedure Code permits to amend a judgment or an order, only for the purpose of correcting any clerical or arithmetical mistake or any error arising from any accidental slip or omission. Such a provision implies the finality of a judgment or an order of an original court judge. Judges are also empowered to make changes to their own decisions when those are made *per incuriam*.

In this case, trial had been fixed for 01.12.2000. On that date, on an application by the plaintiff-petitioner-petitioner-respondent-appellant, [hereinafter referred to as the plaintiff] trial was refixed for the 02.04.2001. On that date namely 02.04.2001, learned District Judge dismissed the plaint with costs due to the nonappearance of the plaintiff and her attorneys. Accordingly, it is an order made in terms of Section 87(1) of the Civil Procedure Code. Thereafter, the plaintiff by way of a motion supported with a petition and an affidavit made the application dated 10.04.2001. In that application, it is clearly mentioned that it is an application made in terms of Section 87(3) of the Civil Procedure Code. Accordingly, it is seen that the plaintiff who needed to have the order dated 02.04.2001 vacated, has taken the correct step according to law. The inquiry regarding the said application had been fixed for the 02.07.2002. On that date too, neither the plaintiff nor her attorneys were present in court. Accordingly, the same learned District Judge who dismissed the plaintiff's action has also dismissed the said application made under Section 87(3) of the Civil Procedure Code, for non-appearance.

Now, it is clear that the court had made an unambiguous and clear order under Section 87(1) of the Civil Procedure Code. Such a decision precludes a plaintiff bringing a fresh action in respect of the same cause of action. [Section 87(2)] Moreover, Section 88(1) prevents a

plaintiff filing an appeal against such a judgment entered upon default unless the order of dismissal under Section 87(1) has been first vacated by an order made under Section 87(3). Those provisions show the strength of the finality attached to an order made under Section 87(1) of the Code when the plaintiff is in default, unless that order is vacated in terms of Section 87(3). In this instance, learned District Judge who succeeded the Judge who made the earlier two decisions has entertained an application on behalf of the plaintiff, which was supported on 31.03.2003 seeking to vacate the order made on 02.07.2002 along with an application for substitution. Under those circumstances, it is my opinion that it is wrong for the learned District Judge to entertain any application even after the delivery of the order dated 02.07.2002 made pursuant to the application dated 10.04.2001 that had been made in terms of Section 87(3) of the Code. Accordingly, the impugned order of the learned District Judge made on 17.07.2003 should be set aside since the learned trial judge, without any authority has vacated an order made by the same court. Hence, the order dated 02.07.2002 shall remain intact.

Remaining issue is whether an appeal could be filed by a plaintiff who is aggrieved by an order made under Section 87(1) having defaulted to be present in court on the day; the case is fixed for trial. In such a situation, an opportunity to make an application under Section 87(3) is given to a defaulted plaintiff probably because Section 88(1) precludes a plaintiff filing an appeal against an order made under Section 87(1) of the Code. Therefore, it is a unique opportunity given through the aforesaid Section 87(3), to a plaintiff in a civil suit that had been filed and proceeded according to the regular procedure referred to in Section 7 of the Civil Procedure Code. The said Section 87(3) reads thus:

"87(3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the court is satisfied that there were reasonable grounds for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made."

Looking at the aforesaid Section, it is seen that it provides for a plaintiff who is aggrieved by an order made under sub Section 87(1), to make an application to have it vacated. If the court is satisfied by the reasons given for the default, it could act under Section 83(3) to set aside the said order made under 87(1) and allow the plaintiff to proceed with the action from the point that it was stopped. Therefore, it is further seen that if the court is not satisfied with the reasons adduced by the plaintiff for his default, the order so made dismissing the plaint will remain intact. It shows that the Legislature has taken a serious stance against a plaintiff who has defaulted in proceeding with the action. Under those circumstances, court is not in a position to allow an aggrieved plaintiff to file an appeal either. However, such a plaintiff may have the opportunity to make an application to a higher forum by way of a revision application provided he/she establishes exceptional circumstances to do so.

I will now advert to the procedure that is to be followed by a plaintiff-petitioner who needs to have an order made under Section 87(3) canvassed. As mentioned earlier, Section 88(1) precludes a plaintiff filing an appeal against any judgment entered upon default. However, Section 88(2) stipulates that an order made in an application under Section 87(3), which set aside or refused to set aside a 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.** [emphasis added] The manner in which this Section 88(2) is worded, it is seen that an order made pursuant to an application made under Section 87(3) should accompany a judgment that should contain the matters similar though not identical, to the matters contained in Section 187 of the Civil Procedure Code. Section 187 is the Section in which the requisites of a judgment are found. Certainly, such a pronouncement would decide the rights of the parties in a conclusive manner. When such a judgment is delivered by a competent court, the party who is aggrieved by that should be able to file an appeal, as of a right. Indeed, this right is guaranteed under the aforesaid Section 88(2) of the Code as well, by having it included the words "shall be liable to an appeal" at the end of that Section. Accordingly, it clearly removes any misconception with regard to the appealability of an order made under Section 87(3).

This position of law had been discussed in the cases of **Wijenayake Vs Wijenayake [Srikantha Law Reports Vol. 5 at page 99] and Sangarapillai Brothers Vs. Kathiravelu [Srikantha Law Reports Vol. II at page 30]** as well. In Wijenayake Vs. Wijenayake [supra], Palakidnar J. held as follows:

"If Section 88(2) did not contain the requirement that the order shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds on which it is made, one may deem it to be an order contemplated in Section 752(2), and that the instant application was correctly made. But Section 88(2) makes it very plain that the order shall be accompanied by a judgment and is an appealable order as distinct from an order for which leave has to be had and obtained from the Supreme Court. On the mere reading of the two Sections 754(2) and Section 88(2) one has to reject without hesitation the argument that the former repeals the latter".

I will now refer to the facts of this case once again, in order to ascertain whether the plaintiff has followed the procedure referred to above when making the application to have the order dated 02.07.2002 vacated. Attorneys for the plaintiff, in order to have the said order dated 02.07.2002 vacated, has made the application dated 12.07.2002. It had been filed by way of a petition stating that both the plaintiff and her attorneys heard the date of inquiry as 08.07.2002 and not as the 02.07.2002. It is on that basis, the plaintiff sought to have the order dated 02.07.2002 vacated.

As mentioned earlier in this judgement, the decision made on 02.07.2002 is an order made pursuant to an application made under 87(3) of the Code. Section 88(2) stipulates that such an order shall accompany a judgment and it is liable to an appeal being filed. Therefore, the decision on 02.07.2002 is clearly falls within the meaning of a judgement and a party who is aggrieved by such a finding shall follow the appellate procedure referred to in Chapter LVIII of the Civil Procedure Code. Admittedly, the plaintiff has failed to follow the said procedure found in the said Chapter LVIII of the Civil Procedure Code. Instead, her attorneys have filed a petition in the same District Court on the 12.07.2002 seeking to set aside the order dated 02.07.2002. Therefore, it is my considered opinion that the plaintiff's said application dated 12.07.2012 should stand dismissed for not adhering to the procedure stipulated in the Civil Procedure Code.

As mentioned above, the plaintiff has failed to follow the procedure stipulated in the Civil Procedure Code when she challenged the order made in terms of Section 87(3) of the said Code. I believe it is a serious violation of the procedural law and should not consider it as a mere technicality. This is because this particular Section namely Section 88(2) determines the court in which an order under 87(3) could be canvassed. At this stage, I am also reminded

of the decision made in the case of **Fernando Vs. Sybil Fernando and others [1997 (3) SLR at page 01]** to show the importance attached to the procedural law. In that decision, Dr.Amerasinghe J. stated thus:

"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."

In view of the above, I am compelled to answer the questions of law raised in this appeal in favour of the defendant-respondent-respondent-petitioner-respondent. Accordingly, this appeal is dismissed with costs having affirmed the judgment of the Court of Appeal.

JUDGE OF THE SUPREME COURT

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

K.R.W.Dalpadadu,

No.237, Diggala Road,

Keselwatta, Panadura.

Plaintiff

SC Appeal No:-69/2015

SC(HC) CALA 14/2012

WP/HCCA/KAL/74/2004

D.C.Panadura Case No:-1073/M

V.

Badanasinghe Nangallage Punyasiri

221/2, Diggala Road, Keselwatta,

Panadura.

Defendant

AND

Badanasinghe Nangallage Punyasiri,

221/2, Diggala Road,Keselwatta,

Panadura.

By his Attorney

Badanasinghe Nangallage Jayatissa

No. 5/3, Temple Road, Keselwatta,

Panadura.

Defendant-Respondent-Appellant

V.

K.R.W.Dalpadadu,

No.237, Diggala Road,

Keselwatta, Panadura.

Plaintiff-Appellant-Respondent

BEFORE:-PRIYASATH DEP, PCJ.

UPALY ABEYRATHNE, J. &

H.N.J.PERERA, J.

COUNSEL:-N.Mahendra with D.Pathirana for the Defendant-Respondent-Appellant

Ikram Mohamed PC with M.S.A.Wadood for the Plaintiff-Appellant-Respondent

ARGUED ON:-21.06.2016

DECIDED ON:-30.11.2016

H.N.J.PERERA, J.

The Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff) instituted action bearing No. 1073/M against the Defendant-Respondent-Appellant (hereinafter referred to as Defendant) in the district Court of Panadura praying inter alia for judgment in a sum of Rupees Two Million as damages from the Defendant for wrongfully

ejecting the Plaintiff from Lot 1 shown in plan No.12643 made by B.M.C.Caldera, Licensed Surveyor marked P1, having purchased Lot 2 and 8 in the said plan at the execution of the decree entered in Mortgage Bond case No. 2148/MB.

The Plaintiff pleaded inter alia that the Mortgage Bond action No 2148/MB was filed in the District Court of Panadura against Mrs.Y.D.Charlotte Pieris , the mother of the Plaintiff on Mortgage Bond No. 7627 dated 6th June, 1985 attested by Lasantha G.A.Estambu, Notary Public . In terms of the decree entered in the said action lots 2 and 8 along with the buildings depicted in plan No 12643 made by D.N.F.Caldera, Licensed Surveyor were sold by way of Public auction and the same was purchased by the Defendant.

In execution of the writ of possession by the Fiscal of the District Court, the Plaintiff was ejected from premises standing on lot No.1 of the said plan No.12643 unlawfully and maliciously. The Plaintiff who is a medical practitioner claimed damages in this action in a sum of Rs2 Million.

The Defendant filed his answer pleading inter alia that the Plaintiff has not demanded any compensation from the Defendant by way of Notice of action, and accordingly he cannot maintain this action and that the Defendant purchased Lots 2 and 8 along with the residential house from the Registrar of the District Court of Panadura at the Public Auction and the Defendant in the Mortgage Bond action, namely Charlotte Peiris was ejected from the premises in execution of the Writ of Possession.

It was the position of the Defendant that the Plaintiff was never ejected by the Fiscal, but it was the mother of the Plaintiff who was ejected by execution of the Writ of Possession. It was also the position of the Defendant that he is in possession of the land that he purchased at the auction held in terms of the decree entered in the District Court of Panadura Case No. 2148/MB and was placed in possession by the steps

taken by Court according to law. The Defendant prayed for the dismissal of the Plaintiff's action. After trial the learned District judge delivered judgment on 01.03.2004 dismissing the Plaintiff's action with costs. The Plaintiff appealed from the said judgment to the Civil Appellate High Court of Kalutara and the Civil Appellate High Court after hearing the submissions of parties by its judgment dated 6th December 2011 allowed the appeal filed by the Plaintiff and set aside the judgment of the Learned District Judge of Panadura awarding a sum of Rupees Five Hundred Thousand being damages to the Defendant.

Being aggrieved by the said judgment of the Civil Appellate High Court of Kalutara dated 6th December 2011 the Defendant filed an application for leave to appeal to the Supreme Court and when the said application for leave to appeal came up for hearing on 31st March 2015 the Supreme Court granted leave to appeal on the following questions of Law:-

(a) Did the High Court fall into grave error when it failed to consider the evidence of the Respondent and the documents tendered on behalf of the Petitioner (Appellant)?

(b) Did the High Court fall into grave error when it awarded damages to the Respondent who failed to establish his residence at the Premises?

(c) Did the High Court fall into error when it held that the Respondent had been ejected from the premises due to the gross negligence or bad faith of the Petitioner?

(d) Did the High Court in awarding damages to the Respondent erred, When it held that liability may be imposed on the Petitioner Because he was guilty of fraud or bad faith or he knew that his

Act would prejudicially affect the Respondent?

It was contended on behalf of the Plaintiff that the only matter in issue is whether the Plaintiff had been ejected from Lot 1 and if so whether he is entitled for damages for wrongful ejectment. It was submitted, the Plaintiff's evidence that he was ejected from Lot 1 stood un-contradicted and the Defendant has not given or adduced evidence to show that in execution of the decree Lot 1 was not affected at all. It was the position of the Plaintiff that the house was a two storied building which was on Lot 1 extended to Lot 2 as well. And when the Plaintiff was at work the Plaintiff had been ejected from Lot 1 and all his belongings were thrown out, and that there was a large crowd gathered when he came home after work which embarrassed and ridiculed him.

It was contended by the Counsel for the Defendant, that the judgment of the Civil Appellate High Court was on the basis that what was sold to the Defendant at the auction was Lots 2 and 8 and not Lot 1 and therefore the Defendant cannot evict the Plaintiff from the house. It was further submitted that the learned Judges of the Civil Appellate High Court misdirected themselves when they failed to consider the fiscal's Conveyance marked (A) by which the Defendant purchased this property on a Judicial sale and also failed to consider document V3 which is the estimate done by an Officer of Court upon the direction given by Court and the conditions of sale which was imposed by the Court. It was the contention of the learned Counsel for the Defendant that the Civil Appellate High Court failed to consider what was purchased by the Defendant at the auction was Lot 2 and 8 along with the residential house.

It was also submitted by the learned Counsel for the Defendant that the Civil Appellate High Court has failed to consider the oral evidence given by the Plaintiff wherein he stated that the house abuts Lot 1 also, that

there is no boundary between Lot 1 and 2 and that part of the building is in Lot 1 and the other part is in Lot2.

There is no dispute between the parties that by judgment dated 1.8.1988 In case No.2148/MB (V8) lots 2 and 8 described in its schedule, had been decided to be sold out in public auction to recover the money borrowed by the defendant (the mother of the Plaintiff) in that case. The Notice published in a National newspaper concerning the plots of land scheduled to be sold in auction (V1), the precept on possession issued to the Fiscal by the District Judge of Panadura dated 28.09.1992(V19), the report issued by the Fiscal on handing over the possession of the land purchased by the Defendant dated 16.10.1992 (V20) are also not challenged by any party to this case.

According to the judgment dated 1.8.1998 in case No.2148/MB only Lot 2 and 8 depicted in plan No. 12643 dated 4.8.1941 made by Mr. Caldera Licensed Surveyor had to be auctioned in order to recover the money borrowed by the defendant (Plaintiff's mother) in the said case. According to the schedule of the said judgment (V8), the Lot No.1 does not constitute a part of Lot No.2 which was the subject matter of the said action. It is clearly seen that Lot No.1 is outside Lot No.2.

According to the Plaintiff, he and his mother lived in the two storied building standing on lot 1. It is stated in the said schedule that lot No.2 is bounded on North by lot No.1 and boundary wall of the land belonging to D.Hendrick Pieris. Therefore it is very clear that lot No1 did not constitute a part of the land that had to be sold out in public auction.

Subsequently, the Defendant who had purchased the said lot No.2 and 8 as depicted in the aforesaid plan moved in the District Court that a writ of possession be issued in order to take over vacant possession of lot2 and 8. On the application of the Defendant the District judge of Panadura issued a writ of execution on the Fiscal. On perusal of the order P19 it is

seen that P19 clearly states that only lot No.2 and 8 in plan bearing No. 12643 had to be sold out in public auction.

Therefore it is very clear that lot No.1 in the said plan is not a part of lot no.2 and was not subjected to public auction. There is no dispute between the parties as to the lots subjected to the said auction, that it was only lot 2 and 8 in plan 12643. The parties do not dispute the fact that lot no 1 in the said Plan 12643 was not to be auctioned.

The learned judges of the Civil Appellate High Court have held that the evidence of the Plaintiff clearly reveled that he was ousted from building situated in lot No.1 and his belongings that were inside the said house was thrown-out by Fiscal by breaking doors and in turn handed over the building to the Defendant. The learned judges of the Civil Appellate High Court had referred to the Fiscal's Report marked V20 and had stated that the said report reveals that the Defendant, the purchaser had shown the land described in the schedule and that thereafter steps were taken to remove all articles kept inside the building in lot No.1 and the same were handed over to the Defendant.

On perusal of the said Fiscal's report marked V20 it is very clear that the learned judges of the Civil Appellate High Court have misdirected themselves as to the contents of the said Report marked V20. It is to be noted that nowhere in the said report the fiscal has stated that he took steps to remove all articles kept inside the building in lot No.1. The Fiscal in his report has very clearly stated that he explained the contents of the Writ of possession to the Defendant (the mother of the Plaintiff) and to her agents. And thereafter he removed the articles in the house which was inside the schedule to the case and gave possession of the land described in the schedule 1 , in extent of 1 Rood and 28 Perches and the land described in the schedule 2 , in extent of 1 ½ Perches to the Defendant in this case namely B.N.Punyasiri. The Fiscal has not stated

anywhere in his report that he removed articles from the house which was in lot No.1 in the Said Plan 12643.

Further it is very clearly seen that the Plaintiff was not present at the time when the Fiscal executed the said writ. In his plaint dated 03.09.1993 in paragraph 4 he has stated that although he informed that the said lot No1 and the house standing thereon is not subject to the seizure in case No.2148/MB, the Defendant without considering the same has evicted the Plaintiff illegally and maliciously by force in front of all the neighbours that were gathered at the time of execution.

But in giving evidence before Court he has admitted that he was not at home at the time and came to know about it later.

The documents tendered by the parties in this case clearly establish the fact that the writ of execution marked V19 was only in relation to the lots No.2 and 8 in the Plan 12643. The other documents issued by the District Court of Panadura does not support the fact that possession of the Lot No1 in the said Plan No.12643 was given to the Defendant in this case. The documents marked in this case establish the fact that the Defendant had purchased this property at an auction held by the District Court of Panadura and that he has purchased lot 2 and 8 in the said plan 12643.These documents do not support the fact that the Plaintiff was evicted from lot No.1 in the said Plan 12643.

The Plaintiff in his evidence has stated that a part of the house is in lot No.1. And also is in lot no.2.There is no plan before this court to verify the same. Only a true copy of the plan made in the year 1941 marked P1 has been tendered to court.

The Plaintiff has not taken steps to take out a commission to identify the said lot No. 1 in plan 12643. Although the plaintiff has stated that the house is situated in both lots, he has failed to lead evidence and prove

the same before court. The Plaintiff could have easily taken out a commission to superimpose and show the said lots in a Plan. This would have enabled the court to see how the said building is situated whether it is in lot 1 or 2 or what part of the building comes within lot 1 in plan No.12643. Whether a major part of the said building comes within the said lot 2.

The plaintiff has filed this action against the Defendant claiming damages on the basis that he has been evicted from lot No.1. The burden is on the Plaintiff to prove the same. The documents tendered in this case establish that the Defendant has been placed on possession by the Fiscal of the District Court of Panadura in lot No.2 and 8 only. The burden is on the plaintiff to prove that in fact the Fiscal ejected him from lot No.1.

Section 101 of the Evidence Ordinance reads thus:-

101. 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 exists.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Therefore in the instant case, the burden is clearly on the Plaintiff to prove that in fact the Fiscal ejected him from the house standing therein in lot No.1 in Plan 12643.

The Plaintiff has categorically stated that the house abuts Lot No.1 also, that there is no boundary between Lot 1 and 2 and part of the building is in Lot 1 and the other part is in Lot 2.

The fiscal had the clear authority to execute the said writ of possession and hand over lot 2 and 8 with the buildings and plantation standing therein in the said Plan 12643 to the Defendant. According to the Fiscal's Report the Fiscal has clearly confined himself to lot 2 and 8 in plan 12643. The mother of the Plaintiff has been ejected by the Fiscal from the said two lots. The Mother of the Plaintiff was the Defendant in the said case and the writ was against her and her agents. The Plaintiff if at all if he had possession in lot2, that was in the capacity as an agent of his mother. The plaintiff cannot be heard to complain from being ejected from lot 2 and 8 in the said plan. His position is that he was ejected from lot 1. It is for him to prove it before Court by placing cogent evidence. The evidence if believed, given by the Plaintiff clearly shows that he was also living with his mother and other sisters and brothers in the said house in lot 2. It is not the Plaintiff's position that the entire building falls within lot no.1. The Fiscal has proceeded to eject the mother of the Plaintiff and her agents from the said premises and give possession of lot 2 to the Defendant. This could have resulted in ejecting the Plaintiff and removal of his belongings as well from the said lot No.2. The fiscal had the authority and power to do so in executing the writ of possession in lot No 2 and 8 in plan 12643.It was for the Plaintiff to prove that he was in fact ejected from lot 1 and not from lot 2. In my view the Plaintiff had clearly failed to lead evidence and prove the same to the satisfaction of Court.

The failure of the Fiscal to accompany a Surveyor to identify the said lots or the fact that the Defendant has shown him the said land cannot be held against the defendant to prove that he has acted maliciously in getting possession of the said lots. If the Fiscal had any difficulty about

identifying the said lots he should have reported the same to Court and got the services of a Surveyor for that purpose. The Defendant had purchased the said lots from a sale conducted by the District Court of Panadura. He has moved Court to place him in possession of the said lots through the Fiscal. The Defendant has accordingly been placed in possession by the Fiscal of the District Court Panadura. The Defendant has come into possession of the said lots lawfully. The Defendant's position is that he purchased the said lots with the buildings and plantation thereon. The documents tendered by parties in this case support that position.

There is nothing in the said Fiscal Report marked V20 to show that the Fiscal had handed over the house which is in Lot No. 1 to the Defendant. The Fiscal has further stated that as shown by the Defendant he visited the premises described in the schedule and explained the contents of the Writ of Possession to the Defendant and her agents in case No.2148/MB. In my opinion there is no material to infer that the Defendant and her agents in the said case 2148/MB was ousted by the Defendant in this case due to gross negligence or bad faith as stated by the learned Judges of the Civil Appellate High Court in their judgment. The learned Judges of the Civil Appellate High Court misdirected and erred in law when they held that the Defendant has acted maliciously and/or negligently by showing the house to the Fiscal.

The Plaintiff has clearly stated that a part of the house was situated in lot No.2. There was nothing wrong in Defendant showing 2 lots he has bought from the Fiscal sale with the house to the Fiscal. The Plaintiff in this case has clearly failed to prove that a part of the house abuts lot 1.In his evidence the Plaintiff has clearly admitted the fact that there was nothing on the ground to separate the lots 1 and 2. The Plaintiff's mother seems to have possessed the two lots together as one land. Even in 1941 when the Plan P 1 was made there was nothing to separate lot 1 from lot

2. There is a building shown in lot 1 in P1. The said building shown in P1 does not extend up to lot 2.

The Mortgage Bond marked P2 the schedule 1 refers to the lot 2 in Plan 12643 and the buildings and plantation standing thereon. The Mortgage Bond is dated 6th June 1985.The schedule to the Plaint in the said case No 2148/MB marked P3 also refers to the buildings and plantations standing in lot No 2. It is clear that the building referred to in P2 and P3 is not the building shown in P1 in 1941. Thus it is patently clear that the building which the Plaintiff's mother has mortgaged by P2 is in lot 2. The Plaintiff is not the owner of the said house. His sister one Nalini Dalpadadu has claimed ownership to the said lot 1 and 2 before the District Court Panadura.

After examination of the evidence and the judgments, I am of the view that the findings of the District Judge were not unreasonable. The Civil Appellate High Court should not have set aside his findings and consequently should not have reversed his decision.

In De Silva and Others V. Seneviratne and Others (1981) 2 S.L.R 7, it was held :-

(1) Where an Appellate Court is invited to review the findings of a trial Judge on questions of fact, the principles that should guide it are as follows:-

(a) Where findings on questions of fact are based upon the credibility of witnesses on the footing of the trial Judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the Appellate Court that the trial Judge has failed to make the full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced

by the plainest considerations that it would be justified in doing so;

(b)That however where the findings of fact are based upon the trial Judge's evaluation of facts, the Appellate Court is then in as Good a position as the trial Judge to evaluate such facts and no Sanctity attaches to such findings of fact of a trial Judge;

(c)Where it appears to an Appellate Court that on either of these Grounds the findings of fact by a trial Judge should be reversed Then the Appellate Court "ought not to shrink from that task".

In my view there was no reason for the Civil Appellate High Court to interfere with the decision of the learned District Judge. However the findings of fact of the Civil Appellate High Court are based on evaluation of facts. No sanctity attaches to such findings of fact by the said Court. In my view the learned Judges of the Civil Appellate High Court had misdirected themselves in holding that the Plaintiff had been ejected from lot No1 in Plan 12643 and that the plaintiff was ejected from the said premises due to the gross negligence or bad faith of the Defendant. The inferences drawn by the Civil Appellate High Court are not supported by evidence. (Gunewardene V.Cabral and others (1980) 2 Sri.L.R 220). On an examination of the evidence and the judgments, I am of the view that the findings of the District Judge were not unreasonable. He had the advantage of seeing and hearing witnesses giving their evidence. The Civil Appellate High Court should not have disturbed the findings of the learned District Judge and consequently should not have reversed his decision.

Therefore I answer all the questions of law raised in this case in favour of the Defendant-Appellant. I allow the appeal, set aside the judgment of the Civil Appellate High Court Kalutara dated 06.12.2011, and affirm the judgment of the District Court of Panadura for the reasons set out. The Defendant-Appellant will be entitled to costs in this Court and in the Civil Appellate High Court.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, PCJ.

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 L ANKA

SC (LA)Appeal No. 70/2016

SC/HCCA/LA/No. 576/2014
WP/HCCA/LA/AV/1151/10(F)
D.C. Homagama Case No. 5241/EJ

1. Gnanawathie Abeysinghe
2. Ruvini Sandamali Abeysinghe

Both of 47, Depanama, Pannipitiya.

PLAINTIFF

Vs.

1. D. A. Yahampath
   170, "Ranasiri"
   Horana Road,
   Kottawa, Pannipitiya.

DECEASED – 1ST DEFENDANT

1A. Padukkage Dona Premalatha Gunawardena
2B. Yahampath Arachchige Don Kavinda Kanchuka
1C. Yahampath Arachchige Dona Nishani Namalika

All of 170, "Ranasiri"
Horana Road,
Kottawa, Pannipitiya.

SUBSTITUTED 1ST DEFENDANT

2. D. Mahinda Ranasinghe
   45, Kottawa, Pannipitiya

DEFENDANTS

AND BETWEEN

1A. Padukkage Dona Premalatha Gunawardena
2B. Yahampath Arachchige Don Kavinda Kanchuka
1C. Yahampath Arachchige Dona Nishani Namalika

All of "Ranasiri"
No. 170, Horana Road,
Kottawa, Pannipitiya.

SUBSTITUTED 1ST DEFENDANT-APPELLANTS

Vs.

1. Gnanawathie Abeysinghe
   47, Depanama, Pannipitiya.

2. Ruvini Sandamali Abeysinghe

   Appearing by her Power of Attorney Holder Rathnamali Sirikanthi Abeysinghe Dissanayake.

   Both of 47, Depanama, Pannipitiya.

PLAINTIFF-RESPONDENTS

2 D. Mahinda Ranasinghe
45, Kottawa, Pannipitiya

2ND DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. Gnanawathie Abeysinghe
   47, Depanama, Pannipitiya.

2. Ruvini Sandamali Abeysinghe

   Appearing by her Power of Attorney Holder Rathnamali Sirikanthi Abeysinghe Dissanayake.

   of 47, Depanama, Pannipitiya.

PLAINTIFFS-RESPONDENTS-PETITIONERS

Vs.

1A. Padukkage Dona Premalatha Gunawardena
2B. Yahampath Arachchige Don Kavinda Kanchuka
1C. Yahampath Arachchige Dona Nishani Namalika

All of "Ranasiri"
No. 170, Horana Road,
Kottawa, Pannipitiya.

SUBSTITUTED 1ST DEFENDANT-APPELLANTS-RESPONDENTS

3. D. Mahinda Ranasinghe
45, Kottawa, Pannipitiya

2ND DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.
Sisira J de. Abrew J. &
Anil Gooneratne J.

COUNSEL: Nihal Jayamanne P.C. with Ms. Noorani Amarasinghe
for the Plaintiff-Respondent-Appellant

Seevali Amitirigala with Pathum Wijepala instructed by Sudath Wickremaratne for the Substituted 1st Defendant-Appellant-Respondent

WRITTEN SUBMISSIONS TENDERED ON:

02.05.23016 (By the Appellant)
13.06.2016 (By the Respondent)

ARGUED ON: 13.11.2017

DECIDED ON: 07.12.2017

GOONERATNE J.

This is an appeal in an action in ejectment by the Plaintiffs and the 1st Plaintiff being the landlady and the 2nd Plaintiff, the owner of the premises in dispute. The question that arises for decision is whether the 2nd Defendant was a sub-tenant and whether sub-tenancy has been established. At the hearing of this appeal the other question of unauthorised alterations was not taken up for argument and learned counsel of both parties did not press on this issue. At the trial it had been admitted that:

(a) Premises in dispute is subject to the Rent Act of 1972
(b) Premises in dispute is No. 88
(c) It is a business premises
(d) That the person called 'Alice' expired

The learned District Judge of Homagama held in favour of the Plaintiffs, but, the Civil Appellate High Court set aside the Judgment of the District Court. This court on 21.03.2016 granted Leave to Appeal on the following two questions of law.

(1) Did the Honourable High Court Judge err in not taking into consideration the totality of the evidence, both documentary and oral in coming into the conclusion that the Plaintiffs have not established the burden of establishing a sub tenancy?

(2) Did the Honourable High court Judges err in not taking into consideration, that once the 2nd Defendant admits that he is in possession, and the 1st Defendant is claimed by the Plaintiff to be the tenant; then the burden is on the 2nd Defendant to show that he is in occupation on a different basis other than of a sub tenant?

Parties proceeded to trial on 29 issues. There is no specific admission on ownership of the property in dispute which was not contested by the Defendant party. The 2nd Defendant got title to the property from her grand-parents and parents. The 1st Plaintiff was the 2nd Plaintiff's mother. It is also noted that the 2nd Defendant did not appeal to the High Court from the Judgment of the learned District Judge.

The premises in dispute is situated in the heart of Kottawa town, which is a business premises. Alice the grand-mother of 2nd Plaintiff died on 02.05.1998. After her death the property vested on the 2nd Plaintiff absolutely. 2nd Plaintiff was a student at that time and the 1st Plaintiff, the mother of 2nd Plaintiff collected rents as landlady from 1st Defendant and continued to rent out the premises to the 1st Defendant. The 1st Defendant in or about June 2000 did certain structural alterations without any consent or permission of the 1st Plaintiff and also subsequently sub-let the premises to the 2nd Defendant. In brief the above is the version of the Plaintiffs.

The case of the Defendants was that one Don Ranasinghe the 2nd Defendant's father was the tenant of the premises in dispute for over 50 years and was carrying on business of a eating joint (ආපන ශාලාව) on 26.06.1932 the above R.W. Ranasinghe handed over the business to the 2nd Defendant. The 1st Defendant too was involved in the business and the question of sub-letting does not arise. Whilst the trial was proceeding the 1st Defendant died and in his place the wife, son and daughter 1A, 1B & 1C Defendants-Appellant-Respondents were substituted. Defendant party relies heavily on the Judgment of *Perera Vs. Seneviratne 77 NLR 402* which held that the land lord who pleads sub-tenancy has to discharge the burden by proving that some person occupied premises and also paid rent for his occupation. Learned counsel for the Defendant-Respondent relies on Section 101 of the Evidence Ordinance. Learned counsel also argued that the 1st Defendant was not the tenant, and it was the 2nd Defendant who was the tenant.

It is important to ascertain the correct tenant of the 1st Plaintiff. In this connection the 1st Plaintiff produced counter foils of the rent receipts issued to the 1st Defendant. It was marked and produced as පැ5 and පැ6. I find that the learned trial Judge has given her mind to same and arrived at the conclusion by accepting both පැ5 and පැ6 to be genuine (Pg. 4 of Judgment and folio 539) on the other hand the Defendants produce V2 – V5 to prove that a partnership was

carried on between 1st Defendant and 2nd Defendant's father who was one William Ranasinghe from the year 1943, as 'Ranasiri Hotel'. The business registration was produced as V3 but no rent receipts produced by the Defendant party. Documents V2 is a tax evasion letter by William Ranasinghe from the Income Tax Department. Address of same is 'Ranasiri' Hotel. V3 is a business registration of 1983. V4 is a document from the Local Authority on payment of Rates. V5 is a loan application to the People's Bank. All these have been produced by the Defendant party to establish a partnership business and the Address (not clear).

Trial Judge observed that no rent receipts were produced by the Defendant party nor was 2nd Defendant or his father was called to give evidence. I observe that the best method to prove tenancy is to produce the rent receipts which the Plaintiff has done. I also note that the learned trial Judge has disbelieved the stance taken by the Defendant party. (Folio 540)

The question of the best evidence to be led is discussed in the case of *Jayawardena Vs. Wanigasekera 1985 (1) SLR 125*. It is the rent receipt. As such the position of the Defendants that the 2nd Defendant was the tenant is rejected by this court and the court below, the District Court. The trial Judge has correctly dealt with this position in the Judgment at folio 541 of the record. As such the tenant of the premises in dispute was the 1st Defendant, and to say it was the

2nd Defendant was nothing but an attempt to mislead court. I also observe that the Civil Appellate Court has in view of the created confusion by the Defendant party as to who was the tenant, was under a duty to examine this position prior to deciding on the issue of sub-tenancy.

It is not the function of an Appellate Court to re-write the evidence, but in a given circumstances it is desirable to consider the evidence and decide whether the lower court has properly applied the evidence to the facts of the case and decide on the law. The 1st Plaintiff in her evidence at folio 444 categorically stated that from 2001 January the business of the rented out premises was not continuously carried out and it was closed. Employees were found and she came to know that the 1st Defendant was ill. The 1st Defendant having recovered from the illness paid the arrears of rent. It was further stated by this Plaintiff that the shop was closed but some renovations were being done. She inspected the premises and found some bed and some furniture brought into the premises. A ceiling had been fixed, floor broken, walls erected within the premises and work was in progress. All this evidence is found at folios 445 to 447. At folio 446 evidence reveal 1st Plaintiff noticed an extension to the kitchen and an encroachment of land from behind. On sub-letting the following evidence noted. Plaintiff met Yahampath (1st Defendant) and asked him what was all this.

ප්‍ර: එතකොට තමා යහම්පත්ගෙන් ඇහුවාද?

උ :මම ඔහු හම්බ වෙන්න ගෙදරට ගියා. ගිහින් ඇහුවා ඇයි කඩය මෙහෙම කරන්නේ කියා. ඔයා අසනීපයෙන් ඉන්නේ. එයා අවුරුදු 5කට කඩය රණසිංහ මහත්තයාට (2 වෙනි විත්තිකරුට) දෙනවා කිව්වා. මම ඒකට විරුද්ද වුනා. මම කිව්වා මහත්තයා කඩය කාටවත් දෙන්නේ නැතුව පුතාට දෙන්න මහත්තයාගේ කියා. පිට කෙනෙකුට දෙන්න එපා කිව්වා. මම කීප සැරයක් කිව්වා කඩය දෙන්න එපා. පුතා ලව්වා කරන්න කියා. අපි අඩු කුලියට වුනත් එහෙම කරන්න එකග වුනා. ඒත් එයා 2 වෙනි විත්තිකරුට අකුරු බද්දට දුන්නා.

ප්‍ර: තමා අධිකරණයට ඉදිරිපත් කරලා තියෙනවා පැ 4 කියා ඒ සම්බන්ධව දියණිය විසින් පොලිසියට කල පැමිණිල්ල?

උ: ඔව්

The above evidence remains uncontradicted.

At pg. 17 and folio 485 it is in evidence that the 2nd Defendant sent the rent by post but the Plaintiff returned it. Ranasinghe is at present doing business in the shop. At folio 457 the evidence is that the 2nd Defendant is having a pastry shop. I would at this point prefer to refer to the case of *Samad Vs. Samsudeen and another 2003(2) SLR 235 per Somawansa J*. "Burden of proving subletting is with the Plaintiff-Respondent. However once the Plaintiff proves that the premises had been in the exclusive occupation of a 3rd party other than a tenant as in the instant case in the absence of any explanation by the tenant

or the 3rd party showing that there is no subletting court has to draw the presumption that it is a case of subletting by the tenant to the 3rd party".

It is so in the case in hand. Defendant party has taken pains to establish partnership. Renovation done without Plaintiff's consent. There is 1st Defendant's own evidence that 2nd Defendant took over the business. Further Plaintiff's uncontradicted evidence on this point is relevant. All this shows subletting. 2nd Defendant never gave evidence. That would have been of great assistance to court if evidence was given by the 2nd Defendant. As such court could draw adverse inference and draw the presumption available by law. Court may presume existence of certain facts (Section 114 of Evidence Ordinance). Illustration (F) is relevant to the circumstances of this case.

In an action instituted by a landlord to eject his tenant on the grounds that the tenant has sublet a portion of the rented premises, the land-lord's evidence is sufficient to establish a prima facie case of subletting, the burden is on the tenant to furnish evidence in rebuttal. In the case in hand the Defendant party failed to lead any evidence in this regard.

In Seyed Mohamed Vs. Meera Pillai 70 NLR 237

The question was whether the defendant had, in contravention of section 9 of the Rent Restriction Act, sub-let a part of the premises rented to him by the plaintiff. The evidence disclosed that one A.C was in sole and exclusive occupation of a room of the premises and that he carried on business in that room. The defendant took up the position that no rent was

paid to him by A.C and that the latter had been let into occupation of the room before the defendant became the tenant of the premises.

Held, that, in the absence of acceptable evidence to explain A.C's occupation, the only inference was that A.C was in occupation as a sub-tenant paying rent to the defendant.

Held further, that, where sub-letting is continued, there is a continued breach by the tenant of the statutory provision against sub-letting.

Azhar Vs. Fernando 76 NLR 118

Where in an action instituted by a landlord to eject his tenant on the ground that the tenant has sublet a portion of the rented premises, the landlord's evidence is sufficient to establish a prima facie case of subletting, the burden is then on the tenant to furnish evidence in rebuttal.

The learned High Court Judges have failed to consider the position that as stated above the burden is on the Defendant party to give cogent reasons and discharge that burden. To decide on subletting the true nature of the transaction by parties and totality of surrounding circumstances would be decisive to determine such position. I am of the view that the so called partnership suggested by Defendants was another crafty attempt of the Defendant party to take the court on a long path to create some confusion, similar situation was considered in *Abdul Latiff Vs. Seyed Mohamed 72 NLR 20*. Held when a tenant of a rent controlled premises enters into a "partnership" agreement with a person in relation to the premises but such agreement is only

a blind to cover the subletting of the premises, the tenant and subtenant are liable to be ejected if the landlord has not given his permission.

The learned District Judge has very carefully analysed the evidence and the facts of this case. In that Judgment at folio 545 of the brief it is stated that the Defendant in their written submissions had admitted the Plaintiff's documents produced at the trial. Trial Judge observes that Plaintiff's evidence on the point is genuine and no reason to doubt it. It is stated that the 2nd Defendant got into the business by the later part of 1999. At this stage the trial Judge refer to the evidence on point and makes observation of sub-tenancy, it is correct in the context of the case in hand. It is as follows:

ප්‍ර: මම තමාට යෝජනා කරනවා 2005 වර්ෂයේ 2 වන විත්තිකරු නඩුවට අදාළ ස්ථානය හැර ගියා කියලා?

උ: නැහැ ස්වාමිනි, 99 මුල් භාගයේ තමයි මහින්ද රණසිංහ මේකට සම්බන්ධ වෙලා මගේ පියා මට කිව්වා අධ්‍යාපන කටයුතු නිසා මේකට එන්න එපා කියලා. 2005 මගේ අධ්‍යාපන කටයුතු ඉවර වුණා. ඊට පස්සේ මම එම කටයුතු කරගෙන ගියා.

ප්‍ර: පැමිණිලිකාරිය කියා සිටින කාලසීමාව තුල තමයි තමා කියන විදියට ක්‍රියාකාරී විදියට 2 වන විත්තිකරු ව්‍යාපාරයට සම්බන්ධ වුණා?

ප්‍ර: ඔහු රෙදි නිෂ්පාදන ආයාතනයක කළමණාකරු ලෙස කටයුතු කර නිසා ඔහු වැඩිපුර හෝටලයට ආවේ නැහැ. නමුත් මාගේ පියා රෝගාතුර වෙලා හිටපු නිසා

මගේ අධ්‍යාපන කටයුතු නිසා තමයි මහින්ද රණසිංහ කරගෙට යන්න කියලා කිව්වේ. ඊට පස්සේ තමයි හෝටලය භාරගත්තේ.

ඉහත සියලු කරුණු සලකා බැලීමේදී පෙනී යන්නේ පැමිණිලිකාරිය විසින් කියා සිටින කාලසීමාව තුළ 2 වන විත්තිකරු අදාළ පරිශ්‍රයේ ව්‍යාපාරික කටයුතු කරගෙන ගොස් ඇති බවත් 2005 වර්ෂයේ ඉන් ඉමුවත් වී ඇති බවත්ය. මෙම කරුණු දැනගත් වහාම පැමිණිලිකාරිය විසින් හෝමාගම පොලිසියට පැමිණිල්ලක් කොට මෙම නඩුව පවරා ඇත. කෙසේ වෙතත් පැමිණිල්ල විසින් 1 වන විත්තිකරු අදාල පරිශ්‍රයේ කුලී නිවැසියා බවට වැඩිබර සාක්ෂි මත සනාථ කොට ඇති බැවින් ඉහත තීන්දුව පරිදි ම 2 වන විත්තිකරු විසින් විෂය වස්තුවේ රුඳි සිටින්නේ එහි අතුරු බදුකරු වශයෙන් බවට අධිකරණයේ පුර්ව නිගමනය කිරීමට සිදු වේ.

In all the facts and circumstances of this case I set aside the Judgment of the High Court and affirm the Judgment of the learned District Judge. I answer the questions of law as 'Yes' in the affirmative. The trial Judge has correctly dealt with all primary facts. I see no valid basis to interfere with same, vide 1993(1) SLR 119; 20 NLR 332; 20 NLR 282. The effect of Sections 10(2) and 10(5) of the Rent Act No. 1972 is that unauthorised sub-letting of premises falling within the purview of the Act, by the tenant to a third party, confers on the landlord or landlady as the case may be, the right to a decree for ejectment of the tenant and sub-tenant.

I Order costs payable by the Substituted Defendants to both Plaintiffs in a sum of Rs. 100,000/- and to be paid to each of the Plaintiffs the said sum of Rs. 100,000/-.

Appeal allowed as above with costs.

JUDGE OF THE SUPREME COURT

B.P. 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

In the matter of an application for Special Leave to Appeal in terms of S.128(2) of the Constitution

SC Appeal No.71/2010
SC Spl LA No.289/09
HC Hambantota
Case No.HCA 14/2005
MC Tissamaharama
Case No.58385

Officer-in-Charge
Police Station
Tissamaharama

Complainant

Vs.

1. Poddana Priyankarage Ajith Indika
Nissnsala, Polgahawalan
Debarawewa
Tissamaharama

2. Hewa Thondilage Nissanka
Akkara 80, Uduwila
Tissamaharama

3. Palliyaguruge Premapala
Molakaputana
Tissamaharama

4. Landage Piyatissa
522/35 – Gangasiripura
Tissamaharama

5. Lokuyaddehige Niroshan

Seylan Bank Road
Deberawewa
Tissamaharama

6. Pelaketiyage Sunil Shantha
Molakeuthana
Polgahawalan
Tissamaharama

7. Yaddehi Guruge Damayanthi
403/5 – Molakeputhana Road
Debarawewa
Tissamaharama

8. Weligath Sethuge Indralatha
Lasanthi
Molakeputhana
Tissamaharama

9. Amarasinghe Kankanamge
Aruna Sampath
582/2A – Gangasiripura
Tissamaharama

10. Hewajuan Kankanamage
Ariyatilake
Wijerama
Molakeputhana Road
Polgahawalana
Deberawewa

11. Liyana Arahchige Milton
Mahindapura
Pannagamuwa
Tissamaharama

12. Balagodage Jinasena
Molakeputhana
Deberawewa
Tissamaharama

13. Landage Sanath
553/9 Gangasiripura
Tissamaharama

14. Visanthi Baduge Wimalaratne
Molakeputhana Road
Polgahawalane
Tissamaharama

15. Ananda Madawanarachchi
Molakeputhana Road
Polgahawalane
Tissamaharama

16. Susantha Gunasekera
Molakeputhana Road
Polgahawalane
Tissamaharama

Accused

And

1. Poddana Priyankarage Ajith Indika
Nissnsala, Polgahawalan
Debarawewa
Tissamaharama

2. Hewa Thondilage Nissanka
Akkara 80, Uduwila
Tissamaharama

3. Palliyaguruge Premapala
Molakaputana
Tissamaharama

4. Landage Piyatissa
522/35 – Gangasiripura

Tissamaharama

5. Lokuyaddehige Niroshan
Seylan Bank Road
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Tissamaharama

6. Pelaketiyage Sunil Shantha
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Polgahawalan
Tissamaharama

7. Yaddehi Guruge Damayanthi
403/5 – Molakeputhana Road
Debarawewa
Tissamaharama

8. Weligath Sethuge Indralatha
Lasanthi
Molakeputhana
Tissamaharama

9. Amarasinghe Kankanamge
Aruna Sampath
582/2A – Gangasiripura
Tissamaharama

10. Hewajuan Kankanamage
Ariyatilake
Wijerama
Molakeputhana Road
Polgahawalana
Deberawewa

11. Liyana Arahchige Milton
Mahindapura
Pannagamuwa
Tissamaharama

12. Balagodage Jinasena

Molakeputhana
Deberawewa
Tissamaharama

13. Landage Sanath
553/9 Gangasiripura
Tissamaharama

14. Visanthi Baduge Wimalaratne
Molakeputhana Road
Polgahawalane
Tissamaharama

15. Ananda Madawanarachchi
Molakeputhana Road
Polgahawalane
Tissamaharama

16. Susantha Gunasekera
Molakeputhana Road
Polgahawalane
Tissamaharama

Accused-Appellants

Vs.

1. The Officer-in-Charge
Police Station
Tissamaharama

2. The Attorney General
Attorney General's Department
Colombo 12

Respondents

And Now Between

1. Amarawansa Manawadu alias Sunil
"Punchi Bangalawa"

Halambagaswala
Tissamaharama

(Since deceased)

2. Dr. Gallage Udayapala de Silva (of)
No.51 Darbyshire Road
Mt. Waverly
Victoria 3149
Melbourne
Australia

(and also of)

No.2B – De Silva Road
Kalubowila
Dehiwala

Aggrieved Party-
Virtual Complainant-Petitioner

Vs.

1. Poddana Priyankarage Ajith Indika
Nissnsala, Polgahawalan
Debarawewa
Tissamaharama

2. Hewa Thondilage Nissanka
Akkara 80, Uduwila
Tissamaharama

3. Palliyaguruge Premapala
Molakaputana
Tissamaharama

4. Landage Piyatissa
522/35 – Gangasiripura

Tissamaharama

5. Lokuyaddehige Niroshan
Seylan Bank Road
Deberawewa
Tissamaharama

6. Pelaketiyage Sunil Shantha
Molakeuthana
Polgahawalan
Tissamaharama

7. Yaddehi Guruge Damayanthi
403/5 – Molakeputhana Road
Debarawewa
Tissamaharama

8. Weligath Sethuge Indralatha
Lasanthi
Molakeputhana
Tissamaharama

9. Amarasinghe Kankanamge
Aruna Sampath
582/2A – Gangasiripura
Tissamaharama

10. Hewajuan Kankanamage
Ariyatilake
Wijerama
Molakeputhana Road
Polgahawalana
Deberawewa

11. Liyana Arahchige Milton
Mahindapura
Pannagamuwa
Tissamaharama

12. Balagodage Jinasena

Molakeputhana
Deberawewa
Tissamaharama

13. Landage Sanath
553/9 Gangasiripura
Tissamaharama

14. Visanthi Baduge Wimalaratne
Molakeputhana Road
Polgahawalane
Tissamaharama

15. Ananda Madawanarachchi
Molakeputhana Road
Polgahawalane
Tissamaharama

16. Susantha Gunasekera
Molakeputhana Road
Polgahawalane
Tissamaharama

Accused-Appellant-Respondents

1. The Officer-in-Charge
Police Station
Tissamaharama

2. The Attorney General
Attorney General's Department
Colombo 12

Respondent-Respondents

Before : **Sisira J De Abrew J**
Upaly Abeyrathne J
Anil Gooneratne J

Counsel : Ranjan Mendis with B.S. Peterson and
Ms. A.C. Kandambi for the Aggrieved Party Virtual Complainant-Appellant

W. Dayaratne PC with Ms. R. Jayawardena for the Accused-Appellant-Respondents

A.R.H. Bary SC for the Respondent-Respondents

Argued on : 24.01.2017

Written Submissions
Tendered on : 21.03.2011 by the Accused-Appellant-Respondents
30.08.2010 by the Aggrieved Party Virtual Complainant-Appellant

Decided on : 30.6.2017

Sisira J De Abrew J

This is an appeal against the judgment of the High Court dated 04.11.2009 wherein he acquitted the accused-appellant-respondents (hereinafter referred to as the accused-respondents).

The accused-respondents were convicted by the learned Magistrate on Charge No.1 (a charge of trespass punishable under Section 433 read with Section 146 of the Penal Code), on Charge No.2 (a charge of mischief punishable under Section 409 read with Section146 and 408 of the Penal Code) and on Charge No.3 (a charge of being members of an unlawful assembly punishable under Section 140 read with Section 138 of the Penal Code). They were, on Charge No.1, ordered to pay a fine of Rs.1000/-. On Charge No.2 they were ordered to pay a fine of Rs.1000/-. On Charge No.3 they were sentenced to 6 months rigorous imprisonment suspended for 10 years.

Being aggrieved by the judgment of the learned Magistrate the accused-respondents appealed to the High Court. High Court, by its judgment dated 04.11.2009, set aside the conviction and the sentence. Being aggrieved by the said judgment of the High Court, the aggrieved party has appealed to this Court. This Court by its order dated 21.07.2010, granted leave to appeal on questions of law set out in paragraph 30(a) to 30(f) of the petition of appeal dated 14.02.2009 which are stated below-

a. Where the charge sheet in a Magistrate's Court contains a charge of unlawful assembly or being a member of an unlawful assembly (in terms of s.138 read with 140 etc) does it become a legal requirement for the prosecution to file a non-settlement certificate under the Mediation Boards Act No 72 of 1988 (as amended) in order to maintain their action?

b. In the course of a trial before the Magistrate's Court, if a charge against the accused is amended by the Magistrate on his own accord, is it

imperative that a fresh charge sheet with a fresh plaint should be annexed to the record?

c. In the course of a trial before the Magistrate's Court, if a charge against the accused is amended by the Magistrate on his own accord, is it imperative that the Magistrate shall order a fresh trial?

d. Did the charge sheet in the instant matter contain a charge where it was averred that an offense punishable under s.138 read with 140 of the Penal Code has been committed?

e. At all events, is it possible in law to convict an accused, even in a situation where the charge sheet mentions only the section which spells out the definition (without mentioning the punitive section)?

f. When there is a change of Magistrate midway in the course of a trial, in terms of the proviso to s.267 of the Criminal Procedure Code, is there a burden on the trial judge to offer the option of a fresh trial to the accused person or is it a right which the accused or his counsel could exercise by demanding a fresh trial?

This Court also allowed the following question of law raised by learned President's Counsel appearing for the accused-respondents.

> "Is the aggrieved party virtual complainant–petitioner entitled in law to seek appeal against the order of the learned Provincial High Court Judge made in the exercise of its appellate jurisdiction?"

I would first like to consider the question of law raised by the learned President's Counsel for the accused-respondents. In considering the said

question of law it is relevant to consider Section 9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 which reads as follows:-

9 *"Subject to the provisions of this Act or any other law, any person aggrieved by-*

(a) a final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings:

Provided that the Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree or sentence made by such High Court, in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act, or any other law where such High Court has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided further that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance; and

(b) a final order, judgment or sentence of a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction conferred on it by paragraph (3) (a), or (4) of Article 154P of the Constitution may appeal therefrom to the Court of Appeal."

Article 154P (3) (b) reads as follows:-

(3) *"Every such High Court shall –*

(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 any Primary Courts within the Province;"

The impugned order of the High Court in the present case was made in the exercise of its appellate jurisdiction. Therefore, it is an order made after invoking the jurisdiction under Article 154P (3) (b) of the Constitution. When this Court granted leave to appeal, this Court had decided that this case was fit for review by the Supreme Court. When I consider the above legal literature I hold that an aggrieved party complainant-petitioner (hereinafter referred to as aggrieved party petitioner) is entitled to appeal to the Supreme Court against the impugned order. I answer the above question of law in the following language.

"The aggrieved party virtual complainant-petitioner is entitled in law to appeal to the Supreme Court against the order of the Provincial High Court made in the exercise of its appellate jurisdiction"

The charge sheet in this case was amended. The learned High Court Judge concluded that the amended charges were not read out to the accused by the learned Magistrate. Section 167 (1) and (2) of the Criminal Procedure Code reads as follows:-

> **167** (1) *Any court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials before the High Court by a jury, before the verdict of the jury is returned.*
>
> (2) *Every such alteration shall be read and explained to the accused.*

It is a requirement under the law when the charge sheet or indictment is amended, amended charge sheet or the indictment should be read and explained to the accused. Although the learned High Court Judge concluded that the amended charge sheet had not been read out to the accused-respondents, page 125 of the appeal brief reveals that the learned Magistrate had read out the amended charge sheet to the accused-respondents and they had pleaded not guilty to the charges. Therefore the learned High Court Judge, in my view, was in error when he reached the above conclusion.

The learned High Court Judge in his judgment concluded that the learned Magistrate under Section 167 of the Criminal Procedure Code cannot change a portion of the charge. Under Section 167 of the Criminal Procedure Code amendment of a charge or an indictment is permitted. Can an amendment of a charge be effected without changing a portion of a charge?

This question has been answered in the negative. The High Court Judge has fallen into error when he reached the above conclusion. What was the amendment effected in this case? The learned Magistrate deleted Section 32 of the Penal Code and inserted Section 146 of the Penal Code. Thus, this amendment cannot cause prejudice to the accused-respondents. In ***Doole v. Republic of Sri Lanka*** *(78-79) 2 SLR page 33* the Court of Appeal held –

> *''As a rule an amendment or an indictment should be allowed if it would have the effect of convicting the guilty or securing the acquittal of the innocent but it should not be allowed if it would cause substantial injustice or prejudice to the accused.''*

In my view the learned High Court Judge would not have fallen into the above error if he considered the principles enunciated in the above judicial decision. The learned High Court Judge concluded that failure to order a new trial under Section 169 of the Criminal Procedure Code by the learned Magistrate when the charge sheet was amended had caused prejudice to the accused-respondents. Section 169 of the Criminal Procedure Code reads as follows:-

> **169.** *"If the alteration made under section 167 is such that proceeding immediately with the trial is likely in the opinion of the court to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary."*

As I pointed out earlier amendment to the charge sheet had not caused prejudice to the accused-respondents. When amended charge sheet was read out to the accused, the lawyer appearing for the accused-respondents had not even asked for a new trial or an adjournment of the trial. Thus, what is the basis on which the learned High Court Judge came to the conclusion that the failure on the part of the Magistrate to order a fresh trial had caused prejudice to the accused-respondents? There is no basis. When I consider the above matters, I hold that the learned High Court Judge had fallen into grave error when he reached the above conclusion.

The learned High Court Judge came to the conclusion that the identity of the accused-respondents has not been proved by the prosecution. But Rathnayake Koralage Danny in his evidence had identified all the accused in Court. His evidence with regard to the identity of the accused was corroborated by Lunuhewage Sirisena. When I consider the above evidence I hold the view that the learned High Court Judge had fallen into grave error when he reached the above conclusion. The learned High Court Judge concluded that as the accused-respondents have been charged under Section 433 and 409 of the Penal Code the case should have been referred to the Mediation Board and a non-settlement certificate under Section 14 (A) and/ or 12 should have been produced before the Magistrate and that the Magistrate did not have jurisdiction to proceed with the case without the said non-

settlement certificate being filed in Court. I now advert to this contention. The second schedule of the Mediation Board Act No.72 of 1988 does not include offence under Section 140 of the Penal Code. The 3rd Charge leveled against the accused-respondents is a charge under Section 140 of the Penal Code. When one charge of a charge sheet comes within the schedule of the Mediation Board Act and the other charge does not come within the schedule of the Mediation Board Act, should such a case be referred to the Mediation Board? If this question is to be answered in the affirmative when an accused person is charged for robbery of a bank and for causing mischief (a charge under Section 409 of the Penal Code) the case should then be referred to the Mediation Board and a non-settlement certificate should be filed. Robbery of a bank cannot be settled by Mediation Board. If the accused is convicted for robbery of a bank the Magistrate or the High Court Judge as the case may be will have to impose a punishment. In a case of this nature, if Mediation Board Act procedure is adopted it will be a waste of time and would contribute to the laws delays in the country. In my view this is not what the legislature intended and the Mediation Board Act was enacted. Therefore the above question cannot be answered in the affirmative. Considering the above matters, I hold that when one charge of a charge sheet comes within the schedule of the Mediation Board Act and the other charge does not come within the said schedule, such a case need not be referred to the Mediation Board and a non-settlement certificate from the Mediation Board is not necessary. For the above reasons I hold that the learned High Court Judge had fallen into grave error when he reached the

above conclusion. For the aforementioned reasons I answer the questions of law raised in paragraphs 30(a) to 30(c) in the negative. The questions of law set out in paragraphs 30(d) to 30 (f) do not arise for consideration.

For the aforementioned reasons I hold that the judgment of the learned High Court Judge cannot be permitted to stand. I therefore set aside the judgment of the learned High Court Judge dated 04.11.2009 and affirm the judgment of the learned Magistrate dated 17.01.2005.

Judgment of the High Court Judge set aside.

Judgment of the Magistrate affirmed.

Judge of the Supreme Court

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

S.C. Appeal No. 74/2015
SC/HCCA/LA No. 288/2013
CP/HCCA No. 62/2008
D.C Hatton No. DE/198

In the matter of an Application for Leave to Appeal

Sinnaiya Siwasamy
112, Ragala Bazar
Halgranoya.

PLAINTIFF

Vs.

M. Nadaraga Moorthi
8 ¼, Ragala Bazar
Halgranoya.

DEFENDANT

NOW BETWEEN

Sinnaiya Siwasamy
112, Ragala Bazar
Halgranoya.

PLAINTIFF-APPELLANT

Vs.

M. Nadaraga Moorthi
8 ¼, Ragala Bazar
Halgranoya.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Sinnaiya Siwasamy
112, Ragala Bazar
Halgranoya.

PLAINTIFF-APPELLANT-APPELLANT

Vs.

M. Nadaraga Moorthi
8 ¼, Ragala Bazar
Halgranoya.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: S.E. Wanasundera P.C., J.,
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: Rohan Sahabandu P.C., with Hasitha Amarasinghe
For the Plaintiff-Appellant-Appellant

P. Peramunagama with Ranga Peiris
For the Defendant-Respondent-Respondent

WRITTEN SUBMISSIONS TENDERED BY THE APPELLANT ON:
16.07.2015

WRITTEN SUBMISSIONS TENDERED BY THE RESPONDENT ON:
14.10.2015

ARGUED ON: 20.06.2017

DECIDED ON: 27.07.2017

ANIL GOONERATNE J.

The question to be decided in this appeal is whether, the serving of the Notice of Appeal on the counsel is valid, and whether material prejudice has been caused to the Defendant-Respondent by the Plaintiff-Appellant-Appellant due to non-compliance of Section 755 (2) of the Civil Procedure Code, could be excused under Section 759 (2) of the Code. This court on 27.04.2015 granted Leave to Appeal on the questions of law set out in paragraphs 20(1) to (3) and (5) of the petition. It reads thus:

(1) Did the learned High Court Judge consider that as no material prejudice has been caused the court could have acted under Section 759 (2)?
(2) Could the High Court consider that objection again, as it has been determined by the Court of Appeal, when the Court of Appeal directed the High Court to hear the appeal?
(3) Did the High Court Judge err in law in holding that serving of the Notice of Appeal on the Registered Attorney or the Respondent is Mandatory, and the failure results in the rejection of the appeal?
(4) In the circumstances of the case is the serving of the Notice of Appeal on the counsel who had been appearing instructed by the Registered Attorney bad in law?

The applicability of Sections 759 (2) and 755 (2) had been examined on numerous occasions by the Superior Courts. However each case has to be

decided on facts and circumstances relevant to the case, without causing any harm/injury or by misinterpretation of the above sections of the Code. It is conceded that the Plaintiff did not serve a copy of the Notice of Appeal as required by the procedural law, on the Registered Attorney, but on the counsel.

Sections 755 (2) and 759 (2) reads thus:

755 - The notice of appeal shall be accompanied by –

(a) except as provided herein, security for the respondent's costs of appeal in such amount and nature as is prescribed in the rules made by the Supreme Court under Article 136 of the Constitution or acknowledgment or waiver of security signed by the respondent or his registered attorney; and

(b) proof of service, on the respondent or on his registered attorney, of a copy of the notice of appeal, in the form of a written acknowledgment of the receipt of such notice or the registered postal receipt in proof of such service.

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 Judgement in this case was delivered by the learned District Judge on 22.11.2006. The Plaintiff-Appellant appealed against the Judgment of

the District Court. This matter then came up before the High Court and learned counsel for Defendant-Respondent contested the appeal on the ground that caption to the Notice of Appeal and the Petition of Appeal addressed to the Court of Appeal and not to the Provincial Civil Appellate High Court. At that point the High Court sent the case to the Court of Appeal. The President of the Court of Appeal acting in terms of Section 5 (d)(1) of the Provincial High Court (Special Provisions) Act No. 59 of 2006 decided to transfer the appeal to the Provincial High Court.

Notice of Appeal, according to the Notice available in the record shows the date stamp of 30th November 2006, which is within time. This is confirmed by the journal entry dated 01.03.2007 (unsigned) and a line drawn across it. The next journal entry dated 22.05.2007 confirm that the Notice of Appeal had been filed within time. There is reason to comment on the above journal entries but no such matter was raised by either counsel at the hearing of this appeal. Court may presume that judicial and official acts have been regularly performed. (Section 114 illustration (d) of Evidence Ordinance) As stated above the Notice of Appeal is available in the record and proof of service of the registered postal article receipt is also filed of record. As such court has to presume that the Notice of Appeal has been filed within time.

It is conceded that the Notice of Appeal has been sent to the counsel of the Defendant party and not the registered Attorney as required by the procedural law. Mandatory provisions are contained in Section 755 (2) of the Code. The date stamp in the Notice of Appeal is relevant to see whether it is within time 1995 (2) SLR 273. In *Dharmaratne Vs. Kumari 2005 (1) SLR 269 T.B. Weerasooriya J*. permitted the aggrieved party to apply under Section 759 (2) – observing that the mandatory provisions of Section 755 (2) could be remedied under Section 759, if such omission has not caused any material prejudice. What is required by looking at both above sections of the Code is to ascertain whether any material prejudice has been caused to the party concerned. In the instant case the Plaintiff's action had been dismissed. Action was filed for declaration of title and ejectment of Defendants. Therefore the question of executing a writ or getting the benefits of the fruits of the Judgment and victory by executing a writ pending appeal did not arise.

Therefore no material prejudice had been caused to the Defendant party. In *Nanayakkara Vs. Warnakulasooriya 1993 (2) SLR 289 Kulathunga J*. held: "the power of the Court to grant relief under 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 in the opinion of court if the Respondent has been materially prejudiced, in which event the appeal has to be dismissed.

I also wish to observe that when court has to consider in granting relief under Section 759(2), it is essential to consider whether there was any carelessness or neglect or gross negligence. In the case in hand I cannot find any of them other than a mistake to serve the notice on counsel. As such court could proceed to grant relief under Section 759(2) which emphasis in granting relief in the event of a mistake omission or defect. Section 759 (2) of the Code is much wider in its application than the corresponding Section 756(3) in the earlier Code. The Special Provisions of Section 759 (2) which empowers the court to grant relief must prevail over Section 33 of the Stamp Duty Act. *Kithsiri Vs. Weerasena 1997 (1) SLR 70*. The relief under 759 (2) would, upon a literal construction, appear to apply even in the case of non-compliance with the requirement of hypothecation contained in Section 757 (1) of the Code. *Martin Vs. Sudahmy.Bar Journal 1990 Vol III pg. 7.*

I consider the question of law as follows:

(1) No. The High Court has not correctly considered the applicability of Section 759 (2) of the Civil Procedure Code to the case in hand.
(2) High Court is bound to consider the objection as the President of the Court of Appeal transferred the case back to the Provincial Appellate High Court.
(3) Yes. The High Court erred.

(4) Ordinarily Notice of Appeal should be served on the registered Attorney, but in view of the provisions contained in Section 759 (2) of the Code a mistake, omission or defect if detected in the service of the Notice of Appeal, a service of Notice on the counsel could be excused.

Upon a consideration of all the facts and circumstances of this case, this court is inclined to allow this appeal in view of the provisions of Section 759 (2) of the Civil Procedure Code. I see no material prejudice caused to the Defendant party. In the context of the case in hand no material prejudice is caused. Case should be decided on its merits and as such the case is remitted to the High Court. Appeal allowed as per sub paragraphs 3 and 4 of the prayer to the petition.

Appeal allowed as above.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera 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 Appeal from the Civil Appellate High Court.

1. People's Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2.
2. Don Wimalasiri Dissanayake,
   No. 177 G, Maya Avenue,
   Colombo 5.

Petitioners

SC APPEAL NO. 77/15
SC/HCCA/LA No.427/14
WP/HCCA/GPH/70/2009(F)
D.C. Gampaha Case No. 3823/SPL

Vs

Hetti Kankanamlage Gunasi-Ngha, Wanuwagalawatta, Haggala, Ellakala.

Respondent

AND BETWEEN

Hetti Kankanamlage Gunasi-Ngha, Wanuwagalawatta, Haggala, Ellakala.

Respondent Appellant

1. People's Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2.
2. Don Wimalasiri Dissanayake, No. 177 G, Maya Avenue, Colombo 5.

Petitioner Respondents

AND NOW BETWEEN

Hetti Kankanamlage Gunasi-Ngha, Wanuwagalawatta, Haggala, Ellakala.

Respondent Appellant Appellant

Vs

1.People's Bank, No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2.
2.Don Wimalasiri Dissanayake, No. 177 G, Maya Avenue, Colombo 5.

Petitioner Respondent Respondents

BEFORE :**S. EVA WANASUNDERA PCJ, PRIYANTHA JAYAWARDENA J. & ANIL GOONERATNE J**.

COUNSEL : Ms. Sudarshani Cooray for the Respondent Appellant Appellant.

Sunil Abeyrathne with Thashira Gunathilaka for the 1st Petitioner Respondent Respondent.

ARGUED ON : 02.06.2017.

DECIDED ON : 13.07.2017.

S. EVA WANASUNDERA PCJ.

This Court has granted leave to appeal in this matter on the following questions of law to be decided by Court contained in paragraphs 11 (i) to (v) and (viii) of the Petition dated 28th August, 2014 and the other two questions of law, as suggested by Counsel for the 1st Petitioner Respondent Respondent:-

1. Did the learned High Court Judge err in deciding that although the determination was published in Gazette Notification dated 09.07.2001, there is no mention in respect of notifying of such determination to the owner of such premises under Sec. 71(4) (a) of Finance Act No. 11 of 1963?
2. Did the learned High Court Judge err in deciding that although the determination was published in Gazette Notification dated 09.07.2001, there is no mention in respect of directing every person who was interested (for compensation) of such premises immediately before the date on which such premises were so vested to make within a period of one month to make a written claim under Sec. 73 of Finance Act No. 11 of 1963?
3. Did the learned High Court err in deciding that High Court has no jurisdiction to question the validity of the procedure taken by the Respondent Bank , when the Respondent Bank acting contrary to Finance Act can be also interpreted in the same context?
4. Did the learned High Court err in deciding that the District Court was correct in making absolute order nisi when the procedure adopted by the Respondent Bank is against the Finance Act itself?
5. Did the learned High Court err in deciding that the Appellant Petitioner has filed this Appeal in the High Court on the basis that it will take a long time for compensation to be paid to him.

6. Did the learned High Court err in deciding that although ' compensation should be paid to the Appellant Petitioner without delay ' there is no provision for the Appellant Petitioner to make a claim for compensation at this stage?
7. In terms of the Finace Act No. 11 of 1963 (as subsequently amended) whether a right of appeal lies?
8. Whether the learned District Judge has jurisdiction to enter order absolute without the 1st Petitioner Respondent Respondent Bank complying with the provisions of Sec. 73 of the above Act?

The background facts of the case should be noted before the questions of law are considered. One lady by the name Thanthirige Piyaseeli Somalatha had transferred the property which is the subject matter of this case, of an extent of 0A 3R 37.2P in Walpola, Gampaha by Deed of Transfer No. 1887 dated 14.07.1987 attested by D.S.Jayakody Notary Public to the Respondent Appellant Appellant (hereinafter referred to as the Appellant) , Hetti Kankanamalage Gunasinghe for a sum or Rs. 15000/- . This was a **Conditional Transfer** with the condition that, if the Rs, 15000/- and interest thereon is paid within one year from the date of execution, the property shall be transferred back to the said Somalatha. The money and the interest thereon was not paid within one year and the position was that Gunasinghe then became the owner of land. After about 8 years, Somalatha made an application to the People's Bank, the 1st Petitoner Respondent Respondent (hereinafter referred to as the 1st Respondent or the Bank) **in terms of Sec. 71 of the Finance Act No. 11 of 1963.**

Sec. 71 of the Finance Act No. 11 of 1963 was amended by Finance and Ceylon State Mortgage Bank (Amendment) Law No. 16 of 1973, by Finance (Amendment) Act No. 19 of 1984 and Finance (Amendment) Act No. 36 of 2000. Part VIII of the Finance Act deals with ' the acquisition by the People's Bank of certain premises and the disposal of such premises '. This Part of the Finance Act contains Sections 69 to 98. According to Sec.71, the People's Bank is authorized "to acquire the whole or any part of any agricultural, residential or business premises, if the Bank is satisfied that those premises were transferred by the owner of such premises to any other person after receiving from such other person a sum of money as consideration for such transfer and upon the condition that , on the repayment by the transferor of that sum with or without interest thereon within a specified period, such other person will re-transfer those

premises to the original owner." The application has to be within ten years. In the case in hand Somalatha had informed the Bank within time.

The main grievance of the Appellant in this Appeal is that the **Bank has failed to adhere to the mandatory provisions of the Finance Act and thereby not taken steps to afford an opportunity to the Appellant to submit his claim for compensation.** Furthermore the Appellant claims that he did not have the opportunity to submit his claim **within one month** from the date of notice under Sec. 73. Therefore the owner had not been able to place his claim or hand over his claim to the Bank. Then Bank officers had come to the land to take possession of the land after informing him that they are coming to do so. As alleged by the Appellant, due to the reason that he was not given the opportunity to make his claim, due to the Bank not having complied with the provisions of the Finance Act, on the day that the Bank had tried to take possession of the land, the Appellant had been present on the premises and he had submitted **a written objection and refused to hand over the premises to the Bank.**

In this case, when Somalatha made an application to the People's Bank under Sec. 71 of the Finance Act, the Bank had issued to the Appellant, an order restraining the selling of the land or transferring the land to any other person and after an inquiry**, had decided to acquire the land.**

Sec. 71(4) (a) reads:
Where the Bank has determined that any premises shall be acquired for the purposes of this Part of this Act, the Bank shall,

(a) Notify such determination to the owner of such premises; and
(b) Cause a notice to be delivered or transmitted to the proper Registrar of Lands for registration setting out the prescribed particulars relating to those premises and stating that those premises are to be acquired under this Part of the Act.

Every notice under paragraph (b) shall be registered by the Registrar of Lands in the manner provided in the Registration of Documents Ordinance for the registration of an instrument affecting or relating to land and shall be deemed for such purposes to be an instrument affecting or relating to the premises the prescribed particulars of which are set out in such notice.

The Bank had informed the owner Gunasinghe by registered post about the application of Somalatha on 13.05.1996. The next communication from the Bank to the Appellant Gunasinghe was on 05.07.1996 giving notice to him that a restraining order has been made directing him not to sell or transfer the land to any other person. According to Sec. 71(3) and Sec. 71(3A) the Bank had caused to hold an inquiry with both parties being heard and finally determined that the land in question should be acquired. Where the Bank has determined that any premises shall be acquired, the Bank should notify such determination to the owner of such premises according to Sec.71(4)(a).

The Bank acquired the same having followed the procedure laid down by Sec. 72 and then the Minister to whom the subject or function of the People's Bank is assigned, vested the premises with the Bank by notice published in the Gazette No. 1192/5 dated 09.07.2001**. According to Sec. 73**, the Bank should give notice to persons entitled **to make claims** to the compensation payable under Part VIII of the Finance Act, in respect of any premises vested in the Bank.

Sec. 73 reads:

Where **any premises are vested in the Bank**, the **Chairman** of the Board of Directors of the **Bank shall**, by notice published in the Gazette **and** in such other manner as may be determined by him **direct every person** who was interested in such premises immediately before the date on which such premises were so vested, to make, **within a period of one month** reckoned from the date specified in the notice **a written claim** to the whole or any part of the compensation payable under this Part of this Act in respect of such premises, and specify in the claim,

a. His name and address,
b. The nature of his interest in such premises,
c. The particulars of the claim, and
d. How much of such compensation is claimed by him.

Then, by letter dated 23.04.2002, the Bank had informed the Appellant, Gunasinghe that the land had been acquired and that the possession should be handed over to the Bank on 29.05.2002. The Appellant was present at the premises on the said date and submitted a written objection and refused to hand over the premises to the Bank. The Bank had then made an application to the District Court dated 28.05.2003 under Sections 72(7) and 72(8) of the Finance Act

praying for an order nisi directing the Appellant to hand over possession of the premises to the Bank.

The Bank has not placed before the District Court in the Petition made to court, between the date of the acquisition i.e. 09.07.2001 and the date of visiting the land to take over possession i.e. 29.05.2002, whether the provisions of Sec. 73 were complied with or not.

In the Application to Court to get possession of the land, there is no mention at all about the procedure taken by the Bank under Sec. 73 of the Finance Act. In paragraph 4(g) of the said Petition regarding the Application, which is at page 32 of this brief, it is briefly mentioned that an inquiry was held by the Bank with regard to compensation and that the Appellant had made lengthy written submissions at the inquiry. However, the Petition does not indicate when the Appellant, Gunasinghe made the claim, whether there were no others who made claims and when the inquiry was held and under what provisions it was held etc.

The Bank has not brought forward before this Court or any other lower Court any submission or any other evidence to demonstrate that provisions of Sec. 73 had been complied with before making the Application to Court to get an order nisi to get possession of the land from the Appellant, Gunasinghe. I have gone through the Petition by the Appellant filed in the District Court under Sec. 72(7) and 72(8) dated 28.05.2003 praying for a decree nisi granting the possession of the premises. The said Petition contains 9 paragraphs and the prayer and the Schedule which describes the land. The land is almost one acre, i.e. 3 Roods and 37.2 Perches with a right of way as described in the second schedule. The value of the case has been placed in the caption as only Rs. 15000/- and the number is 3823/Spl and the procedure is summary in accordance with Chapter XXIV of the Civil Procedure Court. It is **not mentioned anywhere** in the Petition filed in Court to take possession of the premises **whether Sec. 73 has been complied with** by the Bank.

I am of the opinion that Sec.73 does not only affect the Appellant, Gunasinghe but it also affects others who would have had a claim of the land itself or any claim regarding improvements on the land or anything pertinent to the said land for the purpose of claiming compensation from the Bank. That is the reason why the draftsman of that Section has deliberately drafted it that way, for the Chairman of the Bank to be responsible to get the same published in the gazette and in such

other manner that the Chairman thinks fit so that all other parties who need to make whatever claim can make the claim as prescribed by Sec. 73 with the name, address, the amount claimed etc. During the period between the date of the acquisition and the date of taking over possession, the Sec. 73 notice should have been published by the bank and the same notice should have been sent to the owner of the land, Gunasinghe and more over the Bank should have pasted a notice under Sec. 73 on the land on a tree or trees or any other place on the land so that all parties who claim compensation could make a claim. The wording in the section is **mandatory** and the Bank having gone **to the next step without having complied with the provisions of Sec. 73 of the Act is a fatal irregularity done by the Bank.**

The Bank is at liberty to correct the procedure, comply with the provisions and take over possession of the acquired land as provided by law. Even at present there is no impediment for the Bank to commence the duty of complying with Sec. 73 of the Finance Act.

The Finance Act Part VIII seems to have made special provisions for a special purpose with regard to the rights of persons who transfer their land on conditions and failing to perform that condition, loose their land to others. The law has granted seemingly very special powers to the People's Bank. The procedure is specifically provided and each step in the course of the way up to taking possession of the land from the person in whose ownership the land remains, has been laid down. Since it is summary procedure which is adopted when the Bank makes the application to the District Court to take over possession from the owner and/or any other possessor the procedure which is made mandatory with the word "shall" being included, the legislator has had the wisdom to make sure that no party would get any injustice. The provisions of law which are mandatory in nature have to be complied with.

The claim for compensation has to be made within one month from the notice given and/ or the publication of the notice in the gazette inviting any person interested in getting compensation , under Sec. 73 and the Appellant has not been able to forward his claim for compensation as provided by law due to the Bank not having complied with the legal provisions. I find that in the Petition of Objections by the Appellant filed in the District Court dated 23.11.2006 , he has prayed **to grant him an opportunity for him to place a claim for compensation to the Bank** while submitting to court that he had not been even given the

amount of money he paid to Somalatha, the complainant to the Bank, i.e. Rs. 15000/-. He had prayed that he be given the said money and interest from 14.07.1987. He had claimed for improvements of the land as well. The Appellant had begged Court not to make the order nisi, absolute.

It is interesting to note what the Bank had mentioned in the Counter Objections filed by the Bank dated 21.02.2007 in reply to non compliance with Sec. 73. Paragraph 11 of the said counter objections the Bank has interpreted Sec. 73 and stated that the Chairman of the Bank is given the discretion " to publish a notice in the Gazette **or** to give notice in such other manner as may be determined by him" and the discretion was used to develop the form named " eee bay de " form. The statement of counter objections state that "therefore the Chairman using his discretion has directed the authorized officer of the Bank , the 2nd Respondent, to give a form on paper named " eee bay de No. 20" to whoever claims any compensation. The authorized officer gives them 30 days to bring it back with the claim to him. The Appellant had not handed over possession of the premises and that is the reason why he was not given the said 'form'. It will be handed over to the Appellant only after the possession has been surrendered to the Bank."

The said paragraph 11 is totally distorting the provisions of law contained in Sec.73. The Section does not give any discretion to the Chariman to decide on the mode of notifying the owner and the public but stipulates in plain language that " the Chariman **shall** by notice published in the Gazette **and** in such other manner as may be determined by him ". The Chairman has a discretion to decide, in what other manner he should notify others **after publishing the notice in the Gazette.** It may be that the Chairman can decide to send a letter by post or send a notice by courier or paste a notice on the trees or fence or the parapet wall of the premises etc. I hold that the Bank has in fact admitted in their statement of counter objections that the Bank has failed to act in accordance with Sec. 73.

The other sections from Sec. 74 to 90 provide for a compensation tribunal, to hold an inquiry, to call for witnesses, consider documents etc. prior to granting compensation.

In the Petition filed by the Bank dated 28.05.2003, there is no mention that the owner of the premises was notified of the said determination of the land being acquired and vested with the Bank under Sec. 73 to prefer a claim for

compensation. The matter had been heard by Court and the order nisi had been granted. Thereafter only, the order nisi was served on the Appellant to hand over the premises to the Bank and he was directed to show cause as to why the said order should not be made absolute. Upon the summons being served on the Appellant, he had appeared before Court and filed his objections and stated to Court that the Bank had not adhered to the mandatory provisions in terms of the law and that he was not given the opportunity to submit his claim for compensation. Accordingly the Appellant prayed that he be given an opportunity to submit his claim for compensation. After the submissions the District Judge had delivered order making the order nisi as absolute.

Both the District Judge and the High Court Judges have taken the view that any Court has no jurisdiction to hear and determine the procedures adopted by the Bank and that the court has no jurisdiction to refrain from making an order nisi which is already in place as absolute.

Sec. 72(8) of the Finance Act provides for hearing the matter under summary procedure. Summary procedure is regulated by Chapter XXIV of the Civil Procedure Code. The owner of the land or any person claiming any interest on the land has a right to file objections and adduce evidence to prove the facts stated in the objections, according to Sec. 384 of the Civil Procedure Code. Thereafter, according to Sec. 387 of the Civil Procedure Code, upon the Respondents presenting their case, the Court is obliged to consider the same and make a final order. Natural Justice should be followed and that is the reason for court to hear both parties and their evidence. The Court has a duty to see whether the proper procedure has been followed ' in the back drop of facts complained and natural justice to be done according to the injustice if any ', and if it is not done properly, court shall not proceed to hear the matter with such defects in the procedure. There is no compulsion on Court as alleged to make an order nisi absolute without hearing the parties.

The High Court judge had quoted the judgment in **Bakmeewewa, Authorised Officer of the People's Bank Vs Konarage Raja 1989 1SLR 231** and held that in view of that decision , no person can file action

challenging the acquisition of land / premises acquired under Sec. 72 of the Finance Act and therefore the Appellant had **no right to challenge the procedure adopted by the Bank with regard to taking over possession and claim for**

compensation. In the case in hand the Appellant is not challenging the acquisition or the procedure regarding the acquisition. He is challenging the **procedure laid down regarding the claims for compensation**. His grievance is that the Bank has not given notice under Sec. 73 which has shut him out, from getting any compensation as he could not have made the claim within the one month's time as provided by law. In **Bakmeewewa , Authorised Officer of the People's Bank Vs Konara Raja (supra)** , it was held by Justic G.P.S. De Siva that ' The jurisdiction exercised by the District Court under **Sec.72(7) and (8)** of the Finance Act as amended is **a special jurisdiction** and there is **no right of appeal** from an order in the exercise of such jurisdiction, unless a right of appeal is expressly provided for in the Act. No right of appeal is provided in the Act. Hence the **District Court had no jurisdiction to entertain an application for stay of execution pending appeal under Sec. 763(2) of the Civil Procedure Code.'**

Accordingly, that authority cannot be quoted to reject the arguments taken up at the hearing in the case in hand and to dismiss the Appellant's application, with regard to non compliance of Sec.73 of the Finance Act. Bakmeewewa case is with regard to the order of acquisition of the land; the non existence of a right of appeal therefrom and no right for a stay of execution pending appeal under Sec. 763(2) of the Civil Procedure Code.

I answer the questions of law enumerated above in favour of the Respondent Appellant Appellant and against the Petitioner Respondent Respondent, the People's Bank. The Appeal is allowed. However I am not inclined to grant costs.

Judge of the Supreme Court

Priyantha Jayawardena PCJ
I agree.

Judge of the Supreme Court

Anil Gooneratne J
I agree.

Judge of the Supreme Court

SC.Appeal No. 82/2016.

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

In the matter of an application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC.Appeal No. 82/2016.

SC(SPL) LA.Application No. 101/2015

High Court Colombo Case:- HCMCA 20/2014

Magistrate Court Colombo Case No. 28028/03

1) Manohar Aranraj,
No.49, Sri Bhodhiraja Road,
Amor Street,
Colombo-12.

2) Mahalingam Gopinath,
No.59/36, 5th Lane,
St.Benedicts Road,
Kotahena,
Colombo-13.

Sureties-Appellants-Petitioners

-Vs-

1) Officer-in-Charge,
(Unit 07)
Colombo Fraud Investigation Bureau,
Colombo-06.

Complaint-Respondent-Respondent

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

Respondent-Respondent

3) Pushparaja Gokulam,
   1st Floor,
   Super market,
   Kotahena.

Accused-Respondent-Respondent

Before: **Sisira J.de Abrew, J**

Nalin Perera, J &

Vijith K.Malalgoda, PC, J

Counsel: Amila Palliyage with Ms. Sandeepani Wijesooriya and Nihara Randeniya for the Sureties-Appellants-Petitioners-Appellants.

Sanjeewa Dissanayake SSC for the Respondents.

Argued &
Decided on: 21.09.2017

Sisira J.de Abrew, J

Heard both counsel in support of their respective cases. The appellants in this case signed a bail bond for Rs. 02 millions (each appellant signed a bond for Rs. One million) to produce the accused on each and every day that the case is called. The accused did not appear

in Court and the learned Magistrate issued warrants on the accused and the sureties and after inquiry the learned Magistrate made an order dated 28.11.2013 to forfeit the money stated in the bail bond. Since they failed to pay the said amount, the Magistrate made an order to recover the said amount, as a fine. In default of the fine he sentenced the sureties to 06 months Simple Imprisonment.

Being aggrieved by the said order of the learned Magistrate dated 28.11.2013, the appellants appealed to the High Court and the learned High Court Judge by order dated 15.05.2015 dismissed the appeal.

Being aggrieved by the said order of the High Court Judge, the appellants have appealed to this Court. When a surety is produced before a Magistrate for failure to produce the suspect or the Accused he must act under section 422(2) of the Criminal Procedure Code which reads as follows:- " *If sufficient cause is not shown, and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable or immovable property belonging to such person"* . The most important question that must be decided in this case is whether the learned Magistrate has acted under section 422(2) of the Criminal Procedure Code. Both parties admit that the learned Magistrate has failed to act under section 422(2) of the Criminal Procedure Code (CPC).

The Magistrate is empowered to act under section 422(4) of the CPC, only after he complied with section 422(2)of the CPC. Section 422(4) reads as follows:- " *If such penalty be not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable by order of the Court which issued the warrant to simple imprisonment for a*

term which may extend to 06 months ". As I observed earlier the learned Magistrate has failed to comply with section 422(2) of the Criminal Procedure Code. He has failed to give reason for not complying with section 422(2) of the Criminal Procedure Code. In my view if a Court intends to make an order under section 422(4) of the CPC, the said Court should first act under section 422(1),(2) of the CPC. A Court cannot act under section 422(4) of the CPC without acting under section 422(1),(2) of the CPC. This view is supported by the Judicial decision in ***De Silva Vs S.I. Police- Kandy 63 C.L.W. Page 109*** wherein Supreme Court held as follows:- " *The order of forfeiture should be set aside as the learned Magistrate had failed to comply with the provisions of section 411(1) and (4) of the Criminal Procedure Code. He should have recorded the grounds of proof that the bond had been forfeited and it is only if the penalty cannot be recovered by attachment and sale that he could have imposed the sentence on him for imprisonment."* Section 411(4) of the old Criminal Procedure has been reproduced as section 422(4) of the CPC. As I observed earlier, the learned Magistrate had failed to comply with section 422(1),(2) of the Criminal Procedure Code. Therefore he could not have acted under section 422(4) of the CPC. It appears that the learned Magistrate was too quick in sentencing the appellants.

We therefore hold that the order of forfeiting money stated in the bail bond, imposing the fine and sentencing the appellants (sureties) to six months simple imprisonment is clearly wrong. We therefore set side the order of the learned Magistrate dated 28.11.2013. If the learned Magistrate's order is wrong, the order of the High Court Judge refusing to set aside the said order of the Magistrate is also wrong. The learned High Court Judge has failed to consider the said provisions of the Criminal Procedure Code. We therefore set aside the order of the learned High Court Judge dated 15.05.2015.

The learned Magistrate is hereby directed to act under section 422 of the Criminal Procedure Code in order to recover the amount stated in the bail bonds from each surety.

Appeal is allowed. Both orders of the Magistrate and the High Court Judge are set aside. The Registrar of this Court is directed to communicate this order to the Magistrate's Court and the High Court forthwith.

JUDGE OF THE SUPREME COURT

Nalin Perera, J

I agree.

JUDGE OF THE SUPREME COURT

Vijith K.Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

kpm/-

IN THE SUPEME COURT OF

THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Jayanthi Chandrika Perera
No.132/2, Kolonnawa Road,
Dematagoda, Colombo
Presently at
No.161, Hospital Road,
Kalubowila, Dehiwala
Defendant-Petitioner-Appellant

S.C.Appeal No.83/2014
SC/HCCA/LA No. 210/13
WP/HCCA/MT/No. 48/2011/F
D.C.Mt. Lavinia No. 1788/03/L

Vs.

D. Don Chandrakumara
No. 161, Hospital Road,
Kalubowila, Dehiwela
Presently at
No.167/6 Hospital Road,
Kalubowila, Dehiwala
Plaintiff-Respondent-Respondent

BEFORE : **B.P. ALUVIHARE, PC, J.**
PRIYANTHA JAYAWARDENA, PC, J.
K.T.CHITRASIRI, J.

COUNSEL : W. Dayaratne, PC with R.Jayawardane for the Defendant-Petitioner-Appellant

M.U.M.Ali Sabry, PC with Nuwan Bopage and Samhan Munzir for the
Plaintiff-Respondent-Respodnent

ARGUED ON : 17.11.2016

WRITTEN SUBMISSION ON : 19.11.2016 by the Defendant-Petitioner-Appellant.
15.12.2016 by the Plaintiff-Respondent-Respondent

DECIDEDON : 24.03.2017

CHITRASIRI, J.

This is an action filed in the District Court of Mt. Lavinia by the plaintiff-respondent-respondent (hereinafter referred to as the plaintiff) seeking inter alia for a declaration that the plaintiff is the owner of the premises described in the schedule to the plaint dated 17th September 2003. He has also sought for a declaration that the defendant-petitioner-appellant (hereinafter referred as the defendant) is holding the said property as a trust in his favour. He has further prayed for an order to have the aforesaid property, transferred in his name upon payment of a sum of Rs.2,100,000/= (Two million one hundred thousand) to the defendant and also to recover Rs.100,000/= per month as damages.

The defendant filed her answer denying most of the averments in the plaint and has pleaded that she is the absolute owner of the premises in suit in view of the deed bearing No. 9222 attested by D.W.Pathinayake, Notary Public that was marked as P9 in evidence. Accordingly, she has prayed that the action of the plaintiff be dismissed. The case proceeded to trial on 25 issues and the learned District Judge

by his judgment dated 08th March 2011 held with the plaintiff having determined that the defendant is holding the property subject to a constructive trust in favour of the plaintiff.

The defendant filed an appeal in the Civil Appellate High Court, challenging the aforesaid judgment of the learned District Judge and in that appeal he sought to have the judgment in the District Court set aside. Learned Judges in the Civil Appellate High Court dismissed the appeal and affirmed the judgment of the learned District Judge. Being aggrieved by the aforesaid decision, defendant filed this appeal in the Supreme Court. This Court, granted leave to proceed with the appeal, on the questions of law referred to in paragraph 14 of the petition of appeal dated 04th June 2013.

Basically the question of law that is to be answered in this appeal revolves round the issue i e; whether the defendant is holding the property referred to in the schedule to the plaint as a constructive trust in favour of the plaintiff. Therefore, it is clear that the plaintiff is relying upon Section 83 of the Trust Ordinance to have his reliefs obtained in his favour. Section 83 of the Trust Ordinance reads thus:

> *"Where the owner of a property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the*

beneficial interests therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."

I shall now turn to consider the merits of this appeal. It is the burden of the plaintiff to establish that he did not intend disposing the beneficial interest when he parted with his rights in the property in question. A heap of authorities is found to determine the manner in which Section 83 of the Trust Ordinance had been applied when a claim is made relying upon the same. Before referring to those decisions, I will briefly refer to the facts of this case.

Admittedly, the plaintiff became the owner of the premises in suit by executing the deed of gift bearing No.163 dated 5th January 1992 which was marked P1, in evidence. Thereafter, he has transferred this property to Vajira Samarawickrama by the deed bearing No.3303 dated 12th January 2000, marked P2. The plaintiff in his evidence has stated that the aforesaid deed 3303 was executed in order to obtain a loan from "The Finance Company" for the benefit of the plaintiff and purpose of which was to construct a building on the land in question. Aforesaid Samarawickrama gave evidence in this case and he has clearly stated that he only helped the plaintiff to raise a loan and the money obtained from the Finance Company was given to the plaintiff to construct a

building on the land. He also has stated that the loan was serviced by the plaintiff having paid the due installments by the plaintiff himself. Evidence of Samarawickrama in this regard is as follows:

ප්‍ර. දැන් ද පිනෑන්ස් එකෙන් ණයක් ගත්තද?

උ. මගේ ඥාති සහෝදරයා වන පැමිණිලිකරුට නුගේගොඩ ද පිනෑන්ස් ආයතනයෙන් ණය ගත්තා. ණය ගැනීම සඳහා ඔක්කොම කටයුතු කලේ පැමිණිලිකරු.

ණය ලාබා දුන්නෙ මගේ නමට. නමුත් වෙක් එක ගත්තෙ පැමිණිලිකරු. එයා ණය ගන්න පෙර අයියාගේ දේපලක් මට පවරා තිබුනා. එම ලේඛණය පැ.2 ලෙස ලකුණු කරනවා. ලක්ෂ 20 ක මුදලක් ගත්තේ.

එම මුදල ගන්නකොට ද පිනෑන්ස් ආයතනයට යම් දේපලක් සුරක්ෂිතයක් ලෙස තබන්න කිව්වා. ඒ සඳහා කලුබෝවිල ඒ නිවස තිබ්බා. ඒ ඉඩම ණය මුදල සඳහා උගසට තියෙනකොට අයිතිවෙලා තිබුනේ පැමිණිලිකාර අයියට අයිතිව තිබුනේ. මගේ නමට ඒ ඉඩම උගස් කලා.

ප්‍ර. ද පිනෑන්ස් සමාගම අයියගේ නම තිබුන ඉඩම බාර ගන්න කැමති වුනාද? මිලියන දෙකක් දෙන්න?

උ. ඔව්.

ප්‍ර. ඒ වෙලාවේ උකස් තබන්න බලාපොරොත්තුවන දේපලේ අයිතිය තිබුනේ ඥාති සහෝදරයා වන පැමිණිලිකාර චන්ද්‍රකුමාරටයි කියා කිව්වා?

උ. ඔව්.

ප්‍ර. ද පිනෑන්ස් සමාගම කැමති වුනාද චන්ද්‍රකුමාර නමින් එය ලාබාගෙන ණය දෙන්න?

උ. නැහැ. මගේ නමට දෙන්න කැමතිවුනේ.

ඊට පසුව මගේ නමට විකුනුම්කරයක් හැදුවා. ඒක තමයි පැ.2 ලෙස ලකුණු කලේ. මේ නඩුවට අදාල දේපල පැමිණිලිකාර චන්ද්‍රකුමාර විසින් මගේ නමට හැරෙව්වේ ඒ පැ 2 ඔප්පුවෙන්. මෙම දේපල සම්බන්ධයෙන් ඇත්ත වශයෙන්ම විකිණීමක ආකාරයෙන් කිසිම ගනුදෙනුවක් සිදුවුනේ නැහැ. ඒ සඳහා මම චන්ද්‍රකුමාරගෙන් සත පහක්වත් අරන් නැහැ. පැමිණිලිකරුගේ උපදෙස් පිට මම මේක කලේ.

ප්‍ර. දැන් පැ.2 ඔප්පුව ප්‍රකාරව පැමිණිලිකරු කිව්ව ආකාරයට මේ දේපල තමන්ගේ නමට පැවරුවානේ. ඊට පස්සේ එම දේපල නැවත වතාවක් ද පිනෑන්ස් ආයතනයට උකස් කළාද?

උ. ඔව්.

උකස් තබා ලක්ෂ 20 ක් ගත්තා.

ප්‍ර. ලක්ෂ 20 ක් ලබා ගැනීම සඳහා සකස් කරන ලද උකස් ඔප්පුව තමයි මේ පැ. 3 ලෙස ලකුණුකර තිබෙන්නේ?

උ. ඔව්.

(vide at page 244 in the appeal brief)

Accordingly, it is clear that the transfer effected in favour of Vajira Samarawickrama was merely to obtain a loan for the benefit of the plaintiff. Hence, it is seen that the plaintiff had no intention to transfer

the beneficial interest of the property to Vajira Samarawickrama when the deed 3303 marked P2 was executed. Samarawickrama has also stated that he never paid any loan installment to the Finance Company to settle the loan. Admittedly, all the loan installments had been paid by the plaintiff.

Thereafter, aforesaid Vajira Samarawickrama has transferred the property by deed No.9222 marked P9 which was attested by D.W.Pathinayake, Notary Public on 09th April 2003 in the name of the defendant namely, Jayanthi Chandrika Perera. It is this deed that is being challenged by the plaintiff stating that it is not an outright transfer but it was executed with the intention of him retaining the beneficial interest of the property.

Following are some of the decisions that show the manner in which the issues similar to the question in hand are to be considered, having regard to Section 83 of the Trust Ordinance. In the case of **Piyasena Vs. Don Vansue [1997 2SLR at page 311],** it was held thus:-

> *"Even though a transfer is in the form of an outright sale it is possible to lead parole evidence to show that facts exist from which it could be inferred that the real transaction was either.*
>
> *(i) money lending, where the land is transferred as a security as in this case or,*

(ii) a transfer in trust-in such cases section 83 would apply;

(iii) A trust is inferred from attendant circumstances. The trust is an obligation imposed by law on those who try to camouflage the actual nature of a transaction. When the attendant circumstances point to a loan transaction and not a genuine sale transaction the provisions of section 83 of the Trust Ordinance apply"

(emphasis added)

In the case of **Carthelis Vs. Ranasinghe, [2002 (2) SLR 359]** importance of looking at the intention of the parties when parting with the beneficial interest of a particular property had been considered as a material fact when looking at the attendant circumstances. In **Perera Vs. Fernando and Another [2011 (2) SLR 192 / 2011 BLR at 263]** Suresh Chandra J held as follows:

"…It would be necessary to conclude that both transfers did not convey absolute title to the transferees and that they held the property in trust for the transferor as the transferor in both instances had not intended to convey the beneficial interest in respect of he property. This is in line with the principle laid down in Section 83 of the Trust Ordinance."

In the circumstances, it is now necessary to consider the attendant circumstances in relation to the execution of the deed P9 in order to determine the intention of the plaintiff on the issue of transferring the beneficial interest of the property in question. In fact, it is the requirement that is to be considered under Section 83 of the Trust ordinance.

Transferor of the deed marked P9 namely, Vajira Samarawickrama has clearly stated that he held the property not for his benefit but it was held by him for and on behalf of the plaintiff. It is also in evidence that the plaintiff at one stage has failed to service the loan obtained from the Finance Company. Under those circumstances, the plaintiff has requested his brother-in-law Gamini Vithanage to help him servicing the loan. Plaintiff's evidence is that he requested said Gamini Vighanage to help him by giving him a loan amounting to Rs.2100,000/= in order to pay the Finance Company. The evidence to that effect adduced by plaintiff is found at page 166 in the appeal brief and it reads as follows:

"මේ කාලය තුල මම ද පිනෑන්ස් සමාගමට බදු මුදල් ගෙව්වේ අමාරුවෙන්. ද පිනෑන්ස් සමාගමෙන් ආවා. මට ගෙවන්න පුළුවන්කමක් තිබුනේ නැහැ. විත්තිකාර ජයන්ති චන්ද්‍රිකා පෙරේරා මගේ නෝනාගේ අයියාගේ භාර්යාව. මෙම නඩුවේ විත්තිකරු මගේ නෝනාගේ අයියාගේ භාර්යාව. මට බදුමුදල් ගෙවන්න අපහසු වුනාම අයියා අපේ ගෙදර එන නිසා, ඔහු කිව්වා උදව්වක්

ලෙස මුදල් ගෙවන්නම්, කැමති දවසක ගෙවන්න කියලා. චිත්තිකාරියගේ ස්වාමිපුරුෂයාගේ නම ගාමිණි විතානගේ. ඒ මහත්මා මගේ භාර්යාවගේ එක කුස උපන් සහෝදරයා. මගේ භාර්යාවට මේ ප්‍රශ්ණය පිළිබඳව මම කිව්වා. අපි අතර එකගත්වයක් ඇතිවුනා. ඔහු කිව්වා කැමති දිනයක ගෙවන්න කියලා. එයා උදව්වක් ලෙස ගෙවන්නම්, නංගිගේ නමට ලියන්න කියලා සුරකුමක් ලෙස. ලක්ෂ 21ක් ද පිනැන්ස් සමාගමට ගෙවන්න තිබුන මුදල. ඒ මුදල ගෙව්වා.”

(vide at page 166 in the appeal brief)

Admittedly, the plaintiff’s wife and the defendant’s husband are siblings. The plaintiff in his evidence has stated that his brother-in-law agreed to give Rs.2,100,000/= provided the plaintiff keeping the property in dispute as a security for the said loan. The position of the defendant is that the deed P9 was executed as a full pledged transfer and there was no intention to have the property kept as a security. This is the very question that is to be determined in this case.

The authorities referred to above show that the circumstances of each case has to be considered independently to ascertain the intention of the parties and then only the Court could decide whether such circumstances fall within the ambit of Section 83 of the Trust Ordinance. Admittedly, Vajira Samarawickrama being a close relative of the plaintiff has helped his cousin brother to raise a loan in order to

construct a building on the premises in suit. Accordingly, the property was transferred in the name of Smarawickrama and the loan had been raised on behalf of the plaintiff through Samarawickrama. Loan installments were paid by the plaintiff himself. It is not in dispute, that the plaintiff had failed to settle the loan obtained from the Finance Company.

Under such circumstances, the plaintiff has requested his brother-in-law to give money as a loan to settle the moneys due to the Finance Company. Evidence is forthcoming to establish that the loan obtained from the Finance Company had been settled after receiving the said sum of money by the plaintiff. It is the background for the transfer of the property by executing the deed P9, in the name of the defendant.

It is also necessary to ascertain whether the plaintiff did receive the exact value of the property when the deed P9 was executed. The person who valued the property has given evidence. There is no dispute as to the qualifications of the valuer who issued the valuation certificate in respect of the property in question. He has valued the property in a sum Rs. 09 million which was the market value of the property at the time the deed P9 was executed and the said valuation has not been disputed.

The Notary who executed the deed P9 also has given evidence. In his evidence he has stated that Rs.5.1 million was given by the defendant to the plaintiff at the time the deed was executed. This evidence had been rejected by the trial judge who heard the witnesses and saw them giving evidence. He also has given enough reasons for not believing the Notary.

Surprisingly, the Notary Pathinayake, in his attestation clause which is found in the deed P9, has mentioned that the amount transacted in his presence when he executed the deed P9 was only Rupees three million. Such a contradiction is sufficient to conclude that the Notary is not coming out with the truth as to the amount that was paid by the defendant when executing the deed marked P9. On the other hand, the plaintiff in his evidence has categorically stated that he received only Rs.2,100,000/= and it was to settle the loan that Vajira Samarawickrama had obtained on his behalf from the Finance Company. Even if the aforesaid evidence as to the alleged payment of Rs.5.1 million is accepted as correct, obviously it is not the full value of the property the defendant should have paid to the plaintiff when executing the deed P9. Therefore, it can safely be concluded that the correct value of the property had not been received by the plaintiff when executing the deed marked P9.

Having considered all those materials, the learned District Judge as well as the learned Judges in the Civil Appellate High Court had inclined to accept the evidence of the plaintiff. The Original Court Judges being the best Judges of facts, I am not inclined to interfere with those findings of the learned District Judge on issues of facts.

[Frad Vs.Brown & Co. Ltd (20 NLR 282)

Sumanawathie Vs. Bandiya and Others 2003 (3) SLR 278]

Defendant in support of her position has also argued that she came into possession of this premises soon after the execution of the deed P9. Therefore, she has claimed that such possession should be looked at when the attendant circumstances are being considered. However, the manner in which the defendant came into possession had been explained by the plaintiff in his evidence. He has stated that the defendant came into possession forcibly, soon after the lessee who was in occupation left the premises. In support of this position, the plaintiff has submitted two complaints that he had made to the police and those were marked as P10 and P12. The plaintiff by making those complaints to the police has explained that the defendant entered the premises in dispute forcibly soon after P9 was executed. Those matters also had been carefully considered by the learned trial Judge. To my mind, facts in relation to receiving the correct value by the plaintiff as the consideration

for the transfer of the property should prevail over the evidence in relation to its possession when considering the attendant circumstances referred to in Section 83 of the Trust Ordinance.

Accordingly, the attendant circumstances of this case show that the plaintiff did not intend transferring the beneficial interests in the property in question when the deed P9 was executed. Therefore, the plaintiff is entitled to have the benefit of Section 83 of the Trust Ordinance

For the aforesaid reasons, this appeal is dismissed with costs. Decisions of the Civil Appellate High Court and the District Court shall remain intact.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

B.P.ALUVIHARE, 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

1. Wijsmuller Salvage B.V.
   Sluisplein 34
   1975 AG Ijmuiden
   The Netherlands

2. Sri Lanka Shipping Company Limited
   46/5, NawamMawatha
   P.O. Box 1125
   Robert Senanayaka Building
   Colombo 2

Plaintiffs-Petitioners-Petitioners

SC Appeal 87/2011

SC Spl. LA No.69/2011
Court of Apeal
Revision Application No.CA (PHC) 45/2006
High Court Action in Rem No.1/2006

Vs

1. The Bangladesh Motor Vessel
   'M.V. JAMMI currently lying in the
   Port of Colombo
2. Midlands Shipping lines Limited
   1st Floor, HBFC Building
   Agrabad, Commercial Area
   Chittagong 4100
   Bangladesh

Defendants-Respondents-Respondents

1. Sri Lanka Ports Authority
   19. Church Street, Colombo 1
2. Sea Consortium Lanka (Private ltd)
   256, Srimath Ramanathan Mawatha
   Colombo 15.

Intervenient-Defendants-Respondents-Respondents

Before : Eva Wanasundera PC J
Sisira J De Abrew J
NalinPerera J

Counsel : Murshid Maharoof with Dushantha De Silva instructed by
Julius Creasy for thePlaintiffs-Petitioners-Petitioners

Canishka G Witharana with Medha NGamage for the 1st and 2nd
Defendant-Respondent-Respondents
Vicum De Abrew DSG withManoharaJayasinghe SSC
For the 1stIntervenient-Defendant-Respondent-Respondent

Argued on : 22.2.2017

Written Submissions
tendered on : By the Plaintiffs-Petitioners-Petitioners on 23.2.2017
By the 1stIntervenient-Defendant-Respondent-Respondent
on 22.3.2017

Decided on : 22.6.2017

Sisira J De Abrew J.

This is an appeal filed by the Plaintiff-Petitioner-Petitioners against the judgment of the Court of Appeal dated 7.3.2011 wherein the Court of Appeal refused an application of the Plaintiff-Petitioner-Petitioner to charge the relevant persons for contempt of Court of Appeal. Being aggrieved by the said judgment of the Court of Appeal the Plaintiff-Petitioner-Petitioners have appealed to this court. This court by its order dated 29.6.2011 granted leave to appeal on questions of law set out in paragraphs 10(a) to 10(h) of the petition dated 6.4.2011 which are set out below.

a. The Respondent Shipowners are not entitled in Admiralty Law and the rules to seek any disbursement of the sales proceeds of the vessel, irrespective of

whether there is any Stay Order preventing such disbursement or any undertaking by the vessel owners not to seek such disbursement. Such disbursement could only be done upon the conclusion of all the connected Actions *inRem*, which would also include the conclusion of the CA (Revision) Application No. 45/2006 to set aside the Order dismissing the Action *in Rem* No.1/2006, and thereafter, in terms of the Rules prescribed under the Admiralty Jurisdiction Act giving rightful place to priorities.

b. The Respondent shipowners are not entitled to any proceeds of the sale of the said vessel in view of the claims of the Judgment creditors in Action *in Rem* No. 11/2005 (i.e. SLPA) and Action in *Rem* No. 15/2005 being greater than the said sales proceeds of the said vessel, and in the event the Petitioners succeed in CA (Revision) Application No. 45/2006, as the Petitioners' claim for salvage services rendered to the vessel taking precedence over all other claims, which claim is also greater than the said sales proceeds.

c. The Power of Attorney Holder of the Respondent Shipowners had surreptitiously obtained the release of the said moneys in Action *in Rem* No. 15/2005, by merely tendering a letter to the High Court Registry and without notice to the other interested parties, including the Petitioners, who were entitled in law to such notice, despite the fact that the said moneys were lying in the connected Action *in Rem* No. 9/2005, and there were Orders by the High Court (Vide the documents marked X1 and X2 to the document marked Y2 hereinbefore) which clearly stated that no disbursement was to be effected other than in terms of Rules laid down in the Admiralty Jurisdiction law.

d. The pervious surreptitious applications by the Power of Attorney Holder of the Respondent Shipowners to unilaterally obtain the release of the said sales proceeds which culminated in the Order dated 11th December 2006 of the Court of Appeal (Vide: the document marked X3 to the SLPA's Motion marked Y2) and that this Order was extended and/or reiterated by the Court of Appeal on 6th February 2007 (Vide: the document marked X4 to the SLPA's Motion marked Y2). And the fact that the Order dated 25th June 2008 of the Court of Appeal was made consequent to a further application by the Power of Attorney holder of the Respondent shipowners seeking an unlawful release of the sales proceed from the said Action *inRem* No. 9/2005 (Vide: the document marked HCR 1 (b) to the Petitioners' Motion marked Y5 hereinbefore)

e. The firm undertaking given by Counsel in open Court on behalf of his clients not to seek any disbursements pending the determination of this matter in the Court of Appeal and acted upon by court and formally recorded as an order of Court are not to be disregarded and in view of such undertaking and the subsequent order of court there was no necessity to formally support a stay order to prevent the disbursement of the sales proceeds of the vessel. The Respondent shipowners through their Counsel and Power of Attorney holders had been represented in Court on all occasions when such undertakings were given or extended.

f. The non availability of the minutes of 6th February 2007 of the Hon. Court of Appeal in CA (Revision) Application No. 45/2006, (wherein all Counsel had given a firm undertaking not to seek the disbursement of the sales proceeds

of the said vessel) was a matter beyond the control of the Petitioners. Its non availability should not have been decided to the disadvantage of the Petitioners as,

i. *Ex facie* the Order dated 25th June 2008 of the Hon. Court of Appeal (Vide: the document marked HCR 1 (b) to the Petitioners' Motion marked Y5) clearly show that the Court seem to have had the benefit of referring the said minutes of 6th February 2007.

ii. The SLPA's Motion marked Y2 contains a certified copy of the said minutes of 6th February 2007 (vide: the document marked X4 thereto) issued by the Registry of the Court of Appeal.

g. The High Court and its Registrar had notice of all the relevant Orders and undertakings in the Court of Appeal as regards the said matters and the High Court and its Registrar could not have been unaware of the Petitioners' lawful concerns as to the safety of the sales proceeds of MV Jaami. However, other than the filing of the High Court Registrar's Report in Action *in Rem* No. 15/2005, confirming the removal of the said moneys by the Power of Attorney holder of the Respondent shipowners, there was no further action by the High Court to remedy the gross prejudice caused to the interest of the Petitioners as well as the other claimants by the said unlawful removal of moneys from the sales proceeds of the vessel.

h. The manifest conduct of the power of attorney holder of the Respondent shipowners, in surreptitiously seeking and obtaining the release of the said

moneys, is at variance with the clear provision in the Admiralty law as to priority of claims, and such conduct is an abuse of the process of Court and a fraud perpetrated on Court.

In my view, there are no specific questions of law set out in the said paragraphs. When submissions of counsel are considered, the most important question of law that must be considered in this case can be stated as follows.

"When a party to an action violates an undertaking given to court by him, can such party be charged for contempt of court."

The Plaintiff-Petitioner-Petitioners (hereinafter referred to as the Plaintiff-Petitioners) filed action in Rem No.1/2006 in the High Court in the High Court of Colombo seeking, inter alia, for an order of arrest and detention of Motor Vessel MV JAAMI lying in the port of Colombo. The learned High Court Judge by her judgment dated 28.2.2006 dismissed the action of the Plaintiff-Petitioners. Being aggrieved by the judgment of the learned High Court Judge,the Plaintiff-Petitioners on 15.3.2006 filed a Revision Application No.45/2006 in the Court of Appeal seeking, inter alia, the following reliefs.

1. To act in revision and grant interim relief by issuing an interim order and stay order staying the operation of the order of the learned High Court Judge dated 28.2.2006.
2. To act in revision and grant interim relief by issuing an interim order and stay order staying the disbursement of the sum of US$ 1,615,000/- credited to the Admiralty Account of the High Court of Colombo, being the purchase consideration of the said vessel (MV JAAMI) which is lying to the credit of the Admiralty Account of the High Court of Colombo and arises from the sale of the said vessel MV JAAMI until the final determination of the Application in Revision.

3. To act in revision and set aside the order of the learned High Court Judge dated 28.2.2006.

The Court of Appeal in Revision Application No.45/2006 made an interim order on 6.2.2007 (marked as X4 in Y2) which reads as follows.

"All Counsel agree that they will not seek any disbursement of the sale proceeds of MV JAAMI lying in the High Court without prejudice to the rights of parties to proceed with the trial. As this order relates to 15/2005 and 11/2005, Registrar is ordered to issue copy of this order to the Registrar of the High Court of Colombo."

According to the order of the Court of Appeal dated 25.6.2008, the Deputy Registrar of the Court of Appeal on 7.2.2007 had communicated the said order to the Registrar of the High Court of Colombo.

The Court of Appeal on 25.6.2008 in Revision Application No.45/2006 made a further order (marked as X5 in Y2) which reads as follows. On this day all parties were represented by their lawyers.

"In accordance with the order dated on 6.2.2007 as stated earlier all counsel agreed that they would not seek any disbursement of the sale proceeds of MV JAAMI lying in the High Court without prejudice to the rights of parties to proceed with the trial as this order relates to 15/2005 and 11/2005. As the Registrar of this court has already issued a copy of this order to the Registrar of the High Court of Colombo, this court is of the firm belief that the aforesaid order made by this court should not be violated unless a contrary order is made by a Superior Court. As this matter is pending before this court, the Registrar is directed to inform the Registrar of the High Court that any application pertaining to the disbursement of the sale proceeds should not be entertained pending the application before this court."

When the above orders were in operation PPJ Hewawasam, the Power of Attorney holder of the 2nd Defendant-Respondent-Respondent (hereinafter referred to as the 2nd Defendant-Respondent made an application to the High Court to

release US$ 337,553 from the sale proceeds of vessel MV JAAMI. The High Court ordered the release of the money and as a result of the said order, PPJ Hewawasam, the Power of Attorney holder of the 2nd Defendant-Respondent received Rs.33983850/95 (cheque No.648824). It appears that PPJ Hewawasam, the Power of Attorney holder of the2nd Defendant-Respondent has made the above application to the High Court for the release of the money when the orders of the Court of Appeal dated 6.2.2007 and 25.6.2008 were in operation. It appears from the said orders of the Court of Appeal that on 6.2.2007 and 25.6.2008 the 2nd Defendant-Respondent had been represented in the Court of Appeal by counsel and that both orders had been communicated to the High Court (vide document marked CR1a). Learned counsel for the Plaintiff-Petitioners contended that the 2nd Defendant-Respondent and or his Power of Attorney holder had committed contempt of Court of Appeal when the said application for the release of money was made to the High Court on 18.12.2009.The Plaintiff-Petitioners filed papers in the Court of Appeal alleging thatthe 2nd Defendant-Respondent and or his Power of Attorney holder had committed contempt of Court of Appeal when the said application for the release of money was made to the High Court on 18.12.2009. The Court of Appeal,after hearing submissions of both parties on the said application of thePlaintiff-Petitioners, delivered its judgment on 7.3.2011. The Court of Appeal by its judgment dated 7.3.2011 decided that the order of the Court of Appeal dated 25.6.2008 was a per-incuriam order and therefore refused to inquire into the charges of contempt of court. Learned counsel for the Plaintiff-Petitioners contended that the said judgment of the Court of Appeal was wrong. I now advert to this contention. The Court of Appeal by its order dated 25.6.2008 (marked as X5 in Y2) observed that all counsel on 6.2.2007 had agreed not to seek any disbursement of the sale proceeds of MV JAAMI lying in the High Court.The Court of Appeal in the said order dated 25.6.2008 also observed that the order of

the Court of Appeal dated 6.2.2007 should not be violated by the parties. When this order made on 25.6.2008 was in operation how did the Power of Attorney holder of the 2nd Defendant-Respondent made an application on 18.12.2009 to get the money released from the sale proceeds of M.V. JAAMI lying in the High Court. He received Rs.33983850/95 from the sale proceeds of M.V. JAAMI. When I consider the above matters, it appears that there is material to consider that the 2nd Defendant-Respondent and/or his Power of Attorney holder had committed the offence of contempt of Court of Appeal.

The Court of Appeal by its order dated 7.3.2011, decided that order of the Court of Appeal dated 25.6.2008 was a per-incuriam order and that therefore refused to inquire into the charge ofcontempt of Court of Appeal. When the Power of Attorney holder of the 2nd Defendant-Respondent made the above application on 18.12.2009, was there any declaration by the Court of Appeal to the effect that the order of the Court of Appeal dated 25.6.208 was a per-incuriam order. The answer is in the negative. Party to an action cannot decide that an order of court is a per-incuriam order. Such a decision must be made by court and if such an order was made by court. It is the duty of court to vacate it. When I consider the above matters, I am of the view that there is material to consider that the 2nd Defendant-Respondent and/or his Power of Attorney holder had violated the order of the Court of Appeal dated 25.6.2008. In this connection I would like to consider a judicial decision. In De Alwis Vs Rajakaruna 68 NLR 180 this court observed the following facts.

"According to the terms of an interim settlement recorded by court in an action the plaintiff agreed to hand over certain motor vehicles (tractors) and undertook not to make use of them. The plaintiff however failed to honour his undertaking." This Court held as follows.

"The plaintiff was guilty of contempt of court. The failure of a party to honour an undertaking given by him to court is a contempt of court."

When a party to an action gives an undertaking to court, it becomes his duty to implement it. When a party fails to honour an undertaking given to court, such party is guilty of contempt of court.The 2nd Defendant-Respondent has failed to honour the undertaking given by him to court when his Power of Attorney holder made the application to court on 18.12.2009 to release money from the sale proceeds of vesselM.V. JAAMI.

When I consider all the above matters, I hold that the Court of Appeal was wrong when it, by judgment dated 7.3.2011, decided not to initiate an inquiry or issue charges for contempt of Court of Appeal. In my view there is material against the 2nd Defendant-Respondent and/or his Power of Attorney holder to consider contempt charges. For the above reasons, I set aside the judgment of the Court of Appeal dated 7.3.2011 and direct the Court of Appeal to rehear the case.

The Plaintiff-Petitioners in their application filed in this court has also sought the following relief.

"Order the 2nd Defendant-Respondent and/or his Power of Attorney holder PPJ Hewawasam to forthwith return the sum of Rs.33,983,850/95 received by him on 22.12.2009."

It has to be noted here that in the Revision Application 45/2006 filed in the Court of Appeal, the Plaintiff-Petitioners had not sought such a relief. His appeal to this court was against the judgment dated 7.3.2011 wherein the Court of Appeal refused to consider charges of contempt of Court of Appeal.The Court of Appeal by the said judgment has not considered the granting or refusing of the said relief. Therefore it is not proper for me to consider granting of the said relief. I therefore refused to consider the said prayer.

For the aforementioned reasons, I set aside the judgment of the Court of Appeal dated 7.3.2011 and direct the Court of Appeal to rehear the application for contempt of court filed by the Plaintiff-Petitioners.

Rehearing ordered.

Judge of the Supreme Court.

Eva Wanasundera PC J

I agree.

Judge of the Supreme Court.

NalinPerera J

I agree.

Judge of the Supreme Court.

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

SC. APPEAL No. 87/16

In the matter of an application for Leave to Appeal against the judgment dated 28th October 2014 of the Civil Appellate High Court of the Western Province holden in Mt. Lavinia in Case No. WP/HCCA/MT/113/2012 (f).

SC.HCCA.LA. No. 648/14
H/C Case No.
WP/HCCA/MT/113/2012(f)
DC Moratuwa Case No. 543/L

Dilrukshi Dissanayake
No. 20, Old Galwala (Quarry) Road,
Mount Lavinia.

Represented by her
Power of Attorney
Viraj Anthony Jayakody
No. 20, Old Quarry Road,
Mount Lavinia.

Plaintiff-Appellant-Appellant

Vs.

1. Beminihennadige Meulet Malini Fernando
   No. 307/1, Egoda Uyana Road,
   Moratuwa.

2. Nishantha Aponso
   No. 307/1, Egoda Uyana Road,
   Moratuwa.

Defendants-Respondents-Respondents

Before : B P Aluwihare PC J
Sisira J De Abrew J &
Prasana Jayawardena PC J

Counsel : Geoffrey Alagaratnam with Lueie Ganeshathasan
for the Plaintiff-Appellant- Appellant
No appearance for the Defendant-Respondent-Respondents

Written submissions
Tendered on : 29.6.2016 by the Plaintiff-Appellant-Appellant

Argued on : 1.11.2016

Decided on : 17.1.2017

Sisira J De Abrew J.

Notices on the 1st and the 2nd Defendant-Respondent-Respondents (hereinafter referred to as the 1st and the 2nd Defendant-Respondents) have been sent on several occasions by the Registrar of the Supreme Court but they have failed to respond to the notices. Hence the argument commenced without their participation. Learned President's Counsel for the Plaintiff-Appellant-Appellant made submission in support of his case.

This is an appeal filed by the Plaintiff-Appellant-Appellant (hereinafter referred to as the Plaintiff-Appellant) against the judgment of the High Court of Civil Appeal hereinafter referred to as the High Court). This court by its order

dated 4.5.2106, granted leave to appeal on questions of law set out in paragraph 24(a) and 24(b) of the petition dated 8.12.2014 which are set out below.

1. Did the learned High Court judges err in law in holding that the Appellant is not entitled to relief (b) of the Amended Plaint to obtain vacant and peaceful possession of the subject land especially considering the pleadings, admissions of parties and the order of the learned District Judge?
2. Did the learned High Court judges misdirect themselves on the facts in holding that the Appellant failed to prove that the Respondents are in possession of the subject land especially considering the admissions by the Respondents?

The Plaintiff-Appellant instituted action bearing No. 543/L in the District Court of Moratuwa seeking, inter alia, a declaration of title to lot No.2 in Plan No.1204 dated 20.12.1971 prepared by LRL Perera Licensed Surveyor morefully described in the 2nd schedule to the Amended Plaint and for ejectment of the Defendant-Respondents and all those holding under them from the said property. After trial, the learned District Judge delivered the judgment on 30.9.2011 in favour of the Plaintiff-Appellant granting only the relief prayed for paragraph (a) of the prayer to the Amended Plaint (that the Plaintiff-Appellant is the owner of the property in suit) but did not make an order to eject the 1st and the 2nd Defendant-Respondents (prayer (b) of the Amended Plaint). Being aggrieved by the said judgment of the District Court, the Plaintiff-Appellant appealed to the High Court and the High Court by its judgment dated 28.10.2014, affirmed the judgment of the District Court. Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellant has appealed to this court. Both courts below observed that the Plaintiff-Appellant had failed to prove that the 1st and the 2nd Defendant-Respondents were in unlawful occupation of the property in suit. I now advert to this question.

The 1st Defendant-Respondent, in her evidence at page 274 of the brief, says that at present her daughter is occupying the property in suit; and that she gave the property in suit on rent to the 2nd Defendant-Respondent. Further the 1st and the 2nd Defendant-Respondents, in their answer, admits that the 1st Defendant-Respondent had given the property in suit on rent to the 2nd Defendant-Respondent and that they are in occupation of the property in suit. The above facts clearly prove that the 1st and the 2nd Defendant-Respondents are in occupation of the property in suit.

The 1st and the 2nd Defendant-Respondents, in their answer, further take up the plea of prescription. The 1st and the 2nd Defendant-Respondents, in their answer sought a declaration of title to the property in suit. But the learned District Judge rightly rejected this claim and decided that they are not entitled to get a declaration of title to the property in suit. Then on what basis do the Defendant-Respondents claim that their occupation of the property in suit is lawful? There is no basis for this claim. The above facts demonstrate that the 1st and the 2nd Defendant-Respondents are in possession of the property in suit and that their possession is unlawful. Therefore it appears that there was clear evidence before the trial court to decide that the 1st and the 2nd Defendant-Respondents were in unlawful occupation of the property in suit. Therefore both courts below were wrong when they decided that the Plaintiff-Appellant had failed to prove that the 1st and the 2nd Defendant-Respondents were in unlawful occupation of the property in suit. The evidence led at the trial has clearly established that the 1st and the 2nd Defendant-Respondents were in unlawful occupation of the property in suit. The learned District Judge, in her judgment declared that the Plaintiff-Appellant is the lawful owner of the property in suit. If the Plaintiff-Appellant was declared the owner of the property in suit by court and the Defendant-Respondents are in unlawful occupation of the property in suit, an order to eject the Defendant-Respondents and all those holding under them will have to be issued by court. In this connection I would like to

consider a passage of the judgment of Justice Gratiaen in Pathirana Vs Jayasundera 58 NLR 169 at page 172 wherein His Lordship observed thus:

> "In a *rei vindicatio* action proper the owner of the immovable property is entitled, on proof of title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. The Plaintiff's ownership of the thing is of the very essence of the action."

Applying the principles lad down in the above legal literature, I hold that in an action for rei vindicatio, if the court declares that the plaintiff is the owner of the property and the defendant is in unlawful occupation of the property, it becomes the duty of court to issue an order for ejectment of the defendant from the property.

I have earlier held that the Defendant-respondents are in unlawful occupation of the property in suit. When I consider the above matters, I am of the opinion that the learned District Judge should have granted the relief sought in paragraph (b) of the prayer to the petition.

For the above reasons, I set aside the judgment of the learned District Judge and the judgment of the High Court with regard to the refusal to grant relief (b) prayed for in the Amended Plaint but I affirm the judgments of both courts relating to the granting of relief (a) prayed for in the Amended Plaint. I grant the relief (b) prayed for in the Amended Plaint. The learned District Judge is directed to enter judgment accordingly and amend the decree granting relief sought in paragraphs (a) and (b) of the prayer of the Amended Plaint.

Learned President's Counsel did not address with regard to the other prayers in the Amended Plaint. In view of the conclusion reached by me, I answer

the questions of law raised in the affirmative. The Plaintiff-Appellant is entitled to recover the costs in all three courts.

Judge of the Supreme Court.

BP Aluwihare 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 for Special Leave to Appeal in terms of
Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

D D Gnanawathi Ranasinghe,
165/5,Park Road,
Colombo 5
Petitioner-Appellant(Deceased)

PHK Dharmasiri Ranasinghe
165/5,Park Road,
Colombo 5
Substituted Petitioner-Appellant

Vs

SC Appeal 87A/2006

SC (Spl) LA156/2006
CA Writ Application 1642/2003

1. Hon. Minister of Lands,
Ministry of Lands,
80/5, Govijana Mandiraya,
Battaramulla.

2. Divisional Secretary of Nugegoda,
"Highlevel Plaza"
Gangodawila,
Nugegoda

3. Chairman,
Urban Development Authority,
6th and 7th Floors,
"Sethsiripaya"
Battaramulla.

4. Urban Development Authority,
6th and 7th Floors,
"Sethsiripaya"
Battaramulla.

5. Chairman,
Sri Lanka Land Reclamation and
Development Corporation,
351,Kotte Road,
Rajagiriya.

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

Respondent-Respondents

Before : Sisira J de Abrew J
Anil Goonerathne J
Nalin Perera J

Counsel : Faiz Musthapa PC for the Substituted Petitioner-Appellant
Rajeev Gunatilake SSC for the Respondent-Respondent

Written Submissions tendered on : 11.7.2017 by the Substituted Petitioner-Appellant
20.6.2017 by the Respondent-Respondent

Argued on : 7.6.2017

Decided on : 13.09.2017

Sisira J De Abrew J.

The Petitioner-Petitioner-Appellant (hereinafter referred to as the Petitioner-Appellant) claims that she and her children are the owners of the land in dispute.

The acquisition of the land in dispute commenced in 1980 by publishing a Section 2 of the Land Acquisition Act notice (hereinafter referred to as the Section 2 notice) and an order made under proviso to Section 38(a) of the Land Acquisition Act (hereinafter referred to as the order under Section 38(a) proviso). The order

under Section 38(a) proviso was published in Government Gazette No.102/6 dated 20.8.1980 marked as 1R2. Notice under Section 7 of the Land Acquisition Act (hereinafter referred to as Section 7 notice) too was published in Government Gazette No.179/8 dated 11.2.1982 marked as P6. The Petitioner-Appellant filed a Writ Application in the Court of Appeal) seeking a writ of certiorari to quash P6 and seeking a writ of mandamus against the 1st Respondent-Respondent-respondent (hereinafter referred to as the 1st Respondent) directing him to revoke in terms of Section 39(1) of the Land Acquisition Act (hereinafter referred to as the Act), any vesting order made in relation to the Government Gazette notification marked P6 or in the alternative, publish a gazette notification in terms of Section 39A of the Act divesting the Petitioner-Appellant's property. The Petitioner-Appellant further sought a writ of mandamus directing the 1st Respondent to pay compensation to the Petitioner-Appellant regarding the acquisition. The Court of Appeal, by its judgment dated 9.5.2006 dismissed the case of the Petitioner-Appellant. Being aggrieved by the said judgment, the Petitioner-Appellant has appealed to this court. This court by its order dated 16.10.2006, granted leave to appeal on the following questions of law.

1. Whether the Petitioner-Appellant is entitled, in law, to have the subject matter divested since the property had not been used for the public purpose for which it was acquired during the period of last 26 years.

2. Whether the 1st and the 2nd Respondents have failed to follow the proper procedure with regard to the payment of compensation.

Learned President's Counsel for the Petitioner-Appellant submitted that although the land had been acquired under the proviso to Section 38(a) of the Act, the land has not been used for any public purpose. He therefore contended that the

1st respondent should act under Section 39(1) of the Act. Section 39(1) of the Act reads as follows.

> *"Notwithstanding that by virtue of an Order under section 38 (hereinafter in this section referred to as a " vesting order") any land has vested absolutely in the State, the Minister may, if possession of the land has not actually been taken for and on behalf of the State in pursuance of that Order, by subsequent Order published in the Gazette revoke the vesting order."*

The governing part of the above section, in my view, is the following phrase: *"if possession of the land has not actually been taken for and on behalf of the State in pursuance of that order."*

In my view if the possession of the land has **not** been taken for and on behalf of the State, the Minister has the power to make an order under Section 39(1) of the Act. But if the possession of the land has been taken over for and on behalf of the State, the Minister has no power to make an order Section 39(1) of the Act. I will now examine whether the possession of the land has been taken over by the State or not. The Petitioner-Appellant, in his petition and in his statement made to the Police, (P39) states that the possession of the land has not been taken over. But the 1st Respondent in his affidavit states that the possession of the land has been taken over by the Urban Development Authority (UDA) on 2.10.1980. The document marked 2R2 indicates that 44 people had been paid compensation for the acquisition of the land in question. If the possession of the land in question has not been taken over for and on behalf of the State, how did the State pay compensation to 44 claimants? This document indicates that the possession of the land has been

taken over for and on behalf of the State. When I consider all the above facts, I hold that the possession of the land has been taken over by the State. Therefore the Minister (the 1st Respondent) cannot revoke the vesting order in terms of Section 39(1) of the Act. Therefore the court cannot issue a writ of mandamus directing the 1st Respondent to revoke, in terms of Section 39(1) of the Act, the vesting order. For the above reasons, I hold that the Court of Appeal was correct when it refused to issue a writ of mandamus directing the 1st Respondent to revoke, in terms of section 39(1) of the Act, the vesting order.

Learned President's Counsel for the Petitioner-Appellant next contended that the 1st Respondent had a duty to issue a divesting order in terms of Section 39A of the Act. I now advert to this contention. Section 39A(1) and 39A (2) of the Act read as follows.

39A(1):

> Notwithstanding that by virtue of an Order under section 38 (hereafter in this section referred to as a " vesting Order ") any land has vested absolutely in the State and actual possession of such land has been taken for or on behalf of the State under the provisions of Paragraph (a) of section 40, the Minister may, subject to sub section (2), by subsequent Order published in the *Gazette* (hereafter in this section referred to as a " divesting Order") divest the State of the land so vested by the aforesaid vesting Order.

39A(2):

The Minister shall prior to making a divesting Order under subsection (1) satisfy himself that-

a) no compensation has been paid under this Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;
b) the said land has not been used for a public purpose after possession of such land has been taken by the State under the provisions of paragraph (a) of section 40;

c) no improvements to the said land have been effected after the Order for possession under paragraph (a) of section 40 had been made; and

d) the person or persons interested in the said land have consented in writing to take possession of such land immediately after the divesting Order is published in the Gazette.

According to Section 39A(2) of the Act, the Minister, prior to making a divesting order, should satisfy himself that the following conditions have been fulfilled.

1. no compensation has been paid under this Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;
2. the said land has not been used for a public purpose after possession of such land has been taken by the State under the provisions of paragraph (a) of section 40;
3. no improvements to the said land have been effected after the Order for possession under paragraph (a) of section 40 had been made;
4. the person or persons interested in the said land have consented in writing to take possession of such land immediately after the divesting Order is published in the Gazette.

What happens if compensation has been paid to the claimants? Then the Minister is not empowered to make a divesting order in terms of Section 39A of the Act because in such a situation condition No.1 in Section 39A (2) has not been fulfilled.

At this stage it is relevant to consider the judicial decision in the case of Rashid Vs Rajitha Senaratne Minister of Lands and Another [2004] 1 SLR 312.

This Court observed the following facts in the above case.

"The petitioner was the owner of 1/16 share of a land and building, No. 2 New Bazaar Street, Nuwara Eliya. Proceedings for acquiring the said land commenced in 1983. A section 2 notice was published in respect of the land. This was followed by an order for the acquisition of the land under section 38 proviso (a)-of the Land Acquisition Act. The notice of the order did not specify the purpose of the acquisition; and the acquiring proceedings continued for 17 years. The land was not used for any purpose although possession of the land was given to the Urban Development Authority.

A notice under section 7 of the Act was published calling for claims to the land. The appellant claimed title and compensation to the land. As different decisions were being made by the acquiring officer, the appellant applied for a *writ of mandamus* to compel finality to the proceedings. That case was settled when the Surveyor-General made a plan NU/1839 dated 15.12.97 showing the premises acquired as 25:25 purchase *viz.*, premises No. 2 aforesaid.

In view of the continuing delay of proceedings the appellant applied *inter alia*, for a *writ of mandamus* to direct the Minister to make an order divesting the property under section 39A of the Act.

The application satisfied the pre-conditions in section 39A for divesting, but the Court of Appeal dismissed it stating that it could not be shown that the acquisition was *ultra vires*."

This Court held:

"1. The Minister never claimed that the land was required for a particular public purpose.

2. For the issue of mandamus to compel a divesting of the land under section 39A of the Act, it is unnecessary to establish that the acquisition was *ultra vires.*

3. The appellant was entitled to a *writ of mandamus* for a divesting of No. 2 New Bazaar Street depicted in the Surveyor-General's plan UN/1839 dated 15.12.97 and a *writ of certiorari* quashing the initial order of acquisition."

In Rashid's case (supra) the applicant had satisfied the pre-conditions in Section 39A. But in the present case condition No.1in Section 39A (2) has not been fulfilled. Therefore the principles enunciated in Rashid's case are not applicable to the present case.

The document marked 2R2 states that the State had paid compensation to 44 people. Therefore the Minister cannot make a divesting order in terms of Section 39A of the Act. When I consider the aforementioned matters, I hold that the Court of Appeal was correct when it refused to issue a writ of mandamus directing the 1st Respondent to issue a divesting order under Section 39A of the Act.

For all the aforementioned reasons, I answer the 1st question of law in the negative.

The Petitioner-Appellant also sought a writ of mandamus directing the 1st Respondent to pay her compensation. But the Court of Appeal refused to grant the said relief. Was the Court of Appeal right when it made the above order? I now advert to this question. Although Section 7 notice was published, the Petitioner did not make any claim for compensation. The inquiry under Section 17 of the Act was concluded in 1983 and compensation was paid to 44 people but the petitioner maintained silence with regard to her alleged claim. The document marked 2R2 indicates that compensation was paid to 44 people. Under these circumstances the above relief sought by the Petitioner-Appellant cannot be granted. For the above reasons, I hold that the Court of Appeal was correct when it refused to grant the above relief. For the aforementioned reasons, I answer the 2nd question of law in the negative.

For the aforementioned reasons, I affirm the judgment of the Court of Appeal and dismiss this appeal. Considering the facts of this case, I do not make an order for costs.

Appeal dismissed.

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.

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

NGA Wijenayake
No. 4B, 57L
Raddolugama.

Applicant

SC Appeal88/2010
SC HC L.A No.11/2009
HC.ALT.No.16/2008
LT Case No.2/326/2002

Vs

International Construction Consortium Ltd
Bernards Building,
First Floor, No.106/4,
Kohuwala,
Dehiwala

Presently at
No.70,
S. de.SJayasinghaMawatha,
Kohuwala,
Dehiwala

Respondent

AND BETWEEN

NGA Wijenayake
No. 4B, 57L
Raddolugama.

Applicant-Appellant

Vs

International Construction Consortium Ltd
Bernards Building,
First Floor, No.106/4,
Kohuwala,
Dehiwala

Presently at
No.70,
S. de.SJayasinghaMawatha,
Kohuwala,
Dehiwala

Respondent-Respondent

AND NOW BETWEEN

NGA Wijenayake
No. 4B, 57L
Raddolugama.

Applicant-Appellant-Petitioner-Appellant

Vs

International Construction Consortium Ltd
Bernards Building,
First Floor, No.106/4,
Kohuwala,
Dehiwala

Presently at
No.70,
S. de.SJayasinghaMawatha,
Kohuwala,
Dehiwala

Respondent-Respondent-Respondent-Respondent

Before : Sisira J De Abrew J
UpalyAbeyratne J
KT Chitrasiri J

Counsel : MohamadAdamaly with J Abeysundera for the
Applicant-Appellant-Petitioner-Appellant
Manohara de Silva P C with J Abeysundera for the
Respondent-Respondent-Respondent-Respondent

Argued on : 18.1.2017

Written submission
tendered on : 8.10.2010 by the Applicant-Appellant-Appellant
10.11.2010 by the Respondent-Respondent-Respondent

Decided on : 1.3.2017

Sisira J De Abrew J.

The Applicant-Appellant-Petitioner-Appellant (hereinafter referred to as the Applicant-Appellant) filed an application in the Labour Tribunal alleging that his services were unjustifiably and wrongfully terminated by the Respondent-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent-Respondent). The learned President of the Labour Tribunal, after inquiry, ordered compensation in a sum of Rs.648,000/- being the two years salary of the Applicant-Appellant. Being aggrieved by the said order of the Labour Tribunal, the Applicant-Appellant appealed to the High Court. The learned High Court Judge by his order dated 2.4.2009, reduced the said amount to 12 months salary. Being aggrieved by the said judgment of the High Court, the Applicant-Appellant has appealed to this court. This Court by its order dated 30.8.2010, granted leave to appeal on the questions of law set out in paragraph 11(i) and11(iii) of the petition of appeal dated 14.10.2009 which are set out below.

1. Has the learned High Court Judge erred in law in reducing the quantum of compensation awarded by the learned President of the Labour Tribunal in circumstances where the Respondent had not preferred any Appeal?

2. Has the learned High Court judge erred in law in purporting to grant relief that has not been prayed for in the pleadings?

This court by the said order allowed the following question of law raised by learned counsel for the Respondent-Respondent.

"When the Appellant invokes the jurisdiction of the High Court under Section 31D of the Industrial Disputes Act from an order of the Labour Tribunal under the provisions of the Industrial Disputes Act as amended by Act No. 32 of 1990, whether the power of the High Court is restricted to the relief sought by the Appellant or whether it (the order of the Labour Tribunal) can be affirmed, varied or reversed."

Learned counsel for the Applicant-Appellant submitted that orders ofthe Labour Tribunal are based on the principle of just and equitable and as such the High Court Judge is also required to observe the same principle when hearing appeals from the orders ofthe Labour Tribunal. Learned counsel contended that the learned High Court Judge had not observed the said principle when he reduced the quantum of damages ordered by the Labour Tribunal. I now advert to this contention. Although learned counsel contended so, the learned High Court Judge, in her judgment, has observed that the order of the Labour Tribunal was not a reasonable one for both parties and that the order of the Labour Tribunal was not a just and equitable order. It has to be noted here that when the Applicant-Appellant joined the Respondent-Respondent he was 53 years old and worked in the

company of the Respondent-Respondent only for four (4) years. The learned High Court Judge, in her order, further made the following observations.

1. The Applicant-Appellant had worked at several places for short periods
2. The Applicant-Appellant is a person who has the ability to find a job easily irrespective of his age.
3. The Applicant-Appellant had given his services to the Respondent-Respondent only for a period of 4 years and as such he had not given his services to the Respondent-Respondent for a long period.
4. The Applicant-Appellant has joined the Respondent-Respondent only at the age of 53.
5. The learned President of the Labour Tribunal had not considered the facts which were in favour of the Respondent-Respondent when granting compensation and that therefore the order of the learned President of the Labour Tribunal could not be considered as a just and equitable order.

The learnedHigh Court Judge after considering the facts in favour of both parties decided that compensation of 12 months salary would be just and equitable.

When I consider the above facts, I hold that thelearned High Court Judge has considered the principle of 'just and equitable' when she made the above order. I therefore reject the above contention of learned counsel for the Applicant-Appellant.

Learned Counsel for the Applicant-Appellant next contended that the learned High Court Judge had erred in law when she reduced the compensation awarded by the learned President of the Labour Tribunal. He further submitted that the learned High Court Judge when considering an appeal filed by an employee could not reduce compensation awarded by the learned President of the Labour

Tribunal especially when there is no appeal by the employer. To support this contention, learned counsel cited Brohier Vs Munidasa 73 NLR 17 wherein Sirimana J held as follows.

> *"Under Section 31C of the Industrial Disputes Act, a Labour Tribunal must make its order on the evidence led and must not go beyond the evidence. Accordingly, where a workman states in his evidence that his application is for salary for a certain number of months for wrongful dismissal, there is no justification for the tribunal to order the employer to pay salary for a certain period of loss of career."*

The contention of learned counsel for the Applicant-Appellant in the present case is that the reduction of compensation by the learned High Court Judge is wrong. When I consider the said contention and the principle laid down in the above judicial decision, I am of the opinion that the said judicial decision does not support his contention.

Learned counsel for the Applicant-Appellant relied on the following judicial decision.Upali Management Services Ltd Vs Ponnambalam [2004] 1SLR 331. The Supreme Court in the above case observed the following facts.

> *"The High Court upheld the order of the Tribunal disallowing only the petrol allowance and entertainment allowance. The High Court reduced the compensation to Rs.4,243,378.00."*

The Supreme Court held:

1. *"In terms of Section 31B(4) of the Industrial Disputes Act (The Act) the Labour Tribunal had the power to grant equitable relief against harsh terms*

imposed by the employer and the Labour Tribunal had the power to make just and equitable orders. It does not have the freedom of wild ass."

2. *The order of the Tribunal regarding compensation was perverse.*
3. *There was no constructive termination of the workman's service by the employer."*

Learned counsel for the Applicant-Appellant further relied on the following passage at page 338 of the above judgment.

> *"In terms of the provisions of the Industrial Disputes Act where Section 31(C) provides the Tribunal to make 'such order as may appear to the Tribunal to be just and equitable' admittedly a Labour Tribunal has very wide powers. However it is to be noted that the Tribunal does not possess an unfettered authority. As observed by H.N.G. Fernando J (as he then was) in Walker Sons &Co.LtdVs Fry 68 NLR 73, Labour Tribunal does not have the 'freedom of wild ass'."* In my view, the judgment in the above case too does not support the contention of learned counsel for the Applicant-Appellant.

The main question that must be considered in this case is whether the High Court in the exercise of its appellate jurisdiction has the power, in an appeal filed by the workman, to reduce compensation when there is no appeal by the employer. Learned counsel for the Applicant-Appellant contended that the High Court could not do so when there was no appeal by the employer. He further submitted that all what High Court could do was either to enhance the compensation as sought bythe Applicant-Appellant or to dismiss the appeal. I now advert to this contention. If the contention of learned counsel for the Applicant-Appellant is correct, then it is possible to contend that the Applicant-Appellant can impose conditions on the High Court Judge when he considers an appeal of the Applicant-Appellant. Can an

Applicant-Appellant impose such conditions on the High Court Judge when he exercises appellate jurisdiction in a case filed by the Applicant-Appellant? In considering this question I would like to consider Section 31D(3) of the Industrial Disputes Act which reads as follows:

> *"Where the workman who, or the trade union which, makes an application to a Labour Tribunal, or the employer to whom that application relates is dissatisfied with the order of the tribunal on that application , such workman, trade union or employer may, by written petition in which the other party is mentioned as the respondent, appeal from that order on a question of law, to the High Court established under Article 154P of the Constitution, for the Province within which such labour tribunal is situated."*

Section 6(a) of High Court of the Provinces (Special Provinces) Act No. 19 of 1990 reads as follows.

> *"A High Court established by Article 154P of the Constitution may in the exercise of any appellate jurisdiction vested in it by the Constitution or section 3 or any other law, affirm, reverse, correct or modify any order, judgment, decree or sentence according to law or may give directions to any Court of First Instance, or tribunal or institution or order a new trial or further hearing upon such terms as the court may think fit."*

According to Section 6(a) of High Court of the Provinces (Special Provinces) Act No. 19 of 1990, the High Court in the exercise of its appellate powers has the power to affirm, reverse, correct or modify any order or judgment of the Labour Tribunal.This section does not contemplate on a separate procedure when the High Court considers an appeal filed by a workman or a trade union. When I consider all

the above matters, I hold that no party can impose conditions on the High Court when it exercises its appellate jurisdiction and the said power given to the High Court cannot be curtailed by the parties to the case.

When I consider the above legal literature, I hold that when the High Court in the exercise of its appellate jurisdiction considers an appeal filed against an order or judgment of Labour Tribunal, it has the power to affirm, reverse, correct or modify an order or the judgment of Labour Tribunal. I further hold that the High Court in the exercise of its appellate powers has the right to reduce compensation awarded by the Labour Tribunal when it considers an appeal filed by a workman or trade union although there is no appeal by his employer and that the High Court also has the power to enhance the compensation awarded by the Labour Tribunal when it considers an appeal filed by the employer although there is no appeal by the workman or the trade union.

The 1st and 2nd questions of law are reproduced below.

1. Has the learned High Court Judge erred in law in reducing the quantum of compensation awarded by the learned President of the Labour Tribunal in circumstances where the Respondent had not preferred any Appeal?
2. Has the learned High Court judge erred in law in purporting to grant relief that has not been prayed for in the pleadings?

In view of the conclusion reached above, I answer the above questions of law in the negative.

I reproduce below the question of law raised by the Respondent-Respondent.

“When the Appellant invokes the jurisdiction of the High Court under Section 31D of the Industrial Disputes Act from an order of the Labour Tribunal under the

provisions of the Industrial Disputes Act as amended by Act No 32 of 1990, whether the power of the High Court is restricted to the relief sought by the Appellant or whether it (the order of the Labour Tribunal) can be affirmed, varied or reversed."

Considering the aforementioned matters, I answer the above question of law as follows. When the Appellant invokes the jurisdiction of the High Court under Section 31D of the Industrial Disputes Act from an orderof the Labour Tribunal, the power of the High Court is not restricted to the relief sought by the Appellant and the High Court has the power to affirm, very and reserve the order of the Labour Tribunal.

For the above reasons, I affirm the judgment of the High Court and dismiss the appeal of the Applicant-Appellant. However having considered the facts of this case, I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court.

UpalyAbeyratne 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

S.C. Appeal No. 89/2013
SC HC CA LA Application No. 551/2012
SP/HCCA/GA/066/2004 (F)
DC Galle Case No. L/13147

In the matter of an Appeal to the Honourable Supreme Court of the Democratic Socialist Republic of Sri Lanka.

Neil Jayasundera
No. 283, Morris Road,
Maitipe, Galle

PLAINTIFF

Vs.

Agostinu Saranapala
No. 16A, Aluthgedarawatta
3rd Lane, Maitipe, Galle.

DEFENDANT

AND

Neil Jayasundera
No. 283, Morris Road,
Maitipe, Galle

PLAINTIFF-APPELLANT

Vs.

Agostinu Saranapala
No. 16A, Aluthgedarawatta
3rd Lane, Maitipe, Galle.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Agostinu Saranapala
No. 16A, Aluthgedarawatta
3rd Lane, Maitipe, Galle.

DEFENDANT-RESPONDENT-PETITIONER

Vs.

Neil Jayasundera
No. 283, Morris Road,
Maitipe, Galle

PLAINTIFF-APPELLANT-RESPONDENT

BEFORE: Priyasath Dep P.C., C.J.
Anil Gooneratne J. &
Vijith K. Malalgoda P.C., J.

COUNSEL: Ms. V. Arulananthan with Ms. J. Arulananthan
for the Defendant-Respondent-Petitioner

Harsha Soza P.C. with Srihan Samaranayake
For the Plaintiff-Appellant-Respondent

ARGUED ON: 11.09.2017

WRITTEN SUBMISSIONS OF THE APPELLANT FILED ON:
13.08.2013

WRITTEN SUBMISSIONS OF THE RESPONDENT FILED ON:
08.10.2013

DECIDED ON: 16.10.2017

GOONERATNE J.

Action was filed in the District Court of Galle by Plaintiff-Appellant-Respondent against the Defendant-Respondent-Appellant (hereinafter called the Defendant) praying for the following relief:

(a) A declaration that the land morefully described in paragraph 2 of the plaint and the building standing thereon belongs to the Respondent.
(b) The ejectment of the Appellant from the said land and the building standing thereon and for peaceful vacant possession thereof to be given to the Respondent; and
(c) Damages in a sum of Rs.10,000,00 together with Rs.750,00 per mensum from 01.10.1995 until restoration of the Respondent to vacant and peaceful possession of the premises in suit.

Plaintiff inherited the premises in dispute. In or about 1946 father of the Appellant was permitted to live in order to look after the plantation, on the basis that he would handover vacant possession and building when requested to do so. On the demise of Appellant's father the Defendant continued to live and occupy the land with his wife and children. It was, as stated by Plaintiff with the leave and license of Plaintiff's father. On 05.07.1995 Appellant built an extension to the house already built. Plaintiff lodged a complaint with the Galle police. Appellant failed to hand over possession. On or about 22.08.1995 Plaintiff sent

a quit notice, through his Attorney-at-Law. The Appellant ignored the notice and continued to occupy.

The Plaintiff has good/sound title to the property in dispute. Land in question is identified as lot 2 in plan 421A of Surveyor Gunasekera in D.C Galle 23536 in extent of 1 Rood 5.8 perches, a divided portion of a land called Mulane Ketakalagahawatta". Plaintiff traces his title to a partition decree in D.C. Galle 23536. Defendant was in occupation of a portion of land described above. Defendant was a caretaker. Attention of this court has been drawn to the following points by the learned President's Counsel.

(a) Identity of corpus
(b) Plaintiff's title
(c) Defendant's wrongful occupation
(d) Damages caused to Plaintiff

This court takes the view that, Plaintiff having established above (a) to (d), has satisfied court that the Plaintiff is entitled to a declaration of title and ejectment of the Defendant and all those holding under the Defendant.

Defendant could be described as in permissive occupation, which later turned out to be unlawful occupation. In fact in evidence Defendant has admitted title of Plaintiff. Defendant has not placed material to show any adverse possession which is a requirement under Section 3 of the Prescription Ordinance.

I don't see a basis to interfere with the High Court Judgment. Corpus has been identified very clearly. Vide Jayasuriya Vs. Ubaid 61 NLR 352 at 353. Lathiff and Another Vs. Mansoor. 2001(BLR) 189 at 197. Plaintiff has established paper title. Vide Loku Menike and another Vs. Gunasekera 1997 (2) SLR 281; Leisa and another V. Simon 2002 (1) SLR 148 at 151 – 153. It was also established the termination as an revocation of Defendant's leave and licence. Vide Ahriff Vs. Rasik 1985 (1) SLR 162 at 166.

In all the above circumstances, I affirm the Judgment of the High Court and dismiss this appeal without costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C

I agree

CHIEF JUSTICE

Vijith K. Malalgoda P.C.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal with Leave to Appeal granted from the order of the High Court of the Civil Appeal of the Southern Province (Holden in Galle) dated 14.09.2011, under and in terms of Section 5C of the High Court of the Provinces (special Provisions) (Amendment) Act No.54 of 2006.

S.C.APPEAL NO:-92/2012

CASE NO:-SP/HCCA/GA/LA 04/2011

D.C.GALLE CASE NO:-13211/P

1.Sumathipala Vidana Pathirana,
No.202A, Richmond Hill Road,
Galle. (deceased)

2.Charles Vidana Pathirana,
No.30/38, Longdon Place,
Colombo 7.(deceased)

3.Anulawathi Vidana Pathirana,
No.59, Lighthouse Street, Galle.

4.Dayawathi Vidana Pathirana,
Punchi Duuwa, Uluvitike,Galle.

1A.Sumudu Lakmal Abeywardena,
Vidana Pathirana,
No.202A, Richmond Hill Road,
Galle.

2A.Gamini Charles Vidana Pathrana,
No.30/38, Longdon Place,
Colombo 7.

PLAINTIFFS

V.

1.Thawalama Gamage Anura,
Thalangalla, Opatha.

2.Wickremanayake Karunarathna
Wasantha.Thalangalla, Opatha.

3.Samarage Sunil, Thalangalla, Opatha.

4.Punchhewamulle Mudiyanselage
Indrawathi, Thalangalla, Opatha.

5.Nilanka Sampath, Thalangalla, Opatha

6.Jayanthi Chandralatha, Thalangalla,

Opatha.

7.Saumyadasa Koralage,
Thalangalla,Opatha.

8.Padma Shanthini Weerasinghe,
No.3/33, Udayapura, Robert
Gunawardena Mawatha, Battrmulla.

DEFENDANTS

AND BETWEEN

Punchihewamulle Mdiyanselage
Indrawathi,

4th DEFENDANT-PETITIONER

v.

1.Sumathipala Vidana Parhirana,
No. 202A, Richmond Hill Road,
Galle. (deceased)

2.Charles Vidana pathirana ,
No.30/38, Longdon Place, Colombo 7
(deceased)

3.Anulawathi Vidana Pathirana,
No.59, Lighthouse Street,Galle.

4.Dayawathi Vidana Pathirana,
Punchi Duuwa, Uluvitike,Galle.

1A.Sumudu Lakmal Abeywardena,
Vidana Pathirana, No.202A,
Richmond Hill Road,Galle.

2A.Gamini Charles Vidana Pathirana,
No.30/38, Longdon Place, Colomb0 2

PLAINTIFF-RESPONDENTS

AND

1.Thawalama Gamage Anura,
Thalangalla, Opatha.

2.Wickremanayake Karunaratna
Wasantha. Thalangalla Opatha.

3.Samarage Sunil, Thalangalla, Opatha.

5.Nilanka Sampath, Thalangalla,Opatha

6.Jayanthi Chandralatha, Thalangalla,
Opatha.

7.Saumyadasa Koralage, Thlangalla,
Opatha.

8.Padma Shanthini Weerasinghe,
No.3/33, Udayapura, Robert

Gunawardena Mawatha,Battaramulla

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

Punchihewamulle mudiyanselage

Indrawathi, Thalangalla Opatha.

4Th DEFENDANT-PETITIONER-PETITIONER

V.

1.Sumathipala Vidana Pathirana,

No.202A, Richmond Hill Road,

Galle.

1A.Sumudu Lakmal Abeywarden Vidana Pathirana, No. 202A, Richmond Hill Road, Galle.

2.Charles Vidana Pathirana,

No.30/38, Longdon Place, Colombo 2.

(deceased)

2A.Gamini Charles Vidana Pathirana,

No.30/38, Longdon Place, Colombo 2.

3.Anulawathi Vidana Pathirana,
No.59, Lighthouse Street, Galle.

4.Dayawathi Vidana Pathirana,
Punchi Duuwa, Uluvitike, Galle.

PLAINTIFF-RESPONDENT-RESPONDENTS

1.Thawalama Gamage Anura,
Thalangalla, Opatha.

2.Wickremanayake Karunarathna
Wasantha, Thalangalla, Opatha.

3.Samarage Sunil, Thalangalla, Opatha.

5.Nilanka Sampath, Thalangalla, Opatha

6.Jayanthi Chandralatha,Thalangalla,
Opatha.

7.Saumyadasa Koralage, Thalangalla,
Opatha.

8.Padma Shanthini Weerasinghe,
No.3/33, Udayapura, Robert
Gunawardena Mawatha, Battaramulla

DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE:-SISIRA J.DE ABREW, J.

H.N.J.PERERA, J. &

PRASANNA JAYAWARDENA, PCJ.

COUNSEL:-Nilshantha Sirimanne for the 4th Defendant-Petitioner-Appellant.

Shihan Ananda for the 1A Substituted Plaintiff-Respondent-Respondent

ARGUED ON:-14.10.2016

DECIDED ON:-09.12.2016

H.N.J.PERERA, J.

The Plaintiff-Respondent-Respondents above named (hereinafter referred to as "the Plaintiffs") instituted Partition action to partition a land called Atahawlevila Deniya more fully described in the schedule to the plaint. The land described in the schedule to the plaint is lots A to S depicted in Plan No. 348 dated 20.04.1997 made by surveyor Y.R.D.Samarwickrema. After trial the judgment and the Interlocutory Decree was entered by the learned District Judge on 05.12.2000. Accordingly a commission was issued to the Licensed Surveyor Y.R.D.Samarawickrema, the Court Commissioner, to prepare a Final Partition Plan.

The said commission was thereafter returned to Court together with the Survey Plan bearing No. 584 dated 01.02.2002 and report. Subsequently the 4th Defendant-Appellant-Appellant (hereinafter referred to as the 4th Defendant) filed objections against the scheme of partition proposed by

the Commissioner and sought a commission in the alternative to prepare a scheme of partition.

The main contention of the 4th Defendant was that the scheme of partition proposed by the Commissioner Samarawickrema did not contain the improvements which were effected by the said Defendant. Accordingly, a commission was issued to Mr.Weerasuriya Licensed Surveyor, to prepare an alternative scheme of partition and the Plan Y was prepared. Subsequently, at the inquiry held thereto, both Mr. Samarawickrema and Mr. Weerasuriya gave evidence. Thereafter the scheme of partition proposed by the Commissioner Mr. Samarawickrema plan marked "Z" was affirmed and the Final Decree was entered by the Learned District Judge.

Being aggrieved by the said order made by the District Court on 28.01.2011 the 4th Defendant preferred an application to leave to appeal to the High Court of Civil Appeal in Galle seeking to have, inter alia, the said order set aside and to have the said alternative scheme of partition confirmed but however, the said application was dismissed by order dated 14.09.2011.

Being aggrieved by the said judgment of the High Court of Civil Appeal, the 4th Defendant filed an application for leave to appeal to the Supreme Court and the Court granted leave on the following questions of law stated in paragraph 26 (F) and (G) of the Petition dated 24.10.2011.

26(F) Did the High Court (and the District Court) err by totally failing to consider and/or appreciate that, in any event, the Petitioner had not, at any time or in any manner, given up her preferential rights in respect of the plantations consisting of coconut trees and tea Plants on Lot No.13 and / or that the Interlocutory decree evidently

had no effect or application whatsoever to the Petitioner's said preferential rights?

26(G) In the circumstances of this case, did the High Court (and the District Court) err by failing to appreciate that the said alternative Plan bearing No.2054 (prepared by Mr. Ajith Ranjan Weerasuriya, dated 18.06.2006 and marked as "Y") and the scheme of partition pertaining thereto was a fairer and a more reasonable scheme than the said previous scheme of partition and Survey plan bearing No. 584 (marked as "Z")?

The 4th Defendant claimed the plantations contained on Lots 13 and 01 of the said Plan No. 584 marked "Z" as well as dwelling house/building contained in Lot No.13 thereof. It was the position of the 4th Defendant that the majority of the 4th Defendant's plantations consisted of 1,800 tea plants and 28 coconut trees. A part of the 4th Defendant's said plantations were also located on Lot No.01 of the said Plan "Z".

The interlocutory decree in this Partition Action was entered on 25.01.2001. It was contended on behalf of the 4th Defendant that although she did not give up her preferential rights to the building/ dwelling house standing on Lot No.13 of plan "Z", it was erroneously stated in the judgment and ensuing interlocutory decree that the 4th Defendant had given up her preferential right to the said building/ welling house. It is her position that she did not challenge the said decision to the effect that she had given up her preferential fights to the said dwelling house located on Lot No.13, as she was confident that, since the majority of the plantations were also located on the said same Lot No.13, she would be allocated the said Lot of land when the Court

Commissioner surveyed the same and prepared the scheme of partition in terms of his obligations under section 31 of the Partition Law.

The finality and conclusiveness of an interlocutory decree and a final decree, subject to certain exceptions, and an appeal to a Superior Court are defined in section 48(1) of the Law.

48(1) " Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36, shall, subject to the decision of an appeal, which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share, or interest awarded therein to him, and be final and conclusive for all persons against all purposes whomsoever, whatever right, title or interest they have, or claim to have to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before Court or the fact that all persons concerned are not parties to the partition action, and the right , share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree."

The 4th Defendant has not appealed from the said judgment of the Learned District Judge. According to her own admission she was quite aware of the fact that she was not given preferential rights to the said building in the judgment. The 4th Defendant had done nothing about it. It is now too late to complain about it.

The Learned District Judge finds that the scheme of partition depicted in the plan of Court Commissioner Mr. Samarawickrema marked "Z' ensures that the land is partitioned in a more equitable manner. The Learned trial Judge has clearly considered the claim put forward by the 4th Defendant regarding the said building and has clearly come to the

conclusion that the 1st to 7th Defendants cannot claim preferential rights to the buildings depicted in the said plan "Z".

Section 33 of the Partition Law No.21 of 1977 provides as follows:-

"The surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of the soil, be allotted, so far as practicable, that portion of the land which has been so improved or built upon, as the case may be".

As the interlocutory decree does not give any preferential rights to the 1st to the 7th Defendants regarding the buildings there is no need for the court Commissioner to take special care to include the said building to the said lots given to the 4th Defendant. It is also to be noted that the proceedings of 24.10.2000 clearly indicate that the defendants have not claimed preferential rights to any buildings.

This Court cannot agree with the submissions made on behalf of the 4th Defendant that the Surveyor has completely failed to allocate to the 4th Defendant that particular allotment of land that encompasses her said plantations and /or at least a major portion thereof. Whenever possible, co-owners should be allotted the portions containing their improvements. A co-owner is not entitled as of right to be allotted the portion containing his improvements.

The Learned trial Judge had also considered the claim put forward by the 4th Defendant regarding the plantation and has given cogent reasons for his conclusions in detail. On an examination of the two schemes, it is apparent that the scheme preferred by the learned District Judge is undoubtedly the better one.

The Court Commissioner Mr. Samarawickrema has given cogent reasons for his conclusions. Mr. Weerasuriya who prepared the alternative plan

'Y', whilst giving evidence has conceded that the scheme of partition proposed by the Court Commissioner Mr. Samarawickrema was more equitable than that of his plan. The scheme of partition proposed by the Court Commissioner gives the improvements and buildings to the parties according to the interlocutory decree. Therefore the learned District Judge was absolutely correct in affirming the scheme of partition proposed by the Commissioner Mr. Samarawickrema.

In Appuhamy V. Canekeratne 46 N.L.R 461 it was held that a partition proposed by the Commissioner will not be rejected on light grounds, if in making it, the Commissioner has honestly exercised his judgment. Also see Peers V. Needham (1854) 19 Beav. 316

The surveyor is required to partition the land in such a way that each party entitled to compensation in respect of improvements effected thereto will, if such party is entitled to a share of the soil, be allotted, as far as practicable that portion of the land so improved or built upon by him. A co-owner should be allotted the portion which contains his improvements whenever it is possible to do so. Nevertheless, this is not an invariable and rigid rule, which must be followed in all cases.

In Premithiratne V. Elo Fernando 55 N.L.R 369 it was held that although in a partition decree a co-owner should, whenever possible, be given the lot which carries his improvements, this principle should not be adhered to, if in the process of giving effect to it, substantial injustice is likely to be caused to the other co-owners.

Similarly, in Liyanage V. Thegiris 56 N.L.R 546 it was held that in an action for the partition of a land owned in common the rule that a co-owner should be allotted the portion which contains his improvements is not an invariable rule, and that it will not be followed if it involves substantial injustice to the other co-owners.Thus it is very clear that a co-owner should be allotted the portion which contains his improvements "so far

as is practicable" This is not an invariable rule, and the allocation in this manner has to be followed as far as practicable.

In my opinion, the Civil Appellate High Court had quite correctly dismissed the said application for leave to appeal made by the 4th Defendant at the stage of support itself. I see no reason to interfere with the said order made by the Civil Appellate High Court dismissing the application of the 4th Defendant on 14.09.2011. Therefore I answer the two questions of Law raised in this case in favour of the Plaintiff-Respondent. Accordingly the appeal of the 4th Defendant is dismissed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

SISIRA J.DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT

PRASANNA JAYAWARDENA, 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 application for Leave to Appeal under and in terms of section 5C of the Provincial High Courts (Special Provisions) Act No. 19 of 1990 as amended by the Act No. 54 of 2006 read with Article 127 of Constitution

SC APPEAL No. 92/2013
SCHCCALA No. 286/2011
WP/HCCA/COL /366/05(F)
DC Colombo No. 17486/P

1. Ariyasena Amarasingha

2. Mahinda Amarasingha, both of No. 82/3, Hokandara South Hokandara.

1st & 3rd Defendant-Respondent-Petitioner

Vs.

1. Wedimbuli Arachchige Wijesiri Perera

2. Nalanee Amarasinghe
Both of No. 82 Hokandara South Hokandara

Plaintiff-Appellant-Respondent

3. Sunil Amarasingh

4. Sarath Amarasinghe (deceased)

4.A Ariyasena Amarasinghe (substituted)

5. Ratnasiri Amarasingha
All of No. 82/3, Hokandara South
Hokandara.

6. Weragalage Don Weerasiri
Dayananda, No. 78, Hokandara
South, Hokandara

7. Makuburage Wimalasena
Hokandara South, Hokandara

8. Egodahage Piyadasa Alwis
Samarakoon, No.75/1, Hokandara
South, Hokandara

Defendants-Respondents-Respondents

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

In the matter of an application for Leave to Appeal under and in terms of section 5C of the Provincial High Courts (Special Provisions) Act No. 19 of 1990 as amended by the Act No. 54 of 2006 read with Article 127 of Constitution

SC APPEAL No. 93/2013
SCHCCALA No. 287/2011
WP/HCCA/COL /366/05(F)
DC Colombo No. 17486/P

1. Wedimbuli Arachchige Wijesiri Perera

2. Nalanee Amarasinghe
Both of No. 82 Hokandara South Hokandara

Plaintiff-Appellant-Respondent

Vs.

1. Ariyasena Amarasingha

2. Sunil Amarasingh

3. Mahinda Amarasingha,

4. Sarath Amarasinghe (deceased)

4.A Ariyasena Amarasinghe (substituted)

5. Ratnasiri Amarasingha
All of No. 82/3, Hokandara South Hokandara.

6. Weragalage Don Weerasiri
Dayananda, No. 78, Hokandara
South, Hokandara

7. Makuburage Wimalasena
Hokandara South, Hokandara

8. Egodahage Piyadasa Alwis
Samarakoon, No.75/1, Hokandara
South, Hokandara

Defendants-Respondents-Respondents

Before : Priyasath Dep, PC J
Sisira J. De Abrew, J
Upaly Abeyrathne, J

Counsel : Ikram Mohamed, PC Lal Matarage and Lakshman Amarasinghe for the 1st and 3rd Defendant-Respondent-Appellants in SC Appeal 92/2013

U. de Z. Gunawardene with N. Malkumara for 1st and 2nd Plaintiffs-Appellants-Appellants in SC Appeal 93/2013.

Collin A. Amarasinghe for 6th Defendant-Respondent-Respondent instructed by Thilak Kahandawa Arachchi.

Argued on : 30.09.2015

Decided on : 09.02.2017

Priyasath Dep, PC. J

The Plaintiff Appellants-Appellants herein after referred to as "Plaintiff " instituted action in the District Court of Colombo in Case No. 17486/P to partition a land called Dewatagahawatta Kotasa also known as Dewatagahalanda kotasa described in the schedule to the Plaint between the Plaintiffs and 1st to 5th Defendant-Respondents-Respondents. The extent of the land is two acres one rood and twenty perches. (A2-R1-P20) The 6th Defendant was cited as a party as he is unlawfully claiming the land without any rights whatsoever.

The Plaintiffs in their pedigree referred to several deeds to establish their title. According to the Plaintiffs, one Thantrige Peter Perera by deed No. 8613 dated 17.08.1927attested by Don Cornelis Gunesekera, Notary Public transferred the land described in the schedule to the plaint to Sembakutti Aratchige Luwisa Perera. The said Luwisa Perera by deed No. 2457 dated 02.08.1951 attested by Wijaya Wickrema Senanayake, Notary Public donated the land referred to in the schedule to the plaint to her daughter Dona Karunawathi Hamine and to her husband Amarasinghege Piyadasa Perera. Upon the death of Karunawathi Hamine, her husband became entitled to half of her share. Thus Amerasinghege Piyadasa Perera became entitled to ¾ of the entire land. The remaining half share of her land that is ¼ of the entire land devolved on her six children that is the 2nd Plaintiff and the 1st-5th Defendants. Each became entitled to 1/24th share of the entire land. Amerasinhege Piyadasa Perera donated his share (3/4) to his son in law Wedimbule Arathige Wijesiri Perea who is the 1st Plaintif. The 2nd Plaintiff is the wife of the 1st Plaintiff and daughter of Amerasinghege Piyadasa Perera and a sister of the 1st-5th Defendant. 1st-5th Defendant accepted the pedigree and the devolution of title and there is no contest between the Plaintiffs and 1st- 5th Defendants.

The 6th Defendant in his amended statement of claim stated as to how he came to own and possess a land to the extend of 5 acres and 10 perches. By deed No. 7794 dated 09-10-1926 attested by H.D.C.Gunesekera, Notary Public, his grandfather Don Agilis gifted four lands referred to as Dawatagahahenelanda and Dawatagahawatte which consist of 7 acres and 28 perches which included the land proposed to be partitioned to his father Weragalage Don Gabriel. His father Weragalage Don Gabriel by deed no.1811 dated 13-05-1972 attested by W.M.P.Wijesundera, Notary Public gifted the land to his mother Dona Pemawathi, to him and to his brother Ananda Kumarasiri.(who is not a party to this action). Thereafter they got the land surveyed by A.E. Wijesuriya, licensed surveyor who made the plan No 1144 dated 17.02. 1980 (This plan was prepared 16 years before the institution of this action.)

Thereafter the parties amicably partitioned the land and a deed of partition No. 203 dated 04.04.1987 was executed. The said deed of partition marked 6V10 was made on the plan No. 1144 made on 17.02.1980 by A.E. Wijesuriya, licensed surveyor In the said partition deed lot A was given to Ananda Kumarasiri, the brother of the 6th Defendant

and lot B was given to the 6th Defendant and to his mother. His mother by deed No.533 dated 01.03.1995 gifted her share of the land to the 6th Defendant.

Thus 6th –Defendant became the sole owner of lot "B" in plan No. 1144 to the extent of 5 acres and 10 perches. The 6th Defendant stated that out of his land the Plaintiff Appellants claimed an undivided portion of land as the corpus of the partition action.

It is the position of the 6th Defendant that the land sought to be partitioned by the Appellant is a part or a portion of a land containing in extend five acres and ten perches.(A5- R0- P10) belonging to him known as Dewatagahawatta and also as Devatagahalanda which is morefully described in the amended statement of claim. The 6th Defendant further stated that the said land was depicted as lot B in plan No. 1144 dated 17.02.1980 prepared by D.E. Wijesuriya, licensed surveyor.

On an application made by the Plaintiff –Appellants a commission was issued to the W.A.D.G Wijeratne, to survey and prepare a preliminary plan. However when issuing the commission no plan was annexed to assist the surveyor to identify and survey the land. The surveyor prepared the Plan No. 715 dated 15.01.1997. According to the surveyor on the day he visited the land the Plaintiffs, 1st -6th Defendants other than the 4th Defendant who has died were present and the land was shown by them. The Plaintiffs produced the Surveyor General's plan No. 128908 dated 14th November and wanted him to superimpose the plan on the land surveyed. As it was not possible he did not use that plan and instead used plan no.1144 dated 17-02-1980 made by A.E.Weerasuriya. licensed surveyor which was given to him by the 6th Defendant. He made the plan No. 715 dated 15.01.1997.

The Plaintiff-Appellant dissatisfied with the plan prepared by Wijerathne, licensed surveyor applied for a fresh commission to be issued to K.G. Krishnapillai, licensed surveyor to survey and identify the corpus making use of Surveyor General's Plan No. 128908 dated 14.11.1983. K.P.G.P. Krishnapillai, licensed surveyor submitted his Plan No. 691A dated 24th January 2001 along with his report marked X.

The trial in the District Court proceeded on 24 issues raised by the parties. The main issue that has to be determined is whether plan No. 691A dated 24th January 2001 made by K.G. Krishnapillai, licensed surveyor correctly depict the corpus sought to be partitioned in this action which is described in the schedule to the Plaint.

On behalf of the Plaintiffs the K.G.Krisnapillai, licensed surveyor and the1st Plaintiff gave evidence. On behalf of the 6th defendant , the 6th Defendant, Wijerathne, licensed surveyor, an officer from Department of Rubber Development, A.P. Rodrigo, retired Principal, L. D. Cyril Grama Niladhari and brother of the 6th Defendant gave evidence. After the recording of evidence parties were permitted to file written submissions and accordingly written submissions were filed.

The District Court delivered the judgement on 10.11.2005 . The learned District Judge at the commencement of his judgment referred to main points of contest based on the issues raised by the parties as follows:-

1. What is the plan that should be considered as the preliminary plan in this case?.
2. Whether the land proposed to be partitioned has been properly identified or not?
3. Is the land proposed to be partitioned according to the preliminary plan is a part or portion of the land belonging to the 6th Defendant as alleged by him?
4. Whether the Plaintiffs and their predecessors or the 6th Defendant and his predecessors were in possession of the land proposed to be partitioned?

Thereafter learned District Judge examined and evaluated the evidence given on behalf of the Plaintiffs and on behalf of the Defendants. The learned District Judge answered 24 issues raised by the parties and gave his final conclusions with reference to the main points of contest.

1. The preliminary plan in respect of the land proposed to be partitioned is the plan No. 691A dated 24.01.2001 made by K.G.Krishnapillai, licensed surveyor.

2. The court is not satisfied that Lot No. 1 of the said plan which refer to the land proposed to be partitioned was correctly surveyed and depicted in the plan.

3. Lot No. 1 of the preliminary plan is the Lot No.'B' referred to in Plan No. 1144 dated 17.02.1980 made by A.E. Wijesuriya, licensed surveyor which was relied upon by the 6th Defendant.

4. The Plaintiff failed to establish that Lot No. 1 of the preliminary plan was possessed by the Plaintiff and his predecessors. It is the 6th Defendant and his predecessors possessed the said lot.

The learned District Judge proceeded to dismiss the action. In his judgement dated 10th November 2005 the learned District Judge concluded that he was not satisfied that K.G. Krishnapillai, licensed surveyor has properly surveyed and identified the land referred to the schedule to the Plaint and made the plan No. 691A dated 24th January2001. Further the learned District Judge held that Lot No. 1 depicted in the preliminary plan was not possessed by the Plaintiff and his predecessors and it was established that it was possessed by the 6th Defendant and his predecessors.

Being aggrieved by the judgment of the learned District Judge, the Plaintiff appealed against the judgement to the Provincial High Court of Western Province held in Colombo. After the hearing of the oral submissions the learned judges of the High Court permitted the parties to file their written submissions. The learned judges of the High Court dismissed the appeal and affirmed the judgement of the District Court.

Being aggrieved by the judgement of Civil Appellate High Court the Plaintiff-Appellant filed a leave to appeal application in the Supreme Court in SC HC(CA) LA No.287/11. Similarly1st and 3rd Defendant-Respondents also filed a leave to appeal application in SC HC (CA) LA 286/11. Both Applications were taken up together for support and the Supreme Court granted leave on the question whether or not the identity of the land proposed to be partition was established. The Case No.SC No 93/013 was allotted to the Appeal of the Plaintiff-Appellant-Appellant and SC No 92/2013 was allotted to the Appeal of the 1st and the 3rd Defendant- Respondents-Appellants. .Both Appeals were

listed for hearing together and the SC Appeal 93/2013 was argued before us. The Counsel for the 1st and 3rd Defendants-Respondents-Appellants and the 6th Defendant-Respondent-Respondent in SC Appeal 92/2013 agreed to abide by the decision in SC Appeal 93/2013.After the conclusion of the hearing the parties were permitted to file written submissions. Accordingly written submissions were filed by both parties.

Submissions on behalf of the Plaintiff- Appellant-Appellant.

It was submitted on behalf of the Appellants that the plan No. 715 prepared by W.A.D.G. Wijeratne was not in terms of the commission issued to him. The licensed surveyor Wijeratne instead of superimposing the Surveyor General's plan No. 128908 dated 14th November 1883 supplied by the Plaintiff-Appellant-Appellant which depict the corpus sought to be partitioned used a private plan No. 1144 dated 17.02.1980 made by A.E. Weerasuriya, licensed surveyor which was given to him by the 6th Defendant-Respondent-Respondent.

It was further submitted that the purpose of the application for commission is to get the corpus surveyed and identified by supper imposing of the Surveyor General's title plan No. 128908. The surveyor Wijerathne did not act in accordance the terms of the commission.

The Plaintiff-Appellants' case is that the land to which the deeds pleaded in the Plaint apply to the land depicted in Surveyor Generals title plan No. 128908 dated 14.11.1883 marked 'Y' by the Surveyor K.G.Krishnapillai who filed it along with his report marked 'X'. The Plaintiffs' case is that the preliminary plan No. 691A marked P2 depicting the corpus sought to be partitioned by the plaintiff had been prepared after superimposition of the title plan No. 128908 marked 'Y'. It is endorsed on the face of the said plan No. 691A itself that the land depicted in plan No. 691A is the same as the land depicted in title plan No. 128908.

It was submitted that the solitary question this Court has to consider is whether the land described in the schedule to the plaint is correctly identified and shown in the preliminary plan No. 691A made by K.G.Krishnapillai, licensed surveyor.

The Plaintiffs' case is that the deeds pleaded in the plaint apply to or relate to the land depicted in title plan No. 128908 marked 'Y' and that the land depicted in plan No. 128908 is the same as the land depicted in the preliminary plan No. 691A which was made after superimposition of the title plan No. 128908. It was submitted that the superimposition of an old plan is of inestimable value in the process of identification.

The learned Counsel for the Plaintiffs- Appellants submitted that for the Plaintiff to succeed in this action the plaintiff has to prove two elements;

(i) That the deeds pleaded in the plaint apply to the land depicted in title plan No. 128908 and

(ii) That the land depicted in the title plan No. 128908 and the land depicted in the preliminary plan No. 691A marked P2 is one and the same land or substantially the same.

The learned Counsel for the Plaintiffs-Appellants submitted that though Plaintiffs-Appellants are required to establish the identity of the land on balance of probability they have gone beyond that and established the identity of land beyond reasonable doubt, the standard required in a criminal case. According to the learned Counsel for the Plaintiff the identity of the corpus was established with mathematical precision.

Submissions on behalf of the 6th Defendant-Respondent-Respondent

The learned Counsel for the 6th Defendant –Respondent- Respondent submitted that though description of the land in the schedule to the plaint and what is appearing in Surveyor General's Plan No. 128908 marked Y is the same neither the title deeds of the said co-owners nor the plaint refers to the said plan by number or by name of the land given therein.

The learned Counsel for the 6th Defendant-Respondent-Respondent submitted that though the Plaintiffs –Appellants-Appellants in their plaint averred that they and their predecessors in title had the independent and uninterrupted possession of land for well over sixty years and prescribed to the land they could not establish that fact at the trial.

It was submitted that the 1st Plaintiff-Appellant in his examination in chief said that he lives about half a mile from the corpus and under cross examination admitted that the 6th Respondent lives about 3 feet from the south east undefined boundary of the alleged corpus. He further admitted under cross examination that the boundaries of the alleged corpus except for 'pita wella' cannot be identified on the ground. Wijerathne and Krishapillai, licensed surveyors testified to the fact that it was the 6th Defendant-Respondent who claimed the rubber cultivation on the corpus.

It was submitted that the 6th –Defendant Respondent became the sole owner of lot "B" in plan 1144 comprising 5 acres and 10 perches out of which the Plaintiff Appellants claimed an undivided portion of land as the corpus of the partition action.

The Surveyors who made plans 715 and 691 on commissions issued by court disclosed to courts by their reports that the land claimed to be the corpus has a cultivation of 119 and 65 rubber trees respectively, claimed only by the 6th Defendant-Respondent.

An Officer of the Department of Rubber Development who testified before Court produced documents marked 6V1 to 6V4(at page 478 to 481) and said that the original owner Gabriel and the 6th- Defendant- Respondent his son had cultivated rubber on the land in question with subsidies granted by the Department.

A.P. Rodrigo, a retired school principal and L.D. Cyril, a retired Grama Niladhari on evidence confirmed the enjoyment of the said property as a part of the larger land by Gabriel and his family including the 6th Respondent.

The learned counsel submitted that Surveyors reports marked P9 and P12 in respect of the said commissioners plans, although they state that boundaries and the lands were shown to court commissioners by the parties to the action, the plans 715 and 691A depict two different lands by their metes and bounds. The aforesaid contradictory identifications of the corpus on ground, demonstrate that the parties concerned were unable to identify the corpus to be partitioned as a land in existence and found on the ground.

The deed of partition marked 6V10 has been executed and relied upon by the 6th Defendant- Defendant for his title was made on the partition plan No. 1144 made on 17.02.1980 by A.E. Wijesuriya, licensed surveyor marked 6V9. This plan was made sixteen years prior to the institution of the action.

The two plans made by court commissions Nos. 715 and 691A by reference to the said partition plan No. 1144 identify and acknowledge that they were made out of different parts of the land partitioned and claimed by the 6th Defendant- Respondent and his brother who was his witness at the trial. In plan 715 the South Eastern boundary and in Plan No. 691A the North Eastern and South Eastern boundaries by reference to the land of the 6th Defendant -Respondent W.D. Dayananda by name and that the lands shown marked lot 1 are part and parcel of a land owned by the 6th Respondent by deeds 6V 10 and 6V 11 and depicted in the said plan 1144 as lot 'B'.

The learned Counsel submitted that the absence of permanent boundaries on the North East and South East of the portion of land claimed as the corpus by the Appellants as depicted in plan 691A and bounded by parts of the lands claimed by W.D.W. Dayananda the 6th –Defendant-Respondent leads to the necessary conclusion that the land surveyed as the corpus is a part of the land depicted in plan No.1144 owned by the 6th Defendant-Respondent.

Conclusions.

The main question that has to be decided is whether the corpus was properly identified or not. It is the burden of the parties seeking to partition the land to establish the identity of the land on balance of probability. The Appellants relied on Surveyor General's Plan No. 128908 dated 14.11.1983 and the Plan No. 691A dated 24th January 2001 made by K.P.G.P. Krishnapillai, licensed surveyor based on the Surveyor General's Plan.

The plaintiffs did not refer to the Surveyor General's Plan No. 128908 dated 14.11.1983 in the plaint or in the title deeds. It was not appended to the plaint. This plan was first produced by the first Plaintiff when Wijerathne, licensed surveyor went to the land to survey the land. It is the position of the licensed surveyor Wijerathne that this plan could not be superimposed on the land. This compelled the Plaintiffs to obtain another commission on K.G. Krishnapillai, licensed surveyor who made the plan no 691A making use of the Surveyor General's Plan No. 128908. There were no boundaries on the ground. He used a pitawella(embankment) as the northern boundary and made a plan according to the shape and extend given in the Surveyor Generals plan and demarcated

the boundaries as there were no boundaries on the ground. Surveyor Generals Plan refers to a watercourse as the norther boundary and not a pitawella (embankment)

It is clear from the evidence that the Plaintiffs could not establish the identity of the land sought to be partitioned. Therefore, the findings and the judgment of the learned District Judge is correct. The learned judges of the Provincial High Court of Civil Appeals affirmed the Judgment of the learned District Judge. There are no reasons to interfere with thee Judgments of the District Court and the High Court.

Appeals dismissed. 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 appeal

S.C. Appeal No. 92A/2008
S.C. (H.C) CALA 68/2008
NCP/HCCA/ARP/43/2007F

Pandigamage Podinona
No.44, Kandy Road,
Medawachchiya

Plaintiff

D. C. Anuradhapura
Case No.14383/L

~Vs~

M. H. M. Suweyal,
No.40, New Siyana Hotel,
Jaffna Road,
Medawachchiya

Defendant

And Between

M. H. M. Suweyal
No.40, New Siyana Hotel,
Jaffna Road,
Medawachchiya.

Defendant/Appellant

~Vs.

Pandigamage Podinona
No.44, Kandy Road,
Medawachchiya

Plaintiff/Respondent

And Now Between

M. H. M. Suweyal
No.40, New Siyana Hotel,
Jaffna Road,
Medawachchiya.
Presently at
No.22/1, Bulugahatenna,
Akurana

Defendant/Appellant/
Appellant

~Vs~

Pandigamage Podinona **(deceased)**
No.44, Kandy Road,
Medawachchiya.

Plaintiff/Respondent/
Respondent

1A. Hettiaarachchige Sriyani
1B. Hettiarachchiige Wasantha Kumara Hettiarachchi
1C. Hettiarachchige Chalton Jayaweera
1D. Hettiarachchige Nandaniemala

All of No.44, Kandy Road,
Medawachchiya.

Substituted Plaintiff/
Respondent/Respondents

BEFORE: **B.P.ALUWIHARE, P.C, J**
UPALY ABEYRATHNE, J &
ANIL GOONARATNE, J

COUNSEL: W. Dayaratne, P.C, with Ms. R. Jayawardena for the Defendant-Appellant-Appellant.
Ananda Kasturiarachchi for the substituted Plaintiff-Respondent-Respondents.

ARGUED ON: 14.02.2017.

DECIDED ON: 05.07.2017

ALUWIHARE, P.C., J,

This appeal had arisen from an order of the High Court of Civil Appeals (hereinafter referred to as HCCA) of North Central Province.

Facts germane to the issue are as follows:
The Plaintiff-Respondent-Respondent (hereinafter referred to as The Plaintiff) filed a *rei-vindicatio* action in the District Court against the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant). At the conclusion of the trial the learned District Judge by his judgment dated 10th December, 2001 held with the Plaintiff.

Aggrieved by the said judgment the Defendant preferred an appeal to the HCCA. The Defendant having deposited required fees had secured a copy of the brief. Sometime thereafter, Registrar of the HCCA, North Central Province had dispatched notices to the parties informing them that the matter was due to be called on 30th April, 2008. According to the Defendant he had shifted from his original address at 40, New Siyane Hotel, Jaffna Road, Medawachchiya to an address in Akurana. The Defendant asserts that when he received the notice he got his registered Attorney to peruse the record and he was informed that the matter had come up on 30th April, 2008, and the appeal had been dismissed on that day. Subsequently the Defendant had made an application, to have the order of dismissing the appeal, set aside and to have the appeal relisted.

The HCCA had, by its order dated 10th June, 2008, dismissed the application for relisting on the ground that the Defendant had failed to exercise due diligence in prosecuting the appeal.

The Defendant is now canvassing the legality of the order of the HCCA referred to above.

Leave was granted on 11th November, 2008 on the following question of law: (Referred to in paragraph 18 (e) of the Petition of the Defendant dated 21st June, 2008)

" Did the High Court fail to consider that no appeal can be dismissed on a calling date on the ground of default of appearance of the parties or their respective Attorney-at-Law, as the High Court has the power to dispose the appeals only on its merits"

Proceedings before the HCCA on 30th April 2008 reveal that the order of dismissal states that, `although the Defendant-Appellant had been noticed to attend court, the party is neither present nor represented. The appeal is dismissed for the said reason´.

Upon perusal of the order made by the HCCA, on the relisting application, it is evident that the court had gone into the reasons adduced by the Defendant for his non-appearance. The court having considered the reasons so adduced had held that the Defendant had failed to satisfy the court that there were sufficient reasons or grounds to have the order of dismissal vacated and to have the appeal relisted.

I do not wish, however, to consider the sufficiency or otherwise of the reasons adduced as the issue before us is simply whether a court can dismiss an appeal

on a date fixed for calling of the matter without considering the merits of the case.

At the hearing of the appeal the learned President's Counsel for the Defendant-Appellant relied on the decision in the case of *Jinadasa Vs. Sam Silva reported in 1994 1 SLR page 231.*

The learned President's Counsel for the appellant submitted that the HCCA was in error dismissing the appeal on the basis that the court could not have dismissed the application on a day the matter was only to be called and secondly falling into further error in dismissing the appeal without considering the merits.

The attention of this court was drawn to Section 769 (1) of the Civil Procedure Code which reads as follows:

769 (1) When the appeal comes on for hearing, the Appellant shall be heard in support of the Appeal. The Court shall then, if it does not at once dismiss the appeal or affirms the decree appealed from, hear the Respondent against the appeal, and in such case the Appellant shall be entitled to reply.

(2) If the appellant does not appear either in person or by an Attorney-at-Law to support his appeal, the court shall consider the appeal and make such order thereon as it thinks fit. (emphasis added)

Provided that, on sufficient cause shown, it shall be lawful for the court of Appeal to reinstate upon such terms as the court shall think fit any appeal that has been dismissed under this subsection.

The subsection (2) of Section 769 of the Civil Procedure Code castes a mandatory duty on the court to **consider the appeal** before making any order thereon, in instances where the Appellant does not appear.

It is clear, that in the instant case, the order of dismissal was wrong as the learned Judges had not complied with a mandatory provision of Section 769 of the Civil Procedure Code and learned judges of the HCCA had merely dismissed the appeal due to the absence of the Appellant, without considering the appeal.

It was the contention of the learned counsel for the Respondent that the powers of the Appellate Court are not fettered by any legal principle to dismiss an appeal on a date the matter is only fixed for it to be either mentioned or called. I do not see any conflict of this argument with the position taken up on behalf of the appellant. The learned counsel for the appellant did not challenge the powers of the court to dismiss an appeal, but complains of non-compliance with Section 769 (2) of the Civil Procedure Code as referred to earlier.

It was also contended on behalf of the Respondent that, the Petitioner had failed to act diligently and therefore the Appellant is not entitled to the relief sought.
In the instant case the appellant had lodged the appeal on time, and had paid fees for the preparation of the briefs and the appellant had collected the briefs. These steps taken by the appellant amply demonstrate that the appellant had been diligent in prosecuting the appeal and the only blemish had been the non-appearance on 30th April, 2008, the date for notice returnable, which the appellant had explained when the matter was supported for relisting.

I wish, however, to refer to the view formed by their Lordships in deciding the case of Jinadasa Vs. Sam Silva et el 1994 (1) SLR 232.
Their Lordships held that the court cannot prevent miscarriage of justice except within the framework of the law: it cannot order reinstatement on compassionate

grounds. Inasmuch as it is a serious thing to deny a party to his right of hearing, a court may, in evaluating the established facts, be more inclined to generosity rather than being severe, rigorous and unsparing.

The judges, as much as, are required to dispose cases, must also be alive to the fact that litigants come before them to vindicate their rights.

As such, if this court is called upon to dismiss the appeal without going into merits, such an order must be made only upon considering all facts relevant to the issue of the maintainability of the appeal. This was a supplication for relief or redress which the Petitioner had made, as a matter of right, in terms of section 754 of the Civil Procedure Code, read with Article 138 of the Constitution, seeking to have errors in fact or law corrected, which the petitioner alleges that were committed by the District Court.

As such the HCCA was obliged in terms of Section 769 (2) of the Civil Procedure Code to consider the matter before dismissing the appeal.

As referred to earlier, it was strenuously argued on behalf of the Respondent that "there is no legal principle to state that an appellate court has no power to dismiss an Appeal, on the very first day". No doubt the court has wide powers of disposal; such powers, however, must be exercised without transgression of the law and legal principles.

Chief Justice Beaumont in the case of *Shamdasani and others v Central Bank of India AIR1938 Bombay* stated, as to the exercise of the discretion by the court:

> *" The court ought to have considered that, it is after all, a very serious matter to dismiss a man's suit or summons, or whatever it*

may be, without hearing it, and that course ought not to be adopted unless the court is really satisfied that justice so requires".

Having considered the facts and circumstances relevant to this case, I hold that the High Court of Civil Appeals was in error when it dismissed the appeal of the Defendant-Appellant without fully complying with Section 769 of the Civil Procedure Code and I answer the question of law on which leave was granted in the affirmative.

Accordingly, the order made by the High Court of Civil Appeals on the 10th June 2008, dismissing the Appeal is hereby set aside. The learned judges of the High Court of Civil Appeals are directed to relist this matter and dispose the same in compliance with Section 759 of the Civil Procedure Act.

JUDGE OF THE SUPREME COURT

Justice Upaly Abyrathne

I agree

JUDGE OF THE SUPREME COURT

Justice Anil Gooneratne

I agree

JUDGE OF THE SUPREME COURT

IN THE SUPEME COURT OF

THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Nihal Ranjith Weerawarna
No.91,
Wijaya Road,
Madaketiya,
Tangalla
Defendant-Appellant-Appellant

S.C.Appeal No.94/2013
C.A. No.263/97(F)
D.C. Tangalla Case No. 2468/L

Vs.

Herbert Walter Techope
No.91,
Wijaya Road,
Madaketiya,
Tangalla

Plaintiff-Respondent-Respondent

BEFORE : **S. E. WANASUNDERA, PC J.**
K.T.CHITRASIRI, J.
PRASANNA S. JAYAWARDENA, PC J.

COUNSEL : J.P.Gamage for the Appellant-Appellant-Appellant
Razik Zarook PC with Rohana Deshapriya for the Respondent-Respondent-Respondent

ARGUED ON : 30.11.2016

WRITTEN SUBMISSIONS ON : 14.12.2016 by the Appellant-Appellant-Appellant
28.01.2014 by the Respondent-Respondent-Respondent

DECIDEDON : 05.04.2017

CHITRASIRI, J.

Plaintiff-respondent-respondent (hereinafter referred to as the respondent) filed this action relying upon the lease agreement bearing No.386 attested by Siri A. Andrahannadi, Notary Public. Parties to the said lease agreement were the respondent and the defendant-appellant-appellant (hereinafter referred to as the appellant). Upon a perusal of the averments and the manner in which those averments are pleaded in the plaint, show that the respondent, he being a foreign national had been keen to have a house in Sri Lanka for him to live whenever he comes to this country. The way in which moneys were spent by the respondent for this purpose also is explained in detail in the plaint. Those matters are found not only in the averments in the plaint but in the evidence as well. The evidence also shows the manner in which the respondent came into occupation of the premises having spent a substantial amount of money.

The appellant in his answer has stated that he had no intention to have the said premises leased out to the respondent. He also has stated that the respondent did not pay him the full consideration referred to in the lease agreement marked P1. In the answer, the appellant has also pleaded that the aforesaid lease agreement P1 has no validity before the law. He has also taken up the position that the cause of action pleaded by the respondent has prescribed.

Relying upon the pleadings referred to above the parties framed their issues before the learned District Judge. Thereafter, the case proceeded to trial and the learned District Judge decided the case in favour of the respondent. Being aggrieved by the aforesaid findings of the learned District Judge, appellant filed an appeal in the Court of Appeal. Court of Appeal dismissed the appeal of the appellant. Thereafter, the appellant came to this Court seeking to have both the judgments of the District Court as well as the Court of Appeal set aside.

When this matter came up before this Court on the 15th July 2013, it granted leave, on the question of law set out in paragraph 9(b) of the petition of appeal. The said question of law reads as follows:-

"*Did the Court of Appeal err in law in deciding that the cause of action had not been prescribed?"*

Therefore, the only issue that is to be determined in this appeal is to ascertain whether or not the cause of action of the respondent is prescribed. According to the learned Counsel for the appellant, the aforesaid question of law is based on Section (4) of the Prescription Ordinance. It reads as follows:-

"It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of Law, to institute proceeding against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action brought, the Respondent in such action shall be entitled to a decree against the appellant for the restoration of such possession without proof of title."

The aforesaid provision of the law applies when a person is dispossessed from any immovable property. Next question then to be answered is whether that person who was dispossessed, came to court for relief within one year from the date of dispossession. Contention of the appellant is that the respondent has failed to file action within a period of one year from the date that he was dispossessed as required by Section 4 of the Prescription Ordinance.

In support of that, the appellant has relied on paragraph (16) of the plaint in which the respondent has averred that the appellant did not allow him to enter the premises on 19th January 1992. The appellant has also stated that the evidence of the respondent was that he was prevented entering the premises in dispute when he returned from Nurwara Eliya on the 19th January 1992. (vide at page 116 in the brief) Accordingly, the appellant has argued that the respondent when seeking relief under Section 4 of the Prescription

Ordinance, he should have filed the action on or before the 19th January 1993. Admittedly, the date of filing of this action is 28.06.1993. Hence, on the face of it, it is clear that the date of filing the plaint in this case is beyond the period of one year when counted from the date of dispossession namely 19.01.1992.

However, it is important to note that the appellant has failed to refer to the aforesaid Section 4 of the Prescription Ordinance upon which the argument was advanced in this Court, when his Counsel made submissions at the conclusion of the trial in the District Court. His submission to the learned trial Judge was on the basis of Section 6 of the said Ordinance and not on Section 4 therein. It was the position taken up by the appellant, right throughout the trial. The law referred to in Section 4 of the Prescription Ordinance was never brought to the notice of the trial judge. Indeed, the appellant's reliance on Section 6 of the Prescription Ordinance had been based on the lease agreement put in suit by the respondent. Accordingly, the appellant himself has taken up the position that it is the date of execution of the lease agreement that should be taken into consideration when determining the issue of prescription. [vide at page 273 in the appeal brief] Therefore, it is clear that the position taken up by the appellant as to the applicability of Section (4) of the Prescription Ordinance has never been an issue in the trial Court. In the circumstances, this Court cannot find fault with the decision of the learned District Judge on the question of prescription.

Be that as it may, I shall now consider whether the appellant has established whether the issue before this Court falls within the ambit of Section (4) of the Prescription Ordinance. As mentioned hereinbefore, the plaint of the respondent is basically on the strength of the lease agreement marked P1. In fact, it is the position taken up by the appellant too in the trial court. Such a position is evident by looking at all the issues framed by the appellant. Accordingly, it is seen that the respondent has presented his case to meet such a defence and not on the basis of Section 4 of the Prescription Ordinance. Therefore, merely because the reliefs sought in the plaint are to restore him in possession, it cannot change the character and the scope of the plaint particularly when arguing an appeal.

In this instance, it is also necessary to look at the background that prevailed when executing the lease agreement between the respondent and the appellant. Respondent being a foreign national has spent a huge sum of money to have his home in Sri Lanka. In order to achieve his desire, he has sought the help of the appellant. It may be due to the impediments in the law that was prevalent in Sri Lanka at the time the lease agreement P1 was executed, as far as the foreign nationals are concerned. Learned District Judge having considered the evidence carefully has held that the respondent is entitled to regain possession of the premises in dispute having interpreted the terms and conditions of the lease agreement marked P1.

In this connection, I would like to quote one passage from the judgment of the learned Judge in the Court of Appeal to see how he has looked at the issue. In that judgment, Anil Gooneratne J. has stated thus:

> *"if one considers document P-1 and the evidence suggested by Appellant-Appellant to invalidate the lease document, I find that the Appellant had not been able to substantiate any of those matters. P-1 and its conditions in no way prejudice or result in a failure of justice to either party. If at all the wrongdoer is the Appellant who prevented access to the Respondent Respondent, to the premises in question."*

Learned Counsel for the appellant has referred to two cases namely, **Fernando vs. Fernando 13 NLR 164** and **Silva vs. Appuhamy 15 NLR 297** in support of his contention. In the case of Fernando vs. Fernando the lease agreement relied upon by the plaintiff were defective and also contained infirmities. That was the reason assigned by Court when disregarding the lease agreement. However, the court in that case found that there were material to consider it as a possessory action in order to grant relief to the person who was dispossessed. In the case of Silva vs. Appuhamy (Supra) the lessee has subsequently become a co-owner having purchased part of the land in dispute in that case. Therefore, the two decisions relied upon by the learned Counsel for the appellant cannot be applied to this case since the facts involved in those cases are different to the facts in the case in hand.

As I have mentioned earlier, the manner in which the averments in the plaint been set out show that the respondent is basically relying upon the terms and conditions of the lease agreement marked P1. Therefore, I am unable to agree with the contention of the learned Counsel for the appellant that the plaint of the respondent should be considered as a possessory action that comes under Section 4 of the Prescription Ordinance.

In these circumstances, it is clear that the facts and circumstances of this case and the manner in which the case was conducted and proceeded in the trial court do not fall within the ambit of Section (4) of the Prescription Ordinance. Accordingly, it is my opinion that the law referred to in that Section 4 shall not apply to the case in hand. Therefore, the question of law raised in this appeal is decided in favour of the plaintiff-respondent-respondent. For the reasons set out above, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

I agree

S. EVA WANASUNDERA, PC J.

I agree

PRASANNA S. JAYAWARDENA, PC J.

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

S.C. Appeal No. 97/2013

S.C (HCCA) LA Application No. 410/2012

WP/HCCA/I.N/MT/101/08 (F)

D.C. Mt. Lavinia 607/00/RE

In the matter of an Application for Leave to Appeal in terms of the Article 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) Act No. 19 of 1990 as amended by the Act No. 54 of 2006

Samarakoon Mudiyanselage Saheli Sajeera Samarakoon
No. 80, Library Mawatha,
Maharagama

PLAINTIFF

Vs.

Karunadasa Abeywickrema
No. 72, "Samram Groceries"
High Level Road,
Maharagama

DEFENDANT

AND BETWEEN

Karunadasa Abeywickrema
No. 72, “Samram Groceries”
High Level Road,
Maharagama

DEFENDANT-APPELLANT

Vs.

Samarakoon Mudiyanselage Saheli Sajeera Samarakoon
No. 80, Library Mawatha,
Maharagama

PLAINTIFF-RESPONDENT

AND NOW

Karunadasa Abeywickrema
No. 72, “Samram Groceries”
High Level Road,
Maharagama

DEFENDANT-APPELLANT-PETITIONER-APPELLANT

Vs.

Samarakoon Mudiyanselage Saheli Sajeera Samarakoon
No. 80, Library Mawatha,
Maharagama

PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT

BEFORE: B.P. Aluwihare P.C. J.,
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: Gamini Hettiarachchi for the
Defendant-Appellant-Petitioner-Appellant

Ranjan Suwandaratne P.C. for the
Plaintiff-Respondent-Respondent-Respondent

ARGUED ON: 19.06.2017

DECIDED ON: 03.08.2017

GOONERATNE J.

This was an action filed in the District Court of Mt. Lavinia bearing No. 607/00/RE to eject the Defendant-Petitioner-Appellant and all those holding under him from the property described in the schedule to the plaint and recover arrears of rent in a sum of Rs. 83,000/- and continuing damages at Rs. 10,000/- per month from 01.12.1999 until Plaintiff is placed in possession. The premises in dispute was a business premises. It was pleaded in the plaint that the monthly rental was Rs. 1000/- per mensum and the premises in question was 'excepted premises'. It was also pleaded that the rental was in arrears since June 1993 and Defendant had put up an unauthorised structure in or about 1994. Notice to quit

was sent on 18.10.1999 to terminate tenancy and hand over vacant possession on or before 01.02.1999 with damages fixed at Rs. 10,000/- as aforesaid.

Defendant party takes up the position that the premises in dispute is subject to the provisions of the Rent Act No. 7 of 1972 and that the Defendant is a statutorily protected tenant. Defendant denies of any arrears of rental or that he constructed an unauthorised constructions. He also takes up the position that the termination of tenancy is contrary to Act No. 7 of 1972 and tenancy has not been properly terminated. It is also pleaded that since Plaintiff refused to accept rent, he deposited rent at the Maharagama Pradeshiya Sabha. Parties proceeded to trial on 22 issues and 6 admissions. It was admitted that the rent was Rs. 1000/- per month and the premises in question was a business premises, situated with the Town Council area which is at present within the Maharagama Pradeshiya Sabhawa. It was submitted that the Defendant was the Plaintiff's tenant and M.C. Gangodawila Case No. 5246 was filed.

The material submitted to this court indicates that the Plaintiff succeeded in the District Court and in the High Court. The issues raised in the lower court suggest that the crucial issues were whether the premises in disputes were excepted premises, or that the premises in question was subject to the provisions of the Rent Act No. 7 of 1972. The other matter of some

importance is whether tenancy was properly terminated, and Defendant failure to hand over vacant possession by 20.11.1999.

Supreme Court granted Leave on the following questions of law.

1. Whether their Lordships Judges have erred in law by not considering the fact that according to certified copy of the annual assessment in respect of the said premises in 1988 the annual value of the said premises is less than the relevant amount according to the provisions of the Rent Act?

2. Whether their Lordships Judges have erred in law by misinterpreting the sections 2(4), 2(5) and the schedule of the Rent Act?

3. Have the Hon. Judges when arriving at the final conclusion considered the question of arrears of rent.

4. Whether there was a cause of action based on arrears of rent?
   If not, whether the Judgments of both District Court and High Court erroneous.

In the case in hand the most important question to be decided is whether the premises in dispute is an 'excepted premises' as per the Rent Act. As such before I proceed to analyse the evidence and Judgments of the lower court, I prefer to consider the following matters on the question of excepted premises, gathered mainly from authorities and statute.

Section 2(4) of the Rent Act provides if the Rent Act is in operation in any area provisions of the Act applies to all premises other than excepted premises. Section 2(5) states that regulation in the schedule to the Act has the effect of determining that the premises shall be 'excepted' premises. The schedule to the Act gives a chart. Column (1) describes the Local Authority area. Municipality, Town Council etc. and Column II gives the annual value. If the annual value exceed the specified figure in Column (II), it is deemed to be excepted premises, and January 1968 value is also relevant. In *Plate Ltd Vs. Ceylon Theatres Ltd 75 NLR at 129 per Samarawickrema J*. It was the intention of the legislature not to exercise control over a certain category of premises. The premises of that kind were deliberately regarded by the legislature as falling outside the scope of the objects of policy which necessitated the protection of tenants in certain circumstances. The annual value in excess of the amount set out in the schedule is assessed by the Local Authority.

In *Podisinghe Vs. Perera 75 NLR 333. Wimalaratne J*. held. Annual value for the time being simply means, in my view, the annual value at the time of institution of the action, irrespective of the fact that any objection has been taken to it.

The burden of proof is placed very fairly and squarely on the party who asserts that the premises in question are "excepted premises". In

Muttucumaru Vs. Corea.n59 NLR 525 Plaintiff sued the Defendant alleging that the premises were “excepted premises within the meaning of the Rent Act. Notice to quit was admitted, and the only question on which the parties went to trial related to the issue whether the premises in suit were “excepted premises” within the frame work of the Rent Act. Sinnatamby J. declared: “the burden of proof no doubt was on the Plaintiff to establish that the premises are “excepted”.

I have examined the evidence led at the trial and the two Judgments of the lower courts. Plaintiff in her evidence inter alia states as per P2 (annual value) was 4912/- in 1989 and thereafter the annual value rose to Rs.10,294/-. Quit Notice and registered postal article was produced as P6 and P6(a). It was her father who was the land-lord and on his demise her mother collected rents. The Mother’s death resulted her becoming the owner and land-lord. It was her father that gave the premises on lease to the Defendant. The building in question was in existence since 1970 and it was admitted that Plaintiff did not produce extracts of annual value from 1970 to 1980. Plaintiff’s position was that documents were destroyed in 1988 due to communal violence. Plaintiff denied that the annual value was 396/- in the year 1988. The defence in cross examination of the Plaintiff witness confronted her (witness) with the rates extracts from 1988 onwards and produced same as V1. In cross-

examination it is permissible to mark and produce documents to contradict the witness (Section 175(2) proviso) Civil Procedure Code.

This being a very relevant item of evidence I wish to incorporate the items of evidence elicited by the defence to prove document V1 and establish that the annual value in 1988 was Rs. 396 (cross-examination of Plaintiff witness).

ප්‍ර : මහත්මයාට වි. 1 දරණ ලේඛණය පෙන්වනවා.
මහත්මයාගේ පලපුරුද්ද අනුව කියන්න, මේ ලේඛණය මහරගම ප්‍රදේශිය සභාව තිබුන කාලයේ ප්‍රදේශිය සභාවෙන් නිකුත් කල ලේඛණයක්?
උ. මේක 2002 ජුනි මාසයේ නිකුත් කරන ලද ලේඛණයක්.
ප්‍ර. මේක මහරගම ප්‍රදේශිය සභාවේ මහරගම-අවිස්සාවේල්ල පාරේ වරිපනම් අංක 72 ට අදාලව නිකුත් කරපු වාර්ෂික තක්සේරු වාර්තාවක්?
උ. ඔව්. එහෙම කියන්න පුලුවන්.
ප්‍ර : මහත්මයා මහරගම නගරසභාව වෙන්න පෙර, මහරගම ප්‍රාදේශිය සභාවේ සේවය කලාද?
උ. ඔව්.
ප්‍ර : මෙම වි. 1 දරණ ලේඛණය අනුව වරිපනම් අංක 72 දරණ ස්ථානය සඳහා 1988 වර්ෂයේ වාර්ෂික වටිනාකම සඳහන් කර තිබෙනවා?
උ. ඔව්.
ප්‍ර : වි. 1 අනුව පාරේ නම වශයෙන් සඳහන් වන්නේ අවිස්සාවේල්ල පාර?
උ. ඔව්.
අයිතිකරු බී. එම්. සී. විල්සන්
කොන්ක්‍රීට් වහල සහිත ගොඩනැගිල්ල සහ ඉඩම.
එහි වාර්ෂික වටිනාකම 396 කට තක්සේරු වෙලා තිබෙනවා.

උ. ඔව්.

මෙම ලේඛණ ආර්. ඩී පත්මලතා කියන අය අත්සන් කර තිබෙන්නේ. ඇය තවම සේවය කරනවා

ඇගේ රජකාරියේ කොටසක් මේ වරිපනම් සම්බන්ධව කටයුතු කිරීම.

ඇගේ අත්සන අඳුනන්න පුලුවන්.

චාන්දනි දැන් මහරගම නගර සභාවේ නැහැ. කලින් වරිපනම් කලේ එයා. මම ඇයවත් දන්නවා. ඇගේ අත්සනත් දන්නවා.

වී. 1 ලේඛණයේ අත්සන් මා හඳුනා ගන්නවා.

එසේම වී. 1 ලේඛණය මහරගම නගර සභාවෙන් නිකුත් කරන ලද ලේඛණ බවත් පිලිගන්නවා. එසේම එම වී. 1 ලේඛණය මහරගම-අව්ස්සාවේල්ල පාරේ වරිපනම් අංක 72 දරණ ස්ථානයට නිකුත් කරන ලද ලේඛණ බවටත් පිලිගන්නවා.

ප්‍ර : 1989 වර්ෂයේ සිට මේ පරිශ්‍රය තක්සේරු කර වරිපනම් අංක 72 යි?

උ. ඔව්.

ප්‍ර : 1989 දි එහි වර්ෂික වටිනාකම රු 396/- යි?

උ. එහෙමයි

ප්‍ර : 1989 ට පෙර අංක 72 දරණ ස්ථානය ව්‍යාපාරික ස්ථානයක් වශයෙන් පැවතුම බව පිලිගන්නවාද?

උ. ඔව්.

ප්‍ර : 1988 දිත් එලෙස පැවතුණාද?

උ. ඔව්.

ප්‍ර : 1987 දි පැවතුණාද?

ප්‍ර : 1986, 1985, 1984, 1983 වර්ෂ වල ව්‍යාපාරික ස්ථානයක් වශයෙන් පැවතුන බව පිලිගන්නවාද?

උ. ඔව්.

The Appellant no doubt proved that the annual value was Rs. 396/- (V1) in the year 1988. The value of this item of evidence is more probable and legally admissible in cross-examination of Plaintiff's witness by the defence on the point suggested from document V1.

I have already discussed that the burden of proof, to prove that the premises in dispute is 'excepted' premises is on the Plaintiff-Respondent. Plaintiff party thought it fit only to produce the rates extracts as P2 from the year 1989. The first assessment of the premises in dispute according to law is not made known to court, by Plaintiff. There is evidence that the building in question was in existence even in the year 1970. I note the requirement of the Rent Act of 1972 to determine the premises as excepted premises. The schedule to the Act reads thus:

> 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 purposes of this Act if the annual value thereof as specified in the assessment made as business premises for the purposes of any rates levied by any local authority under any written law in force on the first day of 1968 or, where the assessment of the annual value thereof as business premises is made for the first time after the first day of January 1968, the annual value as specified in such assessment, exceeds the amount specified in the corresponding entry in Column 11:

1	11
Area	Annual Value Rs.
Municipality of Colombo	6,000
Municipality of Kandy, Galle or any other Municipality	4,000

Town within the meaning of the Urban Councils Ordinance	2,000
Town within the meaning of the Town Councils Ordinance	1,000

I have perused the case of *Wickremasinghe Vs. Atapattu 1986 (1) SLR 16*

> The plaintiff sued the defendant for ejectment of his tenant the defendant from premises let to him. The entire basis of the action was that the premises were business premises situated within the Town Council limits of Maharagama and excepted premises as the annual value was over Rs. 1,000. The defendant was not resident in the premises in suit but ran a private tutory in them.

Held –

> The premises were business premises as a private tutory was being run there but for the plaintiff to succeed the burden was on him to prove that the premises were excepted premises within the meaning of the Rent Act. For this the plaintiff had to prove firstly that the premises were assessed as business premises for the purpose of rates levied by the local authority and secondly that the annual value was over Rs. 1000. All business premises of which the landlord is the Commissioner of National Housing or a local authority are also excepted premises. The premises in suit though of the annual value of over Rs. 1,000 had been assessed as residential premises. Hence the plaintiff's suit fails.

This court having examined the Judgments in the lower courts, it is unfortunate that both courts did not even attempt to consider document V1 produced in cross examination of Plaintiff. Nor can I find a clue on perusal of both Judgments as to whether the lower courts considered the relevant

provisions in the Rent Act, more particularly the schedule referred to above. That is the yard stick to determine 'excepted premises'.

The premises in dispute fall within the description of "town within the meaning of the Town Councils Ordinance, the annual value being Rs. 1000/- In the year 1988 the annual value was on Rs. 396/-. In fact there is material to establish that the building in question was in existence in the year 1970. It may be that the premises in dispute was in existence even prior to 1970. If that be so the Plaintiff is bound to produce the assessment register for the year 1970 or prior to 1970. The schedule referred to above under the Rent Act refer to the period January 1968. Plaintiff has miserably failed to provide the required proof to establish that the premises in dispute is an 'excepted premises'. Plaintiff has not discharged the burden of proof on this aspect. The premises in dispute does not fall within the description of 'excepted premises' in terms of the Rent Act. As such I set aside both Judgments of the District Court and the High Court and allow this appeal as per sub paragraphs 'c', 'd', 'e' & 'f' of the prayer to the petition. The questions of law are answers as follows:

(1) & (2) - yes in favour of the Appellant

(3) Yes, but in view of the answers to (1) and (2) above this answer does not favour the Plaintiff.

(4) In view of the fact that the premises are not excepted premises it does not arise.

Appeal allowed as above.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare 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 Appeal
from a judgment of the
Civil Appellate High Court.

A.C.R. Wijesurendra.
No. 275, Wackwella Road,
Galle.
Applicant

S C APPEAL No. 99/2010
SC (HC) LA: 25/2010
HC Appeal No. HCALT 31/2007
LT Colombo No. LT/2/47/2004

Vs

Sri Lanka Insurance
Corporation Ltd.,
" Rakshana Mandiraya ",
No. 21, Vauxhall Street,
Colombo 02.
Respondent

AND BETWEEN

Sri Lanka Insurance
Corporation Ltd.,
" Rakshana Mandiraya ",
No. 21, Vauxhall Street,
Colombo 02.
Respondent Appellant

Vs

A.C.R. Wijesurendra.
No. 275, Wackwella Road,
Galle.
Applicant Respondent

AND NOW BETWEEN

Sri Lanka Insurance
Corporation Ltd.,
" Rakshana Mandiraya ",
No. 21, Vauxhall Street,
Colombo 02.

Respondent Appellant
Appellant

Vs

A.C.R. Wijesurendra.
No. 275, Wackwella Road,
Galle.

Applicant Respondent
Respondent

BEFORE : **S. Eva Wanasundera PCJ**
Sisira J De Abrew J &
Ani Gooneratne J.

COUNSEL : Sanjeewa Jayawardena PC with Charitha Rupasinghe for the Respondent Appellant Appellant.

Uditha Egalahewa PC with Hemantha Gardihewa for the Applicant Respondent Respondent.

ARGUED ON : 14.03.2017.

DECIDED ON : 28.06.2017.

S. EVA WANASUNDERA PCJ.

The Applicant Respondent Respondent (hereinafter referred to as the Applicant), A.C.R. Wijesurendra had joined Sri Lanka Insurance Corporation Limited as a professional Motor Assessor as he was found to be suitable to carry out inspections, assessments and investigations connected with motor insurance claims made by the customers to the Sri Lanka Insurance Corporation, the Respondent Appellant Appellant (hereinafter referred to as the Appellant). The Applicant joined the Appellant Corporation on the 1st of June, 2001. Two years later, on 18th June, 2003 the Appellant had terminated the services of the Applicant.

The Applicant sought relief from the Labour Tribunal on the basis that the termination was unjust and unreasonable. As usual, the Applicant prayed for reinstatement with back wages or in the alternative, compensation in lieu of reinstatement. The Appellant Corporation in its answer took up the position that the Applicant was an **Independent Contractor and not an Employee** of the Appellant. The Appellant prayed for a dismissal of the Application before the Labour Tribunal. The President of the Labour Tribunal made order that the Applicant was an employee of the Appellant Corporation. Furthermore it was held that the services of the Applicant had been unjustly and unreasonably terminated and that the Appellant should pay Rs. 480,000/- to the Applicant , assessed to be 24 months salary, as compensation.

The Appellant appealed from that order to the Civil Appellate High Court of the Western Province praying that the Order of the Labour Tribunal be set aside. The The Civil Appellate High Court affirmed the order of the Labour Tribunal at the end of hearing the Appeal on 22.04.2010. The Appellant Corporation was aggrieved by the Judgment of the Civil Appellate High Court and sought leave to appeal from this Court. Leave to Appeal was granted on four questions of law

raised by the Petitioner in paragraph 50 (a),(b), (d) and (e) of the Petition and one question of law was added by the Respondent. This Court has to decide on the said questions which are as follows:

a. Did the High Court fall into substantial error by misconstruing the contract entered into between the Appellant and the Respondent as a "Contract of Service" as opposed to a "Contract for Services" and thereby err in holding that the Respondent was an employee of the Appellant?
b. Did the High Court misinterpret and misapply the established tests formulated to distinguish between an "employee" and an "independent contractor" , as well as the particular circumstances of the instant case, especially in the light of the independent status of a Motor Assessor and the other multiple indicia?
d. Did the High Court fall into substantial error by failing to consider the application of the provisions contained in Sec. 131 of the Inland Revenue Act No. 38 of 2000?
e. Did the High Court and the Labour Tribunal err by failing to make an objective evaluation of the matters in issue? And

   ' Is the award of the Labour Tribunal supported by the evidence led before the Labour Tribunal?'

The Applicant Respondent Respondent (hereinafter referred to as the Applicant) , Wijesurendra filed an Application before the Labour Tribunal on 17.12.2003, praying for reinstatement with back wages or compensation in lieu of reinstatement due to the reasoning that the employer, Sri Lanka Insurance Corporation Limited terminated his services on 18.06.2003 unreasonably and unjustly. He submitted that he was employed by the employer on a salary of Rs.20000/- per month from the date of appointment on 01.06.2001, as an Assessor of damages to Motor Vehicles which are subject to motor vehicle accidents at the time the said vehicles are under a valid Insurance Policy granted by the Appellant. The Appellant Corporation filed answer on 12.01.2004 and submitted that there never existed an employer – employee relationship and/or any contract of employment between the Applicant and the Appellant and prayed that the Application be dismissed.

The stance of the Applicant was **that he was employed as an Assessor** by the Appellant. The stance of the Appellant was that the Applicant was **an "independent Contractor" and not a workman** within the meaning of the Industrial Disputes Act.

The President of the Labour Tribunal heard the evidence of all the witnesses of the Appellant and the evidence of the Applicant and delivered his Order on 28.02.2007 in favour of the Applicant holding in the said Order that the Applicant was a workman who was employed by the Appellant, his services had been unreasonably and unjustly terminated and therefore he should be paid compensation amounting to Rs. 480000/- . The Appellant appealed to the Civil Appellate High Court and argued that the Applicant was not an employee.

The Applicant had applied for the post of Assessor. The Appellant had held an interview. The Applicant was selected. The Appellant had issued a letter dated 15th May, 2001 which was marked as **A4** which is at page 332 of the Labour Tribunal brief. The wording in the first paragraph reads as " We are pleased to enroll you to our Panel of Motor Assessors of the Sri Lanka Insurance Corporation Ltd. with effect from 01.06.2001 for a period of one year." The renewal after one year is " at the discretion of the Insurance Corporation ". The letter further states that " The Management reserves the right to renew your assignment and also reserves the right to terminate your assignment without assigning any reasons for such termination." This letter states further that "Your report should reach the Manager/Motor Department as stipulated in AGM/M Circular No. AGM /2000/03 and the guidelines given therein should be strictly followed when inspecting vehicles."

It is interesting to note that the third paragraph of this letter enrolling him as a Motor Assessor reads thus. " Please note that **in the execution of your duties as a Motor Assessor you are expected to safeguard the interests of the Corporation at all times."** According to this wording, the Applicant was duty bound to keep in mind the "interests of the Corporation at all times". What is meant by "the interests of the Corporation" could be analyzed. The main business of the Appellant is insurance of vehicles. When the vehicles get damaged on the road due to whatever reason, the insurer has to pay the insured if the policy is valid on that day the damage occurred and if it covers the said reason for the incident. The Motor Assessor is an integral part of the business. The assessment should be done

immediately or as soon as possible. The Assessor cannot do his work at leisure or at the times that he opts to do. He has to be ready and willing at all times. He has to be mindful of the amount the Insurance Corporation has to pay to the insured vehicle. The Assessor cannot favour the owner of the vehicle and / or assess the damage at his own discretion. He has to be careful in calculations so that it will not be a loss to the Corporation. He has to submit the same to the Corporation which is the final authority. **If his recommendation is against the interests of the Corporation, the Corporation can terminate his services for that very reason** because it is specifically stated in the letter by which he was appointed as an Assessor. The calculations are to be done according to certain guidelines as per Corporations' Circulars. **The letter of appointment points at the position taken up by the Applicant that his employer was the Appellant.**

The Appellant, Insurance Corporation has argued that the letter appointing the Assessor is a "contract for services" entered into by the Appellant with the Assessor Applicant. It was submitted that the specific guidelines imposed by that letter serves to ensure that an efficient and expeditious service was provided to the customers of the Appellant, by way of the quick processing of Insurance claims. The Appellant further argued that the task of the Panel of Assessors who were hired on the basis of 'contract for services' was **to advise** the Appellant Corporation on the condition of the damaged vehicle and the quantum that the Appellant would be liable to pay. However I fail to see any substance in the said argument of the Appellant in the light of the clause in the letter appointing the Applicant Assessor, which reads that " if the recommendation is against the interests of the Corporation, the Corporation can terminate the services ".

Even though the Appellant submitted that there was no master – servant relationship between the Applicant and the Appellant, I find that the Assessors had to sign daily when they reported to work; had to provide reasons if they got late to work and the time of arrival is later than 9.30 a.m. every day; they were not given assignments if they got late; they had to report to the superior officer who gave the assignments every day before 9.30 a.m.; they were given equipment by the Appellant subsequent to them having used their own equipment initially; they were paid travelling expenses and they were also paid for the printed photographs taken by them of the damaged vehicles.

If any kind of work has to be performed independently, there cannot be any time restrictions and there cannot be superior officers under whom the worker has to perform. Any 'contract for services' has to be only for the work to be done by a person alone, using his talent or capability as regards the particular kind of work, within his limits and within his freedom. An independent professional performs his work with his expertise in the job and the person who hires him on a 'contract for services' does not have any strings hung on him. The services are appreciated and paid for, due to his capability to do the job which he was hired to do. There cannot be any control whatsoever, if there is only a **contract for service**. An independent Contractor frequently carries on , an independent business whereas under a **contract of service**, a man **sells his labour and service to the enterprise of another.** In the case in hand, the Applicant sold his service and labour to the Appellant. The Appellant in this case has had many controls over the Applicant and thus it points at the stance taken up by the Applicant that the Appellant was his employer.

In the case of **Y.G.De Silva Vs The Associated Newspapers Ceylon Ltd., Bar Assn. Law Journal 1983, Vol I Part III ,** the Supreme Court stated thus:
" It is not disputed that an independent contractor cannot seek relief from a Labour Tribunal. Under Section 31 B (1) of the Industrial Disputes Act only a workman or a Trade Union on behalf of a workman who is a member of that Union alone can make an Application to a Labour Tribunal for redress. Thus , it is fundatamental to the jurisdiction of a Labour Tribunal that the Applicant should have been on a contract of employment under which the parties were in a relationship of master and servant. Unless a person was thus employed there can be no question of his being a 'workman' within the definition of the term set out in the Act."

In the case of **Jayasuriya Vs State Plantations Corporation 1995, 2 SLR 379** the Supreme Court analyzed what is meant by the wordings contained in Sec. 31 D of the Industrial Disputes Act No. 43 of 1950. The Industrial Disputes Act No. 43 of 1950 states in Sec. 31 D that the **Order of the Labour Tribunal shall be final and shall not be called in question in any Court except** on ***a question of law***. The Supreme Court stated that ;

" While Appellate Courts will **not intervene with pure findings of fact** ……..yet if it appears that the Tribunal has made a finding ,

a. Wholly unsupported by evidence or which is inconsistent with the evidence and contradictory of it or
b. Where the Tribunal has failed to consider material and relevant evidence or
c. Where the Tribunal has failed to decide a material question or
d. Where the Tribunal has misconstrued the question at issue and directed its attention to the wrong matters or
e. Where there was an erroneous misconception or
f. Where the Tribunal failed to consider the documents and/or misconstrued them or
g. Where the Tribunal failed to consider the version of one party or his evidence or erroneously supposed there was no evidence ,

then, **the finding of the Tribunal is subject to review by the Court of Appeal."**

The President of the Labour Tribunal has to go through the evidence carefully and make a decision which is just and equitable. In case law regarding similar matters such as this matter before this Court now, it has been held that the Court hearing the Appeal, has to examine **whether the Labour Tribunal has considered the evidence, having in mind the rights and interests of the workman as well as the position of the alleged employer,** the Appellant Corporation. If the Tribunal has not done so properly, then the order made by it, can be taken as perverse. If the Tribunal has considered the evidence heard by it and then had made the order, then it cannot be categorized as perverse.

In the case of **Ready Mixed Concrete Vs Minister of Pensions 1968, 2 QB 497,** the control test was used to evaluate whether the employee was providing a **contract of service** or **contract for services.** It was observed by Mackenna J that "It may be stated that whether the relation between the parties to the contract is that of master and servant or otherwise, is a conclusion of law dependent **upon the rights conferred and the duties imposed by the contract.** If these are such that the relation is that of master and servant, it is **irrelevant** that the parties have declared it to be **something else**." The contract in this case had contained a declaration that the man named Latimer was an independent contractor. Yet, the evidence had shown that he was an employee of the company, Ready Mixed Concrete.

In the case of **Market Investigations Ltd. Vs Minister of Social Security 1968, 3 A.E.R. 732 ,** it was held that " Control, although a matter for consideration, was not decisive; the fundamental test in determining whether a person was performing services under a 'contract of service' or ' a contract for services' was whether the person engaged to perform those services was performing them **' as a person in business on his own account' and thus under a contract for services** but that no exhaustive list of the relevant considerations or their weight could be compiled." In the same case , it was held that the **right given to the worker to work for others** is **not being inconsistent with the existence of a contract of service** and was accordingly **an employment**. In the said case, Cook J had summarized the conclusion in this way; " The Supreme Court suggests that the fundamental test to be applied is this: Is the person who had engaged himself to perform these services performing them as a **person in business on his own account**? If the answer to the question is 'Yes', then the contract is a **'contract for services'.** If the answer is 'No', then the contract is a 'contract of service'. " It was further decided that no exhaustive test can be compiled of the considerations which are relevant in determining the question and no strict rules can be laid down as to the relative weight which the various considerations should carry in particular cases.

The Labour Tribunal has analyzed the evidence given by the Applicant and the evidence given by three others on behalf of the Appellant Corporation. The evidence has proved that the Assessor's work with regard to motor vehicle accidents is an integral part of the income earned by the Appellant. It is an essential service granted to the Appellant by the Applicant. Without these particular Assessors, the damages caused to insured vehicles in motor vehicle accidents cannot be brought to the books and if that job is not done properly by the Assessor, the Appellant would not be able to earn such a lot of income in that regard. The work of an Assessor is an integral part of the Insurance Corporation.

The learned President of the Labour Tribunal has quoted in his order the case of **Stephenson, Jordan and Harrison Ltd. Vs Mc. Donald and Evans 1952 A.T.L.R. 101.**

In the said case, Lord Denning formulated the test for identifying a servant workman by asking whether the person in question was part of the other's organization. He said thus: " It is often easy to recognize a contract of service

when you see it, but difficult to say wherein the difference lies. (meaning as against a contract for service). A ship's Master, a chauffer and a reporter on the staff of a newspaper are all employed under a **contract of service**: but a ship's pilot, a taxi-man and a newspaper contributor are employed under **a contract for service**. One feature which seems to run through the instances is that on a contract of service a man is employed as part of the business and his work is done work, although done for the business , is not integrated into it but is only accessory to it. "

The Civil Appellate High Court had also agreed with the Labour Tribunal when the President had analyzed the evidence pointing to the fact that the **Applicant was employed as part of the business and the work done is done for the business of the Appellant.** The Appellant's business was insurance. The Assessor worked in the specific area of 'assessing the amount of money to be paid to the insured , keeping in mind the interests of the Appellant at all times' as directed by the letter appointing him as the Assessor. His work was surely not an accessory to the business but was integrated into the business of the Appellant.

Having gone through the evidence and the judgment of the Civil Appellate High Court as well as the order of the Labour Tribunal, I fail to find that the analysis was perverse. I hold that the decisions are just and equitable. I answer the questions of law enumerated at the commencement of this Judgment in favour of the Applicant Respondent Respondent and against the Respondent Appellant Appellant. I uphold the judgment of the Civil Appellate High Court.

This Appeal is dismissed. 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

Konara Mudiyanselage Bandara Menika
Bogahawattegedara, Dambagalla,
Monaragala

Plaintiff

SC Appeal 99/2013

SC/HC(CA)LA No.122/2012
High Court No. UVA/HCCA/BDL/25/2008(F)
DC Monaragala L/1959

Vs

(deceased) Konara Mudiyanselage Kumara Mutuwella

Defendant

1a. Konara Mudiyanselage Chula Indika Kumara
1b. Konara Mudiyanselage Wajira Saminda Kumara
1c. Konara Mudiyanselage Manoj Dilanka
Kumara Podinilame
All of 'Kumara Niwasa', Dambagalla
Monaragala

Substituted Defendants

AND

1a. Konara Mudiyanselage Chula Indika Kumara
1b. Konara Mudiyanselage Wajira Saminda Kumara
1c. Konara Mudiyanselage Manoj Dilanka
Kumara Podinilame
All of 'Kumara Niwasa', Dambagalla
Monaragala.

Substituted Defendant-Appellants

Vs

Konara Mudiyanselage Bandara Menika
Bogahawattegedara, Dambagalla,
Monaragala

Plaintiff-Respondent

AND NOW BETWEEN

Konara Mudiyanselage Bandara Menika
Bogahawattegedara, Dambagalla,
Monaragala

Plaintiff-Respondent-Petitioner-Appellant

Konara Mudiyanselage Heen Menika.
Udumulla, Dambagalla,
Monaragala

Substituted Plaintiff-Respondent-Petitioner-Appellant

Vs

1a. Konara Mudiyanselage Chula Indika Kumara
1b. Konara Mudiyanselage Wajira Saminda Kumara
1c. Konara Mudiyanselage Manoj Dilanka
Kumara Podinilame
All of 'Kumara Niwasa', Dambagalla
Monaragala.

Substituted Defendant-Appellants-Respondent-Respondents

Before : Sisira J De Abrew J
Upaly Abeyratne J
Anil Gooneratne J

Counsel : S N Vijithsingh for the Plaintiff-Respondent-Petitioner-Appellant
DMG Dissanayake for
the Defendant-Appellants-Respondent-Respondents

Argued on : 15.2.2017

Decided on : 16.3.2017

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 21.2.2012 wherein the Judges of the Civil Appellate High Court set aside the judgment of the learned District Judge dated 13.2.2008. The learned District Judge held in favour of the Plaintiff-Appellant. Being aggrieved by the judgment of the Civil Appellate High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 18.7.2013, granted leave to appeal on the following questions of law.

1. Did the Civil Appellate High Court Judges err in law by accepting the validity of deed No.6984 (V2)?

2. Were the learned High Court Judges in error by allowing the appeal of the Respondent holding that there was no issue challenging the validity of deed marked V2 whereas issues No. 5,6 and 12 dealt with regard to the title of the Defendant and the learned District Judge answered the said issues against the Defendant and whereas the Respondent had not prayed for a dismissal of the action of the Petitioner?

The Plaintiff-Appellant instituted this action in the District Court seeking a declaration of title to the property in suit. The Plaintiff-Appellant, in her evidence, has taken up the position that by Deed No.3750 dated 2.10.1966 attested by DS Wickramasingha Notary Public, she became the owner of the property in suit and

that she did not sell the said property to the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) by Deed No.6984 dated 5.8.1988 marked V2. The Defendant-Respondent has taken up the position, in his evidence, that the Plaintiff-Appellant, by Deed No.6984 dated 5.8.1988 attested by Priya. S. Bandara Notary Public (V2) has sold the property in suit to him. He states, in his evidence, that both the Plaintiff-Appellant and her husband signed the said deed. Learned counsel for the Plaintiff-Appellant contended that Deed No.6984 was a forged deed as the Plaintiff-Appellant had not signed the said deed. He further submitted that the Plaintiff-Appellant in her evidence had stated that she had not sold the property. I now advert to this contention. Was there an issue at the trial to the effect that the Deed No.6984 was a forged deed? The answer is in the negative. This shows that the Plaintiff-Appellant had not contested the Deed No.6984. If the Deed No.6984 was a forged deed, one would expect the Plaintiff-Appellant to make a complaint to the police. When the Plaintiff-Appellant was cross-examined by the Defendant- Respondent whether she made a complaint to the police to the said effect, she answered in the negative. It is important to note that both parties admitted at the trial that the Plaintiff-Appellant by Deed No.3750 referred to above, became the owner of the property in suit and reference with regard to the said deed has also been made in the Deed No.6984. From the above matters, it is clear that the Plaintiff-Appellant has not proved that the Deed No.6984 was a forged deed.

Learned counsel for the Plaintiff-Appellant contended that as the Deed No.6984 had not been registered in the proper folio in the Land Registry, the Defendant- Respondent has not got the title. I now advert to this contention. It is correct that the Deed No.6984 was not registered in the proper folio in the Land Registry. If a deed was not registered in the proper folio in the Land Registry and

the said deed is challenged on the basis that another deed on the same property was registered in the proper folio, the deed registered in the proper folio, gets the priority of registration and validity over the other deed. But if there is no contesting deed, the deed that was not registered in the proper folio does not lose its validity and in such a situation, in my view, the purchaser of the property does not lose title of the property merely because it was not registered in the proper folio in the Land Registry. For the above reasons, I reject the above contention of learned counsel for the Plaintiff-Appellant.

Learned counsel for the Plaintiff-Appellant contended that the Deed No.6984 was not a valid deed as the Notary Public who attested the deed, in her attestation, has stated that the Plaintiff-Appellant signed the deed when in fact she did not sign it. I now advert to this contention. The Plaintiff-Appellant placed her left thumb impression in the said deed as she was a person who could not sign. When the deed No.6984 is examined, it is clear that the Notary Public who attested the deed has made a note on the same page to the following effect. "This left thumb impression is the thumb impression of KM Bandara Manike." KM Bandara Manike is the Plaintiff-Appellant. Thus it appears that the Notary Public has certified the thumb impression appearing in the Deed No.6984 is the thumb impression of the Plaintiff-Appellant. When a person cannot sign, his or her left thumb impression is placed on the document. It has to be considered as his or her signature. An examination of Deed No.6984 reveals that the other vendor (the husband of the Plaintiff-Appellant) and two attesting witnesses have signed the deed. When I consider the above matters I hold that the Notary Public who attested the deed has not committed any mistake and that the Plaintiff-Appellant and her husband have signed the deed. For the above reasons, I reject the above contention of learned counsel for the Plaintiff-Appellant.

It is important to consider whether the deed No.6984 is a valid deed or not. KM Sirisena one of the attesting witnesses of the deed No.6984 gave evidence. He stated that two vendors placed their signatures and thereafter two attesting witnesses (one of them was Sirisena) signed the deed. He further stated in his evidence that the Notary Public and the other attesting witness are dead. When I consider his evidence I hold that the validity of the Deed No.6984 has been proved.

Having considered all the above matters, I hold that the Plaintiff-Appellant has not proved his title to the property in suit. A person who seeks a declaration of title to the property in suit must prove his title. This view is supported by the following judicial decisions.

In Peeris Vs Savunhamy 54 NLR 207 Supreme Court held as follows:

> *"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 Loku Menika and Others Vs Gunasekare [1997] 2 SLR 281 Court of Appeal held as follows.

> *"The plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must prove that title against the defendant."*

Since the Plaintiff-Appellant has not proved his title to the property in suit, he cannot be declared the owner of the property and his action should fail.

For the aforementioned reasons, I answer the questions of law in the negative.

For the above reasons, I affirm the judgment of the Civil Appellate High Court and dismiss this appeal 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

In the matter of an Appeal

1. N.W.E.Buwaneka Lalitha
   Keembiela, Beddegama, Galle.

SC Appeal 99/2017
SC/SPL/LA/109/2017
CA (WRIT) 362/2015

2. J.K.Amarawardhana
   8, Bovitiyamaulla,
   Yatalamatta.

3. A.C.Gunasekera
   "Lakshmi", Unawatuna,
   Galle.

4. J.K.Wijesinghe.
   48-10A, Main Street,
   Ambalangoda

5. H.L.Prasanna Deepthilal
   601/1, Visakam Road,
   Galle.

Petitioners

-Vs-

1. Geetha Samanmali Kumarasinghe
   No.2, Temple Road,
   Nawala, Rajagiriya.

2. M.N.Ranasinghe

Controlller General of Immigration
and Emigration
Department of Immigration and
Emigration
41, Ananda Rajakaruna Mawatha,
Colombo 10.

3. Mahinda Amaraweera
Secretary.
United People's Freedom Alliance,
301, T.B.Jayah Mawatha,
Colombo 10.

4. Dhammika Dassanayake.
Secretary General of Parliament.
Parliament of Sri Lanka,
Sri Jayawardenapura,
Kotte.

Respondents

AND NOW

Geetha Samanmali Kumarasinghe
No.2, Temple Road,
Nawala, Rajagiriya.
1st Respondent Petitioner-Appellant

1. N.W.E.Buwaneka Lalitha
Keembiela, Beddegama,
Galle.

2. J.K.Amarawardhana
8, Bovitiyamaulla,

Yatalamatta.

3. A.C.Gunasekera
   "Lakshmi", Unawatuna, Galle.

4. J.K.Wijesinghe.
   48-10A, Main Street,
   Ambalangoda
5. H.L.Prasanna Deepthilal
   601/1, Visakam Road,
   Galle.

Petitioner-Respondents

1. M.N.Ranasinghe
   Controlller General of Immigration and Emigration
   Department of Immigration and Emigration
   41, Ananda Rajakaruna Mawatha,
   Colombo 10.

2. Mahinda Amaraweera
   Secretary.
   United People's Freedom Alliance,
   301, T.B.Jayah Mawatha,
   Colombo 10.

3. Dhammika Dassanayake.
   Secretary General of Parliament.
   Parliament of Sri Lanka,
   Sri Jayawardenapura,
   Kotte.

Respondents-Respondents

Ihala Medagama Gamage Piyasena
"Sandasiri", Medagama,
Neluwa.

Added Respondent

Before : Priyasath Dep PC Chief Justice
B P Aluwihare PC J
Sisira J de Abrew J
Anil Goonerathne J
Nalin Perera J

Counsel : Romesh de Silva PC with Sugath Caldera, Niran Ankitel and Harith de Mel for the 1st Respondent-Appellant.
J C Waliamuna PC with Pulasthi Hewamanna and Senura Abeywardena for the Petitioner-Respondents
Faiz Musthapa PC with Chandaka Jayasundera PC, Pulasthi Rupasinghe, Randika de Silva Nuwantha Satharasinghe and Keerthi Thilakaratne for the 2nd Respondent-Respondent.
Suren Fernando with Luwie Ganeshathasan and K Wickramanayake For the Added Respondent.
Nerin Pulle DSG with Suren Gnanaraj SC the 1st and 3rd Respondent-Respondents

Written Submissions tendered on : 10.10.2017

Argued on : 28.9.2017 and 3.10.2017

Decided on : 2.11.2017

Sisira J De Abrew J.

The Petitioner-Respondents in this case filed case No. CA (Writ) 362/2015 in the Court of Appeal challenging the 1st Respondent-Petitioner-Appellant (hereinafter referred to as the 1st Respondent-Appellant) to show the authority

under which she claims to hold office as a Member of Parliament. The Petitioner-Respondents by their petition filed in the Court of Appeal moved inter alia the following reliefs.

1. Issue a mandate in the nature of Quo Warranto requiring the1st Respondent-Appellant to show by what authority she claims to hold office as a Member of Parliament [vide paragraph (b) of the prayer to the petition].
2. Issue a mandate in the nature of Quo Warranto declaring that the 1st Respondent-Appellant is disqualified to be a Member of Parliament and thus not entitled to hold office as a Member of Parliament.

The Court of Appeal by its judgment dated 3.5.2017, issued a writ of Quo Warranto declaring that the 1st Respondent-Appellant is disqualified to be a Member of Parliament and that she is not entitled to hold the office of Member of Parliament. Being aggrieved by the said judgment of the Court of Appeal, the 1st Respondent-Appellant has appealed to this court. This court on 15.5.2017 by its majority decision granted leave to appeal on questions of law stated in paragraphs 26(a) to (n) of the petition of appeal filed on 9.5.2017 which are set out below.

a) Did not their Lordships of the Court of Appeal err in deciding that Article 91(1)(d)(13) of the Constitution operated to prevent the Petitioner from being qualified as a member of Parliament and/or to sit and vote in Parliament;

b) Did not their Lordships of the Court of Appeal err in deciding that the Petitioner was a citizen of Switzerland when she was elected to Parliament and/or during the pendency of the application in the Court of Appeal contrary to prevailing Law;

c) Did not their Lordships of the Court of Appeal err in failing to sufficiently apprehend and/or consider and/or appreciate the application of Swiss law to the citizenship status of the Petitioner;

d) Did not their Lordships of the Court of Appeal err in deciding that the Court of Appeal had jurisdiction to hear the aforesaid matter;

e) Did not their Lordships of the Court of Appeal err in failing to sufficiently consider and/or appreciate that the relief prayed in the Petition could not be granted on account of the powers, immunities and privileges enjoyed by Parliament and/or Parliamentarians;

f) Did not their Lordships of the Court of Appeal err in failing to sufficiently consider and/or appreciate that Parliament is the sole judge of its composition;

g) Did not their Lordships of the Court of Appeal err in failing to sufficiently consider and/or appreciate that the Court has no jurisdiction in respect of the composition of Parliament otherwise than as provided statutorily by Parliament;

h) Did not their Lordships of the Court of Appeal err in failing to sufficiently consider and/or appreciate that the writ of quo warranto does not lie in respect of a member of Parliament;

i) Did not their Lordships of the Court of Appeal err in failing to sufficiently consider and/or appreciate that the discretionary remedy of a mandate in the nature of a writ of quo warranto required the dismissal of the application on account of the availability of alternate constitutional and statutory remedies;

j) Did not their Lordships of the Court of Appeal err in failing to consider and/or appreciate that the discretionary remedy of a mandate in the nature of a writ of quo warranto required the dismissal of the application on account of the unenforceability of the relief prayed for;

k) Did not their Lordships of the Court of Appeal err in failing to consider and/or appreciate that the discretionary remedy of a mandate in the nature of

a writ of quo warranto required the dismissal of the application on account of non-joinder of necessary parties;

l) Did not their Lordships of the Court of Appeal err in failing to consider and/or appreciate that the discretionary remedy of a mandate in the nature of a writ of quo warranto required the dismissal of the application on account of laches;

m) Did not their Lordships of the Court of Appeal err in failing to consider and/or appreciate that the discretionary remedy of a mandate in the nature of a writ of quo warranto required the dismissal of the application on account of non-joinder of necessary parties;

n) Did not their Lordships of the Court of Appeal err in deciding that the Petitioner was a citizen of
This is an incomplete question

This Court by majority decision stayed the operation of the judgment of the Court of Appeal dated 3.5.2017 until final determination of this case.

Learned President's Counsel for the 1st Respondent-Appellant contended that the 1st Respondent-Appellant had sent document marked X1 to Swiss Authorities in Switzerland and document marked X2 to the Ambassador, Switzerland Embassy in Colombo. But these letters have been produced in this court from the custody of the 1st Respondent-Appellant. Were these letters in fact sent to the Swiss Authorities? They were not produced in the Court of Appeal. They do not form Part of the Court of Appeal record. This court is invited to examine the legality and correctness of the judgment of the Court of Appeal. The Court of Appeal was not given an opportunity to examine these documents. Considering all the above matters, I refuse to consider these documents marked X1 and X2.

One of the important questions that must be decided in this case is whether the 1st Respondent-Appellant (Geetha Samanmali Kumarasinghe) was holding dual citizenship on the day of the Parliamentary Election which was on 17.8.2015. I now advert to this question. The 1st Respondent-Respondent, the Controller General of Immigration and Emigration, in his affidavit filed in the Court of Appeal, states that 1st Respondent-Appellant (Geetha Samanmali Kumarasinghe) was granted dual citizenship (Sri Lanka and Switzerland) on 29.8.2006 and dual citizenship certificate No.17096 was issued to her. The 1st Respondent-Appellant too in her written submission filed in this court on 14.7.2017 admits that she got married to a citizen of Switzerland and by virtue of the said marriage, she was granted citizenship of Switzerland by operation of law. It is important to note that the 1st Respondent-Appellant had submitted to the Controller General of Immigration and Emigration, the 1st Respondent-Respondent a letter dated 11.9.2015 alleged to have been issued by Switzerland Authorities. This letter which has been addressed to the 1st Respondent-Appellant has been produced by the 1st Respondent-Respondent with his objection marked R2. The said letter states that 1st Respondent-Appellant had, on 25.8.2015, sent a request to Switzerland Authorities requesting that she be released from Switzerland citizenship. The said letter states that she has been released from Switzerland citizenship, but the same letter suggests that her release from the Switzerland citizenship has not been made absolute. The date of this letter is 11.9.2015.

As I pointed out earlier 1st Respondent-Appellant in her written submission filed in this court has admitted that she has been granted citizenship in Switzerland by virtue of her marriage to Switzerland citizen. Learned President's Counsel for the 1st Respondent-Appellant tried to contend that the 1st Respondent-Appellant has now given up the Switzerland citizenship. But has she, in fact, given up the

Switzerland citizenship? If so when did she do it? If she says that she has given up Switzerland citizenship she should state the date on which she gave it up because the Petitioner-Respondents in their petition state that she is a Switzerland citizen. The Petitioner-Respondents by producing current passport details of the 1st Respondent-Appellant marked P7 has proved the fact that there is an endorsement in her passport to the effect that she is a dual citizen. The 1st Respondent-Appellant too in her written submission filed in this court admits that she was a citizen of Switzerland. She is now trying to contend that she has given up the citizenship of Switzerland. Under these circumstances the burden shifts to the 1st Respondent-Appellant to prove the date on which she gave up citizenship of Switzerland. This view is supported by Sections 101, 103 and 106 of the Evidence Ordinance.

Section 101 of the Evidence Ordinance 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."*

Section 103 of the Evidence Ordinance reads as follows:

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person"*

Illustration to this section is as follows:

> *"B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it."*

Section 106 of the Evidence Ordinance reads as follows:

> *"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*

Illustration to this section reads as follows:

"A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

The 1st Respondent-Appellant is the best person to speak about the date on which she gave up the citizenship of Switzerland more than anybody. She even in her statement of objection and her affidavit filed in the Court of Appeal, does not state the date on which she gave up the citizenship of Switzerland. She has, by her letter dated 30.10.2015 marked R1 and produced by the Controller General of Immigration and Emigration, requested the said Controller to issue her a Diplomatic Passport and not to state in the Diplomatic Passport that she is a dual citizen as she has got herself released from the dual citizenship. But even in the said letter she does not state the date on which she ceased to be a Switzerland citizen. When the above matters are considered, her claim that she does not hold dual citizenship is very doubtful. It is significant to note that the Petitioner-Respondents state, in paragraph 11 of their petition filed in the Court of Appeal, that she is a dual citizen and produced the current passport details of the 1st Respondent-Appellant marked as P7. It has to be stressed here that her passport details marked P7 was produced by the Petitioner-Respondents and not by her. According to this document her current passport which is an official passport expires on 15.9.2017. The signature, photograph, date of birth, and the address of the passport holder appear in the said document marked P7. She has, in her statement of objections and the affidavit dated 10.2.2016 filed in the Court of Appeal, denied paragraph 11of the petition. Meaning of this denial is that she has even denied her personal details. Can such denial be accepted?

Although she tried to rely on R2, the letter purported to have been issued by Switzerland Authorities, to prove that she has been released from Switzerland citizenship, paragraph 4 of the said letter raises a question whether she has been

released absolutely. When she was questioned about this matter in a letter addressed to her dated 2.11.2015 marked R5 by the Controller General of Immigration and Emigration, she has not replied according to the Controller General of Immigration and Emigration. The document marked P7 indicates that there is an endorsement in her passport to the effect that she is a dual citizen. This evidence is available in the copy of her passport (P7) produced by the Petitioner-Respondents. Expiry date of her passport according to P7 is 15.9.2017. The case was filed in the Court of Appeal on 16.9.2015. The 1st Respondent-Appellant filed her statement of objection in the Court of Appeal on 10.2.2016. If the 1st Respondent-Appellant claims that she has got herself released from Switzerland citizenship she should have submitted her passport to the Controller General of Immigration and Emigration requesting him to make an endorsement nullifying her previous endorsement relating to dual citizen. Has she done it? If she has done it, this endorsement nullifying the previous endorsement should be available in her passport. But she has not produced a copy of her passport to court. In these circumstances, it was incumbent upon her to produce a copy of her passport to court especially in view of the fact that Petitioner-Respondents have, along with their petition, produced her passport details marked P7 which carries an endorsement that she is a dual citizen. In these circumstances, court can apply Section 114(f) of the Evidence Ordinance which reads as follows: *"The court may presume that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it."* The1st Respondent-Appellant who should have her passport in her possession did not produce a copy of her passport in court and withheld it from court. Therefore, the court can presume that she (the 1st Respondent-Appellant) did not produce a copy of her passport as the production of the same in court would be unfavourable to her and further court can presume

that her passport carries an endorsement to the effect that she is a dual citizen. In fact her passport details marked as P7 establishes the fact that there is such an endorsement in her passport. As I pointed out earlier, the letter marked R2 states that she has been released from Switzerland citizenship, but the same letter suggests that her release from the Switzerland citizenship has not been made absolute. The date of this letter is 11.9.2015. When all the above matters are considered, it is clear that she has not got **any release** from Switzerland citizenship prior to 11.9.2015.Thus it is clear that even on 1.9.2015 (the day of taking oaths as a Member of Parliament)she was a citizen of Switzerland.

The letter marked R2 states that 1st Respondent-Appellant had, on 25.8.2015, sent a request to Switzerland Authorities requesting that she be released from Switzerland citizenship. It is clear from the contents of the letter (marked R2) that on 25.8.2015 the 1st Respondent-Appellant was a citizen of Switzerland. The Parliamentary Election was held on 17.8.2015. I again state here that the letter marked R2 was submitted to the Controller General of Immigration and Emigration by the 1st Respondent-Appellant (Geetha Samanmali Kumarasinghe) and this letter was annexed to the affidavit of the Controller General of Immigration and Emigration marked R2. The Court of Appeal by its order dated 28.9.2015, had directed the Controller General of Immigration and Emigration to produce all the documents relating to the citizenship status of the 1st Respondent-Appellant. It appears that the Controller General of Immigration and Emigration in compliance with the said directions has produced the documents marked R1 to R5. It has to be stressed here that the document marked R2 states that 1st Respondent-Appellant had made a request on 25.8.2015 to release her from Switzerland citizenship. When contents of the document marked R2 are considered, it can be concluded that she (Geetha Samanmali Kumarasinghe) had admitted that she has

not given up her Switzerland citizenship even on 25.8.2015. It is clear from the above letter (R2) that the 1st Respondent-Appellant was holding a dual citizenship (Switzerland and Sri Lanka) when she was elected as a Member of Parliament on 17.8.2015 (the day of the Parliamentary Election). Was the 1st Respondent-Appellant (Geetha Samanmali Kumarasinghe) qualified to be elected as a Member of Parliament on 17.8.2015 when she was holding dual citizenship (Switzerland and Sri Lanka)? To find an answer to this question it is important to consider Article 91(1)(d)(xiii) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the Constitution). Article 91(1)(d)(xiii) of the Constitution reads as follows.

"No person shall be qualified to be elected as a Member of Parliament or to sit and vote in Parliament if he is a citizen of Sri Lanka who is also a citizen of any other country."

What is the day on which a candidate becomes elected to be a Member of Parliament? It is the day of the Parliamentary Election. What is the day on which a candidate becomes qualified to sit and vote in Parliament? It is the day of taking oaths as a Member of Parliament and thereafter. When I consider the Article 91(1)(d)(xiii) of the Constitution, I hold that if a candidate in a Parliamentary Election is a citizen of Sri Lanka and any other country

1. on the day of the Parliamentary Election or
2. on the day of taking oaths as a Member of Parliament

he cannot be considered as a Member of Parliament and that the office of such person as a Member of Parliament is a nullity. I further hold that after taking oaths as a Member of Parliament, if he becomes a citizen of any other country or continues to be a citizen of any other country, he too cannot be considered as a

Member of Parliament and that the office of such person as a Member of Parliament is a nullity.

I have earlier pointed out that the 1st Respondent-Appellant was holding a dual citizenship (Switzerland and Sri Lanka) when she was elected as a Member of Parliament on 17.8.2015. Considering Article 91(1)(d)(xiii) of the Constitution, I hold that a person who is holding a dual citizenship on the day of the Parliamentary Election was not qualified to be elected as a Member of Parliament and office of such person as a Member of Parliament is a nullity. In the present case, 1st Respondent-Appellant (Geetha Samanmali Kumarasinghe) was holding a dual citizenship (Switzerland and Sri Lanka) on the day of the Parliamentary Election (17.8.2015). Considering all the above matters, I hold that the 1st Respondent-Appellant (Geetha Samanmali Kumarasinghe) was not qualified to be elected as a Member of Parliament on 17.8.2015; that she being elected as a Member of Parliament is a nullity; that she was not qualified to take oaths as a Member of Parliament on 1.9.2015; that therefore she could not hold the office of Member of Parliament; that she cannot be considered as a Member of Parliament; and that her office as a Member of Parliament is a nullity.

Learned President's Counsel for the 1st Respondent-Appellant tried to contend that Parliament (Powers and Privileges) Act applies to the 1st Respondent-Appellant. I now advert to this contention. I have earlier held that the 1st Respondent-Appellant could not be considered as a Member of Parliament and that her office as a Member of Parliament is a nullity. If she cannot be considered as a Member of Parliament and her office as a Member of Parliament is a nullity, Parliament (Powers and Privileges) Act does not apply to her. Learned President's Counsel for the 1st Respondent-Appellant further contended that Article 140 of the Constitution should be invoked subject to Article 67 of the Constitution. He

advanced this contention since Article 140 of the Constitution contains the words 'subject to Constitution'. Article 67 of the Constitution reads as follows.'

> "The privileges, immunities and powers of Parliament and of its Members may be determined and regulated by Parliament by law and until so determined and regulated, the provisions of the Parliament (Powers and Privileges) Act, shall, *mutatis mutandies,* apply"

I have earlier held that the 1st Respondent-Appellant could not be considered as a Member of Parliament. If she cannot be considered as a Member of Parliament, the Parliament (Powers and Privileges) Act does not apply to her. If the Parliament (Powers and Privileges) Act does not apply to her, she cannot invoke Article 67 of the Constitution. For the above reasons, I reject the above contention of learned President's Counsel for the 1st Respondent-Appellant.

Learned President's Counsel for the 1st Respondent-Appellant next contended that conferring of Switzerland citizenship was an involuntary act and that she had not applied for the citizenship of Switzerland and that citizenship of Switzerland was given to her by operation of law in Switzerland. He further contended that a woman automatically obtains citizenship of Switzerland upon marrying a Swiss national and that since the 1st Respondent-Appellant married a Swiss national, she automatically got the citizenship of Switzerland. He further contended that the 1st Respondent-Appellant should not be unseated from the Parliament as conferring of Switzerland citizenship was not given on an application made by her. He also cited a judgment of Australian High Court to support his contention. In Sykes Vs Cleary and Others [1992] 176 CLR 77 decided on 25.11.1992 (a copy was produced in open court by learned President's Counsel for the 1st Respondent-Appellant) in paragraph 52, Australian High Court made the following observation.

"But there is no reason why section 44(i) should be read as if it were intended to give unqualified effect to the rule of international law. To do so

might well result in the disqualifications in Australian citizens on whom there was imposed involuntarily by operation of foreign law a continuing foreign nationality, notwithstanding that ***they had taken reasonable steps to renounce that foreign nationality****. It would be wrong to interpret constitutional provisions in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance"* (emphasis added).

In the present case has the 1st Respondent-Appellant taken all reasonable steps to renounce her Switzerland citizenship? The answer is in the negative. She has only written a letter. There is no evidence to prove that she has even paid State fee amounting CHF 100 (100 Swiss Francs) stated in the letter marked R2. Therefore, the above judicial decision has no application to present case. In any event I must state here that it is not necessary for me to consider the said judicial decision of the Australian High Court when our Constitution is very clear on the question in hand. Be that as it may, the contention of learned President's Counsel for the 1st Respondent-Appellant is that since the 1st Respondent-Appellant married a Swiss national she automatically got the citizenship of Switzerland by operation of Switzerland law and that she did not make any application to get the citizenship of Switzerland and that it was an involuntary act. Has the 1st Respondent-Appellant taken up this position in his statement of objection and affidavit filed in the Court of Appeal? The answer is in the negative. How does the Court of Appeal know that she got married to a Swiss gentleman? The1st Respondent-Appellant has not produced any material to prove the above facts. The answer to the above question is in the negative. Although learned President's Counsel for the 1st Respondent-Appellant contended so, the 1st Respondent-Appellant in her statement of objection and the affidavit (dated 10.2.2016) filed in the Court of Appeal does not state that

she is a dual citizen of Switzerland and Sri Lanka and that she got married to a Swiss gentleman. In fact, in her statement of objections and the affidavit filed in the Court of Appeal, she has stated that she is not a dual citizen (paragraph 5). The fact that she got married to a Swiss national and she automatically got citizenship of Switzerland has been stated in the written submission dated 14.7.2017 and her affidavit filed in this court. The stand she has taken up in her affidavit and the statement of objections filed in the Court Appeal is different from the stand that she has taken up in the said written submissions. For all the aforementioned reasons, I reject the above contention of learned President's Counsel for the 1st Respondent-Appellant. There is another ground to reject the above contention of learned President's Counsel for the 1st Respondent-Appellant. I would like to state here that I have earlier held that the 1st Respondent-Appellant was not qualified to be elected as a Member of Parliament on 17.8.2015 (day of the Parliamentary election). Whether conferring of citizenship of Switzerland is voluntary or involuntary, on the day of the Parliamentary election the 1st Respondent-Appellant was disqualified to be elected as a Member of Parliament. Considering the above matters, I reject the contention of learned President's Counsel for the 1st Respondent-Appellant.

Learned President's Counsel for the 1st Respondent-Appellant next contended that the Court Appeal did not have jurisdiction in terms of Article 140 of the Constitution to hear this case as 1st Respondent-Appellant taking oaths as a Member of Parliament amounts to proceedings in Parliament. He heavily relied upon the judgment of this court in the case of Attorney General Vs Shirani Bandaranayake SC Appeal 67/2013 decided on 21.2.2014 (hereinafter referred to as Shirani Bandaranayake's case). In Shirani Bandaranayake's case, there was a decision of Parliament to appoint a select committee to look into the conduct of

Shirani Bandaranayake who was the Chief Justice of the country at that time and the select committee appointed by Parliament took a decision. The decision of the select committee was challenged in the Court of Appeal. Thus it is very clear in that case that what was challenged in the Court of Appeal was the proceedings in Parliament. In the present case the Petitioner-Respondents challenged in the Court of Appeal the authority under which the 1st Respondent-Appellant claimed to hold the office as a Member of Parliament. The Petitioner-Respondents have taken up the position that the 1st Respondent-Appellant was a dual citizen of Sri Lanka and Switzerland and that she was disqualified to be a Member of Parliament in terms of Article 91(1)(d)(xiii) of the Constitution. The Petitioner-Respondents in this case challenged the election of the 1st Respondent-Appellant as a Member of Parliament. I have earlier held that the 1st Respondent-Appellant, in terms of Article 91(1)(d)(xiii) of the Constitution, was not qualified to be elected as a Member of Parliament on 17.8.2015 and that she was disqualified to take oaths as a Member of Parliament. When I consider the above matters, I am unable to agree with the above contention of learned President's Counsel for the 1st Respondent-Appellant and reject the said contention.

Learned President's Counsel for the 1st Respondent-Appellant next contended that a writ of quo warranto would not lie against a Member of Parliament. What is quo warranto? Quo warranto is a remedy available to call upon a person who is holding a public office to show the authority under which he claims to hold the office. This view is supported by the following legal literature. In the book titled 'Constitutional Law and Administrative Law of Sri Lanka (Ceylon)' by JAL Cooray at page 364 the learned Author says as follows:

> *"Under the law the writ of quo warranto may be granted by the Supreme Court to determine whether the holder of a public office is legally entitled to*

it.”…. In Sri Lanka in the absence of any procedure under the Local Authorities Elections Ordinance writ of quo warranto lies to question the election of a member of a local government authority who has acted in that office.” At page 365 the learned Author states as follows: “Even if the validity of an election cannot be questioned by a quo warranto, the writ is nevertheless available for the purpose of calling upon a person who is prima facie disqualified from holding a particular office to show upon what authority he claims to hold such office.”

In the book titled ‘Principles of Administrative Law in Sri Lanka’ by Sunil F *A Cooray at page 445 the learned Author says as follows:*

“If the office in question is a ‘public office’, for quo warranto to be available it must be shown that the election/appointment of the de facto holder of it is a nullity. On the question whether the election/appointment is a nullity, the relevant facts and the applicable law must be considered in each case. The election/appointment may be a nullity for different reasons, namely, absence of a necessary qualification for the office, presence of a disqualification for the office, incorrect procedure adopted for the election/appointment, or the wrong person or body has held or conducted the election or made the appointment.”

In Dilan Perera Vs Rajitha Senaratne [2000] 2 SLR 79 at page 100 Justice Yapa observed as follows:

“It is to be observed that quo warranto is a remedy available to call upon a person to show by what authority he claims to hold such office. Therefore, the basic purpose of the writ is to determine whether the holder of a public office is legally entitled to that office. If a person is disqualified by law to hold statutory office the writ is available to oust him.”

Having considered the above legal literature, I hold that writ of quo warranto is a remedy available to call upon a person to show the authority under which he holds the public office and that if the holder of the public office is not legally entitled to hold the public office, court has the power to grant a writ of quo warranto to oust him.

Article 91(1)(d)(xiii) of the Constitution clearly states that no person shall be qualified to be elected as a Member of Parliament or to sit and vote in Parliament if he is a citizen of Sri Lanka who is also a citizen of any other country. The election that the 1st Respondent-Appellant was elected as a Member of Parliament was held on 17.8.2015 and she took oaths as a Member of Parliament on 1.9.2015. I have earlier held that the 1st Respondent-Appellant was not qualified to be elected as a Member of Parliament on 17.8.2015; that therefore she could not hold the office of Member of Parliament; that she could not be considered as a Member of Parliament; and that she being elected as a Member of Parliament on 17.8.2015 is a nullity. According to the aforementioned legal literature, writ of quo warranto is available to oust her from the office of Member of Parliament. Therefore, the contention that writ of quo warranto would not lie against a Member of Parliament lacks merit. For the above reasons, I reject the contention of learned President's Counsel for the 1st Respondent-Appellant.

Learned President's Counsel for the 1st Respondent-Appellant drawing our attention to provisions of Parliamentary Election Act No 1of 1981 next contended that the only way that 1st Respondent-Appellant could have been removed from the office of Member of Parliament by filing an election petition under the provisions of Parliamentary Election Act No 1of 1981 and that Article 140 of the Constitution could not be invoked to remove a Member of Parliament. He contended that an election petition must be filed within 21 days from the date of election and such an

election petition has to be filed by two sets of people described in Section 95 of Parliamentary Election Act No 1of 1981. He contended that removal of Members of Parliament could not be done as and when people choose to do so. If the contention of learned President's Counsel for the 1st Respondent-Appellant is accepted as correct, then Article 140 of the Constitution cannot be invoked and the provisions of Parliamentary Election Act No 1of 1981 would oust the jurisdiction conferred to Superior Courts by Article 140 of the Constitution. Article 140 of the Constitution reads as follows:

> "Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs *of certiorari, prohibition, procedendo, mandamus and quo warranto* against the judge of any Court of First Instance or tribunal or other institution or any other person."

Learned President's Counsel for the 1st Respondent-Appellant submitted that Article 140 of the Constitution should be exercised subject to the law. He advanced this contention since Article 140 of the Constitution contains the word 'law'. Does the Article 140 of the Constitution state that the Court of Appeal shall have power subject to the provisions of Law? No it does not say so**.** If any Article of the Constitution states that it must be used subject to any provisions of law then the contention that such an Article must be used subject to the law can be successful. Are there such provisions in the Constitution? For the purpose of clarity I would like to refer to Article 138(1) of the Constitution which reads as follows.

> "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 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 other institution and sole and exclusive cognizance, by way of appeal, revision or *restitutio in integrum*, of all causes, suits, actions,

prosecutions, matters and things of which such High Court, Court of First Instance, tribunal other institution may have taken cognizance;

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

The above Article states that the Court of appeal shall have power to exercise appellate jurisdiction subject to the provisions of the Constitution or **of any law**. But Article 140 of the Constitution does not state contain the words 'subject to provisions of any law.' The Article 140 of the Constitution states that 'subject to the provisions of the Constitution the Court of Appeal shall have full power and authority'. Therefore, can the contention that Article 140 of the Constitution should be invoked subject to the provisions of Parliamentary Election Act No 1of 1981 be accepted? In other words can the Article 140 of the Constitution be ousted by ordinary legislation? In finding an answer to this question it is necessary to consider certain judicial decisions.

In Sirisena Cooray Vs Tissa Dias Bandaranayake [1999] 1SLR page 1 this court held as follows:

"The writ jurisdiction of the Superior Courts is conferred by Article 140 of the Constitution. It cannot be restricted by the provisions of ordinary legislation contained in the ouster clauses enacted in sections 9(2) and 18A of the Special Presidential Commission of Inquiry Law or section 2 of the Interpretation Ordinance."

In Atapattu and Others Vs Peoples Bank [1997] 1 SLR 208 page 208 at page 222 This Court held as follows:

"Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a

Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution"- I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it. But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3), That phrase refers only to contrary provisions in the Constitution itself, and does not extend to provisions of other written laws, which are kept alive by Article 168(1)"

In Moosajees Limited Vs Arthur and Others [2006] 1SLR 65 this court observed the following facts:

"The 1st respondent tenant applied to the 2nd respondent (Commissioner for National Housing) under section 13 of the Ceiling on Housing Property Law, No. 1 of 1973 ("CHP Law") to purchase the house in dispute owned by the appellant. On 25.01.1984 the Commissioner refused the application holding the premises were business premises under section 47 of the CHP Law. On appeal to the Board of Review under section 39(1) of the Law, the Board held that it was a house as it had been used for residence from 1943. The Court of Appeal refused an application by the appellant to quash the decision of the Board by certiorari. The Court held that in view of section 22 of the Interpretation Ordinance, read with section 39(3) of the CHP Law, the court's jurisdiction was ousted as the decision

of the Board using the test of user was not ex facie outside the Board's jurisdiction and by its order dated 09.02.2001, refused the application for a writ." This court held as follows:

> *"In the above circumstances, the decision of the Board of Review was ultra vires and a nullity-outside its jurisdiction and the appellant was entitled to a writ of certiorari notwithstanding section 39(3) of the CHP Law. Further, Article 140 of the Constitution prevailed over section 22 of the Interpretation Ordinance. For that reason also, section 39(3) of the CHP Law had no application."*

Article 140 of the Constitution is a constitutional provision. Constitution is the Supreme Law of the country. Considering all the above matters, I hold that the ordinary legislation cannot oust the powers conferred to the Superior Courts under Article 140 of the Constitution. When I consider the aforementioned legal literature and the above observation, the contention of learned President's Counsel for the 1st Respondent-Appellant that the only way to remove a Member of Parliament was by filing an election petition and that Article 140 of the Constitution cannot be invoked to remove a Member of Parliament cannot be accepted and is hereby rejected.

Considering all the above matters, I hold that the 1st Respondent-Appellant was disqualified to be elected as a Member of Parliament on 17.8.2015 and that she is not entitled to hold the office of Member of Parliament. In view of the conclusion reached above, the questions of law stated in paragraphs 26 (a) to 26(j) are answered as follows: The Court of Appeal did not make any error in its judgment dated 3.5.2017. The questions of law set out in paragraphs 26(k) to 26(m) do not arise for consideration. Paragraph 26(n) is incomplete. I have earlier held that that the 1st Respondent-Appellant (Geetha Samanmali Kumarasinghe) was not qualified to be elected as a Member of Parliament on 17.8.2015; that the 1st Respondent-Appellant being elected as a Member of Parliament is a nullity; that

she was not qualified to take oaths as a Member of Parliament on 1.9.2015; that therefore she could not hold the office of Member of Parliament; and that she cannot be considered as a Member of Parliament; that her office as a Member of Parliament is a nullity; and that writ of quo warranto is available to oust her from the office of Member of Parliament.

In view of all the aforementioned matters, I hold that the Court of Appeal was correct when it issued a writ of quo warranto declaring that the 1st Respondent-Appellant was disqualified to be a Member of Parliament and that she is not entitled to hold the office of Member of Parliament. For the above reasons, I affirm the judgment of the Court of Appeal and dismiss the appeal of the 1st Respondent-Appellant with costs. In view of the conclusion reached above, the stay order issued by majority decision of the court comes to an end.

Appeal dismissed

Judge of the Supreme Court.

Priyasath Dep PC CJ

I agree.

Chief Justice

BP Aluwihare PC J

I agree.

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.

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 Kurunegala.

Kotagedera Liyanage George
Patrick Perera, "Shanthi",
Ihala Katuneriya, Katuneriya.

Plaintiff

SC APPEAL 101/16
SC HCCA LA 240/2015
WP/HCCA/KUR/ 44/2012(F)
DC MARAWILA 1056/L

Vs

Meththasinge Arachchige Mary
Linette Fernando,
Ihala Katuneriya, Katuneriya.

Defendant

AND BETWEEN

Meththasinge Arachchige Mary
Linette Fernando,
Ihala Katuneriya, Katuneriya.

Defendant Appellant

Vs

Kotagedera Liyanage George
Patrick Perera, “Shanthi”,
Ihala Katuneriya, Katuneriya.

Plaintiff Respondent

AND NOW BETWEEN

Kotagedera Liyanage George
Patrick Perera, “Shanthi”,
Ihala Katuneriya, Katuneriya.

Plaintiff Respondent Appellant

1A Warnakulasooriya Weerakuttige
Mary Therese Fernando
1B Kotagedara Liyanage Disna
Mariyam Geethani Perera
1C Kotagedara Liyanage Shanthi
Kumar Perera

All of, “Shanthi”, Ihala Katuneriya,
Katuneriya.

Substituted 1A, 1B and 1C Plaintiff Respondent Appellants

Vs

Meththasinge Arachchige Mary
Linette Fernando,
Ihala Katuneriya, Katuneriya.

Defendant Appellant Respondent

BEFORE	**: Priyasath Dep PC, CJ.,** **S. Eva Wanasundera PCJ. &** **Vijith K. Malalgoda PCJ.**
COUNSEL	: R. Chula Bandara with Mangala Jeevendra for the substituted 1A, 1B and 1C Plaintiff Respondent Appellants Ms. Sudarshani Cooray for the Defendant Appellant Respondent.
ARGUED ON	: 01.11.2017.
DECIDED ON	: 05.12.2017

S. EVA WANASUNDERA PCJ.

In this matter, leave to appeal was granted on 20.05.2016 on the following questions of law:-

1. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in law;
   (a) By coming to the conclusion that the Petitioner held the corpus under constructive trust on behalf of the Respondent?
   (b) By failing to evaluate the evidence adduced before them?
   (c) By admitting the oral evidence of the Respondent over and above the contents in the three deeds bearing Nos. 0512, 0513 and 0514?
   (d) By deciding /presuming that the Respondent had signed P1 and P2 under duress?
   (e) By holding that the Respondent remained in possession as there was a trust created in her favour?
   (f) By holding that the Respondent was entitled to pay back to the Petitioner the amount she borrowed and retransfer the deeds in her favour?
   (g) By holding that a claim of a 3rd party claiming that there is a constructive trust created in her favour when the contracting parties had no desire to do so?

The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court against the Defendant Appellant Respondent (hereinafter referred to as the Defendant) praying that the Defendant be evicted from the property described in the Schedule to the Plaint dated 06.12.2000, which is of an extent **of 1 Rood and 18.5 Perches**. This land is described as **Lot 2 of Plan 3191** dated **16.01.1989**.

The said **Lot 2** had got blocked out into three allotments by **Plan 3191 A** dated **05.03.1991** by the same surveyor who had made Plan 3191 and naming the said allotments as **Lots 1, 2 and 3** which were **16.5 Perches, 22 Perches and 20 Perches**.

According to the title deed marked **as P6,** the owner of Lot 1 of Plan 3191 A of an extent of 16.5 Perches was Hettigodage Somapala as at 20.02.1998. Information contained in the title deed marked as P6 reveals that the owner of Lot 1 of Plan 3191 A , Hettigodage Somapala had obtained title to the same by Deed No. 14321 dated **03.04.1993**.

According to the title deed marked **as P4 ,**the owner of only a portion of 7 Perches from and out of the combined land encompassing Lots 2 and 3 of Plan 3191 A, was Marasinghe Pedige Wijayaratne as at 20.02.1998. He had obtained title by Deed No. 0031 dated **23.12.1995.**

Information contained in the title deed marked **as P5** reveals that the owners of a portion of 35 Perches from and out of the combined land encompassing Lots 2 and 3 of Plan 3191 A, were Hettiarachchilage Don Newton Francis Appuhamy and Jayasuriya Gonkarage Bernard Oswald Ramya Fernando together as at 20.02.1998 as well as the fact that they had obtained title by Deed No. 0270 dated **31.05.1997.**

The Plaintiff had bought the different portions of the land which together is one and the same land described in the Schedule to the Plaint, adding up to 1 Rood and 18.5 Perches from H. Somapala, M.P.Wijayaratne, H.D.N.F.Appuhamy and J.G.B.O.R.Fernando. These previous owners had owned the said portions of the land from the years 1993, 1995 and 1997. All the Deeds P4, P5 and P6 were executed on one and the same day, i.e. on 20.02.1998. At the time of execution of the said deeds, the Defendant and her son had been in occupation of the land in

question. The Defendant has signed as witness to the transaction in Deeds P4 and P6 and her son has signed as witness to Deed P5. The consideration paid to the vendors are altogether Rs. 370,000/-. The Notary has mentioned that it passed before him and in his presence, in the attestations of the Deeds.

According to the documentary evidence before the trial judge the land in the schedule to the Plaint has got transferred to the Plaintiff on 20.02.1998. The Plaintiff has also produced two documents marked as P1 and P2 signed by the Defendant granting a promise to leave the premises on or before 22.04.1998 and thereafter on or before 95.05.2000. The second promise is after the lapse of two years from the first promise. These two documents are not denied by the Defendant but in the answer it is alleged that the promises were taken under duress but such duress has not been proven at all.

The story which can be gathered by the evidence of the Plaintiff and the Defendant is that the Defendant had transferred the different parts of the property to others and borrowed money from them. When years went by, and the land prices were going higher, the Defendant, M.A.Mary Linette Fernando had requested the Plaintiff who had been living in the neighbourhood and who was known to her for quite some time, to buy all the portions of the land from those to whom she had alienated the same in the early years, keeping a profit to her. She had arranged to settle the dues to all of them on one and the same day; got them all down to the Notary's office on 20.02.1998 ; got down the Plaintiff also to the Notary's office after arranging with him to give her Rs.750,000/- to settle all the money which she had borrowed from the owners of portions of the property as at that time. She was quite successful. The Deeds were written in Sinhalese and everybody was aware that it was a transfer of the property to the Plaintiff, G.Patrick Perera. With the money she got as profit having arranged the transaction, Linette the Defendant is supposed to have bought another block of land somewhere else and had also sent her son abroad. The mother and son promised to leave the premises and the Plaint states that the son left even before the date promised. It can be taken as that he went abroad. Linette did not leave the premises. Patrick went to the Police and to the Mediation Board. Thereafter as it was not settled, Patrick the Plaintiff filed action in the District Court to evict her.

The Defendant pleaded that the Plaintiff held the property in trust for the Defendant. At the end of the trial the District Judge delivered judgment in favour of the Plaintiff. The Defendant appealed to the Civil Appellate High Court and the High Court held that the property in dispute had been held by the Plaintiff in trust for the Defendant and therefore it should be retransferred. Now the Plaintiff is before this Court in Appeal from the High Court Judgment.

Section 83 of the Trusts Ordinance reads as follows:-
" Where the **owner** of a 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 of such property must hold such property for the benefit of the owner or his legal representative."

In the first instance, it is **only the owner** of a property who held the property before transferring the same to another who can claim the benefit of Section 83 of the Trusts Ordinance. If person X transfers the property to person Y, if the attendant circumstances show that X did not intend to dispose of the beneficial interest therein, then , it can be held that Y had held the property for the benefit of X . If persons A,B and C transfer the property to person Y, how can X show any attendant circumstances that Y held the property for the benefit of X? There is no role for X to play. If at all , it is only A, B and C who could come into the scene and allege that attendant circumstances show that A,B and C did not intend to dispose of the beneficial interest to X.

In the case in hand, the Defendant had not even tried to plead or lead evidence to show any ownership to the land at any time. There is no valuable documentary evidence to demonstrate that the Defendant was the owner at any stage regarding the property. The evidence before court for the Defendant is her oral evidence and her daughter's oral evidence and the electoral registers to prove residence in the house on the land. The Grama Niladari also had given evidence only to prove her residence. There is not a single deed to prove any ownership by her. She had not even pleaded or given evidence to show that the previous owners of the portions of land according to the deeds were holding the same on trust for her.

The Defendant had not been able to place evidence even with regard to possession of the land because she had admitted that the Plaintiff continued to pluck coconuts and she also plucked coconuts as the person living in the house on the land. The Plaintiff had got down the persons who collected the coconuts when he got them plucked every two months or so from the whole land, to come and give evidence in court. Duress was alleged against the Plaintiff with regard to getting a document signed giving a promise to leave but it was not proved by the Defendant. The Defendant had not even moved to try to prove the same.

The case law with regard to constructive trusts are contained in several authorities. In **Wickremaratne Vs Thavendraraja 1982, 1 SLR 21**, Justice Atukorale held that Sections 91 and 92 of the Evidence Ordinance cannot have any application unless there has been in the first instance a contract or a grant or any other disposition of property between the parties. In **Dayawathie Vs Gunasekera and Another, 1991, 1 SLR 115,** it was held that the Prevention of Frauds Ordinance and Section 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.
In Thisa Nona and Three Others 1997 1 SLR 169, the Court of Appeal held that when the attendant circumstances show that Appellant did not intend to dispose of the beneficial interest of the property transferred, the law declares that under such circumstances the Respondent would hold such property for the benefit of the Appellant. **In Piyasena Vs Don Vansue 1997 2 SLR 311** also the Court of Appeal held that even though a transfer is in the form of an outright sale, it is possible to lead parole evidence to show that facts exist from which it could be inferred that the real transaction was either money lending where the land is transferred as a security or a transfer in trust, in such cases Sec. 83 of the Trusts Ordinance would apply.

However, none of these case law can be applied in the case in hand simply because the transfer of the land to the Plaintiff was not done by the Defendant but by others who were the owners of the land at the time of the transaction. The Defendant has not proven her ownership to the land at any time by documentary evidence showing her title even before the portions of land were transferred to the people who owned the same at the time of the transfer which had taken place at the instance of the Defendant. The transfer to be looked into, to find whether it was held on trust or not, should be a transfer of property from the

Defendant to the Plaintiff. The transfer in this case was not from the Defendant to the Plaintiff. Therefore whether the land was held by the Plaintiff in trust for the Defendant does not arise in law.

I answer the questions of law aforementioned in the affirmative in favour of the Plaintiff Respondent Appellant and against the Defendant Appellant Respondent. I do hereby set aside the judgement of the Civil Appellate High Court dated 24.06.2015 and I affirm the judgement of the District Court dated 01.03.2007.

This Appeal is allowed. However I order no costs.

Judge of the Supreme Court

Priyasath Dep PC.
I agree.

Hon. Chief Justice

Vijith K. Malalgoda PC.
I agree.

Judge of the Supreme Court.

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

SC.Appeal No.102/12

SC. Spl. LA No.58/2012

D.C.Homagama Case No.764/M

Court of Appeal No.

CA. 1184/02(F)

T.G.Nandadasa
No.128/1 Moragahalanda Road,
Arawwala, Pannipitiya.

Plaintiff-Respondent-Petitioner

Vs.

1. V.S. Kudaligama
   Secretary, Ministry of Education,
   Isurupaya,
   Battaramulla.
2. K.U. Artygalla
   Director of the Western Province,
   Education Department,
   Colombo.
3. Parakrama Randeniya
   Asst. Director Education,
   Education Office,
   Homagama.
4. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

Defendant-Appellant-Respondents

BEFORE : **SISIRA J. DE ABREW, J.**
UPALY ABEYRATHNE, J. &
ANIL GOONERATNE, J.

COUNSEL : Ranjan Suwandaratne for the Plaintiff-Respondent-Appellant.
Milinda Goonatillake, DSG, for the Defendant-Appellant-Respondents.

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ARGUED &
DECIDED ON : 19/01/2017

SISIRA J. DE ABREW, J.

Heard both Learned Counsel in support of their respective cases. The Plaintiff in this case filed an action in the District Court challenging his transfer. In the District Court, the Plaintiff has raised an issue to the effect whether the Plaintiff from the beginning of his service up to the date of institution of this action was an assistant teacher.

The Learned District Judge has answered this issue in the affirmative. The Plaintiff did not file an appeal against the said order of the District Judge. Therefore, the Plaintiff has admitted that from the date of his appointment to the date of institution of this action he was an assistant teacher.

The Plaintiff was, by letter dated 30/01/1989, transferred to Thalpathpitiya Siddhartha Maha Vidyalaya as an assistant teacher. The Plaintiff challenged the said transfer in the District Court. The Learned

District Judge by judgment dated 20/08/2002 held in favour of the Plaintiff.

Being aggrieved by the said judgment, the Respondents appealed to the Court of Appeal. The Court of Appeal by judgment dated 17/02/2012 set aside the judgment of the District Judge and dismissed the Plaintiff's action. Being aggrieved by the said judgment of the Court of Appeal, the Plaintiff-Respondent-Petitioner-Appellant (hearinafter referred to as the Plaintiff-Appellant) has filed this appeal. This Court by order dated 07/06/2012 granted Leave to Appeal on questions of Law set out in paragraph 31(a), (b) and (c) which are set out below,

a Has the Court of Appeal in arriving at the said judgment failed to consider the detailed evidence given at the trial and thereby finally arrived at a finding which cannot be supported by the evidence led at the trial in the District Court.

b. Has the Court of Appeal misdirected with regard to the perse ultra vires decision taken by the 1st Respondent in transferring the Petitioner.

c. Has the Court of Appeal failed to consider the fact that when a decision is perse ultra vires and is made without jurisdiction or a decision is malicious the provisions of Article 55(5) of the Constitution cannot be considered as a bar for the institution of damages action by an affected party in arriving at his final conclusion.

Learned Counsel appearing for the Plaintiff-Appellant submits that the person who made the transfer by letter marked "P3" has no authority to

do so. Learned Judges of the Court of Appeal have made the following observations.

> "If the Plaintiff is to challenge the document dated 13/01/1998 the Plaintiff should resort to an administrative action".

The Plaintiff-Appellant was transferred by letter dated 13/01/1998. The most important question that must be decided in this case is whether, the District Court has jurisdiction to make any declaration with regard to the transfer of the Plaintiff-Appellant. The Plaintiff-Appellant is a Public Servant.

In answering this question, I would like to consider Article 55 (5) of the Constitution which was in operation at the time that the learned District Judge gave the judgment. Article 55 (5) reads as follows:

> "Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission or of a public officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer".

When we consider the above Article we are of the opinion that the District Court has no jurisdiction to make any declaration with regard to the transfer of the Plaintiff. This view is supported by the judicial decision in ***Chandrasiri Vs. Attorney General, 1989 1SLR page 115*** wherein this court held thus,

> " The District Court has no jurisdiction to inquire into, pronounce or otherwise call in question the dismissal of the Appellant."

Considering the above legal literature, we hold that the Learned District Judge did not have jurisdiction to make any declaration with regard to the transfer of the Plaintiff.

Considering all the aforementioned matters, we answer the 3rd question of law in the negative. In view of the conclusion reached above, the 1st and the 2nd questions of law do not arise for consideration.

Considering all the aforementioned matters, we affirm the judgment of the Court of Appeal dated 17/02/2012 and dismiss the Appeal of the Plaintiff with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

UPALY ABEYRATHNE, J.

I agree.

JUDGE OF THE SUPREME COURT

ANIL GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT

Mks

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

In the matter of an application for Leave to Appeal from Judgment dated 19th August 2010 of the High Court of Civil Appeal of the Sabaragamuwa Province Holden in Ratnapura in Appeal No.SP/HC CA/RAT/09/2008.

SC Appeal No:-102/2011

SC [HC] CA LA No:-381/2010

HCCA NO.SP/HCCA/RAT/09/2008 (FA)

DC Ratnapura Case No.10124/Partition

1.Uyanwattalage Piyarathne

2.Uyanwattalage Jayarathne

Both of Hangamuwa, Ratnapura.

Plaintiffs

V.

1.Rajapakse Mudiyanselage Somapala Rajapaksha,

Demalaporuwa Karangoda.

2.Malini Somalatha Wakkumbura nee

Weerasena,

Bopitiya Road, Pelmadulla.

3.Lalani Nirmala Wakkumbura,

Radella, Karannagoda, Ratnapura.

4.Habarakada Arachchige

Hansawathie (deceased)

4A.Lalani Nirmala Wakkumbura

Radell, Karannagoda, Ratnapura.

Defendants

AND BETWEEN

1.Uyanwattalage Piyarathne

2.Uyanwattalage Jayarsthne

Both of

Hangamuwa Ratnapura.

Plaintiff-Appellants

V

1.Rajapakse Mudiyanselage

Somapala Rajapaksha

Demalaporuwa, Karannagoda.

2.Malini Somalatha Wakkumbura

Bopitiya Road, Pelmadulla.

3.Lalani Nirmala Wakkumbura,

Radella, Karannaoda, Ratnapura

4.Habarakada Arachchige

Hansawathie (deceased)

4A.Lalani Nirmala Wakkumbura

Radella, Karnnagoda,

Ratnapura.

Defendant-respondents

AND NOW BETWEEN

Lalani Nirmala Wakkumbura

Radella, Karannagoda,

Ratnapura.

3rd [4A] Defendant-Respondent-Petitioner-Appellant

V.

1.Uyanwattalage Piyarathne,

2.Uyanwattalage Jayarathne

Both of

Hangamuwa, Ratnapura.

Plaintiff-Appellant-Respondent-Respondents

AND

1A. Karangoda Gamage

Kusumawathie

1B. Ajith Mohan Rajapakse

1C. Gihani Sandhaya Rajapakse

1D. Thanuja Rajapakse

1E. Chaminda Rajapakse

1F. Udeshika Rajapakse

All of Demalaporuwa,

Karannagoda, Ratnapura.

1A -1F Substituted Defendant-Respondent-Respondent-Respondents

2.Malini Somalatha Wakkumbura

Nee Weerasena.

Bopitiya Road, Pelmadulla.

4.Habarakada Arachchige

Hansawathie (deceased)

2nd & 4th Defendant-Respondent-Respondent-Respondents

BEFORE:- S.E.WANASUNDERA, PCJ.

PRIYANTHA JAYAWARDENA, PCJ. &

H.N.J.PERERA, J.

COUNSEL:-Kaushalya Molligoda for the 3rd (4A) Defendant-Respondent-Petitioner—Appellant

Anuruddha Dharmaratne for Plaintiff-Appellant-Respondent

Respondent.

ARGUED ON:-03.08.2016

DECIDED ON:-10.11.2016

H.N.J.PERERA, J.

The Plaintiff-Appellant-Respondent-Respondents (hereinafter referred to as the Plaintiff-Respondents) instituted this partition action to partition a land called Ellagawahena and Galellahena more fully described in the schedule to the plaint. The land described in the schedule to the plaint is depicted in plan No 27 dated 05.08.1994 made by surveyor J.Somasiri. There was no corpus dispute in this case. All parties conceded that the land sought to be partitioned was as depicted in Preliminary Plan No.27 produced marked "X".

It was common ground between all parties that the title to the entire land sought to be partitioned was at one point of time owned by Wakkumburage Chandanahamy.

Chandanahamy has conveyed 3 acres by Deed marked 1V1 to Malini, who by Deed marked 1V2 has conveyed it to the 1st Defendant. Chandanahamy by Deed 1V5 has also transferred 7 acres to the 1st Defendant. Accordingly, the fact that the 1st Defendant is entitled to 10 acres out of the corpus has been admitted by all parties. The deceased 4th Defendant claimed the balance portion of the said land by Deed No.109 (3V1). By the said Deed marked 3V1, Chandanahamy had conveyed all his rights to the deceased 4th Defendant. Accordingly, the only dispute at the trial was with regard to the entitlement of the Plaintiff-Respondents on one hand and the 3rd Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as 3rd Defendant-Appellant).

The position of the Plaintiff-Respondents is that, Chandanahamy by Deed marked P8 dated 26.05.1975 transferred the ownership of that portion of the land to Simon with the condition that it has to be re-transferred within a period of 2 years on payment of the principal sum and interest stated thereon; and since Chandanahamy did not get it re-transferred fulfilling the conditions Simon became the absolute owner of the said portion of land; and thereafter Simon conveyed it to the Plaintiffs by Deed marked P9 dated 07.01.1980. The 3rd Defendant-Appellant is Chandanahamy's daughter. After the death of her mother the 4th Defendant, the 3rd Defendant was substituted as 4A Defendant and her position was that the Deed P8 is a Mortgage and not a conditional transfer upon which the possession of the land was never given to the Plaintiffs; and therefore, Chandanahamy donated that 5 acres to her mother, the 4th Defendant (wife of Chandanahamy) by Deed 3V1 dated 11.07.1983. The3rd Defendant-Appellant has claimed title by deed as well as by prescription.

The Plaintiff-Respondents claimed title to the disputed land by deeds. The Plaintiffs also had claimed prescriptive title. Generally all parties in a partition case also claim prescriptive title in order to buttress their paper title. In Leisa and another V. Simon and another [2002] 1 Sri.L.R 148 it was held that an averment of prescription by a plaintiff after pleading paper title is employed to buttress his paper title. The mere fact that the plaintiff claimed both on deeds as well as by long possession did not entail the Plaintiff to prove prescriptive title thereto. His possession was presumed on proving paper title. The averment in the plaint did not cast any burden upon the Plaintiff to prove a separate title by prescription in addition to paper title. It was contended on behalf of the Plaintiff-Respondents that the 3rd Defendant-Appellant could not have prescribed to an undivided portion of land which was co-owned by the 1st defendant.

It was the contention of the 1st Defendant and the 3rd Defendant-appellant that they were at all times material to this action, in exclusive possession of divided and defined portions of land. It was the position of the 1st Defendant and the 3rd Defendant-Appellant that they had amicably divided the land described in the schedule to the plaint and was in possession of the said divided and defined portions of land adversely to the claims of each other and of any third party, for well over 10 years.

After trial, the learned District Judge has held in favour of the 3rd Defendant-Appellant, and decided that Deed P8 has no avail in law and the Plaintiff-Respondents are not entitled to any rights in the land to be partitioned. Accordingly, the learned trial Judge has ordered the corpus to be partitioned only among the 1st and 3rd Defendant-Appellant – 10 acres to the 1st Defendant and the balance to the 3rd Defendant-Appellant. The learned District Judge has held that the 1st Defendant and the 3rd Defendant-Appellants are co-owners of the said land and that they have possessed undivided portions of the said land to be partitioned. He has also held that as the 3rd Defendant-Appellant has paper title from 1983 and that the said land could be partitioned accordingly. He has answered all the issues raised on behalf of the said 1st and 3rd defendants in their favour. The trial Judge has accordingly entered Interlocutory decree to partition the land between the 1st and 3rd Defendants according to the lots they have possessed.

Being aggrieved by the said judgment of the learned trial Judge the Plaintiff-Respondents had preferred an appeal to the Civil Appellate High Court, Ratnapura. The learned Judges of the Civil Appellate High Court Ratnapura set aside the judgment of the learned District Judge and declared that the 1st and 2nd Plaintiffs each are entitled to 1/3 share of the corpus and the 1st Defendant to 4/6 shares.

Being aggrieved by the said judgment dated 19.10.2010 of the Civil Appellate High Court of Ratnapura, the 3rd Defendant–Appellant filed an application for leave to appeal to the Supreme Court and the Court granted leave on the following questions of law stated in paragraph 21 (F), (H) and (J) of the Petition.

21(f)-Did the High Court of Civil Appeal err in its findings that the commencement of adverse possession by the Petitioner must necessarily be with effect from 31.07.1981 –or the date of delivery of judgment of the Court of Appeal stemming from the order of the Debt Conciliation Board?

21(h)-In all the attendant circumstances and in the light of the applicable law, did the High Court of Civil Appeal err in its conclusion that the Petitioner failed in her claim for prescriptive title?

21(j)-In all the attendant circumstances of the case, did the High Court of Civil Appeal err in its conclusion that the Petitioner was not a bona fide possessor?

The Plaintiff-Respondents' position was that the said Chandanahamy has conveyed an undivided 5 acres or an equivalent 800/2403 shares to U.Simon on a conditional transfer No.18962 marked P8. Since a retransfer was not affected as stated in the said Deed, the said U.Simon became the owner or the rights referred to in the said Deed. The said Simon has conveyed the said rights to the Plaintiff-Respondents.

The said Deed P8 is a Notarially executed Deed of Transfer on 26.05.1975 by Chandanahamy in favour of U.Simon in respect of 5 acres out of the land to be partitioned for valuable consideration of Rs.7000/-with the right to call for a retransfer within a period of 2 years on payment to U.Simon of the principal and interest as stipulated .The said Deed has been marked without any objections from the 3rd Defendant-Appellant.

It was not marked subject to proof. The Plaintiff-Respondents had produced deeds marked P 1 to P9 to which no objection was taken at the close of the Plaintiff-Respondents case. The *cursus curiae* of the original Civil Court followed for more than three decades in this country is that the failure to object to documents, when read at the closure of the case of a particular party would render them as evidence for all purposes of the law. In this case the Plaintiff-Respondents have clearly proved their paper title.

The 3rd Defendant-Appellant in her evidence has stated that they went to the Notary's office several times in and around November and December 1979 informing Simon in advance to make the payment and get the property re-transferred, but Simon evaded. As stated in the said judgment of the Civil Appellate High Court , thereafter, as seen from documents marked 3V3 to 3V8, they have gone before the Debt Conciliation Board in 1980 to effect the transfer. The decision of the Debt Conciliation Board that Deed P8 is not a transfer but a Mortgage has been quashed by the Court of Appeal by way of Writ of Certiorari in 1981(3V9). The 3rd Defendant-Appellant admits that they have never gone before the Supreme Court against the said judgment.

It is a general principle of law "that no matter what name or designation the parties give to a contract or transaction, the Court will inquire into the substance of the transaction and give effect to what it finds its true substance or nature to be." In De Silva V. De Silva 39 N.L.R. 169-Where the Plaintiff made a conveyance of property to defendant for a consideration. It was provided in the deed that if the vendor were to repay the said consideration with interest then the vendee shall retransfer the premises on any day within one year from its date. Plaintiff instituted an action after the expiration of the year to redeem the premises on the footing that they were transferred to the Defendant as security for repayment of a debt- it was held that the transaction was a

contract of sale with a right to repurchase, time being of the essence of the contract. The Civil Appellate High Court has very correctly held that Deed P8 is a transfer subject to certain conditions mentioned thereon which have admittedly not been fulfilled during the stipulated time, and therefore the transferor could not transfer the same on the subsequent Deed 3V1 to the 4th Defendant.

This Court was not inclined to grant leave to appeal on the proposed questions whether the said Deed marked P8 was a mortgage and /or whether the 3rd Defendant- Appellant can claim paper title to the corpus. This Court therefore has to accept and proceed on the basis that the said deed marked P8 is a conditional transfer, the condition therein was not fulfilled during the stipulated time and hence the Plaintiff-Respondents predecessor the said U.Simon gets undivided shares in the corpus in terms of the said deed marked P8, which is now owned by the Plaintiff-Respondents in terms of Deed marked P9.

The Plaintiff-Respondents in this case had clearly proved their paper title to the land in dispute. The Plaintiff-Respondents had proved their paper title by marking and producing the Deeds P1 to P9. The Plaintiff-Respondents had proved that they are co-owners of the land to be partitioned. Mere non possession of the Plaintiff-Respondents who are co-owners would not deprive their title since the possession of one co-owner means and includes the possession of all co-owners. Admittedly the 1st Defendant too is a co-owner of the land to be partitioned. The parties have admitted that the 1st Defendant is entitled to 10 acres in the said corpus. The evidence led in this case establish that the 1st Defendant continued to possess a portion of the said corpus close to 10 acres as a co-owner. The mere fact that the 1st defendant had possessed a separate portion in the said land for convenience is not sufficient to prove prescriptive title.

In Corea V. Appuhami 15 N.L.R 65 it was held that:-

“A co-owner’s possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about the result.”

The 1st Defendant is deemed to have possessed the said land on behalf of all the co-owners.

The 3rd Defendant-Appellant has failed to prove paper title. Therefore the burden is clearly on her to prove prescriptive title.

In Sirajudeen and others V. Abbas [1994] 2 Sri.L.R 365 it was held that:-

“Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive right.”

As regard the mode of proof of prescriptive possession, mere general statements of witnesses that the defendant possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or defendant. The occupation of the premises must be such character as is incompatible with the title of the owner.

In Hussan V, Romanishamy 66 C.L.W 112, it was held "that mere statements of a witness, "I possessed the land" or "we possessed the land" and "I planted plantain bushes and also vegetables", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment of rates by itself proof of possession for the purposes of this section."

The 3rd Defendant-Appellant has failed to prove that she has paper title to the corpus to be partitioned. The Civil Appellate-High Court has held that the mother of the 3rd Defendant-Appellant , 4th deceased Defendant got no rights to the land by the said Deed marked 3V1.

The Civil Appellate High Court had held that the 3rd Defendant-Appellant had failed to produce evidence to substantiate the fact she possessed and obtained prescriptive rights to the said land. The Civil Appellate High Court has held that the 3rd Defendant-Appellant had never stated in her evidence that they commenced adverse possession and all what she has stated in her evidence is that she continued with possession even after the Court of Appeal decision. And the Court of Appeal judgment had been delivered on 31.07.1981. The plaintiff-Respondents had instituted this action on 21.11.1990 before the completion of a period of 10 years from the date of the said judgment. The 3rd Defendant-Appellant's evidence clearly establish the fact that she had tried to effect the re-transfer of the land upon complying with the conditions and failed. Thereafter the Debt Conciliation Board decided P8 to be a Mortgage, which decision was quashed by the Court of Appeal on 31.07.1981. The 4th deceased Defendant and the 3rd Defendant-Appellant claimed rights from the deed marked 3V1 written in 1983 after the said judgment of the Court of Appeal. They continued to possess a part of the corpus claiming rights from the said deed marked 3V1. The 3rd Defendant-Appellant also claimed prescriptive title to the said portion of land but had clearly failed to prove prescriptive title to the same.

It seems to me that the Civil Appellate High Court had properly addressed its mind to the important fact that the burden is definitely on the 3rd Defendant-Appellant to establish her plea of prescriptive title. In my view in the present case there is significant absence of clear and specific evidence on such acts of possession as would entitle the 3rd Defendant-Appellant to a decree in favour in terms of section 3 of the Prescription Ordinance. The Civil Appellate Court had carefully analysed all the evidence led in this case and had held with the Plaintiffs.

Therefore I answer all the questions of law raised in this case in the negative in favour of the Plaintiff-Respondents. I affirm the judgment of the Civil Appellate High Court dated 19.10.2010 for the reasons set out. Accordingly the appeal of the 3rd Defendant-Appellant is dismissed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. Appeal No. 103/2005

S.C. Spl. L.A. No. 137/2005
C.A.L.A. No. 34/01
D.C. Negombo 789/RE

In the matter of an Application for Special Leave to Appeal

Madampiti Hettiarachchige
Cyril Norbet Tissera

PLAINTIFF-JUDGMENT-CREDITOR

PETITIONER-RESPONDENT-PETITIONER-APPELLANT

Vs.

Filicia Mary Magdaline
Of No. 131, Negombo Road,
Rilaulla, Kandana.

SUBSTITUTED-DEFENDANT-RESPONDENT-PETITIONER-RESPONDENT-RESPONDENT

BEFORE: Priyasath Dep P.C., C.J.

Priyantha Jayawardena P.C., J.

Anil Gooneratne J.

COUNSEL: Romesh de Silva P.C. for the Plaintiff-Judgment-Creditor Petitioner-Respondent-Petitioner-Appellant

Faize Musthapha P.C. for the Substituted-Defendant-Respondent-Petitioner-Respondent-Respondent

ARGUED ON: 27.06.2017

DECIDED ON: 08.12.2017

GOONERATNE J.

This was a rent and ejectment action filed on or about 1978 in the District Court of Negombo. The premises in question is situated at No 131, Negombo Road, Rilaulla, Kandana. Judgment was entered by the District Court in favour of the Appellant and in terms of Section 22(1) (c) of the Rent Act, a further order was made by the learned District Judge, that before the Writ of Execution is issued by court, directing the Commissioner of National Housing to provide alternate accommodation to the Tenant-Respondent. There was in fact no appeal against the judgment of the District Court. It is the position of the Appellant that representations were made by him to the Commissioner to provide alternate accommodation to the Respondent so that he could execute the decree. It is also stated that the original Respondent expired and the Plaintiff-Appellant substituted the wife of the Respondent on 24.02.1987 in his place.

The material furnished to court suggest that the Commissioner of National Housing by letter dated 17.02.1997 informed the Registrar, District Court of Negombo that the Commissioner is in a position to provide an alternate house from the Divulapitiya, Walpita Housing Scheme which is reserved for the tenant. Thereafter the Appellant moved court and sought a Writ of Execution and also prayed for the issue of notice under Section 377 of the Civil Procedure Code, and in the said application Substituted-Defendant-Petitioner sought an order from court to reject the application of the Plaintiff-Appellant

The Respondent objected to allowing a Writ of Execution and after inquiry, District Court allowed the application for writ and the learned District Judge by order of 19.01.2001 made order allowing the writ subject to conditions. The Respondent being aggrieved by the District Court Order sought Leave to Appeal and Court of Appeal having granted leave, consequently by order of 25.05.2005 set aside the order of the District Court. The Supreme Court on or about 28.11.2005 granted Special Leave to Appeal on question of law set out in paragraph 32 (i), (ii), (iii), (vi) & (vii) of the petition dated 30.06.2005. It reads thus:

(i) Did the Court of Appeal err in law in applying the principles laid down in case Mowjood Vs. Pussadeniya 1987 (2) SLR 292?

(ii) Did the alternate accommodation provided by the Commissioner in accordance with the provisions laid down in Section 22 (1) (c) of the Rent Act as amended?

(iii) In terms of Section 22 (1) (c) of the Rent (Amendment) Act No. 26 of 2002 are the principles laid down in the case Mowjood Vs. Pussadeniya still in force?

(vi) Did the Court of Appeal err in holding that, the agreement referred is a Rent Purchase agreement?

(vii) In any event is the judgment in Mowjood Vs. Pussadeniya correctly decided?

Parties to this suit had been litigating since 1978. Judgment was entered in favour of the Plaintiff-Appellant in 1980, by the District Court. Thereafter the case record went missing from 1987 and later reconstructed by an Order of Court. The substituted-Defendant-Petitioner support the Judgment of the Court of Appeal and further state that the Court of Appeal correctly followed the Judgment in Mowjood Vs. Pussadeniya 1987 2 SLR 287 ... that purported notification on the basis of which the writ had been issued did not constitute "alternate accommodation" as required by Section 22(1) (c) of the Rent Act inasmuch as it was on hire purchase and not tenancy. Defendant also argue that purported notification is bad in law as the notification does not state that alternate accommodation was available for the tenant, and in the contrary it

states that alternate accommodation is available to the Plaintiff, landlord. It is bad in law and invalid.

Section 22 (b) of the Rent Act reads thus:

> Such premises are in the opinion of the court, reasonably required for occupation as a residence for the landlord, or any member of the family of the landlord, or for the purposes of the trade, business, profession, vocation or employment of the landlord, and such landlord has deposited, prior to the institution of such action or proceedings a sum equivalent to ten years' rent or rupees one hundred and fifty thousand, whichever is higher, with the Commissioner for National Housing and has cause notice of such action or proceedings to be served on the Commissioner: or" :

I will at this point of my Judgment consider the Court of Appeal Judgment and the applicability of the case of Mowjood Vs. Pussadeniya which was a Judgment in a Writ Application, and different to the case in hand. In order to clarify the position I will incorporate the operative part of the Court of Appeal Judgment which relied heavily by the Defendant on Mowjood Vs. Pussadeniya, only. The following to be noted.

> At the inquiry into the notification in the present case, all the evidence clearly establishes that the alternative accommodation offered is not on rent basis but on rent purchase basis and the expected occupation of the premises offered is in a character of a rent-purchaser and not of a tenant. In such circumstances, following rule in the decision of *Mowjood Vs. Pussadeniya* (Supra) the learned District Judge could not hold that the premises offered is "alternative accommodation" in the sense of the provisions of Rent Act and specially section 22 (1C) and ought not in law to have allowed the application for the issue of writ of execution of the decree. The learned District Judge has erred in law in holding that what was offered is "alternative accommodation" and consequently basing his decision to allow the writ of execution.

The evidence was led of the Plaintiff and two officers of the National Housing and Development Authority at the inquiry before the District Judge pertaining to the writ of execution. Plaintiff's evidence suggest that agreement to purchase the house at Divulapitiya, Walpita Housing Scheme (alternate house made available to the tenant) is between the Plaintiff-Appellant and the Commissioner of National Housing for Rs. 250,000/- . Plaintiff paid Rs.50,000/- initially and thereafter paid 18 instalements. The Court of Appeal has merely applied the case of Mowjood Vs. Pussadeniya without considering the evidence led at the inquiry. I will refer to certain extracts of Plaintiff's evidence. At Pg. 66 & 67 I note the following evidence.

උ: ඔව්

ප්‍ර : ඒ අනුව විකල්ප නිවාසය සම්බන්ධයෙන් ඉල්ලීමක් කලාද?

උ: ඔව්

ප්‍ර : ඒ ඉල්ලීම අනුව විකල්ප නිවසක් දිවුලපිටිය වල්පිට නිවාස යෝජනා ක්‍රමයෙන් ලබා දීමට ජාතික නිවාස කොමසාරිස් එකග වෙලා තිබෙනවා?

උ: ඔව්

ප්‍ර : ඒ අනුව තමන් ඉල්ලා සිටින්නේ විකල්ප නිවාසයක් ආදේශිත විත්තිකරුට සපයා දීමට දැන් හැකියාව තිබෙන නිසා නඩු තීන්දුව ක්‍රියාත්මක කිරීමට අවසර දෙන්න කියා?

උ: ඔව්

.....

උ: ඔව්

ප්‍ර : ඊට අමතරව ජාතික නිවාස සංවර්ධන අධිකාරිය මගින් මෙම අධිකරණයේ රෙජිස්ට්‍රාර් වරයා වෙත 1977.0217 දින ලිපියක් එවා තිබෙනවා. එම ලිපියෙන් නිවාස සංවර්ධන අධිකාරියේ නිලධාරීන් සඳහන් කරලා තිබෙනවා මෙම නඩුවේ තීන්දුවට අනුව විකල්ප නිවාසයක් සපයා දීමට හැකි බැවින් තීන්දුවට අනුව කටයුතු කල හැකි බව කාරුණිකව දන්වා සිටිමි කියා?

උ: ඔව්

At Pg. 153 of the proceedings which refer to a letter to the Registrar of the District Court from the Commissioner of National Housing clearly states that a house has been reserved, and will be complied with in terms of the order of the District Judge .... "ඉහත තීන්දුව අනුව කටයුතු කල හැකි බව කාරුණිකව දන්වමි.

රෙජිස්ට්‍රාර්,
දිසා අධිකරණය,
මීගමුව.

නඩු අංක 789/ආර්ඊ - නඩු තීන්දුවට අනුව කටයුතු කිරීම

කදාන, හවුගොඩ, අංක 215/ඒ හා පදිංචි එම්.සී.නෝබට් තිසේරා යන අයට ජාතික නිවාස සංවර්ධන අධිකාරිය සතු දිවුල්පිටිය වල්පිට නිවාස ක්‍රමයෙන් නිවසක් වෙන්කර ඇති බැවින්, ඉහත නඩුවේ තීන්දුව අනුව කටයුතු කළ හැකි බව කාරුණිකව දන්වමි.

Though communication by the Commissioner came rather late it is clear that the house is reserved for the tenant. An Assistant Commissioner who gave evidence had this to state, in court.

ප්‍ර : ජාතික නිවාස කොමසාරිස්ගේ කාර්යාලයයි ජාතික නිවාස සංවර්ධන අධිකාරියයි කලින් එකටද තිබුනේ?

උ: එකතැන තිබුනේ.
දෙකක් විදියට තිබී දැන් එකට තිබෙන්නේ.

ප්‍ර : ජාතික නිවාස සැපයිම දැන් කරන්නේ නිවාස සංවර්ධන අධිකාරියද?

උ : ජාතික නිවාස සංවර්ධන අධිකාරිය දැන් කරන්නේ

ප්‍ර : දැන් ජාතික නිවාස සංවර්ධන අධිකාරියෙන් විකල්ප නිවාසයක් සපයන්න පටන් ගත්තේ?

උ: උසාවියේ නියෝගයක්මත ඉල්ලීමක් තිබුනෝත් හදලා තිබුනෝත් ඒ වෙලාවේ නිවාසයක් සපයනවා.

ප්‍ර : කවුද ඉල්ලීම කලේ

උ: ජාතික නිවාස කොමසාරිස්.

The Court of Appeal Judgment has not considered the evidence led at the inquiry and merely arrives at a conclusion based on submission of counsel and the decision in Mowjood Vs. Pussadeniya. The said Judgment has no application at all to the case in hand, especially in the light of evidence that the premises is reserved for the tenant.

On perusing the judgment of Mowjood Vs. Pussadeniya it is stated .. where judgment for ejectment of the tenant had been made it is special concern to protect tenants in occupation of premises whose standard rent does not exceed Rs. 100/-. Hence a purposive interpretation of the statute to give effect to the intention of the legislature should be adopted. ..... reasonably required for occupation as a residence of the landlord or a member of the family writ to issue only after the Commissioner of National Housing has notified the court that he is able to provide alternative accommodation to the tenants. The alternative accommodation should, in view of the social objective of the Act, have some relevance to the needs and circumstances of the tenant so as not to render the offer of alternative accommodation illusory and unmeaningful: the accommodation offered must be habitable and appropriate to the tenant ... It

must be roughly comparable with the existing accommodation in basic amenities.

I cannot certainly agree with the above first part of the judgment. I could only agree with above, only from the point of 'habitable and appropriate' to the tenant. In this regard the Plaintiff as well as the other witnesses testified that, the alternative accommodation provided is a house on a 14 perch land and the house equipped with electricity and water supply and other amenities. It is close to Divulapitiya town. These are all uncontradicted evidence. A house in the nature of the tenants requirements should have basic amenities. Any utility items basic for human habitation must be available, without luxuries. That should be the standard that is required. In todays' context it can be any basis and rent basis is preferred.

In all the above circumstances I would answer the question of law as follows in favour of Plaintiff-Appellant.

(i) Yes

(ii) Yes

(iii) Mowjood Vs. Pussadeniya does not apply to the case in hand in its entirety.

(iv) In view of the answers to above, it does not arise

(v) Same as (iv) above

Mowjood Vs. Pussadeniya was decided 40 years ago, we are today living in a very modern society, notwithstanding the poverty that has crept into the society. I am not in a position to adopt the principles laid down in the above case to the case in hand. Delay that has taken place at various level of courts and the delay of the Commissioner of National Housing to provide alternative accommodation is unfortunate and regrettable. I affirm the Order of the learned District Judge dated 19.01.2001 and I set aside the judgment of the Court of Appeal. The Substituted-Defendant-Respondent-Petitioner and the Plaintiff-Respondent (Judgment-Creditor) to comply with learned District Judges' Order subject to the conditions that the tenant, once the keys to the premises are accepted the tenant should within 6 weeks vacate the premises in dispute and occupy the premises allocated. If any change of circumstances have occurred tenant to notify the District Court, by motion to enable the District Judge to deal with it.

Appeal allowed without costs.

JUDGE OF THE SUPREME CORUT

Priyasath Dep P.C., 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 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 / 103/2009

SC/ HCCA/LA/ 20/2009

CP/HCCA/Kan/367/03

DC Kandy No.19682/L

R. M. Punchi Manike,

No. 130, Thennekumbura,

Kandy.

Plaintiff

Vs.

G. G. Jayarthne,

No. 130, Thennekumbura,

Kandy.

Defendant

AND BETWEEN

G. G. Jayarthne,

No. 130, Thennekumbura,

Kandy.

Defendant Appellant

Vs.

R. M. Punchi Manike (deceased)

1. G. G. Kiribanda,

   Pandiwatta, Sirimalwatta,

   Gunnepana.

2. G. G. Muthubanda,

   No. 213/7, Thalwatta, Kandy.

3. G. G. Senevirathna Banda,

   N0. 46/21, Thennekumbura, Kandy.

4. G. G. Tikiri Banda,

   No. 96/112, Rajapihilla Mawatha, Kandy.

5. G. G. Nawarathna Banda,

   No. 37/26A, Pitiyegedara, Medawatta,

   Wattegama.

6. G. G. Thilakarathna Banda,

   No. 213/7, Pattiyakelewatta,

   Thalwatta, Kandy.

7. G. G. Anula Kumarihamy,

   No. 130/1, Thennekumbura, Kandy.

8. G. G. Seetha Kumarihamy.

   N0. 213, Thalwatta, Kandy.

9. G. G. Wijerathna Banda,

   No. 130/1, Thennekumbura, Kandy.

Substituted Plaintiff Respondents

AND NOW BETWEEN

G. G. Jayarthne,

No. 130, Thennekumbura,

Kandy.

Defendant Appellant Petitioner

Vs.

R. M. Punchi Manike (deceased)

1. G. G. Kiribanda,

   Pandiwatta, Sirimalwatta,

   Gunnepana.

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   Thalwatta, Kandy.

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   N0. 213, Thalwatta, Kandy.

9. G. G. Wijerathna Banda,

   No. 130/1, Thennekumbura, Kandy.

Substituted Plaintiff Respondent
-Respondents

BEFORE	:	PRIYASATH DEP, PC, J. (as he was then) UPALY ABEYRATHNE, J. K. T. CHITRASIRI, J.
COUNSEL	:	Harsha Soza PC with Athula Perera for the Defendant Appellant-Appellant Dr. Sunil Cooray for the 1st to 7th Substituted Plaintiff Respondent Respondents
WRITTEN SUBMISSION ON:		23.11.2009 (Defendant Appellant Appellant) 08.12.2009 (1st to 7th Substituted Plaintiff Respondent Respondents)
ARGUED ON	:	18.01.2016
DECIDED ON	:	29.06.2017

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 19.12.2008. By the said judgment

the Civil Appellate High Court has dismissed the appeal of the Defendant Appellant-Appellant (hereinafter referred to as the Appellant) subject to the variations of the judgment of the learned District Judge of Kandy dated 24.06.2003 which was delivered in favour of the plaintiff. The High Court has held the view that the relief prayed for in prayer 2 to the plaint should be restricted to rooms bearing Nos. 130C, 130D and 130E, other than the rooms bearing Nos. 130A and 130B of the building in question.

Leave to Appeal has been granted on the following questions of law set out in paragraph 20 (a) and (b) of the petition of appeal dated 29th January 2009;

20(a) Is the Defendant Petitioner in possession of boutiques 130C, 130D and 130E?

(b) Did the original Plaintiff terminate the said leave and license granted to the Defendant Petitioner in respect of the boutiques 130C, 130D and 130E?

The Plaintiff instituted the instant action against the Appellant in the District Court of Kandy seeking a declaration to the land described in the schedule to the plaint. The Appellant took up the position that he constructed the said building in question with his money and he was in possession of five rooms bearing Nos. 130A, 130B, 130C, 130D, and 130E. He further averred that the plaintiff has failed to terminate the alleged leave and license given to him.

The Appellant has not disputed the title of the plaintiff to the land in suit. It is apparent from the facts of the case that the plaintiff and the appellant are mother and son. The Appellant went on to say that he spent over Rs. 2.2 Million for the construction of the said building and out of the said five rooms two were

boutiques and three were store rooms. He has further stated that he spent on the administration of the said building, paid the rates and taxes, electricity bills and water bills.

The Appellant has given evidence. With regard to the claim of the Appellant the burden is on him to prove that he was in lawful possession as the plaintiff's title to the land in suit has not been disputed by the Appellant. In this regard, the Appellant has stated that shortly prior to the filing of present action in June, 1999, whilst the Appellant had gone to the Munneswaram temple, the plaintiff and two of her daughters who have instigated the plaintiff to file this action have on or about 17.02.1999 trespassed in to the rooms bearing Nos. 130A, 130B, 130C, 130D and 130E of the downstairs portion of the said premises in suit which were wholly occupied and possessed by the Appellant. The Appellant further averred that the Primary Court of Kandy in case No 46488 had made order that the Appellant be restored to possession.

The Appellant has set out a question of law with regard to the termination of leave and license, at the trial. But the Appellant has failed to raise an issue on the matter of termination of leave and license. He has raised issues No 06 to 15 on the basis that he constructed the building in issue and he was in occupation of the said three rooms in downstairs.

The learned counsel for the plaintiff contended that the case has been heard and concluded on the issues raised by the parties and therefore the Appellant, for the first time in appeal, cannot raised the matter of terminating the leave and license given to the Appellant by the plaintiff since it was a matter arising out of the facts of the case.

It is well settled law that once issues are framed and a trial is held and concluded on those issues, the court should decide the case on the issues already framed and thereby the pleadings recede to background.

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 nee Bastian 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."

The Appellant is burdened to prove his possession as regard the possession of the said rooms bearing Nos. 130A, 130B, 130C, 130D and 130E as the title of the plaintiff to the premises in question is not in dispute. The Appellant has given evidence at the trial to prove his possession. But there had been no any other witness called to testify the possession of the premises in question of the Appellant. An official witness has been called merely to produce the case record of the Primary Court. The Appellant has closed his case leading in evidence the documents marked V 1 to V 15. Said documents do not in any way establish the possession of the Appellant. The Appellant has not adduced any evidence in order to support his evidence. The documents produced by the plaintiff marked P 1 to P 59 clearly establish that she was in occupation of the premises in suit paying rates

and taxes. When I consider the said evidence I cannot find any reason to interfere with the findings of the learned District Judge.

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 said circumstances I see no reason to interfere with the said judgment of the High Court of Civil Appeal dated 19.12.2008. The said questions of law cannot be answered in favour of the Appellant. Hence, I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court

PRIYASATH DEP, PC, CJ.

I agree.

Chief Justice

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 with leave to appeal obtained from this Court.

HEWAWASAM THUDUWAWATHTHAGE SARATH
"Sri Wijaya Mawatha", Maliyagoda, Ahangama.

PLAINTIFF

SC Appeal No. 103/2011
SC HCCA LA No. 362/2009
HCCA SP Appeal No. 039/2002 [F]
DC Galle Case No.11092/Partition

VS.

1. **KAMALAWATHIE WIJEWEERA**
   Maliyagoda, Ahangama.

2. **D.W. SAMINONA,**
   "Sri Wijaya Mawatha",
   Maliyagoda, Ahangama.

3. **LOKUBARANIGE PATHMINI KARAWITA,**
   "Sri Wijaya Mawatha",
   Maliyagoda, Ahangama.

4. **L.D. WAIDYARATHNE,**
   No.149A, Gabada Weediya,
   Matara.

5. **W. ABEYGUNAWARDENA,**
   Visaka Mawatha, Gampaha.

6. **I.ABEYGUNAWARDENA,**
   Visaka Mawatha, Gampaha.

7. **LILIAN SILVA WIJERATHNE,**
   No.155B, John Rodrigo Mawatha,
   Katubedda, Moratuwa.

DEFENDANTS

AND BETWEEN

HEWAWASAM THUDUWAWATHTHAGE SARATH
"Sri Wijaya Mawatha", Maliyagoda,
Ahangama.

PLAINTIFF-APPELLANT

VS.

1. **KAMALAWATHIE WIJEWEERA**
   Maliyagoda, Ahangama.

2. **D.W. SAMINONA,**
   "Sri Wijaya Mawatha",
   Maliyagoda, Ahangama.

3. **LOKUBARANIGE PATHMINI KARAWITA,**
   "Sri Wijaya Mawatha",
   Maliyagoda, Ahangama.

4. **L.D. WAIDYARATHNE,**
   No.149A, Gabada Weediya,
   Matara.

5. **W. ABEYGUNAWARDENA,**
   Visaka Mawatha, Gampaha.

6. **I.ABEYGUNAWARDENA,**
   Visaka Mawatha, Gampaha.

7. **LILIAN SILVA WIJERATHNE,**
   No.155B, John Rodrigo Mawatha,
   Katubedda, Moratuwa.

DEFENDANTS-RESPONDENTS

AND NOW BETWEEN

KAMALAWATHIE WIJEWEERA
Maliyagoda, Ahangama.
1st DEFENDANT-RESPONDENT-PETITIONER/APPELLANT

VS.

HEWAWASAM THUDUWAWATHTHAGE SARATH
"Sri Wijaya Mawatha", Maliyagoda,
Ahangama.

PLAINTIFF-APPELLANT-RESPONDENT

2. D.W. SAMINONA,
"Sri Wijaya Mawatha",
Maliyagoda, Ahangama.

3. LOKUBARANIGE PATHMINI KARAWITA,
"Sri Wijaya Mawatha",
Maliyagoda, Ahangama.

4. L.D. WAIDYARATHNE,
No.149A, Gabada Weediya,
Matara.

5. W. ABEYGUNAWARDENA,
Visaka Mawatha, Gampaha.

6. I.ABEYGUNAWARDENA,
Visaka Mawatha, Gampaha.

7. LILIAN SILVA WIJERATHNE,
No.155B, John Rodrigo Mawatha,
Katubedda, Moratuwa.

2nd TO 7th DEFENDANTS-RESPONDENTS-RESPONDENTS

BEFORE: Sisira J. De Abrew, J.
Upaly Abeyrathne J.
Prasanna Jayawardena, PC, J.

COUNSEL: Palitha Bandaranayake with D.M. Siriwardena, Ms. Dulani Jayanetti and Dilipa Fernando for the 1st Defendant-Respondent-Petitioner/Appellant.
Athula Perera with Ms. Chathurani de Silva for the Plaintiff-Appellant-Respondent.

WRITTEN SUBMISSIONS FILED: By the 1st Defendant-Respondent-Petitioner/Appellant on 9th December 2016.
By the Plaintiff- Appellant-Respondent on 14th December 2016.

ARGUED ON: 31st October 2016.

DECIDED ON: 22nd June 2017.

Prasanna Jayawardena, PC, J.

This an appeal from a Partition Decree entered in favour of the Plaintiff-Appellant-Respondent by the High Court of Civil Appeal which set aside the judgment previously entered by the District Court in favour of the 1st Defendant-Respondent-Petitioner/Appellant. The only question to be decided in this appeal is whether the learned High Court Judges erred in law by failing to consider the documents produced in evidence at the trial by the 1st Defendant-Respondent-Petitioner/Appellant and basing their decision solely on the absence of proof of the document marked **"1වි2"**, which is said to be the Last Will of Lokuge Don Adiriyan De Silva.

The Plaintiff-Appellant-Respondent ("the plaintiff") filed this case, in the District Court of Galle, against the 1st Defendant-Respondent-Petitioner/Appellant and the 2nd and to 3rd Defendants-Respondents-Respondents above named, praying to partition the land called "Kirammawaththa addara Ketakalagahawatta" also known as "Kahatagahawatta", which is situated at Kathaluwa village in the Galle District. This land, which was sought to be partitioned, is referred to as "the land" in this judgment.

The plaintiff prayed for a partition decree dividing the land between the plaintiff and the 1st Defendant-Respondent-Petitioner/Appellant ["1st defendant"] in the following shares:

The plaintiff	-	560/720th share
The 1st defendant	-	160/720th share
		720/720
		==========

In his plaint, the plaintiff claimed the aforesaid 560/720th share of the land upon the following *four* different chains of title: (*a*) *firstly*, an **undivided 11/90th share originating from the title of S.V.A.Peter** who held a 11/90th share in the land and later transferred that share to L.D.P.Silva by Deed No. 2980 dated 20th September 1947 [which was produced at the trial marked "පැ1"], who transferred that share to S.Avudiris Appu by Deed No. 4759 dated 07th November 1960 ["පැ2"], who transferred that share to W. Charlis Appu by Deed No. 1167 dated 05th November 1964 ["පැ3"], who gifted that share to W. Kusumawathie by Deed No. 17307 dated 10th June 1985 ["පැ4"], who then transferred that share to Dayawathie Ramanayake

by Deed No. 17680 dated 20th January 1987 ["පැ5"], who **transferred that 11/90th share to the plaintiff** by Deed No. 18460 dated 08th May 1990 ["පැ6"]; (*b*) <u>*secondly*</u>, an **undivided 1/12th share originating from the title of G.V.Carlinahamy** who held a 1/12th share in the land and later transferred that share to S. Podisingho by Deed No. 31 dated 24th October 1924 ["පැ7"], who then transferred that share to S. Jai Appu by Deed No.565 dated 04th July 1928 ["පැ8"], who transferred that share to S.Carolis Appu by Deed No. 5321 dated 30th June 1931 ["පැ9"], who later re-transferred that share to S. Jai Appu by Deed No. 4128 dated 13th February 1948 ["පැ10"], who transferred the aforesaid 1/12th share to S.Roslin by Deed No. 150 dated 22nd November 1950 [**"**පැ11"], whose aforesaid 1/12th share [together with the 11/45th share referred to hereinafter] devolved on her two heirs, namely Ebert Jayasinghe and Sarath Jayasinghe, who together transferred the aforesaid 1/12th share [together with the 11/45th share referred to hereinafter] to Dayawathie Ramanayake by Deed No. 3760 dated 28th November 1984 ["පැ12"], who then transferred the aforesaid 1/12th share [together with the 11/45th share referred to hereinafter] to K.P.Aaron Singho by Deed No. 18336 dated 17th November 1989 ["පැ13"], who transferred **the aforesaid 1/12th share to the plaintiff** [together with the 11/45th share referred to hereinafter] by the Deed No. 18441 dated 10th April 1990 ["පැ14"]; (*c*) <u>*thirdly*</u>, an **undivided 11/45th share originating from the title of S. Andiris, S. Rosalin and S.Charlie** who jointly held a 11/45th share in the land and later transferred that share to L.D Hendrick De Silva by Deed No. 1848 dated 28th May 1946 [**"**පැ15**"**], who then transferred that share to S. Jai Appu by Deed No.3434 dated 01st March 1948 [**"**පැ16**"**], who transferred the aforesaid 11/45th share together with the 1/12th share referred to hereinbefore to S.Roslin by the aforesaid Deed No. 150 marked**"**පැ11**"**, whose aforesaid 11/45th share together with the 1/12th share referred to hereinbefore, devolved on her two heirs, namely Ebert Jayasinghe and Sarath Jayasinghe, who together transferred the said 11/45th share and 1/12th share to Dayawathie Ramanayake by the aforesaid Deed No. 3760 marked**"**පැ12**"**, who then transferred the said 11/45th share and 1/12th share to K.P.Aaron Singho by the aforesaid Deed No. 18336 marked**"**පැ13**"**, who then **transferred the said 11/45th share to the plaintiff** [together with the 1/12th share referred to hereinbefore] by the aforesaid Deed No. 18441 marked**"**පැ14**"**;(*d*) and <u>*fourthly*</u>, ***another*** **undivided 1/12th share and undivided 11/45th share originating from the title of S. Ranis Appu** who held a 1/12th share and 11/45th share in the land and later transferred that 1/12th share and 11/45th share to the plaintiff by Deed No. 3670 dated 27th October 1983 [**"**පැ17**"**], who then transferred that 1/12th share and 11/45th share to Irene Jayaratne by Deed No.5501 dated 02nd August 1988 [**"**පැ18**"**], who later **re-transferred the said 1/12th share and 11/45th share to the plaintiff** by the Deed No. 5575 dated 24th September 1988 [**"**පැ19**"**].

To sum up, the plaintiff claimed an undivided 11/90th share upon the deeds marked **"**පැ1**"** to **"**පැ6**"**, an undivided 1/12th share upon the deeds marked **"**පැ7**"** to **"**පැ14**"**, an undivided 11/45th share upon the deeds marked **"**පැ15**"** and **"**පැ16**"**

and **"පැ**11**"** to **"පැ**14**"**, finally, *another* undivided 1/12th share and 11/45th share upon the deeds marked **"පැ**17**"** to **"පැ**19**"**. The aforesaid 11/90th share, 1/12th share, 11/45th share and the further 1/12th share and 11/45th share add up to the 560/720th share of the land claimed in this action, by the plaintiff.

In the plaint, the plaintiff states that, the 1st defendant claims to be entitled to a 160/720th share of the land. The plaintiff goes on to aver that he is unaware of the manner in which the 1st defendant claimed her alleged entitlement.

The plaintiff also pleads that, the 2nd Defendant-Respondent-Respondent ["the 2nd defendant"] is not entitled to any part of the land but is in possession of a part of the land. The plaintiff pleads that, the 3rd Defendant-Respondent-Respondent ["the 3rd defendant"] is also not entitled to any part of the land though a deed has been executed in her favour. Accordingly, the plaintiff made the 2nd and 3rd defendants parties to the action.

In her Statement of Claim, 1st defendant pleaded that, the land was originally owned by Lokuge Don Adiriyan De Silva who died leaving a Last Will which was proved in D.C.Galle Testamentary Case No. 3268 and that the land was part of the estate of the late Lokuge Don Adiriyan De Silva which was administered in the said case. The 1st defendant pleaded that, pursuant to the administration of the estate of the late Lokuge Don Adiriyan De Silva in that case, the land devolved upon the following three persons in the manner set out below:

(i) G.V. Don Bastian De Silva Waidyaratne Jayasundera - 1/2 share.
(ii) G.V. Don Charlis De Silva Waidyaratne Jayasundera - 1/4 share.
(iii) Lokuge Don Hendrick De Silva - 1/4 share.

The 1st defendant pleaded that, upon the death of the aforesaid G.V. Don Bastian De Silva Waidyaratne Jayasundera, his 1/2 share in the land devolved upon his six children – namely, Carlinahamy, Helenahamy, Emalihamy, Dona Catherina, Francinahamy and Peter – in 1/12th shares. The 1st defendant claimed that, upon the death of the aforesaid Francinahamy, her 1/12th share devolved on her five children – namely, Asilin Nona, Ariyadasa, Karunadasa, Pemwathie and Piyaseeli - who jointly transferred that 1/12th share to S.Karonchihamy by Deed No. 487 dated 17th July 1961 [which was produced at the trial marked**"**1**වී**3**"**], who then **transferred that 1/12th share to the 1st defendant by Deed No. 129 dated 02nd June 1971** [**"**1**වී** 4**"**]. The 1st defendant next claimed that, upon the death of the aforesaid Peter, his 1/12th share devolved on his only daughter – namely, Adlin Waidyaratne Jayasundera - who transferred that **1/12th share to the 1st defendant by Deed No. 10193 dated 30th June 1969** [**"**1**වී**5**"**].

The 1st defendant pleaded that, upon the death of the aforesaid G.V. Don Charlis De Silva Waidyaratne Jayasundera, his 1/4 share in the land devolved upon his four children – namely, Baby Nona, Punchi Nona, Jane Nona and Bertram Carl – in 1/16th shares. The 1st defendant claimed that, upon the death of the aforesaid Punchi

Nona, her 1/16th share devolved on her two children – namely, Mabel and Oliver - who transferred that **1/16th share to the 1st defendant by the aforesaid Deed No. 10193 marked "**1ඒ5**"**.The 1st defendant further claimed that, upon the death of the aforesaid Jane Nona, her 1/16th share devolved on her six children – namely, Wilfred, Grace, Jeslin, Neville, George and Lilian - who jointly transferred that 1/16th share to S.Karonchihamy by Deed No. 330 dated 21st April 1962 [**"**1ඒ7**"**], who then **transferred that 1/16th share to the 1st defendant by the aforesaid Deed No. 129 marked "**1ඒ4**"**. The 1st defendant also claimed that, the aforesaid Bertram Carl transferred his 1/16th share to S.Karonchihamy by Deed No. 7710 dated 07th September 1965 [**"**1ඒ8**"**], who then **transferred that 1/16th share to the 1st defendant by the aforesaid Deed No. 129 marked "**1ඒ4**"**.

The 1st defendant went on to plead that, upon the death of the aforesaid Lokuge Don Hendrick De Silva, his 1/4 share in the land devolved upon his daughter, Lokuge Darlin Waidyaratne who transferred that **1/4th share to the 1st defendant by Deed No. 3137 dated 07th July 1991** [**"**1ඒ810**"**] which was executed after the institution of this action.

The 1st defendant only admitted that, the plaintiff was entitled to the aforesaid undivided 1/12th share originating from the title of G.V.Carlinahamy, which was claimed in the plaint upon the deeds marked **"**ඇ¿7**"** to **"**ඇ¿14**"**.

On the aforesaid basis, the 1st defendant prayed for a partition decree dividing the land between the 1st defendant and the plaintiff in the following shares:

The plaintiff	-	04/48th share
The 1st defendant	-	29/48th share
Unallotted	-	15/48th share
		48/48
		======

In their joint Statement of Claim, the 2nd and 3rd defendants claimed that the 3rd defendant was entitled to a 3/64th share of the land. They also pleaded that, the 2nd and 3rd defendants were in possession and occupation of a part of the land and claimed the right to the two of the buildings and some of the trees on the land.

During the trial, the 4th to 7th Defendants-Respondents-Respondents were added as parties to the action. However, they did not appear at or participate in the trial.

At the trial, only the plaintiff, the 1st defendant and the 2nd and 3rd defendants appeared and were represented by Counsel. The *corpus* was admitted by all parties, as being depicted in Preliminary Plan No. 186 dated 13th November 1990 prepared by the Court Commissioner, which was produced in evidence marked **"X"**. The accompanying Report was marked **"X1"**. The land is A: 0 R: 3 P:18.32 in extent. There were three small houses and two other small temporary structures on the

land. Thereafter, the plaintiff, the 1st defendant and the 2nd and 3rd defendants raised points of contest based on their pleadings.

The plaintiff gave evidence and closed his case leading in evidence the documents marked **"පැ**1**"** to **"පැ**21**"**. The defendants did not object to the production of any of these documents in evidence.

The 1st defendant gave evidence and produced the documents marked **"1වි**1**"** to **"1වි**10**"**. When learned counsel for the plaintiff cross examined the 1st defendant, the answers and an amended answer filed by 1st defendant in previous D.C.Galle Case No. P/8908 and P/9344 and the proceedings in the previous D.C.Galle Case No. P/6130 in which the 1st defendant gave evidence, were produced by the plaintiff in evidence marked **"පැ**21අ **"**, **"පැ**22**"**, **"පැ** 22**අ "**, **"පැ** 23**" "පැ** 24**"**, **"පැ** 24**අ "** and **"පැ** 24**අා "**. The 1st defendant also led the evidence of the officer in charge of the Record Room of the District Court of Galle who stated that, the case record of District Court of Galle Testamentary Case No. 3268 had perished and that, therefore, it was not possible to ascertain whether probate had issued in this case.

Thereafter, the 1st defendant closed her case leading in evidence the documents marked **"1වි**1**"** to **"1වි**10**"**. The plaintiff and the 2nd and 3rd defendants did not object to the production of any of these documents in evidence.

The 3rd defendant did not give evidence since she was not in Sri Lanka. Her sister, who held a Power of Attorney executed by the 3rd defendant, gave evidence and produced the documents marked **"3වි**1**"** to **"3වි**4**"** and closed the 3rd defendant's case.

In her judgment, the learned District Judge upheld the plaintiff's claim to the aforesaid 11/90th share of the land originating from S.V.A.Peter and set out in the deeds marked **"පැ**1**"** to **"පැ**6**"** and also referred to the fact that, the defendants did not dispute these deeds at the trial. In this connection, the learned District Judge concluded "ඉහත කී කරුණු අනුව මෙම ඉඩමෙන් නොබෙදූ 11/90 පංගුවක් **පැ**1 සිට **පැ**6 ඔප්පු මත පැමිණිලිකරුට හිමි වන බව පිළිගනිමි*"*. Next, the learned District Judge upheld the plaintiff's claim to the aforesaid 1/12th share of the land originating from G.V.Carlinahamy and set out in the deeds marked **"පැ**7**"** to **"පැ**14**"** and also referred to the fact that, the defendants did not challenge these deeds at the trial and that the 1st defendant had admitted the plaintiff's claim to this 1/12th share. In this connection, the learned District Judge concluded *"*එබැවින් මෙම නඩුවට අදාළ ඉඩමේ නොබෙදූ 1/12 පංගුව පැමිණිලිකරුට හිමි වන බවට තීරණය කරමි*"*. Thereafter, the learned District Judge upheld the plaintiff's claim to the aforesaid 11/45th share of the land originating from S. Andiris, S. Rosalin and S.Charlie and set out in the deeds marked **"පැ**15**"** and **"පැ**16**"** and **"පැ** 11**"**to **"පැ**14**"**. In this connection, the learned District Judge concluded *"….* ඉහත කී මෙම නඩුවේ නොබෙදූ 11/45 පැමිණිලිකරුට හිමි වන බව පෙනී යයි *"*.

However, with regard to the plaintiff's claim to the aforesaid further 1/12th share and 11/45th share originating from the title of S. Ranis Appu in respect of which the plaintiff had produced the deeds marked **"පැ**17**"** to **"පැ**19**"**, the learned District Judge held that, the plaintiff has *not* proved that, S.Ranis Appu had title to the said 1/12th share and 11/45th share .

Thus, the learned District Judge has expressly held that, the plaintiff had established his entitlement to the 11/90th share originating from S.V.Peter, the 1/12th share originating from G.V.Carlinahamy and the 11/45th share of the land originating from S. Andiris, S. Rosalin and S.Charlie, as averred in the plaint and upon the deeds marked **"පැ**1**"** to **"පැ**16**"**.

With regard to the 1st defendant, the learned District Judge observed that, unlike the plaintiff who had not traced his ownership back to an owner of the entire land, the title claimed by the 1st defendant could be traced back to a single owner of the entire land - namely, the aforesaid Lokuge Don Adiriyan De Silva who had died leaving the Last Will produced marked by the 1st defendant marked **"**1**වී**2**"**. The learned District Judge held that, the evidence established that this Last Will had been administered in D.C.Galle Testamentary Case No. 3268 and that the Inventory marked **"**1**වී**1**"** established that, the land which is the subject matter of this case was part of the estate of the late Lokuge Don Adiriyan De Silva which had been administered in that case. The learned District Judge did comment on the fact that, the 1st defendant failed to prove that probate had issued in D.C.Galle Testamentary Case No. 3268 and that the 1st defendant failed to lead evidence to establish the manner in which the properties which formed the estate were dealt with or distributed. However, the learned District Judge appears to have taken the view that, since the case record had perished, the Court was entitled to proceed on the assumption that, the land which is the subject matter of this case had come to the three heirs named in the Last Will in the manner set out earlier - *ie:* 1/2 share to G.V. Don Bastian De Silva Waidyaratne Jayasundera, 1/4 share to G.V. Don Charlis De Silva Waidyaratne Jayasundera and 1/4 share to Lokuge Don Hendrick De Silva.

On the aforesaid basis, the learned District Judge concluded that, the Last Will marked **"**1**වී**2**"** and Inventory marked **"**1**වී**1**"** proved that, Lokuge Don Adiriyan De Silva was the sole owner of the land and that, the land was thereafter, transferred to his heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva, in the aforesaid shares. Thereafter, the learned District Judge held that, the deeds produced by the 1st defendant marked **"**1**වී**3**"** to **"**1**වී**10**"** established that, the 1st defendant had become entitled to the 29/48th share of the land which the 1st defendant prayed for in her Statement of Claim.

Although, as set out above, the learned District Judge had previously determined that, the plaintiff had established his entitlement to a 11/90th share, 1/12th share and

a 11/45th share upon the deeds marked **"පැ1"** to **"පැ**16**"**, the learned District Judge finally held that, the plaintiff was entitled to only the 4/48th [*ie:*1/12th share] originating from G.V.Carlinahamy, which the 1st defendant had admitted. The learned District Judge also held that, the 2nd and 3rd defendants had failed to establish rights to any share of the land.

Thus, in her judgment, the learned District Judge entered judgment as prayed for in the 1st defendant's Statement of Claim and directed that, the land be partitioned in the following manner:

The plaintiff	-	04/48th share
The 1st defendant	-	29/48th share
Unallotted	-	15/48th share
		48/48
		======

The plaintiff appealed to the High Court of Civil Appeal of the Southern Province holden in Galle. Only the plaintiff and the defendant were represented when the appeal was argued.

In appeal, the learned High Court Judges observed that, although the learned District Judge had first determined that, the plaintiff had established his entitlement to a 11/90th share originating from S.V.Peter, 1/12th share originating from G.V.Carlinahamy and a 11/45th share originating from S. Andiris, S. Rosalin and S.Charlie, upon the deeds marked **"පැ1"** to **"පැ** 16**"**, the learned District Judge had proceeded to later hold that, the plaintiff was entitled only to the 4/48th [*ie:*1/12th share] originating from G.V.Carlinahamy, which the 1st defendant had admitted.

The learned High Court Judges held that, the 1st defendant's claim in this action was based entirely on the 1st defendant's position that, the Last Will marked **"1වී2"** and the Inventory marked **"1වී1"** established that Lokuge Don Adiriyan De Silva was the sole owner of the land and that, upon his death, the land devolved upon his heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva, in the aforesaid shares in the manner set out in the Last Will marked **"1වී2"**. The learned High Court Judges held that, however, the mere production of the Inventory marked **"1වී1"** did not prove that the land which is the subject matter of the action was the land described in the Inventory since the Inventory did not contain a description of the metes and bounds of the land. The learned High Court Judges further observed that there was a discrepancy between the name of the land as stated in the pleadings and the name of the lands listed in the Inventory since the *corpus* is identified in the present action as the land called "Kirammawaththaaddara Ketakalagahawatta also known as Kahatagahawatta" while the Inventory marked **"1වී1"** lists *one* land named "Kirammawatta addera Ketakalagahawattte" and *another* land "Ketakalagahawatta alias Kahahatagahawatta". Further, it should be mentioned here that, the Last Will

marked **"1වි1"**does not mention the land which is the subject matter of this action or, for that matter, mention any immovable property by name or description.

The learned High Court Judges went on to hold that, the 1st defendant's failure to produce the probate which is said to have been issued in D.C.Galle Testamentary Case No. 3268 and the 1st defendant's failure to even lead secondary evidence to establish that a probate had been issued in the manner set out in the Last Will, led to the conclusion that the 1st defendant has failed to prove that, the heirs of Lokuge Don Adiriyan De Silva – namely, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva – became entitled to the land in the aforesaid shares in the manner set out in the Last Will marked **"1වි2**. In this connection, the learned High Court Judges referred to the case of **DAVOODBHOY vs. FAROOK** [63 NLR 97] where Basnayake CJ held (at p.107) *"There being no proof that the Will No. 418 (P2) has been admitted to Probate it cannot be acted on as the Last Will of the deceased."* In this connection, it is relevant to observe that, the certified copies of the Last Will marked **"1වි2"** and Inventory marked **"1වි1"** produced by the 1st defendant have been issued by the District Court in 1991 and 1987 – *ie:* a relatively short period before this action was filed. In that background, a question arises as to why the 1st defendant did not obtain and produce a certified copy of the probate.

With regard to the deeds marked **"1වි3"** to **"1වි10"** produced by the 1st defendant in support of her claim, the learned High Court Judge observed that, although the Last Will marked **"1වි2"** is dated 04th November 1896 and Inventory marked **"1වි1"** is dated 23rd March 1899, the oldest deed produced by the 1st defendant is **"1වි3"** which is dated 17th July 1961. The learned High Court Judge further observed that, none of the deeds produced by the 1st defendant could be connected, on the face of these deeds, to the title which the 1st defendant claims was originally held by Lokuge Don Adiriyan De Silva and, after his death, devolved upon his heirs - G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva.

On the aforesaid basis, the learned High Court Judges held that, the 1st defendant had failed to prove her entitlement to the 29/48th share she claimed and that the learned District Judge had erred when she entered judgment as prayed for in the 1st defendant's Statement of Claim.

With regard to the plaintiff's claim, the High Court held that, the plaintiff had established his entitlement to the 11/90th share originating from S.V.Peter, 1/12th share originating from G.V.Carlinahamy and a 11/45th share originating from S. Andiris, S. Rosalin and S.Charlie, upon the deeds marked **"ඔැ1"** to **"ඔැ 16"** and that, the 1st defendant had not succeeded in disputing or disproving that entitlement. Accordingly, the learned High Court judges held that, the learned District Judge had erred when she failed to allot to the plaintiff the said 11/90th share, 1/12th share and

11/45th share in the land. It is relevant to mention here that, as stated earlier, the learned District Judge had first upheld the plaintiff's claim to these shares. With regard to the plaintiff's claim for a further 1/12th share and 11/45th share originating from S.Ranis Appu, the High Court held that the learned District Judge correctly determined that the plaintiff failed to prove S.Ranis Appu had title to the said 1/12th share and 11/45th share. Accordingly, the learned High Court Judges affirmed the learned District Judge's determination that, the said 1/12th share and 11/45th share should remain unallotted.

With regard to the 1st defendant's claim, the learned High Court Judges held that, although the 1st defendant had failed to establish her title in the manner set out in her Statement of Claim, she was nevertheless entitled to the 160/720th share which was set out in the plaintiff's pedigree.

Finally, the learned High Court Judges held that, the learned District Judge correctly determined that the 2nd and 3rd defendants had failed to establish any entitlement to the land.

Accordingly, the learned High Court Judges set aside the judgment of the District Court and directed that, the land be partitioned in the following manner:

The plaintiff	-	560/720 – (1/12 + 11/45)	-	324/720th share
The 1st defendant	-		-	160/720th share
Unallotted	-		-	237/720th share
				720/720
				=======

The 1st defendant filed an application in this Court seeking leave to appeal from the judgment of the High Court. This Court has given leave to appeal only on the following question of law:

(i) Did the learned High Court Judges err in law by not considering the documents marked in evidence by the 1st Defendant-Petitioner at the trial and basing their decision entirely on the absence of proof of the Last Will marked **"1ඒ2"**?

The manner in which the aforesaid question of law has been framed suggests that, the High Court Judges' determination that Last Will marked **"1ඒ2"** had not been proved by the 1st defendant, is not in issue in this appeal. In any event, it is appropriate to observe here that, the 1st defendant based her claim in this action on her position that, Lokuge Don Adiriyan De Silva was the sole owner of the land and that, the land was thereafter, transferred to his heirs - G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva - in the aforesaid shares in the manner set out in the Last Will marked **"1ඒ2"** and Inventory marked **"1ඒ1"**. Therefore, it was incumbent on the 1st defendant to prove that, Lokuge Don Adiriyan De Silva was, in fact, the sole owner of the land and that, the land was thereafter, transferred to his

aforesaid three heirs in the shares and in the manner set out in the Last Will marked **"1වි2"**. In these circumstances, the 1st defendant should have produced a copy of the probate which is said to have been issued in D.C.Galle Testamentary Case No. 3268. It should be mentioned here that, a copy of this probate is said to have been produced in evidence in D.C.Galle Case No. 6130/P to which the 1st defendant was a party, as evidenced by the proceedings of that case which were marked **"සැ24"**. However, the fact that, the probate was produced in the earlier case no. 6130/P did not absolve the 1st defendant from the obligation to produce the probate in the present case. It should also be mentioned here that, the proceedings marked **"සැ24"** show that, the plaintiff in the earlier case no. 6130/P produced a Deed No. 3123 dated 23rd November 1988 by which Lokuge Don Adiriyan De Silva obtained title to the land named "Thalakoratuwa" which was the subject matter of that case. However, the 1st defendant failed to produce such a deed in the present case to prove that Lokuge Don Adiriyan de Silva had sole title to the land which is the subject matter of the action.

Further, in light of the discrepancy between the name of the land which is the subject matter of this case and the names of two separate lands in the Inventory marked **"1වි2"**, the absence of proof that Lokuge Don Adiriyan De Silva had title to the land which is the subject matter of this case and the absence of the probate, it is not possible to assume that, land which is the subject matter of this case devolved to G.V. Don Bastian De Silva Waidyaratne Jayasundera and G.V. Don Charlis De Silva Waidyaratne Jayasundera in the manner set out in the Last Will marked **"1වි2"** of Don Adiriyan De Silva *unless* there is other evidence to show that it was so.

In the light of these possibilities, if the 1st defendant wished to succeed in her claim, she was obliged to lead other evidence to establish that, Lokuge Don Adiriyan De Silva was the owner of the land and that, the land was thereafter, transferred to his heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva, in the aforesaid shares in the manner set out in the Last Will marked **"1වි2"**. If the 1st defendant could not produce the probate, she could have produced the Executors Conveyance (or a certified copy of it), which, in the usual course of events, is likely to have been executed in favour of G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva if the land had come to them in the manner set out in the Last Will marked **"1වි2"**. The 1st defendant could have produced the records at the Land Registry which could have established that, Lokuge Don Adiriyan De Silva was the owner of the land and that, the land was thereafter, transferred to his heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva. The 1st defendant has done none of that.

In these circumstances, it is evident that, the learned High Court Judges correctly held that, that the 1st defendant had failed to prove that Lokuge Don Adiriyan De Silva was the owner of the land and that the land was thereafter, transferred to his

heirs, G.V. Don Bastian De Silva Waidyaratne Jayasundera, G.V. Don Charlis De Silva Waidyaratne Jayasundera and Lokuge Don Hendrick De Silva, in the aforesaid shares in the manner set out in the Last Will marked **"1ඒ2"**.

What remains to be considered in terms of the aforesaid question of law is whether the deeds produced by the 1st defendant marked **"1ඒ3"** to **"1ඒ10"**, prove her claim to be entitled to a 29/48th share of the land.

At this point, it is significant to note that, the evidence established that the plaintiff has been in possession of the major part of the land for a long period of time without any dispute from any of the defendants. It was also established in evidence that the 1st defendant did not have possession of the land. In this connection, the learned District Judge held that the Surveyor's Report established that the plaintiff was in possession and that, the 1st and 3rd defendants had admitted the plaintiff had been in possession of the land.

The learned District Judge also held that, the 1st defendant had not been in possession of the land. Thus, it appears from the evidence led at this trial that, the 1st defendant has not made any claims to the land until this action was instituted, despite the plaintiff being in possession for many years.

To get back to considering whether the 1st defendant had proved her claim to a 29/48th share of the land, it is seen that, the 1st defendant claims a **1/12th share** upon the deeds marked **"1ඒ3"** and **"1ඒ4"**. **"1ඒ3"** is deed no. 487 dated 17th July 1961 by which Walgama Wellalage Asilin Nona, Walgama Wellalage Ariyaratne, Walgama Wellalage Karunadasa and Walagama Wellalage Piyaseeli have transferred a 1/12th share in the land to S.Karonchihamy. **"1ඒ4"** is deed no. 129 dated 02nd June 1971 by which S.Karonchihamy transferred that 1/12th share [together with two 1/16th shares] to the 1st defendant. Although the 1st defendant has stated that, the four transferors named in the deed no. 487 marked **"1ඒ3"** were the heirs of Francinahamy and that she was one of the children and heirs of the aforesaid G.V. Don Bastian De Silva Waidyaratne Jayasundera who held a 1/2 share of the land following the death of Lokuge Don Adiriyan De Silva, the deed marked **"1ඒ3"** does not refer to any of those facts claimed by the 1st defendant. The 1st defendant has failed to produce any other evidence to support her claims. It is also to be noted that, although in paragraph [8] of her Statement of Claim, the 1st defendant has stated that, Francinahamy also had a daughter named Pemawathie, that daughter is not named as a transferor in the deed marked **"1ඒ3"**. It is also to be noted that, the deed marked **"1ඒ3"** has been executed over sixty years after the death of Lokuge Don Adiriyan De Silva and there is no evidence with regard to when G.V. Don Bastian De Silva Waidyaratne Jayasundera died and the manner in which his estate was administered. On the other hand, the plaintiff has produced deeds which establish the aforesaid three chains of title claimed by him which stretch back to the 1920s and 1940s and the plaintiff has been in possession of the land for many years. In these circumstances and in the absence of evidence that the aforesaid transferors

who are said to be grandchildren of G.V. Don Bastian De Silva Waidyaratne Jayasundera obtained and continued to have title to the land in 1961, the mere production of the deed marked **"1වි3"** cannot lead to an assumption that the transferors named in that deed had title to the land in 1961 when this deed was executed. Accordingly, it cannot be said that, the deeds marked **"1වි3"** and **"1වි4"** prove that the 1st defendant is entitled to a 1/12th share of the land.

Next, the 1st defendant claims a **87/864 share** upon the deed no. 10193 dated 30th June 1969 marked **"1වි5"** by which Mabel Alwis Wijesiri Gunawardena, Oliver Alwis Wijesiri Gunawardena and Adilin Waidyaratne transferred a 87/864th share in the land to the 1st defendant. Although the 1st defendant has stated that, the first and second transferors named in the deed marked **"1වි5"** were the two children and heirs of Punchi Nona who was one of the heirs of the aforesaid G.V. Don Charlis De Silva Waidyaratne Jayasundera who is said to have held a1/4 share of the land following the death of Lokuge Don Adiriyan De Silva and the third transferor named in the deed marked **"1වි5"** was the only child and heir of Peter who was also one of the heirs of the aforesaid G.V. Don Bastian De Silva Waidyaratne Jayasundera, the deed marked **"1වි5"** makes no statements to that effect other than mentioning that the land had come to the first and second transferors by maternal inheritance and to the third transferor by paternal inheritance. The 1st defendant has failed to produce any other evidence. Further, the birth certificate marked **"1වි6"** states that, Oliver Alwis Wijesiri Gunawardena was the son of one Lucy Waidyaratne Jayasundera and not Punchi Nona De Silva Waidyaratne Jayasundera as claimed by the 1st defendant. The other facts mentioned in the preceding paragraph with regard to the absence of evidence as to when G.V. Don Bastian De Silva Waidyaratne Jayasundera died and the manner in which his estate was administered and with regard to the plaintiff's chain of title and the plaintiff being in possession of the land, are equally relevant *mutatis mutandis* in this case too. In these circumstances and in the absence of evidence that the aforesaid transferors who are said to be grandchildren of G.V. Don Charlis De Silva Waidyaratne Jayasundera and G.V. Don Bastian De Silva Waidyaratne Jayasundera obtained and continued to have title to the land in 1969, the mere production of the deed marked **"1වි5"** cannot lead to an assumption that the transferors named in that deed had title to the land in 1969 when this deed was executed. Accordingly, it cannot be said that, the deed marked **"1වි5"** proves that the 1st defendant is entitled to a 87/864th share of the land.

Thereafter, the 1st defendant claims a **1/16th share** upon the deeds marked **"1වි7"** and **"1වි4"**. **"1වි7"** is deed no. 330 dated 21st April 1962 marked **"1වි7"** by which Wilfred Wijeratne, Grace Senaratne *nee* Wijeratne, Jeslin Alwis *nee* Wijeratne and Neville Wijeratne transferred a 1/16th share in the land to S.Karonchihamy. **"1වි4"** is the aforesaid deed no. 129 by which S. Karonchihamy transferred that 1/16th share to the 1st defendant [along with the aforesaid 1/12th share and another 1/16th share]. Although the 1st defendant has stated that, the four transferors named in the deed marked **"1වි7"** were children and heirs of Jane Nona who was one of the heirs of the

aforesaid G.V. Don Charlis De Silva Waidyaratne Jayasundera who is said to have held a1/4 share of the land following the death of Lokuge Don Adiriyan De Silva, the deed marked **"1වි7"** makes no statement to that effect other than mentioning that the several properties which are the subject matter of the deed are held by the vendors by paternal and maternal inheritance. The 1st defendant has failed to produce any other evidence. It is also to be noted that, although in paragraph [14] of her Statement of Claim, the 1st defendant has stated that, Jane Nona also had two other children named George and Lilian, they are not named as transferors in the deed marked **"1වි7"**. The other facts mentioned in the preceding paragraphs are relevant in this case too. In these circumstances and in the absence of evidence that the aforesaid transferors who are said to be grandchildren of G.V. Don Charlis De Silva Waidyaratne Jayasundera continued to have title to the land in 1962, the mere production of the deed marked **"1වි7"** cannot lead to an assumption that the transferors named in that deed had title to the land in 1962 when this deed was executed. Accordingly, it cannot be said that, the deed marked **"1වි7"** proves that the 1st defendant is entitled to a 1/16th share of the land.

Next, the 1st defendant claims another **1/16th share** upon the deeds marked **"1වි8"** and **"1වි4"**. **"1වි8"** is deed no. 2210 dated 07th September 1965 by which Bertram Carl De Silva Waidyaratne transferred a 1/16th share in the land to S.Karonchihamy. **"1වි4"** is the aforesaid deed no. 129 by which S. Karonchihamy transferred that 1/16th share to the 1st defendant [along with the aforesaid 1/12th share and 1/16th share]. Although the 1st defendant has stated that, the transferor named in the deed marked **"1වි8"** was one of the children and heirs of the aforesaid G.V. Don Charlis De Silva Waidyaratne Jayasundera who is said to have held a 1/4 share of the land following the death of Lokuge Don Adiriyan De Silva, the deed marked **"1වි7"** makes no statement to that effect other than a mention that the land had come to the transferor by paternal inheritance. The 1st defendant has failed to produce any other evidence. Here too, the other facts mentioned in the preceding paragraphs are relevant. In these circumstances, the mere production of the deed marked **"1වි8"** cannot lead to an assumption that the transferor named in that deed had title to the land in 1965 when this deed was executed. Accordingly, it cannot be said that, the deed marked **"1වි8"** proves that the 1st defendant is entitled to a 1/16th share of the land.

Finally, the 1st defendant claims a **1/14th share** upon the deed no. 3137 dated 07th July 1991 marked **"1වි10"** by which Lokuge Darlin Waidyaratne transferred a 1/4th share in the land to the 1st defendant during the pendency of this action. Although the 1st defendant has stated that, the transferor named in the deed marked **"1වි10"** was the only child and sole heir of the aforesaid Lokuge Don Hendrick De Silva, the deed marked **"1වි10"** makes no statement to that effect other than stating that the several properties which are the subject matter of that deed had come to the transferor by paternal inheritance. The 1st defendant did not lead the evidence of the transferor – namely, Lokuge Darlin Waidyaratne. Thereafter, when the 1st defendant

gave evidence, she said that, Lokuge Don Hendrick De Silva had two other children. Those persons were not parties to the action. In these circumstances, a question arises as to whether Lokuge Darlin Waidyaratne was entitled to the 1/4th share which she purported to transfer to the 1st defendant by the deed marked **"1වි10"**. The situation is further complicated by the deed no. 3434 dated 01st March 1949 produced by the plaintiff marked **"ඔැ16"**. By this deed marked **"ඔැ16"**, Lokuge Don Hendrick De Silva has transferred his rights in the land to S.Jai Appu from whom the land has subsequently come to the plaintiff in the manner set out in the plaintiff's chain of title. In these circumstances, it cannot be said that, the deed marked **"1වි10"** proves that the 1st defendant is entitled to a 1/4th share of the land.

In the light of the aforesaid conclusions, the only question of law for determination in this appeal - *ie:* whether the learned High Court Judges erred in law by not considering the documents marked in evidence by the 1st Defendant-Petitioner at the trial and basing their decision entirely on the absence of proof of the Last Will marked **"1වි2"** - has to be answered in the negative.

Accordingly, the judgment of the High Court is affirmed. This appeal is dismissed. The 1st defendant will pay the plaintiff a sum of Rs.20,000/- as costs in this Court.

Judge of the Supreme Court

I agree
Sisira J. De Abrew, J.

Judge of the Supreme Court

I agree
Upaly Abeyrathne J.

Judge of the Supreme Court

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

In the matter of an appeal with leave to appeal obtained from this Court.

N.H.M.S.PERERA
"Anula", Polwatte, Kolonna.
PLAINTIFF

SC Appeal No. 103/2013
SC HCCA LA No. 84/2013
HCCA/SG/RAT Appeal No. 115/2010 [F]
D.C.Ratnapura Case No.16400/L

VS.

MARGARET PERERA
Kadapola, Kolonna.
DEFENDANT

1A. G.D.LEELARATNE
Kadapola, Kolonna.
2A. G.D.RUPANI
Aluth Walauwwa, Kolonna.
SUBSTITUTED DEFENDANTS

AND

1A. G.D.LEELARATNE
Kadapola, Kolonna.
2A. G.D.RUPANI
Aluth Walauwwa, Kolonna.
SUBSTITUTED DEFENDANTS-APPELLANTS

VS.

N.H.M.S.PERERA
"Anula", Polwatte, Kolonna.
PLAINTIFF-RESPONDENT

AND NOW

1A. G.D.LEELARATNE
Kadapola, Kolonna.
SUBSTITUTED 1A DEFENDANT-APPELLANT-PETITIONER/ APPELLANT

VS.

N.H.M.S.PERERA
"Anula", Polwatte, Kolonna.
PLAINTIFF-RESPONDENT-RESPONDENT

M.A. ANULA PERERA
"Anula", Polwatte, Kolonna.
SUBSTITUED PLAINTIFF-RESPONDENT-RESPONDENT

G.D.RUPANI
Aluth Walauwwa, Kolonna.
SUBSTITUTED 1B DEFENDANT-APPELLANT-RESPONDENT

BEFORE: S.E.Wanasundera,PC J
Sisira J. De Abrew, J.
Prasanna Jayawardena, PC, J.

COUNSEL: S.A.D.S.Suraweera for the Substituted 1A Defendant-Appellant-Petitioner/Appellant.
G.Samaranayake with G.D.Gunaratna for the Substituted Plaintiff-Respondent-Respondent.

WRITTEN SUBMISSIONS FILED: By the Substituted 1A Defendant-Appellant-Petitioner/Appellant. on 15th June 2015.
By the Substituted Plaintiff-Respondent-Respondent on 10th March 2014.

ARGUED ON: 03rd November 2016.

DECIDED ON: 22nd June 2017.

Prasanna Jayawardena, PC, J.

This appeal concerns the ownership of a premises in which there is a small shop, located in the bazaar of the town of Kolonna in the Sabaragamuwa District.

The Plaintiff-Respondent-Respondent ["the plaintiff"] filed this action in the District Court of Embilipitiya on 23rd September 1992. The plaintiff's case, as set out in the plaint, was that, the plaintiff had title to the premises described in the schedule to the plaint under and in terms of deed of transfer no.1562 executed in his favour by Somawathie Hamine, to whom the premises had been transferred by her father, Madduma Appuhami. The plaintiff pleaded that the defendant abovenamed had been the tenant of his predecessor in title - namely, Somawathie Hamine - but refused to attorn to him despite being requested to do so. On that basis, the plaintiff prayed for a declaration of title to the premises, the ejectment of the defendant from the premises and damages.

The defendant filed an answer dated 11th May 1994 admitting that, she had been the tenant of Somawathie Hamine and that Somawathie Hamine had later sold and transferred the premises to the plaintiff by the aforesaid deed of transfer no.1562. The defendant denied that she had failed to pay monthly rent to the plaintiff and pleaded that she was ready and willing to pay the monthly rent. The defendant prayed that, the plaintiff's action be dismissed and prayed for a declaration that the defendant was the tenant of the premises.

When the case was taken up for trial on 04th April 1995, Counsel appeared for both the plaintiff and the defendant. The Journal Entry of the day states the names of both the plaintiff and the defendant and it is evident that the plaintiff was present in Court since he gave evidence on that day. However, it is not clear from the Case Record whether the defendant was present in Court. No admissions were recorded. The plaintiff framed nine issues on the lines of the averments in the plaint. The defendant framed only the following two issues:

(a) Whether the defendant is the tenant of the premises?
(b) Whether the plaintiff can have and maintain this action in fact and in law?

Thereafter, the plaintiff gave evidence on the lines of the case set out in the plaint and produced the documents marked "අ1" to "අ6". The plaintiff was cross examined by counsel for the defendant and was re-examined on the same day. Thus, the plaintiff's evidence was completed on 04th April 1995 and the case was re-fixed for further trial on 25th October 1995. On that day the defendant moved for a postponement of the trial and the was case re-fixed for further trial on 07th February 1996.

On 31st January 1996, one M.A.Manamperi, who was the son-in-law of the defendant, filed a petition stating that the defendant had appointed him as her Attorney by a Special Power of Attorney No.1593 dated 29th November 1995 and moved that he be allowed to represent the defendant in the trial from then on. The plaintiff did not object to that application. Accordingly, the District Court permitted Manamperi to represent the defendant in the proceedings. It was also stated by the aforesaid Attorney that the proxy granted by the defendant to her previous Registered Attorney-at-Law had been revoked and a new Proxy had been granted to another Attorney-at-Law.

At the same time, the defendant, through her aforesaid Attorney, Manamperi, made an application to amend the answer by denying that the defendant was, at any stage, a tenant of the plaintiff or his predecessors in title. The defendant went on to claim that, the defendant was entitled to a half share of the premises described in the schedule to the amended answer and, *inter alia*, prayed for a declaration that the defendant was entitled to that half share of the premises described in the schedule to the amended answer. By his Order dated 24th April 1996, the learned District Judge refused this application to amend the answer and fixed this case for further trial on 24th July 1996.

On that date, counsel for the defendant made an application for the trial to commence *de novo* on the basis that evidence up to then had been heard by the learned District Judge's predecessor. By his Order dated 14th August 1996, the learned District Judge refused that application and fixed this case for further trial on 20th November 1996.

On 20th November 1996 and 19th March 1997, the plaintiff led the evidence of one J.M.D.Bandara and the evidence of Somawathie Hamine who produced the aforesaid deed of transfer no. 8520 marked "පැ7". Thus, the plaintiff closed his case on 19th March 1997, leading in evidence the documents marked "පැ1" to "පැ7".

The defendant commenced her case on 20th August 1997 with her Attorney, Manamperi giving evidence. This witness attempted to give evidence which was entirely different to the case averred in the defendant's answer. Counsel for the plaintiff, quite rightly, objected on the grounds that, as explained in section 150 of the Civil Procedure Code, the defendant was not entitled to make out a case which was materially different from the case pleaded in the answer. The learned District Judge upheld that objection and re-fixed the trial for 18th September 1997, presumably to enable the witness to prepare his evidence which should be reasonably in accord with the averments in the answer.

However, the trial was not taken up on 18th September 1997 since the learned District Judge recorded that he did not wish to continue to hear this trial for personal reasons. The case was called on 12th November 1997, on which date, the defendant revoked the proxy granted to her Registered Attorney-at-Law. After considerable delay on her part, the defendant granted proxy to another Registered Attorney-at-Law and trial was fixed for 06th October 1998 before the learned Additional District Judge.

Shortly before that trial date, the defendant made another application to amend the answer on much the same lines set out in the previous application to amend the answer made in 1996, more than two years earlier. The significant difference was that the defendant dispensed with the prayer for a declaration that the defendant was entitled to a half share of the premises described in the schedule to the amended answer. After hearing the submissions made by counsel for both parties, the learned Additional District Judge made an Order dated 06th October 1998 refusing that application and fixed the case for further trial on 01st December 1998.This Order was made in the presence of both parties and their counsel.

However, neither the defendant nor her Attorney nor her counsel appeared when this case was taken up for trial on 01st December 1998 at the appointed time. The case was kept aside and was taken up half hour later. There was still no appearance by the defendant or her Attorney or her counsel even then. Thereupon, counsel for the plaintiff, as entitled to in law, made an application that the case be reserved for judgment on the evidence that had been led. The learned Additional District Judge, entirely correctly, allowed that application and fixed the case for judgment on 08th December 1998. On that day, the District Court entered judgment for the plaintiff, as prayed for in the plaint.

The defendant then made an application under section 86 (2) of the Civil Procedure Code to vacate what the defendant termed was an *ex parte* judgment. The defendant's application under section 86 (2) of the Civil Procedure Code was fixed for inquiry on 03rd March 1999. On that day, Manamperi gave evidence in support of this application. Thereafter, the plaintiff gave evidence and moved to lead the evidence of another witness. Accordingly, the next date of inquiry was fixed for 23rd March 1999.

However, before the case could be taken up for further inquiry on 23rd March 1999, the Registrar of the Court of Appeal informed the District Court that the defendant had made an application to the Court of Appeal praying for leave to appeal from the Order of the District Court dated 06th October 1998 refusing the second application to amend the answer and that the Court of Appeal had granted leaved to appeal on 09th March 1999. Thereupon, proceedings in this case in the District Court were stayed. On 10th February 2000, the Court of Appeal entered judgment observing that the Registered Attorney-at-Law who had appeared for the defendant in the District Court had sent a letter of demand on behalf of the plaintiff and also attested the deed no. 1562, and, therefore, set aside the Order of the District Court dated 06th October 1998. Further, the Court of Appeal transferred the case to the District Court of Ratnapura and directed that the trial be heard *de novo* with the parties having the right to amend their pleadings if they so desired. The Court of Appeal did not make an Order setting aside the judgment dated 08th December 1998 entered by the District Court. However, the fact that, the Court of Appeal ordered that the trial be heard *de novo* would result in that judgment of the District Court being deemed to have been set aside by the Court of Appeal.

In terms of the aforesaid judgment of the Court of Appeal, the case was called in the District Court of Ratnapura on 07th September 2000. The defendant moved to amend the answer and was directed to file answer on 22nd June 2001. However, the defendant did not file answer on that date or on the further date that was granted by the Court and was eventually given a final date of 25th January 2002 to file answer. On 25th January 2002, the District Court was informed that the defendant had died. On 12th July 2002, the aforesaid 1A and 2A Substituted Defendants-Appellants – namely G.D.Leelaratne and G.D.Rupani, who are the son and daughter of the deceased defendant – were substituted in place of the defendant. Thereafter, the plaintiff filed an amended plaint naming the substituted defendants-appellants in the caption and the defendant filed an amended answer and the plaintiff filed a replication. Although the trial was then fixed for

13th November 2003, the trial was not taken up on that day or on the next three days of trial.

On 30th June 2005, the plaintiff filed an amended plaint on lines similar to the original plaint. The plaintiff's case, as pleaded in the amended plaint, is that: the premises described in the schedule to the amended plaint originally belonged to Madduma Appuhami; the premises are described in that schedule as a shop room which is 18 feet x 12 feet in area and has a tiled roof, bounded on the North by the wall of Wijaya Mudalali's shop, on the East by the Embilipitya-Suriyakanda Road, on the South by the Nedola Road and on the West by the wall of Hendrick Appuhami's house; Madduma Appuhami had later transferred the premises to Somawathie Hamine and Wijewardena Appuhami by deed of transfer no. 8520 dated 09th June 1943. As mentioned earlier, Somawathie Hamine was Madduma Appuhami's daughter; Somawathie Hamine became solely entitled to the premises after the death of Wijewardena Appuhami; In the meantime, Madduma Appuhami had given the premises on lease to the defendant's husband upon a lease agreement no. 222 dated 08 November 1967.At the end of term of that lease agreement, the defendant's husband continued to remain in the premises as a monthly tenant; After the death of the defendant's husband, the defendant had attorned as tenant to Somawathie Hamine and paid monthly rent to Somawathie Hamine; the premises were later transferred by Somawathie Hamine to the plaintiff, by deed of transfer no. 1562 dated 03rd December 1990 and, thereby, the plaintiff obtained sole title to the premises. It should be mentioned that, the plaintiff was Somawathie Hamine's son-in-law; By a letter dated 31st January 1991, the plaintiff had requested the defendant to attorn as tenant to the plaintiff and pay the monthly rent to the plaintiff; However, the defendant had not done so; Further, the defendant had failed to quit the premises though requested to do so; The defendant's failure to quit the premises had caused loss and damage to the plaintiff in a sum of Rs.9,000/- with further loss and damage at the rate of Rs.500/- per month until the plaintiff obtained possession of the premises; On the aforesaid basis, the plaintiff prayed for a declaration that he is entitled to the premises described in the schedule to the plaint, for the ejection of the defendant from the premises and for the recovery of damages.

In her amended answer dated 07th July 2006, the defendant denied all the averments in the plaint. The defendant then pleaded a claim in reconvention on the following lines: the original owners of the premises described in the first schedule to the amended answer, were V.Sinnadorai and S. Ponnamma; The premises described in the **first schedule** to the amended answer are: (i) a two roomed shop premises with a thatched roof and (ii) another shop room bearing no.51 which is 18 feet in length and 12 feet in width and has a tiled roof and (iii) a third adjacent shop room which is 18 feet in length and 14 feet in width and has a titled roof, all of which are situated within the larger land named "Bogahaliyadde". However, the first schedule to the amended answer only states the metes and bounds of the larger land named "Bogahaliyadde" and not the metes and bounds of the four shop rooms described in (i), (ii) and (iii) referred to above; V.Sinnadorai and S. Ponnamma sold and transferred the entirety of the premises

described in the first schedule to the answer to P.A.John Singho and D.Hinnihami by deed no. 14443 dated 03rd December 1916; thereafter, P.A.John Singho and D.Hinnihami sold and transferred a demarcated ["වෙන් කර ගත්"] extent out of the aforesaid land and premises which was 26 feet in length and 24 feet in width and consisted of two shop rooms, to S.J.Martin Appuhami by deed no 1519 dated 15th June 1917; S.J.Martin Appuhami entered into possession of the said land and premises and also became entitled to a further extent of the said land and premises upon other deeds and, for many years, remained in sole and exclusive possession of a shop room which was 40 feet in length and 24 feet in width which is described in the **second schedule** to the amended answer and is situated within the aforesaid land named "Bogahaliyadde"; by deed no 7404 dated 19th November 1940, S.J.Martin Appuhami sold and transferred the said shop room described in the second schedule to the amended answer, to the defendant's husband, Hendrick Appuhami; Upon the death of the defendant's husband, the defendant became entitled to the said shop room which is described in the second schedule to the amended answer; upon the death of the defendant, the substituted defendants-appellants have become entitled to the shop room described in the second schedule to the amended answer; The premises described in that second schedule to the amended answer are a ***divided*** extent consisting of a shop room which is 40 feet in length and 24 feet in width and has a tiled roof and is said to be an amalgamation of the two roomed shop premises described in the aforesaid first schedule. However, the second schedule does not state the metes and bounds of this shop room which is said to be 40 feet in length and 24 feet in width; On the aforesaid basis, the substituted defendants-appellants prayed for the dismissal of the plaintiff's action, a declaration that the substituted defendants-appellants are entitled to the premises described in the second schedule to the amended answer and for the recovery of damages in a sum of Rs.200,000/-.

The plaintiff filed a replication denying the claim in reconvention and pleading that the plaintiff was entitled to judgment since the substituted defendants-appellants had made no claim to the premises described in the schedule to the plaint which are bounded on the East by the Embilipitya-Suriyakanda Road and on the South by the Nedola Road.

The trial *de novo* was eventually taken up on 03rd April 2007. The parties framed issues based on their pleadings in the amended plaint, amended answer and replication. The plaintiff gave evidence and closed his case leading in evidence the documents marked "පැ1" to "පැ7" . When the substituted defendants-appellants commenced their case, Manamperi, two official witnesses and the 1A substituted defendant-appellant gave evidence. The substituted defendants-appellants closed their case on 04th January 2010 leading in evidence the documents marked **"**වි1**"** to "වි23" .

At the end of this trial, the District Court entered judgment dated 09th September 2010 for the plaintiff granting a declaration that the plaintiff was entitled to the premises described in the schedule to the plaint - namely, the premises described as a shop room which is 18 feet x 12 feet in area, bounded on the North by the wall of Wijaya Mudalali's

shop, on the East by the Embilipitya-Suriyakanda Road, on the South by the Nedola Road and on the West by the wall of Hendrick Appuhami's house, and an order ejecting the defendant and her successors and those holding under her, from the premises. The District Court held that the plaintiff had failed to prove the damages that had been prayed for in the plaint and did not award damages to the plaintiff.

I have recounted the long history of this case, in some detail, to set out why this action which was instituted in 1992 was taken up for trial only in 2007 – *ie:* 15 years later – and concluded in the District Court in 2010 . The defendant and her successors have remained in possession of the premises during this entire period.

When the District Court delivered its judgment, the substituted defendants-appellants appealed to the High Court of the Sabaragamuwa Province holden in Ratnapura. The High Court affirmed the judgment of the District Court and dismissed the appeal. Thereupon, the substituted 1A defendant-appellant-petitioner/appellant ["the appellant"] filed an application in this Court seeking leave to appeal from the judgment of the High Court. This Court has granted leave to appeal on the following questions of law, which are reproduced *verbatim*:

(i) Did the learned trial judge as well as the honourable judges of the Provincial High Court have err in law in arriving at the erroneous conclusion that the Plaintiff could have and maintain the instant action without a clear identification of the corpus at a time when the plaintiff had instituted action in respect of a very small portion of a larger land,?

(ii) Did the Honourable judges of the Provincial High Court have misdirected themselves on the law in relation to a case of this nature as the Plaintiff was only a co owner of a larger land who had instituted action to eject another co owner?

(iii) Are the judgments of the trial court and the Provincial High Court are erroneous and bad in law in view of the judgment of the Court of Appeal wherein their Lordships of the Court of Appeal had held that the Defendant is a co owner of the land in suit, the Plaintiff's action ought to have been dismissed by the learned trial judge after answering the issues in favour of the Defendant?

(iv) Had the honourable judges of the Provincial High Court have erred in law in arriving at the erroneous conclusion that the Plaintiff had reconciled the boundaries of the land in suit with the boundaries of the original deed as the original deed deals with a much larger land where a road was not a boundary and the land in suit is only an undivided portion of the said larger land with different boundaries?

(v) Could the honourable judges of the Provincial High Court have entered judgment in any event for the Plaintiff in the absence of any evidence that the co ownership in respect of the larger land had been terminated?

During the pendency of this appeal, the plaintiff died and his widow has been substituted in his place.

The first and fourth questions of law set out above raise the question as to whether the plaintiff cannot have and maintain this action because the *corpus* which is the subject matter of the plaintiff's action had not been adequately identified. The second, third and fifth questions of law raise the issue whether the plaintiff cannot have and maintain this action since the plaintiff and the substituted defendants-appellants are co-owners of a larger land and the co-ownership has not been terminated.

With regard to the first and fourth questions of law, when the plaintiff gave evidence, he clearly identified the land and premises described in the schedule to the plaint and described its metes and bounds in the manner set out in the schedule to the plaint. The plaintiff stated that, the land and premises described in the schedule to the plaint was a shop room which is 18 feet in length along the Southern boundary, which was the Nedola Road. The plaintiff went on to state that, the Western boundary was the wall of Hendrick Appuhami's house [Hendrick Appuhami was the defendant's husband] which is now the shop room occupied by the defendant, which is 40 feet in length and 24 feet in width and that the Southern boundary of the defendant's premises was also the Nedola Road. The plaintiff pointed out that the Eastern boundary of the land and premises described in the schedule to the plaint, was the Embilipitya-Suriyakanda Road. It is apparent from the schedule to the amended plaint that, this Eastern boundary is 12 feet in width. The plaintiff emphasised that the substituted defendants-appellants had not claimed any land or premises which bordered the Embilipitya-Suriyakanda Road. The plaintiff stated that, the Northern boundary was the wall of the shop now occupied by Wijaya Mudalali - *vide:* the evidence at p.352-354 and p.400-401 of the record.

Thus, the plaintiff's evidence clearly identified the land and premises described in the schedule to the amended plaint, stated its precise dimensions and extent and clearly stated its boundaries. The plaintiff was cross examined over three days by counsel for the defendant who repeatedly questioned the plaintiff on the identification and description of the land described in the schedule to the plaint. The plaintiff's evidence remained clear, consistent and unshaken.

When the defendant's Attorney, Manamperi gave evidence, he admitted in cross examination that the *corpus* claimed by the plaintiff was correctly described in the schedule to the amended plaint – [*vide:* the evidence at p.421-423 and at p.435 of the record]. In fact, at p.435, the witness gave evidence as follows:

Q: නැගෙනහිරට-ඇඹිලිපිටිය, සූරියකන්ද මහපාර, අදටත් ඒ පාර, දකුණට ගම්සභා පාර අදටත් තියෙනවා. බස්නාහිරට හෙන්ද්‍රික් අප්පුහාමිට අයිති කඩ කාමරය. මේ නඩුවට අදාල ඉඩමේ හතර මායිම් නඩුවට අදාල ඉඩම හොඳට හඳුනාගන්න පුළුවන් විදියට ලියලා තියෙනවා ?

A: ඔව්.

The identity of the *corpus* is further established by the fact that, the land which is the subject matter of this action bounded on the East by the Embilipitya-Suriyakanda Road and on the South by the Nedola Road, which are both public roads. Next, the Western boundary is the premises which are admittedly owned by the substituted defendants-appellants and there is no dispute about the fact that, the Northern boundary of the land is the land previously owned by John Singho and now owned by Wijaya Mudalali.

Thus, the evidence placed before the District Court including the admission by the defendant's Attorney who gave evidence on behalf of the 1A substituted defendant-appellant-petitioner/appellant, clearly identified the land which is the subject matter of this action. In appeal, the learned High Court Judges carefully examined the evidence relating to the identity of the *corpus* and held that the learned District Judge had correctly determined that, the identity of the *corpus* had been proved. In the light of the evidence of the plaintiff, the admission made by the defendant's Attorney and the aforesaid boundaries of the *corpus,* I see no reasons to disagree with the determination of the High Court. Accordingly, the first and fourth questions of law, are answered in the negative.

The second, third and fifth questions of law raise the issue of whether the plaintiff cannot have and maintain this action since the plaintiff and the substituted defendants-appellants are co-owners of a larger land and the co-ownership has not been terminated. Interestingly, the substituted defendants-appellants did not make out a case on these lines in the District Court. No issues were raised at the trial with regard to whether the plaintiff and the substituted defendants-appellants are co-owners of a larger land and the co-ownership has not been terminated.

In any event, a perusal of the deeds relied on by the parties and the evidence makes it abundantly clear that there is no merit or substance in the appellant's contentions which have been embodied in the second, third and fifth questions of law.

In this connection, it is common ground that the land and premises which are claimed by both parties were part of the larger land named "Bogahaliyadde" which was owned by V.Sinnadorai and S. Ponnamma. It is evident from the deed no. 14443 dated 03rd December 1916 marked "පැ7"/ "වි2" and its schedule, that V.Sinnadorai and S. Ponnamma sold and transferred, to P.A.John Singho and D.Hinnihami, a 5/48th of that larger land on which was situated (i) a thatched two roomed shop premises and (ii)

another shop room bearing no.51 which is 18 feet in length and 12 feet in width and has a tiled roof (iii) a third adjacent shop room which is 18 feet in length and 14 feet in width and has a tiled roof. P.A.John Singho and D.Hinnihami were husband and wife and D.Hinnihami was the mother of Madduma Appuhami from whom the plaintiff claims title.

Thereafter, P.A.John Singho and D.Hinnihami sold and transferred *only* the aforesaid thatched two roomed shop premises [described in (i) above] to H.J.Martin Appuhamy by deed no.1519 dated 15th June 1917 marked "වි3", as set out in schedule of this deed which shows that the land and premises sold to H.J.Martin Appuhamy was 26 feet in length and 24 feet in width and that the Eastern boundary of that land and premises was the shop room with a tiled roof and that the Southern boundary was the Nedola Road. Thus, it is clear that the shop room with a tiled roof situated on the Eastern boundary of the thatched two roomed shop premises sold and transferred to H.J.Martin Appuhamy and referred to in the schedule to deed no.1519 marked "වි3", is the shop room bearing no.51 which is described in (ii) of the aforesaid schedule to deed no. 14443 marked "ඡැ7"/"වි2". Thereafter, by the deed of transfer no .7404 dated 19th November 1940, marked **"**වි4", H.J.Martin Appuhamy sold and transferred, to the defendant's husband, the land and premises he had obtained under the aforesaid deed no. 1519 marked "වි 3" – *ie:* the shop premises which are 26 feet in length and 24 feet in width and with an Eastern boundary which is the shop room bearing no.51 with a tiled roof which is described in (ii) of the aforesaid schedule to deed no. 14443 marked "ඡැ7"/ "වි2" referred to earlier. The 1A substituted defendant-appellant-petitioner/appellant claims title under and in terms of this deed no. 7404 marked **"**වි4" and when he gave evidence, he expressly said so. Manamperi also stated the same fact.

P.A.John Singho and D.Hinnihami continued to jointly own the shop room bearing no.51 with a tiled roof which is 18 feet in length and 12 feet in width *and* the adjacent shop room with a tiled roof which is 18 feet in length and 14 feet in width, which are described in (ii) and (iii) of the schedule to deed no. 14443 marked **"**ඡැ7"/"වි2". The plaintiff testified that, subsequently, P.A.John Singho and D.Hinnihami divided these two shop rooms between them with P.A.John Singho having sole ownership of the shop room with a tiled roof which is 18 feet in length and 14 feet in width – *ie: (*iii) of the schedule to deed no.14443 marked **"**ඡැ7"/"වි2" - and D.Hinnihami having sole ownership of the shop room bearing no.51 with a tiled roof which is 18 feet in length and 12 feet in width - *ie: (*ii) of the schedule to deed no.14443 marked "ඡැ7"/"වි2".

Thereafter, D.Hinnihami's sole title to the shop room bearing no.51 which is 18 feet in length and 12 feet in width and has a tiled roof, which is described in *(*ii) of the schedule to deed no.14443 marked **"**ඡැ7"/"වි2", came to her son, Madduma Appuhami. Later, Madduma Appuhami transferred that shop room to his daughter, Somawathie Hamine and Wijewardena Appuhami by the deed of transfer no. 8520 dated 09th June 1943 marked "ඡැ1". Somawathie Hamine became solely entitled to the premises after the

death of Wijewardena Appuhami. Later she has transferred that shop room to the plaintiff by deed no.1562 marked “පැ3”.

As mentioned earlier, the plaintiff has given clear evidence that the land which is the subject matter of the plaintiff’s action is the shop room bearing no.51 which is 18 feet in length and 12 feet in width and has a tiled roof, which is described in (ii) of the schedule to deed no.14443 marked “පැ7”/“වි2”, and which was transferred to the plaintiff by the deed no.1562 marked “පැ3”. He also stated that, the boundaries of that shop room are those described the schedule to the amended plaint, which were described above.

It is clear from the evidence that, the land and premises which are the subject matter of the plaintiff’s action and are described in the schedule to the amended plaint, have been held and owned as a distinct and divided allotment of land for several decades prior to the institution of this action.

The fact that, the defendant’s husband and predecessor in title recognized and accepted this fact is proved by the lease agreement no.222 dated 08th November 1967 marked **“**පැ2” by which Madduma Appuhami has leased the land and premises which are the subject matter of the plaintiff’s action to the defendant’s husband for a period of 30 months at a monthly rent of Rs.381/08.The description of the land and premises in the schedule to that lease agreement is the same as the description of the land and premises set out in the schedule to the amended plaint. The boundaries and the extent are identical. The lease agreement no.222 marked **“**පැ2” also records the fact that, the said land and premises had come to Madduma Appuhami from his mother, D.Hinnihami who had owned and possessed the said land and premises.

Thus, it is clear that, the defendant’s predecessor in title recognized and accepted the fact that, the land and premises which are the subject matter of the plaintiff’s action are a divided and distinct land and premises. It is also evident that, the land and premises claimed by the defendants are another and separate premises as set out in the deed no.1519 marked “වි3” and deed no. 7404 marked “වි4” which the 1A substituted defendant-appellant-petitioner/appellant relies on.

To sum up, the land and premises claimed by the plaintiff and described in the schedule to the amended plaint and the land and premises claimed by the 1A substituted defendant-appellant-petitioner/appellant and described in the second schedule to the amended answer, are two divided and distinct properties which have been separately owned and possessed for several decades. The defendant’s predecessor in title has recognized and accepted that fact when he took the land and premises claimed by the plaintiff on rent from the plaintiff’s predecessor in title upon the lease agreement marked **“**පැ2”. In fact, the long history of this case shows that, the defendant too initially accepted this fact and admitted that she was the tenant of the plaintiff’s predecessor in

title but later resiled from that admission and took an entirely different course after her Attorney, Manamperi intervened in this case.

Thus, there is no merit or substance in the claim of co-ownership which has been belatedly introduced at the stage of making an application for leave to appeal from this Court. Accordingly, the second, third and fifth questions of law are answered in the negative.

The judgment of the High Court is affirmed. and this appeal is dismissed. The various strategies used by the defendant and her successors have resulted in this case being finally determined 25 years after the plaintiff instituted this action. The defendant and her successors have benefitted from this delay as they have been in possession of the land and premises which are the subject matter of this action. In the light of these circumstances, the 1A substituted defendant-appellant-petitioner/appellant will pay the substituted plaintiff-respondent-respondent a sum of Rs.200,000/- on account of the costs in this Court. The plaintiff-respondent-respondent will also be entitled to such other costs as may have been ordered by the District Court and the High Court. The appeal is dismissed subject to the aforesaid costs.

Judge of the Supreme Court

I agree
S. Eva Wanasundera, PC J

Judge of the Supreme Court

I agree
Sisira J. De Abrew J

Judge of the Supreme Court

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

In the matter of an Application for Special leave to Appeal in terms of Section 9 of the High Court of the Provinces (Special Provisions) Act No.9 of 1990 read with Article 128 of the Constitution Democratic Socialist Republic of Sri Lanka

Samara Archchige Chandra Sagara
Sri Palabaddala,
Ratnapura

Accused-Appellant-Petitioner-Appellant

SC Appeal 103/2015
SC (SPL)LA 9/2015
High Court Colombo
HCMCA 157/2013
MC Colombo 53739/03

Vs

1. Officer-in-Charge
   Police Station,
   Kiribathgoda.

Complainant-Respondent-Respondent-Respondent

2. Honourable Attorney General
   Attorney General's Department
   Colombo 12

Respondent-Respondent-Respondent

Before : Sisira J De Abrew J
Priyantha Jayawardena PC J
NalinPerera J

Counsel : Anil Silva PC with SahanKulatunga
for the Accused-Appellant-Petitioner-Appellant
ARH Bary SSC for the Attorney General

Argued on : 1.3.2017

Decided on : 14.09.2017

Sisira J De Abrew J

The accused-appellant in this case was convicted for committing the offence of theft on a vehicle bearing registration number WPLA 7841which belongs to Prasad Cooray which is an offence punishable under Section 370 of the Penal Code. The appeal filed by the accused-appellant was dismissed by the learned High Court Judge by his judgment dated 4.12.2014. Being aggrieved by the said judgment of the learned High Court Judge, the accused-appellant has appealed to this court. This court by its order dated 17.6.2015, granted leave to appeal on questions of law set out in paragraphs 12(c) to 12(f) and 12(h) of the petition of appeal of the petition of appeal which are set out below.

1. Has the learned Magistrate as well as the learned High Court Judge erred in law when they convicted Petitioner on charge No.1 although the said charge has not been proved beyond reasonable doubt?
2. Has the learned High Court Judge failed to appreciate that althoughthe learned Magistrate in his judgment adverted to matters which had no bearing in respect of the charges such as circumstantial evidence, expert evidence, common intention, prescription, jurisdiction, territorial jurisdiction, the relevancy of productions and documents but failed to

address the main issues of the case and therefore that the judgment of thelearned Magistrate is not a judgment within the meaning of Section 283 of the Code of Criminal Procedure Act No.15 of 1979?

3. Havethe learned Magistrate as well as the learned High Court Judge failed to carefully and judicially analyze the evidence in this case where there are two completely contradictory positions as regards how the vehicle happened to be with the Petitioner's father which has resulted in there being no proper judgment in law?
4. Is the conviction of thePetitioner on charge No.1 contrary to law in view of the fact thatthe learned Magistrate as well asthe learned High Court Judge have not related the evidence to the charge?
5. Is the sentence imposed on the Petitioner illegal, unreasonable and excessive?

Learned President's Counsel who appeared for the accused-appellant submitted that when the accused-appellant removed the vehicle he did not entertain dishonest intention to cheat Prasad Cooray as the accused-appellant was under the impression that the owner of the vehicle was his father. I now advert to the above contention. The accused-appellant in the case admits that he removed the vehicle from the possession Prasad Cooray. The vehicle in question was initially purchased by the father of the accused-appellant on a hire purchase agreement with the LOLC Finance Company. Since initial installments went into areas, the accused-appellant with the help of one SisiraWickramasinghe who was known to Prasad Cooray took a loan of Rs.1.0 Million from Prasad Cooray keeping the vehicle as security. Prasad Cooray claims that later on 11.8.2009, the vehicle was transferred in his

name. Prasad Cooray states, in his evidence, that when the accused-appellant removed the vehicle from his possession on 26.8.2009, he was the owner of the vehicle.

Although the accused-appellant claims that the owner of the vehicle washis father, the father of the accused-appellant, by a receipt dated 9.7.2009 (marked P1) states that the vehicle in question was handed over to Prasad Cooray together with Revenue Licence, Insurance Certificate and the Identification Card belonging to the vehicle. Further the vehicle transfer form V1 was signed by the father of the accused-appellant. Details of the vehicle had not been filled in V1.The accused-appellant admits that V1 had been signed by his father. Therefore the contention of the accused-appellant that the owner of the vehicle was his father at the time of the removal of the vehicle from the possession of Prasad Cooray cannot be accepted. In my view the intention of making a complaint to Sapugaskanda Police Station by the father of the accused-appellant to the effect that SisiraKumara got his signature on some papers is not genuine.

The accused-appellant states in his evidence that he removed the vehicle with the intention of handing it back to Prasad Cooray soon after the conclusion of RatnapuraDevalaya'sPageant. Is this correct? If the above evidence of the accused-appellant is correct, why did he keep the vehicle in his custody for one month? The accused-appellant admits in his evidence at page 78 that he kept the vehicle in his possession for one month. The accused-appellant further admits, in his evidence at page 80, that he did not park the vehicle at the usual place thinking that the police would come and remove the vehicle. The Police Officer who took the vehicle into his custody, in his evidence, states that he did not find the number plate of the vehicle at the time he took

the vehicle into custody. The accused-appellant too admits in his evidence that the number plate of the vehicle had been removed at the time that the vehicle was taken into custody. His evidence at page 82 and 83 suggests that it was removed by him. The above evidence clearly indicates that he had entertained dishonest intention when he removed the vehicle from the possession of Prasad Cooray. The Police Officer who took the vehicle into his custody had observed the following the matters.

1. Front buffer of the vehicle had been removed.
2. Windscreen of the vehicle had been damaged.
3. Dash-board of the vehicle had been damaged.
4. Steering wheel of the vehicle had been locked.

It has to be stated here that even if Prasad Cooray came to remove the vehicle, he could not have done sosince thesteering wheel of the vehicle had been locked. When one considers the above evidence, it is clear that the accused-appellant had taken all possible steps to prevent the vehicle being removed from his possession. When I consider the above evidence, I am of the opinion that the accused-appellant had entertained dishonest intention to cheat Prasad Cooray when he removed the vehicle from the possession of Prasad Cooray. For the above reasons, I reject the contention of learned President's Counsel that the accused-appellant did not entertain dishonest intention when he removed the vehicle from the possession of Prasad Cooray.

For the aforementioned reasons, I hold that the learned Magistrate had rightly convicted the accused-appellant on count No.1 of the charge sheet (count under Section 370 of the Penal Code) and that the learned High Court

Judge had rightly affirmed the conviction of the accused-appellant. For all the above reasons, I affirm the conviction of the accused-appellant. In view of the conclusion reached above, I answer the questions of law set out in paragraphs 12(c), 12(e) and 12(f) of the Petition of Appeal in the negative. The questions of law set out in paragraph 12(d)of the Petition of Appeal does not arise for consideration.

The next question that must be decided is whether the sentence imposed by the learned Magistrate is excessive.The accused-appellant was sentenced to a term of one year simple imprisonment, to pay a fine of Rs.1500 carrying a default sentence of six months simple imprisonment and to pay Rs.100,000/- as compensation to the virtual complainant. When the accused-appellant gave evidence in December 2012, he was 30 years old. The offence was committed in August 2009. This shows that the accused-appellant was only 27 years old when he committed the offence. The record does not indicate the accused-appellant had any previous convictions. The vehicle was, initially, kept as a security and a loan of Rs.1.0Million was raised from Prasad Cooray by the accused-appellant when his father could not pay monthly installments to the Finance Company. His father has now lost the vehicle. When I consider all the above matters, I feel that the sentence imposed by the learned Magistrate is excessive. I therefore suspend the sentence of one year simple imprisonment for a period of seven years. Suspension of term of imprisonment is made effective from the date on which this judgment is explained to the accused-appellant by the learned Magistrate.

In view of the conclusion reached above, I answer the questions of law set out in paragraph 12(h) of the Petition of Appeal as follows. The sentence

imposed on theaccused-appellant is excessive. Subject to the above variation of the sentence, the appeal of the accused-appellant is dismissed.

Conviction of the accused-appellant affirmed

Sentence of imprisonment suspended.

Judge of the Supreme Court.

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court.

NalinPerera J

I agree.

Judge of the Supreme Court.

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

In the matter of application for Leave o Appeal to appeal under and in terms of section 5C of the High Court of the Provinces (special provisions) Act No. 19 of 1990 as amended by High Court of the Provinces (special Provisions) (amendment) Act No. 54 of 2006.

S.C.Appeal No:-107/10

S.C.H.C.(CA) LA No:-36/10

Civil Appeal No:-HCCA/KAG/350/2007

D.C.Case No:-25263/P

1.Ranminipura Dewage Hemathunga

2.Ranminipura Dewage Darmasena

3.Ranminipura Dewage Gunathilaka

4.Ranminipura Hewage Somarathna

5.Raminipura Dewage Malani Premasiri

6.Ranminipura Dewage Sunil

Dayarathna

All of Kamuradeniya Danowita.

PLAINTIFFS

Vs

1.Ranminipura Dewage Agoris

1a.Ranminipura Dewage Karunawathi

2.Ranminipura Dewage Thegis

2a.Ranminipura Dewage Thegis

3.Ranminipura Dewage Maiya

4.Ranminipura Dewage Jayasinghe

5.Ranminipura Dewage Gunasinghe

6.Ranminipura Dewage Nimal Ranasingha

7.Ranminipura Dewage Peries

8a.Raminipura Dewage Senewirathna

8a.Ranminipura Dewage Anoma

Chadralatha Senewirathna

9.Ranminipura Dewage Martin

10.Ranminipura Dewage Alpenis

10a.Ranminipura Dewage Jayalath

Premathilaka

All of Kamburadeniya, Danowita.

11.Corporative Society,

Kamburadeniya, Danowita.

12.Ranminipura Dewage Karunathi

13.Ranminipura Dewage Bebinona

14.Ranminipura Dewage Jen

15.Ranminipura Dewage Premalatha

16.Ranminipura Dewage Albert

17.Ranminipura Dewage Smaradasa

18.Ranminipura Dewage Somapala

19.Ranminipura Dewage Kamalawathi

All of Kamburadeniya Danowita.

DEFENDANTS

AND

Ranminipura Dewage Hemathunga

Kamburadeniya, Danowita.

1st PLAINTIFF-APPELLANT

Vs

2.Ranminipura Dewage Darmasena

3.Ranminipura Dewage Gunathilaka

4.Ranminipura Dewage Somarathna

5.Ranminipura Dewage Malini Premasiri

6.Ranminipura Dewage Sunil Dayarathne

All of Kamburadniya, Danowita.

2nd to 6th PLAINTIFF-RESPONDENTS

1a.Ranminipura Dewage Karunawathi

2a.Ranminipura Dewage Maiya

3.Ranminipura Dewage Maiya

4.Ranminipura Dewage Jayasinghe

5.Ranminipura Dewage Gunsinghe

6.Ranminipura Dewage Nimal Ranasinghe

7.Ranminipura Dewage Peries

8a.Ranminipura Dewage Anoma Chandralatha Senewirathne

9.Ranminipura Dewage Martin

10a.Ranminipura Dewage Jayalath Premathilaka

All of Kamburadeniya, Danowita.

11.Corporative Society, Kamburadniya Danowita.

12.Ranminipura Dewage Karunawathi

13.Ranminipura Dewage Bebinona

14.Ranminipura Dewage Jen

15.Ranminipura Dewage Premalatha

16.Ranminipura Dewage Albert

17.Ranminipura Dewage Smaradasa

18.Ranminipura Dewage Somapala

19.Ranminipura Dewage Kamalawathi

All of Kamburadeniya Danowita.

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1a.Ranminipura Dewage Karunawathi

"Somi Niwasa" Kamburadniya

Danowita.

13.Ranminipura Dewage Bebinona

No. D/53, Alwis Watta

Kamburadeniya, Danowita.

8.Ranminipura Dewage Somapala

No.D 46/1, Kamburadeniya

Danowita.

19.Ranminipura Dewage Kamalawathi

No.D 46/2A, Kamburadeniya

Danowita.

1a/12,13,18 & 19th DEFENDANT-RESPONDENTS

Vs

Ranminipura Dewage Hemathunga
Kamburadeniya, Danowita.

1st PLAINTIFF-APPELLANT-RESPONDENT

2.Ranminipura Dewage Darmasena

3.Ranminipura DewageGunathilaka

4.Ranminipura Dewage Somarathna

5.Ranminipura Dewage Malini Premasiri

6.Ranminipura Dewage Sunil Dayarathne

All of Kamburadeniya Danowita.

2nd to 6th PLAINTIFF-RESPONDENT-RESPONDENTS

2a.Ranminipura Dewage Maiya

3.Ranminipura Dewage Maiya

4.Ranminipura Dewage Jayasinghe

5.Ranminipura Dewage Gunasinghe

6.Ranminipura Dewage Nimal
Ranasinghe

7.Ranminipura Dewage Peries

8a.Ranminipura Dewage Anoma
Chandralatha Senewirathne

9.Ranminipura Dewage Martin

10a.Ranminipura Dewage Jayalath
Premathilaka

All of Kamburadeniya, Danowita.

11.Corporative Society

Kamburadeniya, Danowita.

14.Ranminipura Dewage Jen

15.Ranminipura Dewage Premalatha

16.Ranminipura Dewage Albert

17.Ranminipura Dewage Smaradasa

All of Kamburadeniya, Danowita.

DEFENDANT-RESPONDENT-APPELLANTS

BEFORE:-B.P.ALUWIHARE, PC,J.

ANIL GOONERATNE,J

H.N.J.PERERA, J

Counsel:-Rasika Dissanayaka for the 1/12th,13th, 18th &19th Defendant-Respondent-Appellants

Premani Pothupitiya for the 14th & 15th Defendant-Respondent-Respondents

Anura Guneratne with S.Gurugalgoda for the 6th Plaintiff-Respondent-Respondent

ARGUED ON:-04.09.2017

DECIDED ON:-24.11.2017

H.N.J.PERERA, J.

The 1st to 6th Plaintiff-Appellant-Respondents (here-in-after referred to as Plaintiffs) instituted action in the District Court of Kegalle bearing No.25263/P to partition the land called Siyambalagahamulawatta alias Duwehenawatta .The said land is depicted as lot 1 to 5 in the Preliminary plan No.3764 dated 11.11.91 marked X prepared by surveyor K.S.Panditharthne.

According to Plaintiffs the corpus consists of lots 1 to 5 in Plan X. The 1st, 2nd, 3rd, & 13th Defendant-Respondent-Appellants (here-in-after referred to as Defendants) whilst admitting that lots 1, 2 & 5 of the said plan comprises the corpus, disputed that the lots 3 and 4 form part of the land to be partitioned. They claim that lot 3 and 4 in the said Plan X are part of another land called Hitinawatta and sought an exclusion of the said lots from the land sought to be partitioned. The learned District Judge by his judgment dated 17.02.2006 held with the Defendants and made order to exclude lot 3 and 4 from the land sought to be partitioned. Aggrieved by the said judgment, the 1st Plaintiff preferred an appeal to the Civil Appellate High Court of Kegalle. The Civil Appellate High court delivered the judgment dated 1.02.2010 setting aside the judgment of the Learned District Judge and held that lot 1 to 5 of the preliminary plan marked X form part of the corpus. The said Court also held that the Plaintiff has established Undiya's pedigree and that the evidence revealed that Undiya owned ½ share of the land to be partitioned. Accordingly the Court also held that the parties are entitled to shares as stated in the said judgment and directed the Learned District judge to enter the Interlocutory decree accordingly.

Being aggrieved by the said judgment of the Civil Appellate High Court of Kegalle, the Defendants had made an application to leave to appeal from the said decision of the Civil Appellate High court of kegalle. This Court

granted leave to appeal on the questions of law stated in paragraph 18 (i) to (vi) of the Petition. When this matter was taken up for argument on 04 09.2017, the learned Counsel for the Appellant submitted to Court that he will confine and restrict this appeal to question of law No. IV. whether their Lordships of the Civil Appellate High court have erred in law by coming to a conclusion that lots 3 and 4 of the preliminary plan is also a part of the land sought to be partitioned.

The Plaintiff's contention was that lot 1 to 5 in the Preliminary plan marked X consists of the land to be partitioned. The Defendants position was that only lot 1, 2, and 5 consists of the land to be partitioned and lot 3 and 4 should be excluded from the corpus as they form part of another land called Hitinawatta.

The schedule to the plaint describe the land to be partitioned as follows.

A land called "Siyambalagahamulawatta" alias "Duwa Hena Watta" of two acres:-

North:- Land of Marthelis

South:- Hiri kumbure wela

East:- Bomaluwe Watta

West:- Paranagedera Watta

According to the preliminary plan marked X the boundaries are as follows:-

North:- Pahalagedera Watta - (according to Plaintiff)

Sidalage Watta - (according to 2nd and 3rd defendants)

South:- Hirikumbura Wela

East:-- Bo-Maluwe Watta and the Cemetery

West:- Paranagedera Watta

The description of the land to be partitioned as set out in the schedule of the plaint was not disputed by any defendant. In fact the 1a defendant giving evidence had admitted the description of the corpus stated in the schedule to the plaint. The 8th defendant too whilst giving evidence had admitted the corpus consists of lots 1 to 5 in plan X. He has further stated that the Eastern boundary is Bomaluwe Watta and that the Cemetery too is situated in a part of Bomaluwe Watta.

On perusal of the said plan X it is clearly seen that the Southern boundary of the corpus is a paddy field. The schedule of the plaint describes the Southern boundary as Hirikumbura Wela. In plan X the Southern boundary of lot 3 is Iwura, Ellamulla Kumbura, Hirikumbura. None of the witnesses has disputed the said boundary to the South.

If one were to accept the position of the contesting defendants the Eastern and Southern boundary of the corpus has to be Hitina Watta. And the northern and Western boundaries of lot 3 and 4 has to be Siyambalagahamula watta alias Duwa Watta. None of the deeds produced by the contesting defendants proves this fact. In fact on perusal of the deed marked 1V4, being the oldest deed produced by the defendants gives as Eastern boundary of Hitina Watta as Gal enda and the Cemetery, and Western boundary as Gal enda. The preliminary plan does not show any Gal enda in the said plan.

The Northern boundary of lot 3 and 4 in the preliminary plan is Siyambalagahamula Watta alias Duwahena Watta. In the said deed marked 1V4, the Northern boundary of the Land Hitina Watta is stated as Bomaluwe watta. In the preliminary plan marked X the Northern boundary of lots 3 and 4 is lot 2, admittedly a part of the corpus to be partitioned called Siyambalagahamula Watta. The extent given in the said deed marked 1V4 of Hitina Watta is only 2 lahas, about 20 perches.

Lots 3 and 4 of the plan X is 1 rood and 36 perches. The difference in the extent of the said two lots 3 and 4 in the plan X too clearly establish that the said lots 3 and 4 in the preliminary plan cannot be regarded as a different land called Hitina Watta.

It is to be noted that lot No.5 is a rock is situated in the middle of the corpus to be partitioned. None of the plaintiffs deeds refer to a rock as a boundary to the land to be partitioned. Lot No.5 is only a part of the land to be partitioned described in the schedule to the plaint which consists of a rock. And no party has specifically claimed any right to it. It cannot be considered as a boundary of the land to be partitioned.

According to the statement of claims of 1A, 2A, 3rd, 12th and 13th defendant's lots 3 and 4 in the preliminary plan X consists of a land called Hitina Watta .The boundaries are as follows:-

North:- Bomaluwe Watta

South:- Iwura (bund) of the paddy field

East:- Gal enda of the Cemetery

West:- Gal enda

Nowhere a rock is situated as a boundary to the land called Hitina Watta.

On perusal of the deed marked 1V4, it is clear that, where a rock is situated as a boundary, it has been referred to as a rock and not as Gal enda. The third schedule of the said deed marked 1V1 /1V4 refers to a land called 1/4th share of Siyambalagahamula Watta of 8 lahas in paddy sowing. The eastern boundary of the said land is given as a rock. The schedule 2 of the said deed refers to a land called Hitina Watta and boundary to the east is given as gal enda of the cemetary and to the west as gal enda. Therefore it is very clearly seen that it is only a gal enda and not a rock, which has been referred to as the eastern boundary of the

said land Hitina watta. If a rock is situated as a boundary to the east of the said land Hitina Watta, then the Eastern boundry of Hitina Watta would have been referred to as a rock and not as gal enda as stated in the said deed marked 1V4.

In C.A.L.A 187/95 Fernando V. Perera, decided on 02.10.1995, Dr.Ranaraja, held that:-

"Section 18 of the Partition Act provides for parties dissatisfied with the preliminary plan prepared on commission made by Court to make an application for a commission to issue on the surveyor General. The Petitioner has not availed himself of this provision of law. Similarly there is provision in that section for a party to have a surveyor who conducted the survey to be summoned to court and examined in any matter arising from the preliminary plan and report filed in court. The Petitioner has not had recourse to that provision. Instead he had sought a fresh commission on another surveyor which is not permitted by law."

The contesting defendants too have failed to make any application under section 18 of the Partition Act. The contesting Defendants have failed to summon the surveyor who prepared the preliminary plan and to examine him on this issue. Nor have they made an application to court to issue a commission to the Survey General for the purpose of identifying the corpus to be partitioned in this case.

The scheme of the Partition Act is that once an action is instituted the action must proceed in respect of the land described in the plaint except where a larger land is made the subject matter of the action. The court has to issue a commission to the Surveyor to make the preliminary survey of the land set out in the plaint. The Surveyor has to make the survey and furnish a report in which he must set out the particulars specified in section 18 of the Act. The Surveyor has accordingly executed the commission and has tendered the preliminary plan depicting the land

sought to be partitioned as lots 1 to 5 and the report, marked X and X1.The plaintiff's position is that the land depicted as lot 1 to 5 in the said Preliminary plan X is the land described in the schedule to the plaint and the land sought to be partitioned in this case.

The land described in the title deed and described in the schedule to the plaint has been sufficiently identified as the land shown in the preliminary plan. The contesting defendants have failed to satisfy court that lot 3 and 4 in the said preliminary plan X consists of the land called Hitina Watta.

Therefore I answer the question of law raised in this case in the negative and in favour of the Plaintiff-Respondent. I affirm the judgment of the Civil Appellate High Court dated 01.02.2010 and dismiss the Defendant-Respondent-Appellants appeal with costs.

JUDGE OF THE SUPREME COURT

B.P.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 from a Judgment of the Court of Appeal

T. Mohamed Razak,
No. 43, Lake Crescent,
Colombo 12.
Plaintiff

Vs

SC APPEAL 110/2010
SC (Spl) LA 9/2010
CA No. 775/98 (F)
D.C.COLOMBO No. 15849/L

1. N. Ammal Thiyagarajah
2. K. Thiyagarajah
Both of No. 21, Galle Face Terrace, Colombo.
Defendants

AND

T. Mohamed Razak,
No. 43, Lake Crescent,
Colombo 12.
Plaintiff Appellant

Vs

1. N. Ammal Thiyagarajah
2. K. Thiyagarajah
Both of No. 21, Galle Face Terrace, Colombo.

Defendants Respondents

AND NOW

1. N. Ammal Thiyagarajah
2. K. Thiyagarajah
   Both of No. 21, Galle Face Terrace, Colombo.

Defendants Respondents Appellants

Vs

T. Mohamed Razak,
No. 43, Lake Crescent,
Colombo 12.

Plaintiff Appellant Respondent

BEFORE: **S. EVA WANASUNDERA PCJ.**
K. T. CHITRASIRI J. &
PRASANNA S. JAYAWARDENA PCJ.

COUNSEL: Romesh de Silva PC with Sugath Caldera for the Defendants Respondents Appellants.
Faiz Musthapha PC with Amarasiri Panditharatne for the Plaintiff Appellant Respondent

ARGUED ON: 30. 11. 2016.

DECIDED ON: 08. 03. 2017.

S. EVA WANASUNDERA PCJ.

In this Appeal, special leave to appeal was granted on the following questions of law:

1. Is the judgment of the Court of Appeal contrary to law and against the evidence and material which were before Court?
2. Did the Court of Appeal fail to consider that the Appellants were willing and ready to sell the said property by the 1st of March,1991 as established by the letter dated 25.02.1991. marked P7 by which the Appellants requested the Respondent to submit the draft copy of the Transfer Deed for approval by the Attorney at Law of the Appellants to conclude the sale as agreed?
3. Should the written consent referred to in Section 6 of the Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911 as amended be direct and/or can it be implied or inferred?
4. Does the failure on the part of the Respondent to forward the draft Deed of Transfer before 01.03.1991 or thereafter, affirm that the Respondent was not willing to fulfill its obligation under the said Contract?
5. If the performance is impossible, could the Court make order for specific performance?

The facts pertinent to this case should be summarized before considering the law since the problem between the parties who have litigated for so long could be understood clearly only in that background. The Defendants Respondents Appellants (hereinafter referred to as the Defendants) who are husband and wife hailing from the peninsula of Jaffna, yet living in Colombo entered into a written agreement with the Plaintiff Appellant Respondent (hereinafter referred as the Plaintiff) to sell their property in Colombo bearing No. 101/1, W.A.D.Ramanayake Mawatha, Colombo 02. It was an Agreement to Sell dated 24th August, 1990 bearing No. 2795 which was attested by M.Kamil Zaheed, Notary Public marked as P1 at the trial in the District Court. The said Agreement provided that the sale price was Rs. 2000,000/- and that at the time of the execution of document P1, Rs. 1000,000/-was paid. Accordingly the rest of the money, i.e. another Rs.1000,000/-

was due to be paid by the Plaintiff to the Defendants at the time of the execution of the Transfer Deed. It was also agreed that the sale should be concluded on or before the 1st of March, 1991. At the time of the execution of the Agreement to Sell, the Plaintiff was given possession of a **part of the property**. The possession of the other part of the property **was to be given** at the time of the **execution** of the Transfer Deed. The Plaintiff instituted action in the District Court praying for **specific performance** of the sale in compliance with the conditions contained in the said Agreement to Sell No. 2795.

Both parties to the Agreement No. 2795 were aware at the time of execution of the same, that the other part of the property was occupied **by Rowlands Ltd.**, a company running its business as a **tenant** of the Defendants.

The Defendants in their answer stated that the informally agreed true sale price was Rs.3000,000/-. The Defendants also took up the position that the Agreement No. 2795 **was bad in law** since the 2nd Defendant had not previously granted **his consent in writing to the 1st Defendant to legally transfer her share** to the Plaintiff as required by the law of Thesawalamai which governed the Defendants. The Defendants answering the Plaint submitted that **yielding the vacant possession** of the remaining part of the property **was not attainable** in as much as the tenant Rowlands Ltd. refused to vacate the said part of the property, despite all efforts made by the Defendants to get them out of that part of the property before 01.03.1991. The next position taken up by the Defendants was that **the Plaintiff knew that the Defendants were trying** to get the property from Rowlands Ltd. but had so far failed to get it and therefore **the Plaintiff had acquiesced in such inability of the Defendants to secure the vacant possession** of the said portion tenanted by Rowlands Limited. The Plaintiff had **also refrained from requiring the Defendants for specific performance for a long time.** It was after one year and one month from the date on which

execution of the transfer deed was due to be done, that the Plaintiff filed action in the District Court in April, 1992.

At the District Court trial, the Plaintiff, the 2nd Defendant, the valuer Tissera and the Police Constable Indrapala gave evidence. The Plaintiff closed his case reading in evidence documents P1 to P10. The Defendants concluded the defense marking in evidence documents D1 to D16. At the end of the trial, after the written submissions, the learned trial judge **dismissed the Plaint**.

The Plaintiff appealed to the Court of Appeal and the learned judges of the Court of Appeal **allowed the appeal** and **granted the Plaintiff the reliefs prayed for by the Plaint**. Being aggrieved by the said judgment of the Court of Appeal, the Defendants are before this Court by way of this Appeal.

The Plaint had been filed by the Plaintiff against the Defendants on 14th April, 1992. The **only relief** prayed for is **specific performance** of the sale of the property by the Defendants to the Plaintiff as agreed by the Agreement to Sell No. 2795. There is no alternative relief prayed for such as damages. The property in question is Assesment No. 100/1, W.A.D.Ramanayake Mawatha, Hunupitiya, Colomobo within the Municipal limits of Colombo. The property consists of a big single storey dwelling house with four bed rooms, a spacious sitting hall, a library room, open verandhas, two bathrooms and in between spacious open spaces etc. of around an extent of 2500 square feet on the land of 18.87 Perches, according to the evidence before court. **Part of the house, at the time of the Plaint was occupied by the Plaintiff and the other part was occupied by Rowlands Ltd. as a tenant of the Defendants**. The tenants had agreed to leave that part of the house before 01.03.1991.

The Answer dated 11.11.1992 submitted to court revealed that the market value of the property as at the date of execution of the Agreement to Sell, was Rs. 4 million and in 1991 the Plaintiff had

informally agreed to pay the Defendants Rs. 3 million even though the Agreement No. 2795 stated the sale price as Rs. 2 million. Rs. 1 million was taken as an advance and possession of part of the house was given. The Defendants' position was that the said agreement was bad in law as the 2nd Defendant had not given his consent in writing to the 1st Defendant to agree to transfer her share of the property to the Plaintiff and also, that, due to the tenant Rowlands Ltd. not leaving the other part of the premises, the refusal by that company to leave the said portion of the premises and yield up possession of the said part had made the specific performance by the Defendants of the Agreement referred to in the Plaint an **impossibility.**

P7 is the basis of the second question of law raised before this Court. This is a letter dated 25.02.1991 written by the 2nd Defendant to the Attorney at Law , Kamil Zaheed who attested the Agreement 2875, informing him that **"the premises would fall vacant and be ready for sale by the 1st of March,1991**". The 2nd Defendant also added, in the same letter, thus. " **Please submit a draft copy of the Transfer Deed early in order to get the approval of our Lawyers**". He further added that he needs the orginal of the Agreement 2795 as the photocopy is unacceptable to his lawyers. Since no response was forthcoming the 1st Defendant wrote another letter dated 12th March,1991 with a copy to the Plaintiff which letter was produced in evidence marked as P8. The body of the letter reads thus: **"** Further to our letters dated 25.02.1991, we wish to forward a copy of the letter dated 11.03.1991 from the Managing Director of the Rowlands Limited regarding their willingness to vacate the premises as early as possible and their reasons for not having done so, as had been earlier agreed to. **Please be kind enough to send the documents we requested earlier by registered post to the above address**. We hope the final transaction will be settled at the very earliest. We thank you**."** A copy of the letter sent to the 1st Defendant by Rowlands Limited Managing Director, which was referred to, in the body of the letter to the Attorney at Law Kamil

Zaheed' was also produced in evidence marked as P10. By these two letters P8 and P10, it is proven that neither the Plaintiff nor the Attorney at Law of the Plaintiff took any steps to forward a draft copy of the Transfer Deed which was due to be executed on 01.03.1991.

What can be understood by the aforementioned documents is that the Defendants were ready and willing to execute the Deed of Transfer on or before the 01.03.1991 as agreed but the Plaintiff did not perform his part of sending a draft before that date.

Thereafter Rowlands Limited did not keep their word to leave the part of the premises but kept on stating that they have not been able to find another place. There is evidence to the effect that the Defendants were trying to find alternate accommodation for Rowlands Limited which had failed. The Defendants had informed the Plaintiff that they might have to file action to eject Rowlands Limited and that it would take some time to get them ejected.

Then the Defendants had informed the Plaintiff a way out of the problem by offering to execute the sale of the portion the Plaintiff was already occupying which was about 14 Perches in extent. The Plaintiff had not agreed to that suggestion. The evidence show that thereafter the Plaintiff had forcibly opened the library room and the rooms which had till then contained some of the goods belonging to the Defendants and the parties got more and more antagonized. The Plaintiff had obstructed the road used by Rowlands Ltd. workers by putting up an unauthorized wall and also sunk a tube well on the land which Rowlands Ltd. was occupying. There had been many police complaints and police statements by the Defendants and the Plaintiff which were produced in Court through a Police Officer who was called upon to give evidence.

The evidence before court proves that after paying Rs. 1 million, the Plaintiff was occupying a bigger portion of the property than the

portion which was given on rent to Rowlands Limited. The Defendants had genuinely tried to get rid of the tenants. Thereafter the Defendants had given up on the tenant's promise to vacate the smaller portion and decided to file action against the tenants. **They informed the Plaintiff about the impossibility of specific performance due to this genuine reason.** The Defendants had genuinely tried to solve the problem with the Plaintiff in alternative ways. They failed to move on because the Plaintiff did not want a solution but he wanted **only specific performance** of the Agreement to sell . It is to be noted that by the dead line for the execution of the Transfer Deed, the Plaintiff failed in his duty to submit a draft to the Defendants. The Plaintiff's excuse is that his lawyer had gone abroad by that time.

If the Plaintiff was ready with the money on 01.03.1991 and was present at the lawyer's office having informed the Defendants that he was willing and ready to execute the Transfer Deed as agreed by Agreement to sell Deed No. 2795 and **then** , if the Defendants did not turn up and / or informed the Plaintiff that they are unable to get the portion of the property which should be vacant at the time of the execution of the Transfer Deed at that time and on that date, the position would have been different. In such a case, the purchaser, the Plaintiff would have been entitled to go to court and beg for specific performance of the Agreement. It can therefore be concluded that execution of the transfer deed could not have been performed on 01.03.1991 due to the lapse on the part of the **Plaintiff since he was not ready to get it done on that specific date**. He had not offered the money or sent a draft of the Deed of Sale to be executed even after the 01.03.1991. He had not even sent it at any time before filing action for specific performance.

It is clear by the actions of the Plaintiff that he had accepted the fact that the Agreement to sell could not be performed due to the fact that Rowlands Limited had not gone out of the premises and

therefore the Defendants could not actually give him vacant possession prior to the execution of the Transfer Deed.

Both parties had knowledge of the problem of having the tenant Rowlands Limited in the smaller part of the property. It is mentioned in paragraph 5 of the Agreement that Rowlands Limited is there in part of the property as a tenant and the Defendants should get vacant possession prior to the execution of the Transfer.

When the purchaser accepts the fact that the premises is encumbered with a tenant, the purchaser in turn has to accept that it could be possible to get vacant possession or it could be impossible to get vacant possession.

The law of the country regarding the tenant and the land lord prevail at all times and there is no way that a land lord can get the premises by force or by any other means other than by filing action for ejection of the tenant in the District Court. In the case in hand, the tenant company had in writing agreed to leave but failed to do so. Yet, both parties knowing of this situation cannot complain of any aftermath due to this reason, as a breach of a condition. The said condition of **getting rid of the tenant had become an impossibility.** Still for all, the Transfer Deed could have been executed on the 1st of March,1991 if the purchaser genuinely wanted to get the ownership, making provision for getting the tenant out by lawful and legal process. The purchaser could have got the consent of the tenant to leave that part of the premises which was the **smaller part** of the property by way of another agreement. The Plaintiff , having understood that Rowlands Limited was the cause of the impossibility, could have easily made him also a party to this action but he has failed and / or refused to do so. It may also have been that if the deed of transfer was executed, the Defendants would have perhaps paid some money to Rowlands Limited and persuaded them to leave, giving them a little more time.

None of these possibilities could have been made to happen due to the reason that the Plaintiff was not ready to perform his obligation of having the money ready and the Draft Deed of Transfer ready by the dead line, i.e. the 1st of March, 1991. Can such a purchaser turn around and ask for specific performance before a court of law? Certainly not, in my opinion. Specific Performance can be sought only if the party seeking that relief has performed his duty precisely according to the terms and conditions of the Agreement and not otherwise.

In this case, there is no contest that the sale price was informally agreed as Rs. 3 million. Yet there is a contest about how much was paid prior to the signing of the Agreement. The Defendants state that it was only one million which was paid but the Plaintiff's case is that Rs. 2 million was paid. The Plaintiff had marked some receipts to that effect. The Defendants allege that they are false documents which the Plaintiff has manipulated having laminated one document and copying the same with different figures. The Defendants had complained to the Police and had begged that the same be investigated into. The police complaints and letters to the police are part of the record. Police officer gave evidence to the effect that there were a number of complaints regarding the son of the Plaintiff physically hammering the 2nd Defendant on five occasions when he went into the land with a surveyor for the purpose of demarcating the portion occupied by the tenant Rowland Limited. The tenant Rowlands Limited also had made many complaints about the Plaintiff having done forcible entering into their portion of the premises etc. to harass them continuously. I noted that in the police statement of the Plaintiff, he had stressed that " **he had bought the whole property"** from the Defendants for Rs. 2 million. In his statement to the Police which is part of the evidence on record, the Plaintiff states that even though he had paid the money the deed has not been given to him by the Defendants and stresses in his own words that **" whether I get the Deed or not I remain the owner of the whole property."**

He had actually got the name of the tax receipts to the Municipal Council, the electricity bill etc. also changed into his name after the Agreement posing to be the owner of the property. I observe that these actions of the Plaintiff are illegal and unlawful as he was not yet the rightful owner of the whole of the property. The evidence to that effect is unchallenged. It looks like that he had tried to gather proof of himself to be the owner before getting the transfer deed in place.

Thus, the balance of probabilities on evidence goes against the Plaintiff for not having wanted to pay the balance of Rs.2 million to the Defendants on or before the 1st of March,1991 and getting the Transfer Deed done in time on the date as agreed. He had wanted to get possession of the whole property by force so that invariably the Defendants would be forced to execute the Transfer Deed paying only Rs. 1 million more which is less than the accepted agreed purchase price of Rs. 3 million and that also only at a time that the Plaintiff wished to give the same to the Defendants. He thought that he was quite safe with the 'specific performance' clause in the Agreement to Sell.

The Defendants had called a valuer to give evidence who had valued the property to be Rs. 4 million in August, 1991. This evidence was not challenged. The 2nd Defendant giving evidence mentioned that this **property was totally tenanted to two parties at the time of agreeing the purchase price as Rs. 3 million**. That fact was the reason to agree to sell at a lower price than the market price. The advertising company who was the tenant of the portion of which possession was given to the Plaintiff at the time of the execution of the Agreement, left after a settlement was arrived before the Rent Board between the Defendants and that tenant, the advertising company, right before the Agreement No. 2975 was signed. So, it is seen from the evidence before court that the property was agreed to be sold at a lower price due to the fact that it was tenanted.

The lease of the smaller part of the house which was tenanted with Rowlands Limited was ending on 01.03.1991 and that is the reason for agreeing to sign the Transfer Deed on that day because they promised in writing to leave at the end of the lease.

The Law of Contracts by Professor Justice C.G. Weeramantry explains the principles governing the grant of specific performance in Sri Lanka in Chapter 29 of the same. He states that " It has already been observed that specific performance is a **discretionary remedy.** This does not however mean that the court is at liberty to grant or withhold the remedy capriciously and **certain principles** have been evolved which guide the court in the exercise of its discretion." I note that one of the said guiding principles enumerated by him in this Chapter is that " **specific performance will not be granted where the contract is impossible of performance** ". In ***Amarasinghe Appuhamy Vs. Boteju 1908 , 11 NLR 187***, it was held that where the subject matter of a sale has been disposed of to a bona fide purchaser, specific performance will not be decreed against the seller."

The time with reference to **which impossibility is judged** is **the time of performance and not the time of contracting**. In the case in hand even at the time of contracting, the parties were quite aware that the undertaking given to grant vacant possession to the Plaintiff depended on whether Rowlands Limited would vacate on time. The contract Agreement however did not provide for any alternate remedy in case the tenant does not go away leaving the part of the premises vacant by the dead line to sign the Transfer Deed.

Another guideline in granting specific performance is to scrutinize the contract to see whether it is **fair and just**. In the case of ***Haynes Vs Kingwilliamstown Municipality 1951, 2 S.A.371 (A.D.)*** , it was held that specific performance will not be granted when it would be **inequitable to the defendant or to third parties**. In the case in

hand, I observe that the Agreement to Sell No. 2795 is inequitable to the defendants as well as to a third party, the tenant, Rowlands Limited because the terms of this contract has put both the rights of the Defendants as owners of the property and the tenancy rights of Rowlands Limited in jeopardy. It is not a fair and just contract. The contract does not provide for alternate remedies either.

At this juncture, on the evidence before court and the law analyzed as above, I answer the 2nd , 4th and 5th questions of law as enumerated above, in the affirmative, in favor of the Defendants and against the Plaintiff, **firstly** on the basis that the Plaintiff had failed to perform his part of the condition in the Agreement **to offer the balance money** and get ready to sign the Deed of Transfer on 01.03.1991 even though by P7 the Defendants called for the draft deed of sale **offering vacant possession by 01.03.1991** and **secondly** on the basis that giving vacant possession of the smaller part of the property, which is part of the building standing on or about 4.87 Perches, according to evidence before court, **had become an impossibility to perform.**

With regard to the law that applies to the 1st Defendant and the 2nd Defendant, the evidence before court proves that they are subjects of Jaffna and the Thesawalamai law applies to them at all times. Accordingly, the consent of the husband, (the 2nd Defendant) should be given in writing, for the wife (the 1st Defendant), to agree to part with her property. When the Agreement to Sell No. 2795 was signed, such consent in writing had not been given. It was the argument of the Defendants that the said Agreement was bad in law due to that reason.

Even though the consent had to be given in writing, there is no specific method of giving the consent in writing. Of course, the husband can write " I do hereby consent" or a similar sentence when he signs the document giving his consent but if the said phrase showing the consent in writing is not placed on the

document, can that document be branded as 'not valid' only due to that reason. I am of the opinion that substantial compliance takes place once the husband places his signature on the document. Therefore in the case in hand, the Agreement cannot be held to be bad in law as the husband had signed on the document.

I answer the 1st , 2nd , 4th and 5th questions of law in the affirmative in favor of the Appellant. I answer the 3rd question of law in the negative.

I do hereby set aside the judgment of the Court of Appeal dated 30.11.2009. I affirm the judgment of the District Court dated 02.10.1998. The Appeal is allowed. However I order no costs of suit.

Judge of the Supreme Court

K. T. Chitrasiri J.
I agree.

Judge of the Supreme Court

Prasanna S. Jayawardena PCJ.
I agree.

Judge of the Supreme Court

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

S.C Appeal 110/2014

S.C Spl. LA No. 28/2014
C.A Appeal No.534/1995 (F)
D.C Kalutara No. 3368/L

1. Abdul Hameed Marikkar Mohamed Ismail

2. Mohamed Ismail Ummul Kadeeja
Both of No.185, Old Road,
Beruwela.

PLAINTIFFS

Vs.

Mohamed Sainadeen Mohamed Saleem
Of No. 181/1, Old Road,
Beruwela.

DEFENDANT

AND

Mohamed Sainadeen Mohamed Saleem
Of No. 181/1, Old Road,
Beruwela. **(DECEASED)**

DEFENDANT-APPELLANT

Mohamed Saleem Misriya
No. 181/1, Old Road,
Beruwela.

SUBSTITUED-DEFENDANT-APPELLANT

Vs.

1. Abdul Hameed Marikar Mohamed Ismail **(DECEASED)**

1ST PLAINTIFF-RESPONDENT

2. Mohamed Ismail Ummul Kadeeja **(DECEASED)**

Both of No. 185, Old Road, Beruweala.

SUBSTITUTED-1ST PLAINTIFF AND 2ND PLAINTIFF-RESPONDENT

1. Mohamed Ismail Mohamed
2. Mohamed Ismail Ahamed Maood
3. Mohamed Ismail Abdul Rahuman
4. Mohamed Ismail Sulaiha Umma
5. Mohamed Ismail Ahamed Bari
6. Mohamed Ismail Abdul Cader

All of No. 185, Sheik Jamaldeen Road, Beruwala.

7. Abdul Raheema Umma Nafeema
8. Abdul Raheema Umma Aasiya
9. Abdul Raheema Umma Ameena

All of No. 181/1, Sheik Jamaldeen Road, Beruwala.

SUBSTITUTED-PLAINTIFF-RESPONDENTS

AND NOW BETWEEN

1. Mohamed Ismail Mohamed
2. Mohamed Ismail Ahamed Maood
3. Mohamed Ismail Abdul Rahuman

4. Mohamed Ismail Sulaiha Umma
5. Mohamed Ismail Ahamed Bari
6. Mohamed Ismail Abdul Cader

All of No. 185, Sheik Jamaldeen Road,
Beruwala.

7. Abdul Raheem Umma Nafeema
8. Abdul Raheem Umma Aasiya
9. Abdul Raheem Umma Ameena

All of No. 181/1, Sheik Jamaldeen
Beruwela.

SUBSTITUTED-PLAINTIFF-RESPONDENT-PETITIONERS

Vs.

Mohamed Saleem Misriya
Of No. 181/1. Old Road, Beruwala.

SUBSTITUTED-DEFENDANT-APPELLANT-RESPONDENTS

BEFORE: Sisira J. de Abrew J.

Anil Gooneratne J. &

Vijith K. Malalgoda P.C., J.

COUNSEL: H. Withanachchci with Shantha Jayawardena
for the Substituted 1st Plaintiff-Respondent
and 2nd Plaintiff-Respondent-Appellant

Kumaran Aziz with Ershan Ariyaratnam
for the Substituted-Defendant-Appellant-Respondent

WRITTEN SUBMISSIONS FILED ON:

15.08.2014 (By the Substituted-Plaintiff-Respondent-Appellant)
08.06.2015 (By the Substituted-Defendant-Appellant-Respondent)

ARGUED ON: 02.11.2017

DECIDED ON: 22.11.2017

ANIL GOONERATNE J.

This was an action filed in the District Court of Kalutara for a declaration of title in favour of the Plaintiffs that the land depicted as lot 'G' in plan 4344 together with the house formerly bearing Assessment No. 2464 and presently Assessment No. 181 belongs to the Plaintiffs, and ejectment of the Defendants with all those holding under the Defendants and delivery of possession to the Plaintiffs. In brief the Plaintiff's claim and trace title from their predecessor in title who was one Omer Lebbe Marikar Mohamed Ismail. The said O.L.M. Mohamed Ismail by virtue of a certificate of sale executed in D.C Kalutara partition case No. 15312 became the owner of the land in dispute described and "Kundagodawatta" alias 'Kundagoda Tottam' The said O.L.M. Mohamed Ismail by Deed No. 4932 of 19.11.1953 conveyed to 1st Plaintiff his rights to the land in dispute which he purchased from a sale relating to a partition case, as aforesaid. The 1st Plaintiff by Deed No. 11845 dated 02.04.1973 conveyed 1/4th share of his rights and the entire rights of the house standing thereon to the 2nd Plaintiff his daughter.

The Defendant on the other hand plead that his predecessors were in possession of the land in dispute for generations and was never in possession under the leave and licence of the Plaintiffs. Paragraphs 6 to 9 of the amended answer shows the chain of title as to how the Defendant got ownership to the land in dispute. The Defendants further plead that by uninterrupted long term possession of the land in dispute along with the house standing thereon, indicates that Plaintiffs have no title to the said land. Defendant also plead that the final decree has not been entered in D.C. Kalutara Case No. 15312 and sale as relied by the Plaintiffs has not taken place as pleaded in the amended plaint. It was the position of the Defendant party that the Plaintiffs are not entitled to the benefit of a certificate of sale in the absence of a Fiscal's Conveyance which the Plaintiffs do not have. Defendant relies on Section 289 of the Civil Procedure Code which requires a Fiscal's Conveyance subsequent to the sale of the property in dispute and confirmation of the sale by court.

The District Judge gave Judgment in favour of the Plaintiffs, taking into consideration the certificate of sale marked as පැ5 in the trial before the District Court. However in the appeal by the Defendant, to the Court of Appeal, the Court of Appeal set aside the Judgment of the learned District Judge mainly on the ground of the provisions contained in Section 289 of the Civil Procedure

Code on the basis that there had not been a Fiscal's Conveyance in favour of the Plaintiffs. The action of the Plaintiffs was also dismissed.

The only point for decision in this case is whether the certificate of sale confers valid title on the successful purchaser, at a sale held according to the provisions of the Partition Law. At this point in this Judgement I have to mention that prior to the present Partition Law of 1977, we had from earlier times the Partition Ordinance No. 10 of 1863 and Partition Act No.16 of 1951. The case in hand relates to an alienation of land under Partition Ordinance No. 10 of 1863. It is a certificate of sale issued under the hand of the District Judge.

The certificate of sale on which the Plaintiffs rely is contained at Pgs. 249-256 of the brief. It is in favour of the purchaser O.L.M. Marikkar Ismail. The certificate is dated 23.05.1938. It inter alia refer to the Case No. 15312. The certificate of sale in its caption gives the names of the Plaintiffs and Defendants. It states it is a sale in terms of Partition Ordinance No. 10 of 1863. It is further stated that by the Decree of 22.09.1937entered in the said action it was ordered that the land and premises be sold in 3 blocks as set out in the survey and proceeds be distributed amongst the said parties. A commission was also issued to one Mr. L.G. Abeysinghe Auctioneer. Land premises valued at Rs. 663/75 and O.L.M. Mohamed Ismail became the purchaser. It is certified by the District Judge and signed by the District Judge affixing the District Court Seal.

In the text on "The Law of Partition in Ceylon by D.A.St. V. Jayawardena Pg. 187 – The certificate takes the place of a conveyance from the former owner to the new owner. The certificate should

(1) Be singed by the Judge

(2) State that the property was sold on the Order of the Court

(3) Give the names of the purchaser; and

(4) State the purchase money has been duly paid.

At. Pg. 188 .... *Sir Joseph Hutchinson, C.J in the case of Cathirihami Vs. Babahamy 11 NLR 20*, where he said that the intention of the Partition Ordinance was to give an indefeasible title to the purchaser to whom the land was sold when the sale was affirmed and completed by the certificate of the Court under Section 8, intended to say anything more than that the title of the purchaser was indefeasible as regards the estate that passed to him under the Decree.

I observe, as the description given above on the relevant certificate of sale and in comparison with the above authority refer to and demonstrate that the certificate of sale would pass good title to the purchaser in this case the said O.L.M. Mohamed Ismail the purchaser.

I will now consider Section 8 of the Partition Ordinance No. 10 of 1863. The said section deals with the Commission for sale issued by court to a Commissioner to Survey and return the Commission. It also states the certificate

of court to be sufficient title. Section 9 of the said Ordinance states the Decree for partition or sale gives as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property. To give more clarity I annex to this Judgement an annexure of the said sections.

I do not think and nor can I agree with the Court of Appeal Judgment, that states that provisions of Section 289 of the Civil Procedure Code should be complied with and a certificate as aforesaid is not sufficient. It must be kept in mind that the Plaintiff's derive title from the above named purchaser O.L.M. Mohamed Ismail. The said O.L.M. Mohamed Ismail had good and valuable title from the purchase he made and the certificate of sale is conclusive in terms of Section 8 & 9 of the said Partition Ordinance. The said purchaser who got title from the certificate of sale sold by deed No. 4932 of 19.11.1953 the land in dispute to the Plaintiff. As such the law relevant at the time of issuance of the certificate of sale was the Partition Ordinance No. 10 of 1863. As such the certificate of sale is final and conclusive and the necessity to have a further conveyance like a Fiscal Conveyance is not acceptable in law (which prevalent at that time). Certificate of sale operates as a final Decree. Section 8 of the said Ordinance enacts that where a Decree for sale has been ordered like in the case in hand, the procedure to be followed in a partition case where instead of

dividing the land among co-owners, court could issue a Commission for sale of lands by public auction.

In the full Bench Judgment of *Bandara Vs. Baba 18 NLR Pg.1,* Supreme Court settled the law, held: The Decree for sale to which a conclusive effect is given by Section 9 of the Partition Ordinance of 1863 is the Decree under Section 4 or the Final Judgment spoken of in Section 6 of that Ordinance. It is the last step in the proceedings, namely, the issuance of the certificate of the Court (At Pg. 3).

I would also refer to a more recent case, *Cinemas Ltd. Vs. Ceylon Theatres Ltd. 67 NLR 97*. This deals with the Partition Act of 1951. This Act was enacted to among other things to clarify certain issues the Act was intended to give conclusive title to the land which a person buys under a Decree of Court. Even the subsequent Partition Act of 1951 fortify the position of certificate of sale.

Pg. 97.

On a proper construction of sections 46, 48 and other relevant provisions of the Partition Act, it is clear that when, in pursuance of an order for the sale of a land, a certificate of sale of the land is entered in terms of section 46 of the Partition Act, the title which the certificate of sale confers on the purchaser of the land and buildings thereon is free from any life interest or usufruct which may be declared in favour of a person in the interlocutory decree entered under section 26, read with section 48 of the Act. The purchaser under a decree for sale gets title free from all encumbrances except only the interests of the

proprietor of a *nindagama* and the interests which are specially preserved by section 54 of the Act.

In the interlocutory decree entered in a partition action, the Court gave the 2nd defendant life interest over one-third share of the land and building standing thereon and ordered that the sale of the property should be subject to the life interest of the 2nd defendant over the one-third share.

Held, that that part of the interlocutory decree which stated that "the said premises will be put up for sale subject to the life interest of the 2nd defendant in respect of one-third share of the soil and one-third share of the building" should be deleted and the following words be substituted: "the said premises will be put up for sale". The interests awarded to the 2nd defendant should be valued and he should be paid the estimated value of his usufruct out of the proceeds of the sale.

The Partition Act of 1977, as amended as well as the previous partition laws which I mentioned above comprises both the substantive law and the procedural law. There is no doubt that parties need not resort to the provisions of the Civil Procedure Code, when the partition law itself provide for the procedural law. In the case reported in 78 NLR 525, when execution proceedings were initiated under Section 337of the Civil Procedure Code, for an order to put the Appellant in possession of the lots, Supreme Court held that it is a wrong procedure and under Section 53 of the Partition Act, he should ask for possession by way of a motion.

In the same way I observe that the decree for sale and decree for partition are two different decrees and whether the decree for sale is of a lesser degree of recognition? It is not so. In *Aserappa Vs. Jokino Jouse (1915) 1CWR*

133, Shaw J. held "it is perhaps unfortunate that the ordinance gives no discretion to the court to refuse partition or sale, in cases where it is clearly detrimental to the interests of the majority of persons affected, but in my opinion no such discretion is given and the right of an owner in common to compel partition or sale is absolute. In the present Partition Law of 1977 also there are provisions dealing with sale. In the 2nd schedule to the Act gives the format of a certificate of sale under Section 46 which has to be signed by the District Judge. It specifically state, in the final paragraph of the certificate of sale, shall be conclusive evidence of the title.

In the circumstances I state that there is no necessity to resort to the provisions of the Civil Procedure Code, especially Section 289 of the Code. The certificate of sale, and the law applicable is clear as regards the case in hand. The Ordinance No. 10 of 1863, the Partition Act of 1951 and the present Partition Law of 1977 are all laws which recognise that the certificate of sale is conclusive evidence of title.

In all the facts and circumstances of the case in hand I affirm the Judgment of the District Court. Title of O.L.M. Mohamed Ismail is valid and conclusive and one need not resort to any provisions of the Civil Procedure Code. In these circumstances I set aside the Judgment of the Court of Appeal. Supreme Court on 04.07.2014 granted Special Leave on question of law set out

in paragraphs 17(i), (iv) & (vi) of the petition dated 10.03.2014. I answer the said question of law in favour of the Substituted-Plaintiff-Respondent-Petitioner in the affirmative.

I also state in a partition action it is not necessary to execute a Fiscal Conveyance consequent to a Decree of sale in order for title to effectively pass to the purchaser, in the circumstances and in the context of the case in hand. Relief granted as per subparagraphs (b) & (c) of the prayer to the Petition.

Appeal allowed as above with costs.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda 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.

Don Padmasiri Abeysingha,
Anguruwatota Road,
Horana.

Plaintiff

SC APPEAL No. 113/13
SC/HC/(CA) LA/428/11
WP/HCCA/Kal/58/2004/F

Vs

D C Horana Case No. 652/P

1. Abdul S. Mohamed Anver,
   No. 43, Anguruwatota Road,
   Horana. (Deceased)
2. Gamage Don Sisiliyawathi,
   Anguruwatota Road,
   Horana. (Deceased)

2A. Gamage Don W. Gunawardena,
   No. 110, Sri Somananda Mawath,
   Horana.

3.Y.W.Costa, Anguruwatota Road,
   Horana.

4. Induruwage P. Thisera,
   No. 69, Anguruwatota Road,
   Horana.

5. Gamage Don W. Gunawardena,
   Anguruwatota Road,
   Horana.

6. Thalagalage David Gunatilake,
   Anguruwatota Road, Horana.

6A. Karunarathna Banda Wijesekera
Mediwaka, No. 47, Anguruwatota
Road, Horana.

6B. Weerasekera Wasala Mudiyanselage
Mediwaka Walawwe Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.

7. Induruwage Rosalin Thisera,
Anguruwatota Road, Horana.

Defendants

AND

Abdul Salam Mohamed Anver,
No. 43, Anguruwatota Road,
Horana.

1st Defendant Appellant

Vs

Don Padmasiri Abeysingha'
Anguruwatota Road,
Horana.

Plaintiff Respondent

Don Muditha Abeysingha,
No. 30, Ariyawilasa Road,
Horana.

Substituted Plaintiff Respondent

2A. Gamage Don W. Gunawardena,
No. 110, Sri Somananda Mawath,
Horana.

3.Y.W.Costa, Anguruwatota Road,
Horana.

4. Induruwage P. Thisera,
No. 69, Anguruwatota Road,
Horana.

5. Gamage Don W. Gunawardena,
Anguruwatota Road,
Horana.

6. Thalagalage David Gunatilake,
Anguruwatota Road, Horana.

6A. Karunarathna Banda Wijesekera
Mediwaka, No. 47, Anguruwatota
Road, Horana.

6B. Weerasekera Wasala Mudiyanselage
Mediwaka Walawwe Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.

7. Induruwage Rosalin Thisera,
Anguruwatota Road, Horana.

7A. Weerasekera Wasala Mudiyanselage
Mediwaka Walavve Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.

Defendants Respondents

AND THEN

Weerasekera Wasala Mudiyanselage
Mediwaka Walavve Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.

6B & 7A Substituted Defendant
Respondent Petitioner

Vs

Abdul Salam Mohamed Anver,
No. 43, Anguruwatota Road,
Horana.

1st Defendant Appellant Respondent
(now deceased)

AND NOW BETWEEN

Weerasekera Wasala Mudiyanselage
Mediwaka Walavve Buddika Apsara
Mediwaka, No. 47, Anguruwatota
Road, Horana.

6B & 7A Substituted Defendant
Respondent Appellant Petitioner

Vs

1A. Abdul Samadu Marikkar Ummu Ala,
No. 432, Galle Road, Horetuduwa,
Moratuwa.
1B. Mohamed Anver Ahmed Jausakky,
No. 137/4, Hill Street, Dehiwela.
1C. Mohamed Anver Ahamed Hassan,
No. 38, De Vos Lane,
Grandpass, Colombo 14.
1D. Mohamed Anver Pattumma
Husseniya, No. 432, Galle Road,
Horetuduwa, Moratuwa.

1E. Mohamed Anver Ummul Nihara,
No. 432, Galle Road,
Horetuduwa, Moratuwa.

Substituted 1st Defendant
Respondent Respondents

BEFORE : S. EVA WANASUNDERA PCJ.
PRIYANTHA JAYAWARDENA PCJ &
VIJITH K. MALALGODA PCJ.

COUNSEL : M.U.M. Ali Sabry PC with Lasitha Kanuwanaarachchi and Nalin Alwis for the 6B / 7A Substituted Defendant Respondent Appellant.
H. Withanachchi for the 1A to 1E Defendant Appellant Respondents.

ARGUED ON : 10.07.2017.

DECIDED ON : 02.08 .2017.

S. EVA WANASUNDERA PCJ.

On 06.09.2013, this Court has granted leave to appeal in this matter on the questions of law set out in paragraph 22(d), (e), (f), (k) and (m) of the Petition dated 28.10.2011. One more question of law was raised by the counsel for the 1st Defendant Appellant. They read as follows:

1. Have the learned High Court Judges failed to analyze the true and real nature of the documents marked 1V2 (Q8) and the rights flow based on the said document?

2. Have the learned High Court Judges failed to appreciate the fact that according to the terms of settlement contained in 1V3 (Q9) the Respondents cannot claim any right whatsoever to the land mentioned in 1V2 (Q8)?
3. Have the learned High Court Judges misdirected in both law and facts in coming to a conclusion that the default on the part of the vendor in 1V2 (Q8) conveyed the title to the 1st Respondent to a portion of the corpus?
4. Have the learned High Court Judges erred in law in granting reliefs not prayed for by the 1st Respondent and more specifically permitting the 1st Respondent to obtain title after the payment of Rs. 12000/- even after the purported agreement to sell 1V2 (Q8) had been clearly prescribed?
5. Have the learned High Court Judges erred in law in failing to appreciate that in any event, the 1st Respondent is not entitled in law to claim 9 Perches of land based on 1V2 (Q8) wherein the original 6th Defendant only had ½ share of the land?

6. The terms of the settlement contained in 1V3 (Q9) would supersede the terms in the document marked as 1V2 (Q8) to confer title on the 1st Defendant without any further documentation.

It is understood by the aforementioned questions of law that in this Appeal, Court has to specifically consider the documents **1V2 (Q8)** and **1V3 (Q9**) which has given rise to the questions of law.

1V2 is an Agreement to Sell on the face of it. However it is titled as Deed No. 713 **– Deed of Agreement**. The contents state that the vendee has paid Rs. 28000/- to the vendor and the balance of Rs. 12000/- should be paid to the vendor within 5 years from the date this agreement was entered into , i.e. from 06.12.1964, when a deed of Conveyance would be executed at the cost of the vendee. At the same time, there is no clause providing for the failure of paying the balance money by the vendee but there is a clause providing for the vendor to pay to the vendee Rs. 28000/- in one payment, in the event the vendor is ' not willing and ready to sell the land and premises ' to the vendee within the said 5 years and thereafter the vendor is free to cancel the deed of agreement entered into between the parties. From the other clauses in the deed, it was agreed that the vendee could occupy the house without any rent for the period of 5 years and the vendor to pay rates and taxes.

The vendor was Thalagalage David Gunatilake and vendee was Abdul Salam Mohamed Anver, in the aforementioned deed of agreement No. 713 attested by Bafic, Notary Public. The Schedule to the deed describes the land and building thereon bearing No. 43, Horana Town and the extent of the land is stated **as about 9 Perches.**

This Appeal has arisen out of **a Partition action** in the District Court of Horana. The other parties were represented at the initial stages of this case and they got themselves discharged from these proceedings by orders requested from this Court and granted by this Court, due to the fact that **the contention** has been right along, between **the 1st Defendant** Abdul Salam Mohamed **Anver and the 6th Defendant** Thalagalage Don **David Gunatilake.**

In the Partition Action, among other lands to be partitioned was the portion of land in question in the case in hand. The title to the property which is the subject matter in question, contained in the Deed of Agreement 713 dated 26.12.1964 was claimed by the 1st Defendant Anver but **the District Judge by his judgment dated 14.06.2004 held that the 1st Defendant Anver had no entitlement whatsoever** to the land sought to be partitioned in the Partition Action. An Appeal was filed in the Civil Appellate High Court by the 1st Defendant Anver against the judgment of the District Judge. **The High Court delivered its judgment on 20.09.2011 in favor of the 1st Defendant, Anver.**

One of the heirs of the 6th Defendant David Gunatilake who is also an heir to the inheritance of the 7th Defendant Rosalin Thisera , namely, W.W.M.M.W. B.A. Mediwaka has come before this Court by way of an Appeal as the 6B/7A Substituted Defendant Respondent Appellant against the judgment of the High Court Judges of the Civil Appellate High Court dated 20.09.2011. At present the parties to this Appeal are heirs of David Gunatilake and Anver.

The title of Thalagalage Don David Gunatilake was not contested by any other party to the Patition action except by Anver on the said Deed of Agreement No. 713 attested by Bafiq Notary Public which is dated 26.12.1964. It is interesting to note that in the body of the said deed, it is mentioned that " the vendor (meaning David Gunatilake) is seized and possessed of the land …… in the Schedule hereto …….by virtue of Deed No. 3071 dated 30.12.1955 attested by D.R.de

Silva, Notary Public. " Even though, it is mentioned that way, the real position was that David Gunatilake and Rosalin Thisera were the owners of the land in question by that Deed 3071 which was then transferred to Hariet Perera Wickremasinghe by Deed 3072 dated 30.12.1955 but Hariet Perera Wickremasinghe had transferred the land back to David Gunatilake and Rosalin Thisera by Deed No. 712 attested by Bafiq Notary Public on 26.12.1964. So, in fact David Gunatilake owned only half of the land at the time the Deed of Agreement 713 was signed and the clause which stated that he was 'seized and possessed of the land by virtue of Deed No. 3071' was incorrect. However, it can be concluded that the vendor in the Deed of Agreement David owned only ½ of the land.

The next specific document to be looked into is **1V3 (Q9**). This document is a **Settlement at the Debt Conciliation** Board dated 12.10.1970. The person who had gone before the Debt Conciliation Board making an application to intervene and settle the matter was David Gunatilake stating that he had borrowed Rs. 28000/- from Anver who was David's tenant at No. 43, Horana Town, and that he has not been able to pay it back within 5 years as promised by the Deed of Agreement. As agreed Anver had enjoyed the premise No. 43 without paying any rent for the said five years and continued holding the premises without any rent. The Debt Conciliation Board had heard them at the inquiry and placed on record that in their opinion , the transaction contained in **Deed 713 was seemingly a conditional transfer but in fact it is a mortgage of the said land by David to Anver.**

The matter was settled with the agreement of both parties, on 12.10.1970 with the condition that David should pay Anver Rs.28000/- within two years from 12.10.1970. It was further stated that "after the money is paid in full" Anver will again continue to be the statutory tenant of David. The Board went on to state that when the money is fully paid the Deed of Agreement will become invalid and if it is not fully paid, the application of David will be dismissed and then Anver will get **his rights under the said Deed No.713.** Thereafter there is another order of the Debt Conciliation Board dated 25.11.1972 when David, not having been able to pay the Rs.28000/- had gone before the Board with his grievance. Anver was present at that time with his lawyer, Bafiq and objected to the **application for reconsideration** made by the debtor David, giving the reason for the objection by the creditor Anver as the application for reconsideration had been

made two months after the two years for the repayment of the loan by David to Anver, had lapsed. The Board had therefore not given a rehearing.

To my mind, David the co-owner of the land and premises in question had tried to get some more time to repay the actual loan of Rs. 28000/- which he borrowed from his tenant Anver. According to the proceedings before the Debt Reconciliation Board**, it was revealed that the transaction did no amount to an agreement to sell the land to Anver** by David but that agreement was security for the loan and the intention of David was never to part with his land to Anver at any time even in the future but only to get the loan, repay the loan and keep his land to himself as the owner.

When David failed to pay the money within two years, Anver could have anyway returned **to his rights in the Deed 713**. That was the right to get the land conveyed to him as agreed in the Deed of Agreement by David by paying him another Rs. 12000/-. **He has not pursued his rights under the deed**. He had not filed action to get the land conveyed to him. He had only been occupying the premises which was run as a shop by him as a tenant without paying any rent to David even after 1970.

David had passed away in the year 1982. No action was taken by Anver at all until the year 1989 when he filed action to get the land and premises transferred to him by the heirs of David. That was instituted under **L 3938** in the District Court of Horana and in the Plaint filed on 08.06.1989 by the Plaintiff Anver he has based the said action taking Deed 713 as an Agreement to Sell and states that David did not come to the lawyer's office even though Rs. 12000/- was deposited with the lawyer and he had invited David to come and sign the deed of conveyance as agreed. The prayer was for court to declare that Anver is the owner and to get David's heirs who are named as defendants in that case to transfer the land in his name. **The District Judge had dismissed the Plaint but it is in appeal .**

In seeking justice from different forums such as the Debt Conciliation Board, the District Court , the Civil Appellate High Court and the Supreme Court**, one litigant cannot take up different positions and pray for different reliefs. I**n the case in hand the 1st Defendant Appellant Respondent, Anver has placed Deed 713 before the Debt Conciliation Board as **a loan**, in the Partition action he claims that he is **the owner by prescription** and in the District Court in a separate action he claims

that Deed 713 is **an Agreement to Sell.** Therefore I hold that in this Appeal regarding the Partition Action , the 1st Defendant Appellant Respondent, Anver is estopped from claiming prescription at all.

From the documentary evidence before court , in reality, Anver had given a loan of Rs. 28000/- to David, who was the land lord owning the shop building in which Anver was doing business as David's tenant. The land and premises was taken by Anver as security for the loan granted on the document called Deed of Agreement.

Taking Deed 713 as an Agreement to Sell the land and premises, when the 1st Defendant Anver could not pay the balance of Rs. 12000/- to David or if David refused to accept the money and execute the conveyance as promised within the five years as agreed, **at the end of the five years, Anver had a cause of action to institute action against David on the written agreement of Deed 173 within the next 6 years, according to the provisions of the Prescriptions Ordinance**. Anver did not do so. He had filed action only in 1989, which is 20 years past the six year prescription period. The Patition Action was not filed by David. It was filed by Abeysingha in 1969 and David was the 6th Defendant and Anver was the 1st Defendant. David tried to settle the loan by going to the Debt Conciliation Board.

The Counsel for the 1st Defendant Appellant Respondent, Anver submitted to court that the nature of the rights in terms of Deed 713 which would pass to the 1st Defendant had been superseded and/or merged with, the terms in 1V3 which is the terms of settlement by the Debt Conciliation Board, thus giving the resultant position that " David's right to redemption was at an end and Anver would be entitled to the property as in the case of a conditional transfer after the expiry of the period stipulated for redemption".

In law pertaining to land and property, there is no such way that a settlement could supersede a notarialy executed agreement which specifically states that the title has not yet passed and a deed of conveyance will be effected in the future, on conditions provided in the said agreement being satisfied. It cannot be compared with a conditional transfer because it is not a transfer. **It was only an**

agreement to transfer. The heading on Deed 713 read as 'Deed of Agreement'. The intention of the parties were admittedly quite different from what was taken later as an agreement to sell. Even then, the 1st Defendant has not acted on his rights contained in the document deed 713.

The Civil Appellate High Court Judges has decided that the 1st Defendant is entitled to 9 Perches of the land and the buildings thereon. The High Court had not even realized that David Gunatilake was not the sole owner of the said 9 Perches which was described in Deed 713 . The owners, even according to the title deed 3071 incorrectly mentioned as the title deed of David Gunatilake in the said Deed of Agreement 713 as well as according to the correct Deed No. 712 both of which were attested by the same Notary Public, Bafiq on one and the same day, were David Gunatilake and Rosalin Thisera. Then David owned only ½ of the 9 perches , i.e. only 4 ½ Perches. The High Court had **hardly realized** the nature of the suit the judgment was wriiten about , as that of a **Partition case.**

In the High Court Judgment, the judges go on to state that **"** the 1st Defendant Appellant has very clearly established the land in dispute has been very clearly depicted in the Preliminary Plan marked as Lot 1, 1A and 2B was agreed to be sold to the vendee on payment of Rs. 40000/- to the Vendor. ……..Therefore the vendee has to hand over the said amount of Rs.12000/- with legal interest calculated from the date of 26.12.1969 to the vendor and to get the said property conveyed to him. **"** It looks like that the Juges of the High Court have forgotten that the Plaintiff, one Abeysingha had filed a partition case and that it was not a land case filed by the contesting parties to the Appeal to get the ownership of a land which was partly paid for and which is under a sale agreement. In a **Partition** Action, the High Court was not expected to decide on who has to pay, how much, to whom and/or whether it was a motgage or a loan transaction. In law, the Appellate Court Judges cannot decide on specific performance of a sale agreement **within a Partition Action.**

In the case **of Pathmawathie Vs Jayasekera 1977 , 1 SLR 248** the Court of Appeal had made this observation. **"** It must always be remembered by judges that the system of civil law that prevails in this country is confrontational and therefore the jurisdiction of the judge is circumscribed and limited to the dispute presented

to him for adjudication by our Civil Law does not in any way permit the adjudication or judge the freedom of the wild ass to go on a voyage of discovery and make a finding as he pleases may be or what he thinks right or wrong. The adjudicator or

judge is duty bound to determine the dispute presented to him and this jurisdiction is circumscribed by that dispute and no more**".** As such, I hold that the High Court has seriously misdirected itself by awarding relief to the 1st Defendant which has **not been prayed for or which was never in issue at the trial.**

The 1st Defendant Respondent Respondent had not prayed for any of the reliefs that the Civil Appellate High Court had granted. In the Partition case, Anver had taken a different position that he was the owner of that particular land of 9 perches. **He had not prayed for specific performance of the agreement. The Deed of Agreement was not an issue in this Partition case. No court can grant what the parties had not prayed for at all.**

The argument put forward by the 1st Defendant Respondent Respondent, Anver was that the document marked as 1V3(Q9), the settlement by the Debt Conciliation Board, had given him rights to the corpus. The settlement before the Debt Conciliation Board was in terms of Sec. 30 of Ordinance No. 39 of 1941. In the said settlement it was admitted in Clause 1 that **1V2 (Q8) was not a transfer but a document relating to a loan transaction**. Then the Creditor, the 1st Defendant would not get any title to the property, but has only a right to recover the credit amount secured by the Mortgage. According to the clauses in the settlement, in case of default, the creditor get could get the rights in terms of 1V2 (Q8) which is an agreement to sell. 1V3(Q9) does not give any title or ownership to the property to Anver.

In any event **in case of default of a settlement, the creditor should go before the District Court according to Sec. 43(1) of the Debt Conciliation Board Act to claim his rights under the settlement**. It is clear that the terms of a settlement alone does not have any enforceable power and therefore, Anver did not get any

enforceable right by the said settlement as it was not presented to the District Court.

I hold that the learned judges of the High Court have erred in law in having granted a right to specific performance of an agreement to sell within this Partition Action. Even in an action for specific performance in the District Court, the relief cannot be granted due to the fact that it is long prescribed.

I set aside the judgment of the Civil Appellate High Court by answering the questions of law raised in favor of the 6B/7A Defendant Respondent Appellants and against the 1 A to 1 E Defendant Appellant Respondents. I affirm the judgment of the District Court.

Appeal is allowed. However I order no costs.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda PCJ.
I agree.

Judge of the Supreme Court

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

S.C. Appeal 116/2010
Supreme Court
Leave to Appeal No.100/09
Ratnapura Civil Appeals
High Court Leave to Appeal
Application No. LA09/2008)
D. C. Ratnapura
Case No.22669/Land)

In the matter of an application under Article 127(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka for Leave to Appeal.

Hapugastenne Plantation Limited,
No.186, Vauxhall Street,
Colombo 02.

Plaintiff

~Vs~

Kitnan Karunanidi,
Hapugasthenna Estate,
Gallella.

Defendant

AND BETWEEN

Kitnan Karunanidi
Hapugastenna Estate,
Gallella.

Defendant~Petitioner

~Vs~

Hapugastenne Plantation Limited,
No.186, Vauxhall Street,
Colombo 02.

Plaintiff~Respondent

AND NOW BETWEEN

Hapugastenne Plantation PLC,
No.186, Vauxhall Street,
Colombo 02.

Plaintiff~Respondent~Petitioner

-Vs-

Kitnan Karunanidi
Hapugastenna Estate,
Gallella.

Defendant-Petitioner-Respondent

BEFORE: S.E.WANASUNDERA, PC, J.
B.P.ALUWIHARE, PC, J. &
SISIRA J. DE ABREW, J.

COUNSEL: Hilary Livera for the Plaintiff-Respondent-Appellant.
Anuruddha Dharmaratne for the Defendant-Petitioner-Respondent.

ARGUED ON: 23.03.2015

DECIDED ON: 03.02.2017

Aluwihare PC.J

Plaintiff-Respondent-Petitioner (hereinafter referred to as the Plaintiff) instituted action before the District Court seeking an interim injunction among other reliefs, restraining the Defendant-Petitioner-Respondent (hereinafter referred to as the Defendant) from gemming, extracting minerals and damaging cultivation of the paddy field, on the land described in the 2nd schedule to the plaint.

The learned District Judge issued an enjoining order on 6th November,2007 as prayed for and after objections were filed by the Defendant, the learned District Judge issued an interim injunction as prayed for, on 21st January,2008.

Defendant then moved the High Court of Civil Appeals by way of leave to appeal, against the said order.

The High Court of Civil Appeals by its order dated 22nd April,2003 set aside the order of the learned District Judge and vacated the interim injunction.

The Plaintiff aggrieved by the said order of the High Court of Civil Appeals sought leave to appeal from this Court and leave was granted on the following questions of law:

(a) Whether the Plaintiff-Respondent-Petitioner had established a *prima facie* case against the Defendant-Petitioner-Respondent.

(b) Whether the Plaintiff-Respondent-Petitioner had established that the balance of convenience, is with the Petitioner.

Court also granted leave on the following question of law raised on behalf of the Defendant-Appellant-Respondent:

(c) Is the Plaintiff-Respondent-Petitioner entitled to any relief, in view of the material suppression and misrepresentations contained in the Plaint and accompanying affidavit filed in the District Court.

Facts of the case, briefly, are as follows:
Sri Lanka State Plantations Corporation (hereinafter referred to a SPC) became owners of the Hapugastenne tea estate and in 1992, the said tea estate was leased for a period of 99 years to Hapugastenne Plantations Ltd., the Plaintiff-Respondent-Petitioner-Appellant (Hereinafter referred to as the Plaintiff)

Subsequent to the execution of the Indenture of Lease (between the SPC and the Plaintiff company) in the year 2000, SPC transferred a portion of Hapugastenne Estate in extend of 1 Rood and 20 Perches to the Defendant. The land so transferred happened to be a paddy land. It must be noted that the SPC is not a party to these proceedings or the proceedings before the lower courts.

The dispute arose when the Defendant, in 2007 obtained a licence for gemming on the said property and commenced mining. The Plaintiff contended that the licence issued for gemming was subsequently suspended. The defendant, however, continued gemming operations and as a result caused irreparable loss to the Plaintiff due to soil erosion and landslide caused by the mining operations.

As referred to earlier the interim injunction issued by the learned District Judge restraining the defendant from gemming on the impugned property was vacated by the learned Judges of the High Court of Civil Appeals.

In his short order, the learned District Judge had held with the Plaintiff, mainly on two grounds:

Firstly, in terms of the indenture of lease, the lessor (the SPC) can transfer or convey part of the leased property only upon obtaining the permission of the lessee, that is the Plaintiff, and secondly, that he is satisfied that the Plaintiff had made out a *prime facie* case.

I am of the view that the court would have been in a better position to determine this issue had the SPC been made a party to these proceedings. The gravamen complained of is entirely an issue between the plaintiff and the SPC the lessor of the estate. The transaction (sale of the impugned property) between the SPC and the Defendant has nothing to do with the terms and conditions of the lease entered into between the Plaintiff and the SPC. For all intents and purposes the transfer of the impugned property to the Defendant seems lawful.

The second ground was that the defendant had continued with activities relating to gemming, even after the licence issued by the Gem and Jewellery Authority had lapsed. This again is a matter that comes within the province of the Gem and Jewellery Authority, the regulator in that area of activity. If a person is engaged in activities relating to gemming without proper authority, then the Plaintiff ought to have brought it to the notice of the proper authority who has the power to deal with it. There is nothing to indicate that has happened in the instant case.

The learned District Judge had held that irreparable loss would be caused to the Plaintiff, being the lessee of the impugned property, if the Defendant was permitted to continue gemming on the property. The learned District Judge however had not considered the fact that the Defendant was the rightful owner of the block of land in issue which was not challenged by the Plaintiff. All what the Plaintiff stated is that the transfer of the land to the defendant by the SPC was conditional on it being used only for agricultural development. The condition referred to again is a matter between the Defendant and the SPC who was not a party to this case. To claim or waive the rights of the seller, in the instant case the SPC, is a prerogative of that party, and to my mind cannot be a ground to grant injunctive relief. Although not of much relevance to decide the issues in

this case, it had transpired that the impugned paddy field was transferred to the Defendant to give effect to the policy of the State to transfer rights relating to paddy fields to *'Ande'* cultivators, who had worked the land. It had also transpired that, way back in 2004, the Plaintiff had prayed for a writ of certiorari against the Gem and Jewellery Authority to quash the Gemming Licence issued to the Defendant and the Court of Appeal having gone into the matter, had dismissed the application (CA Writ Application No.978/2004).

The High Court of Civil Appeals had come to a finding that the plaintiff had failed to establish a *prima facie* case to obtain injunctive relief.

In the case of *Hubbard V. Vosper 1972 2 QB 84*, Lord Denning stated that 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 best to be done. If the case is weak or is met by a strong defence the court will refuse the injunction.

In the instant case, the defendant had title to the paddy land referred to, in the 2nd schedule to the plaint and he had obtained a licence to mine for gems from the proper authority. The land in question is a distinct land and demarcated by clear boundaries as per the deed marked and produced as V1. Furthermore, the surveyor plan marked and produced as V2 depicts the land described in the 2nd schedule to the plaint and according to the said plan, the boundaries had been pointed out by the Superintendent of Hapugastenne Estate.

In fact the learned District Judge himself had come to a finding that no irreparable loss could be caused to the plaintiff if the land were mined for gems, provided such activity were carried out confined to the area specified in the

licence. The learned District Judge had in fact granted an enjoining order restraining the defendant mining outside his own boundary. The Plaintiff had not asserted that the Defendant was mining outside the land described in schedule 2 to the plaint; the land transferred to the Defendant, by the SPC.

The injunction sought by the Plaintiff is to prevent the Defendant mining on the land described in schedule 2, to prevent damage to the paddy cultivation on the land described in the said schedule – Prayer 9 of the plaint. The position of the Defendant was that, after the land was transferred to him, it had been *aswaddumised* for some time and the land was barren when the mining commenced.

In order to obtain injunctive relief under our law the party seeking the relief not only must establish a prima facie case in which a serious matter relating to their legal right to be tried at the hearing of the case but also that they have a good likelihood of winning the case.

Considering the material placed before court the Plaintiff in my view had failed to establish a legal right, but had only relied on alleged violations of conditions imposed on the Defendant both by the SPC and to an extent the Gem and Jewellery Authority who are not parties to this case.

I hold therefore, that the learned Judges of the High Court of Civil Appeals had not erred when they held that the Plaintiff had not established a *prima facie* case against the Defendant. Consequently I answer the 1st question of law on which leave was granted in the negative.

In determining the balance of convenience, when issuing an interim injunction, the court weighs the possible inconvenience or loss to the respective parties. The

competing factors and weight to be attached to each such factor, no doubt varies from case to case. In the instant case, the defendant has established that he is the owner of the property in question and he had obtained a licence to mine for gems from the Authority which is empowered to do so. The Defendant had the right therefore, to engage in mining, an occupation which is lawful and a right, guaranteed under Article 14(1) of the Constitution. Hence unless there were compelling reasons, in my view, restraining the Defendant in engaging in mining is not justified.

The Plaintiff had averred in paragraph 17 of the plaint filed before the District Court that, if the defendant were to permit continue mining, it would have a considerable adverse effect on the tea plantation by upsetting the daily routine of the labourers who work on the estate. Further the Plaintiff had asserted that, the mining process had led to soil erosion as well and the damage is irreparable.

The Plaintiff, however, as referred to earlier, in the prayer had sought an injunction against the defendant, in order to avoid damage being caused to the paddy cultivation on the land described in the 2nd schedule, which property is owned by the Defendant. As such when one considers the factors in favour of each party, I am of the view that the balance of convenience lies with the Defendant and the judges of the High Court of Civil Appeals were correct in deciding it was so. Thus, with regard to the 2nd question of law on which leave was granted, I hold that the Plaintiff had not established that the balance of convenience was with the Plaintiff.

Considering the above I see no reason to interfere with the findings of the High Court of Civil appeal on the two questions referred to.

As to the 3rd question on which leave was granted, which was raised by the Defendant, I see no purpose in delving into the issue as I have already held that the learned Judges of the High Court of Civil Appeals have not erred in deciding the matters raised before them.

For the foregoing reasons, I dismiss the appeal and the Defendant-Petitioner-Respondent would be entitled to the cost of the appeal.

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 Leave to Appeal from the judgement of the High Court of Civil Appeal of the Western Province Holden in Colombo dated 25.03.2014 under an in terms of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 and read with Article 127 of the Constitution.

SC Appeal No. SC(LA)116/2014
SC HCCA LA No. 207/2014
CIVIL HIGH COURT OF APPEALNO. WP/HCCA/COL/294/2009(F)
DC Colombo Case No. 20421/L

1. Kuruwitage Don Preethi Anura
   No. 234, Sri Jayawardenapura Mawatha
   Rajagiriya

2. K.Don Suwinith Rohan Siriwardena
   No. 48, Ambathale,
   Mulleriyawa Town.

3. K. Vajira Gamini Gunasekara
   No. 31/1, De Fonseka Road
   Colombo 05.

Plaintiff-Respondent-Appellants

Vs.

1. Makalandage William Silva
   No. 326/18 Udumulla, Mulleriyawa
   New Town

2. Makalandage Gnanathilake
   No. 437/2, Udumulla, Mulleriyawa
   New Town

Defendant-Appellant-Respondent

Before	:	Priyasath Dep, PC. J Sisira J. de Abrew, J. Priyantha Jayawardene, PC J.
Counsel	:	Hiran de Alwis with Asitha Ranasinghe for the Plaintiff-Respondent-Appellant U. Kulathunga with C. Paranagama for the Defendant-Appellant-Respondent
Argued on	:	06.07.2015
Decided on	:	05.06.2017

Priyasath Dep, PC. CJ

Plaintiff- Respondent-Appellant hereinafter referred to as the "Plaintiff" instituted action in the District Court of Colombo in Case No. 20421/L against the Defendant-Appellant-Respondent hereinafter referred to as the 'Defendant' seeking a declaration of title to the land described in the 2nd schedule to the Plaint and to evict the Defendant and others who are in possession of the land. The learned District Judge answered the Plaintiffs' issues in the affirmative and gave judgment in favour of the Plaintiff.

Being aggrieved by the judgement of the learned District Judge, the Defendant filed an appeal to the High Court (Civil Appeal) of the Western Province holden in Colombo in Case No. WP/HCCA/COL/294/2009(F). The learned High Court Judges after hearing allowed the appeal of the Defendant holding that the plaintiff failed to establish the title to the land .

Being aggrieved by the judgement of the High Court, the Plaintiff filed a Leave to Appeal Application in the Supreme Court and obtained leave on the question of law set out in paragraph 13(c) (1) of the Petition which reads as follows:
(c) that the High Court had failed to consider-
(1) the admissions, the gazette, the statutory determination, the evidence of the notary and the administrator's conveyance and thereby erred in law.

This case was argued before us and after the conclusion of the argument the parties were permitted to file written submissions. Thereafter the parties have filed comprehensive written submissions.

The main reason for the learned High Court Judges to set aside judgement of the District Judge was that the Plaintiffs had failed to establish the title to the land. It is the position of the Plaintiffs' that their predecessors in title are the owners of a larger land which is referred to in the 1st schedule and that the Defendants have wrongfully entered in to the portion of the land and in occupation of the land which is described in the 2nd schedule to the Plaint.

In this appeal the main question of law is whether the Plaintiffs' had established the title to the land which is an essential requisite in a rei vindication action.

In the trial parties admitted the jurisdiction of the court and the identity of the land. The Plaintiff raised issues numbers 1-6 and the Defendant raised issues numbers7-14. Thereafter Plaintiff raised consequential issues numbered 15-17.

The Plaintiffs have pleaded that Kuruwitage Don Nicholas Appuhamy is the owner of the land described in Schedule 1 to the Plaint. The said Nicholas Appuhamy by his Last Will bequeathed the said property to his wife Don Senthanona Abeysinghe. The Last Will was proved in the testamentary case bearing No. DC Colombo 17127/T . Thus Don Senthanona Abeysinghe became the owner of the property described in the schedule to the Plaint. The said property was vested with the Land Reform Commission with the coming into operation of Land Reform Law No. 1 of 1972. Thereafter, by Gazette Extraordinary dated 10.11.1992 a statutory determination was made in favour of Senthanona Abeysinghe and thereby she became the owner of the land described in the 1st schedule.

The said Dona Senthnona by Last Will No. 3032 dated 27.04.1982 attested by Herman Perera, Notary Public bequeathed the said land to her grandsons who are the Plaintiffs in this case. The Executor of the estate by executor conveyance No. 913 attested by G.Shelton Perera Notary Public conveyed the land to the Plaintiffs.

It is the position of the Plaintiffs that the Defendants are cultivators of the land adjacent to the land described in the plaint. They have encroached upon a portion of the land in the first schedule and tried to construct a house in the said land . Then the Plaintiffs made a complaint to Mulleriyawa Police on 23.03.2004. The Plaintiffs filed this action seeking a declaration to the land in question and to evict the defendant from the land. Plaintiff sought an interim / permanent injunction to prevent the defendant from constructing a building in the said land.

The Defendants in the answer denied the title of the Plaintiffs. It is the position of the Defendants that the 1st Defendant who is the father of the 2nd Defendant cultivated the land from 1965 and was in possession of that land for a long period of time. The defendants annexed a schedule to the answer and claimed that they were in possession of the land described in the schedule to the answer for a long period of time.

Both parties admitted the identity of the corpus. However, defendant challenged the title of the Plaintiff and moved to dismiss the Plaint.

When considering the description of the land described in the 2nd schedule to the plaint and the schedule annexed to the answer it refers to two different lands. The land claimed by the Plaintiffs'is known as Naimaladuwa whereas the land claimed by the defendants is known as Kiralduwa.

The land claimed by defendants on the basis that they had prescribed to the land refers to a different land. Plaintiffs admitted that the defendants were cultivating in an adjoining land. The

question that arises is whether the defendant have encroached on the land refers to the 2nd schedule to the Plaint.

The Defendants submitted that the Plaintiffs failed to establish as to how Nicholas Appuhamy came to own the land. The Plaintiffs failed to produce deeds to establish the title of Nicholas Appuhamy who is the predecessor in title to the Plaintiffs. The Defendants submits that as the Plaintiffs' title commenced from Nicholas Appuhamy it is necessary to prove as to how Nicholas Appuhamy acquired title to the land

The Defendants took up the position that the documents marked P 1-P7 were produced subject to proof and it was not proved. The trial Judge in his judgment considered this matter and held that the documents were properly proved. The document marked P1 is a gazette and the Court could take judicial notice of the gazette. P2 is a duly certified copy of the plan prepared by the Surveyor General and which is referred to in the gazette. The document marked P3 which is the last will was produced by Herman Perera, Notary Public who attested the Last Will. He gave evidence to the effect that the Last Will was attested by him. The Executor of the Last Will Sunil Siriwardana gave evidence to the effect that the Probate was granted to him and as executor he conveyed the property by executor conveyance No. 913 dated 09.02.1995 attested by Gerald Shelton Perera Notary Public which is marked as P4. The said Notary Public was not called as he is dead. Two attesting witnesses namely Ariyaratne and Jinadasa gave evidence to the effect that they attested the deed. P5 is a letter send by 2nd Defendant to the Plaintiffs which was not challenged. The learned District Judge correctly held that the plaintiffs proved the documents which were produced as evidence.

The learned Trial Judge was satisfied that the Plaintiffs have proved the title to the land. It was further established that the land claimed by the Defendants is a different land. The only question is whether Defendants encroached upon the portion of the land referred to the 2nd schedule and prescribe to the land.

The learned District Judge answered the Plaintiffs' issues in the affirmative and gave judgment in favour of the Plaintiff.

Being aggrieved by the judgement of the learned District Judge, the Defendant filed an appeal in the High Court(Civil Appeal) of the Western Province Holden in Colombo in case No. WP/HCCA/COL/294/2009(F). The learned High Court Judges after hearing allowed the appeal of the Defendant holding that the plaintiff failed to establish the title to the land .

The relevant portion of the judgment reads as follows:

'A copy of the last will of Senthanona Abeysinghe was produced in evidence through the 2nd respondent marked as 'P3' and the executor's conveyance executed by the executor named therein, in favour of the respondent was produced marked as 'P4' . However, there is no evidence that Senthanona's last will was proved in Court. A last will alone confer title upon its beneficiaries. The last will must be proved and the Court must appoint an executor or administrator as the case may be to administer the estate. If the last will is not proved the estate

of the deceased must devolve on his or her heirs under intestate succession which, in this case, would have been the children of Senthanona Abeysinghe and not directly on her grandchildren. The learned trial judge observed that since the notary public who attested the last will had given evidence as to its execution it could be considered as proved. The last will has to be proved in a separate case instituted under chapter XXXV111 of the Civil Procedure Code and not in a *rei vindicatio* action. I am therefore of the view that the respondent's have failed to establish their title to the land in dispute and their case must necessarily fail.

It is the position of the High Court that the Plaintiffs failed to establish the title to the land. The Plaintiffs failed to produce the letters of Probate issued to the executor who conveyed the land to the Plaintiffs. Due to this infirmity the learned High Court Judges set aside the judgement given in favour of the Plaintiffs. It is the position of the Plaintiffs that the oral evidence given by the Plaintiff, Executor of the Last Will of Sentho Nona and the evidence of Herman Perera Notary Public and the document marked P1 – P7C establish the title of the Plaintiff to the land described in schedule 1 and 2 to the Plaint.

The Plaintiffs have to establish title to the land which they claim as this is an essential requirement in a rei vindication action.

The Defendant -Appellant- Respondent had cited several authorities, often cited in courts pertaining to burden of proof in a rei vindicatio action. They are: De Silva Vs. Gunathileke 32 NLR 217, Wanigarathna Vs. Juwanis Appuhamy 65 NLR 167 and Dharmadasa vs. Jayasena 1997(3) SLR 327

In De Silva vs. Gunatillake 32 NLR 217 at page 219 Macdonell CJ citing authorities on Roman Dutch Law referred to principles applicable to rei vindicatio action in the following manner.

> " there is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action *rei vindicatio* plaintiff must have ownership actually vested in him". (1 *Nathan p.* 362, *s.*593) "The right to possess may be taken to include the *ius vindicandi* which Grotius (2, 3, and 1) puts in the forefront of his definition of ownership." (*Lee's Introduction to Roman-Dutch Law, p.* 111 *note, ed* 1915). "This action arises from the right of dominium. By it we claim specific recovery of property belonging to us but possessed by someone else" (*Pereira, p.* 300, *ed.*1913, quoting *Voet* 6, 1, 3). 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 Wanigarathne vs. Juwanis Appuhamy 65 NLR 167 Herath J stated that:

> "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 favor merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title"

In the case of Dharmadasa v Jayasena 1997 3 SLR 327(SC) G.P.S. de Silva CJ at page 330 quoted with approval the statement of Macdonall CJ in De Silva vs. Gunathileke 32 NLR 217 and the statement of Herath J in Wanigarathne vs. Juwanis Appuhamy 65 NLR 167.

It is settled law that in rei vidicatio actions the plaintiff must prove his title. In establishing his title the plaintiff cannot rely on the weakness of the defendant's title. In this appeal we have to consider whether the plaintiff established his title or not.

The learned High Court judges were of the view that it was established that Senthanona Abeysinghe was the owner of the property described in the schedule. The lands belonging to Senthanona Abeysinghe was vested in the Land Reform Commission under Land Reform Law No. 1 of 1972. And under section 6 of the said Act the land vested with the commission free of encumbrances. Section 6 of the said law states thus:

> "Where any agricultural land is vested with the commission under this law, such vesting shall have the effect of giving the Commission absolute title to such land as from the date of such vesting and free from all encumbrances ."

Thereafter, the Commission had made a determination under section 19 of the Land Reform Law allowing Senthanona Abeysinghe to possess the extent of land referred to in the statutory determination which was published in the gazette which was marked as P1. The Surveyor General's plan which was marked as P2 gives the extent and boundaries of the land. In view of the statutory determination Santhonona Abeysinghe became the owner of the land referred to in the said determination. Therefore, there is no doubt as to the ownership of the land. The question that arises is as to how the Plaintiffs got the title to the land. The Plaintiffs produced the last will which was marked as P2 and the executors conveyance marked P4. However, the Plaintiffs failed to produce the letters of Probate appointing the executor. The Probate gives the executor the authority to convey the land. The probate is considered as primary evidence of the proof of the last will and the authority given to the executor to deal with the estate of the deceased testatrix. The Plaintiffs failed to produce the letter of Probate. The Defendants in view of this omission /deficiency invited the Court to draw an adverse inference under section 114 (f)of the Evidence Ordinance which states that "the evidence which could be and is not produced would if produced be unfavourable to the person who withholds it." The learned High Court judges were of the view that the Plaintiffs had failed to adduce evidence to establish that the last will was proved in court and probate was issued. If the will was not proved the Plaintiffs who are the grand children will not inherit the land but it will devolve on Senthanona Abeysinghe's children on the basis of intestate succession. The question that arises is though the Plaintiffs failed to produce the letters of Probate which is the best evidence whether they have adduced oral and documentary evidence to establish the title.

In a rei vindicatio action, the Plaintiff has to establish the title to the land. Plaintiff need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The Plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title. This case been a rei vindicatio action this court has to consider whether the Plaintiffs discharged the burden on balance of probability.

If the last will was not proved the executor and his brother who are the children of the testatrix would have inherited the property. In this case Sunil Siriwardena, the executor a would be beneficiary on the basis of intestate succession, against his proprietary interest gave evidence in favour of the Plaintiffs. He could be accepted as a truthful witness. The executor gave evidence and stated that the last will was proved and the probate was granted to him and he conveyed the property to the legatees who are the grand children of Senthonona and the Plaintiffs in this case. In the executor conveyance marked P4 it was specifically mentioned that in the testamentary case bearing No. DC/ Colombo/ 32235 the Probate was granted to the executor Kuruwitage Don Sunil Siriwardana in respect of the estate of the deceased and in terms of the Last Will conveyed the property to the Plaintiffs. The above oral evidence placed before the District Court supported by documentary evidence proves that the Plaintiffs are the legal owners of the land in question. Their legal title was not challenged by anyone. Therefore, I am of the view that the Plaintiffs have established the title to the property. I agree with the findings of the District Judge. Therefore, I set aside the judgement of the High Court of Civil Appeal and affirm the judgement of the District Court.

Appeal allowed. No costs.

Priyasath Dep, PC, CJ.

Chief Justice

Sisira J. de Abrew J.

Judge of the Supreme Court

Priyantha Jayawardene, PC.,J.

Judge of the Supreme Court

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

In the matter of an Appeal from a judgment of the High Court of Civil Appeal of Gampaha.

Manamalage Michael Ranjith Fernando alias Mahipalage Michael Ranjith Perera of No. 44, Baseline Road, Seeduwa.

Plaintiff

SC Appeal No. 117/2011

Vs

1. Manamalage Marcus Fernando,
2. Prema Dayani

SC/HC/CA/LA/No. 57/2011
WP/HCCA/Gph/188/2002(F)
D.C. Negombo Case No. 4677/L

Both of "Sadawarana Veda Medura" Seeduwa North, Seeduwa.

Defendants

AND BETWEEN

1. Manamalage Marcus Fernando
2. Prema Dayani
   Both of "Sadawarana Veda Medura", Seeduwa North, Seeduwa.

Defendants Appellants

Vs

Manamalage Michael Ranjith
Fernando alias Mahipalage
Michael Ranjith Perera, of
No.44,Baseline Road, Seeduwa.
Plaintiff Respondent

AND NOW BETWEEN

Manamalage Michael Ranjith
Fernando alias Mahipalage
Michael Ranjith Perera, of
No.44,Baseline Road, Seeduwa.

Plaintiff Respondent Appellant

Vs

1.Manamalage Marcus Fernando
2.Prema Dayani
Both of "Sadawarana Veda
Medura", Seeduwa North,
Seeduwa.

Defendants Appellants Respondents

BEFORE : S.EVA WANASUNDERA PCJ.
PRIYANTHA JAYAWARDENA PCJ. &
H.N.J. PERERA J.

COUNSEL : Sanjeeva Jayawardena PC with Ms. Ashoka Niwunhella for the Plaintiff Respondent Appellant.
Dr. S.F.A. Cooray for the Defendants Appellants Respondents.

ARGUED ON : 06.02.2017.

DECIDED ON : 15.03.2017.

S. EVA WANASUNDERA PCJ.

Manamalage John George Fernando and his wife Maria Theresa lived at "Sadasarana Veda Medura", Seeduwa North, Seeduwa. They had two sons named Marcus and Michael Ranjith . They lived in this tiled house which was situated in a coconut estate. The father, George was the sole owner of the land which was of an extent of 4 Acres 2 Roods and 10 Perches. He donated an **undivided portion of the land on which the tiled house was situated on 'an extent of land, leaving out an extent of 1 Acre and 1 Rood on the west of the land,** by Deed No. 14304 to Michael Ranjith the second son, keeping life interest for both himself and his wife on the **1st of June,1980.** Later on, George, the father **again** donated **the extent of land on the west of an extent of 1 Acre and 1 Rood also** to Michael Ranjith by Deed No. 4893 dated 18th July, 1982 without reserving any life interest. Many years later, on 25th August, 1991 by Deed No. 792, George **withdrew the life interest rights** he reserved when he executed Deed 14304 in 1980. Therefore from 25.08.1991 onwards Michael Ranjith became the sole owner of the full extent of the land which is 4 Acres 2 Roods and 10 Perches and the tiled house thereon.

In the year 1979, George's other son Marcus and had come into a room in the tiled house with his wife Prema, **with the consent of his father**. After some time, problems had arisen between the father and Marcus. Then, the father George had given time till end of March,1980 for them to vacate that part of the house

and because they did not leave, he had filed action to get them evicted from that part of the house or the room which they were occupying and for damages. That case was an ejectment case, namely bearing number **888/RE** in the District Court of Negombo filed on **16th of June, 1980**. By that time **George had only the life interest of the land** on which the tiled house was situated because by then, he had donated **the portion of land with the house to his second son Michael Ranjith**. Marcus and Prema filed answer on 27.02.1981 and took up the defense that Marcus being a child of George has a right to live in the said house; that he had come there with his wife and child in 1977,**with the leave and license of the father** George and that they have no other place to go. The Plaintiff George had failed to be present in Court on the first date of trial, i.e. on 01.06.1981 and the District Court **had dismissed the 888/RE case with costs.**

Thereafter George, the father had passed away. Marcus and his wife had continued to be in occupation of the whole house even after the death of the father. Michael Ranjith ,the brother of Marcus was the sole owner of the whole property including the tiled house. Even though Michael Ranjith had requested Marcus and Prema to vacate the house, they did not do so. Then, Michael Ranjith filed action against them under case number 4677/L in the District Court of Negombo on 15th March, 1993 praying for **a declaration of title** to the said land and property on which the said house was and **for eviction** of the Defendants, Marcus and Prema.

The District Judge held with the Plaintiff, Michael Ranjith. The Defendants appealed to the Civil Appellate High Court. The Civil Appellate judges over turned the District Court Judgment and held with the Defendants, Marcus and Prema. Therefore the Plaintiff has appealed to the Supreme Court.

This Court had granted leave to appeal on the 5th of September, 2011 on the following questions of law enumerated in paragraph 38 of the Petition of the Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) dated 21.02.2011.

1. Did the Honourable High Court Judges fall into substantial error by failing to distinguish between the cause of action of the Petitioner in case No. 4677/L as opposed to the cause of action of the Petitioner's father in case bearing No. 888/RE?

2. Did the Honourable High Court Judges fall into substantial error by failing to appreciate that the Petitioner's father was not the owner of the property and was only a life interest holder at the time he filed his action and that he did not seek a declaration but merely possession?
3. Did the Honourable High Court Judges fall into substantial error by failing to appreciate that the Petitioner on the other hand, was in fact, the absolute owner of the property at the time he filed action and that he accordingly sought declaration and vindication of title?
4. In the circumstances of the case, did the Honourable High Court Judges misinterpret and misapply the principles of res judicata to the facts of the instant case and err by dismissing the Petitioner's action?

5. Did the Honourable High Court Judges misdirect themselves by misinterpreting and also mis-applying the provisions of Sec. 41 of the Civil Procedure Code and also the related facts?

6. Did the Honourable High Court Judges fail to evaluate or even identify the detailed evidence in the case?

The learned High Court Judges had allowed the Appeal filed by the Defedants Appellants Respondents (hereinafter referred to as the Defendants) in the present matter before this Court , by judgment dated 11.01.2011. It is a short judgment contained in less than three type written pages. The Judges had mainly considered whether the District Court judgement in 888/RE stands as res judicata against the case filed by the Plaintiff in 4677/L and held in the affirmative against the Plaintiff and allowed the Appeal in favour of the Defendants.

In the fourth paragraph of the said Judgment of the learned High Court Judges, the learned judge who had written the judgment states thus:

"In Perera Vs Fernando 17 NLR 300 held that if the plaint was dismissed when the plaintiff not being ready to proceed such order had all the requirements necessary for the purpose of res judicata. The Plaintiff in the D.C.Negombo case No.888/RE being the father of the present plaintiff as well as the 1st Defendant and cause of action was the same, in my view, the said case operate as res judicata**"**.

The High Court Judges seem to have concluded that res judicata applies to the Plaintiff in the case in hand, while admitting that the plaintiff in 888/RE is the father of the Plaintiff in this case, which means that the **Plaintiffs in the two cases are totally different persons.**

In Roman Dutch Law, K.D.P. Wickremasinghe in his book Civil Procedure in Ceylon states that, for the doctrine of res judicata to operate, there must be three requisites, namely, **same person, same thing and same cause of action.** It is contained in Sec. 207 of the Civil Procedure Code.

Firstly, in the present case the Plaintiff in 888/RE is **different** from the Plaintiff in 4677/L. The father and the son are two different persons. Res judicata cannot be applied.

Secondly, the cause of action in the two cases are also different. The cause of action in 888/RE had arisen for the Plaintiff father George, as **the holder of the life interest** of the property on which the house was situated, to sue the defendants who were one of his sons and the son's wife, **for eviction from the part of the house in which the Defendants were living along with the Plaintiff father**, under the leave and licence of the Plaintiff father. The Plaintiff father wanted to get peaceful possession from the defendants. The cause of action in 4677/L had arisen for the **Plaintiff Michael Ranjith, who was the other son of the Plaintiff in 888/RE,** who had become the sole owner of the house and the land on which the house was situated to sue the defendants who were his brother and his wife, for a **declaration of title to the said property and for eviction of the defendants from the house on the said property.** It was a re vindicatio action. The father was the Plaintiff in 888/RE. The son who owned the property at that time, namely Michael Ranjith was **not a party to that action**. Therefore the Plaintiff in 4677/L was not a party to 888/RE. As such the **cause of action in the two cases were not the same.** Res judicata cannot be applied.

Thirdly, it is not the same thing that the two cases refer to. Case No. 888/RE refers to the rights of the life interest holder of the property. It concerned the eviction of the defendants from a part of the house in which the Plaintiff George lived in. Case No.4677/L refers to **a big land of an extent of 4 Acres 2 Roods and 10 Perches on which the said whole house also stands.** The Plaintiff in case No.

4677/L was entitled to seek in the fullness of amplitude , the vindication of the entirety of the corpus, as against the whole world. In the course of that vindication he has a right to get the Defendants ejected from the entirety of the corpus which he was vindicating. The Plaintiff's action in case No. 4677/L was an action in rem as against the action which was filed by his father in case No. 888/RE which was an action in personam since it was based on the occupation of part of the house with his leave and licence granted to the Defendants only to stay in that part of the house under the father who **had only the rights to life interest**. Therefore also, res judicata cannot be applied.

In Herath Vs Attorney General 60 NLR 193 it was held that Sec. 207 of the Civil Procedure Code will apply only to decrees pronounced after there had been adjudication **on the merits of a suit** and not to a decree entered under Sec. 84 of the Civil Procedure Code in consequence of the **non appearance of the Plaintiff**. Therefore, the decree in the Case No.888/RE which was entered in consequence of the **non appearance of the Plaintiff** should not have been applied as res judicata by the High Court in the Case. No. 4677/L. The learned High Court Judges have erred in having done so, on that account alone, leave aside the analysis I have discussed and concluded earlier regarding the three points of law pertinent to res judicata.

The High Court Judges have not analyzed the facts elicited from the documents and evidence properly. Deed 14304 specifically states that the land gifted to the Plaintiff subject to the life interest of the father and the mother **had the tiled house on it. It is specifically mentioned in the Schedule to that Deed.** It means that on 1.6.1980 i.e. on the date of execution of Deed 14304, the Plaintiff Michael Ranjith became the owner of the portion of the bigger land on which the house was. Then, when the father George filed action against the Defendants in Case No. 888/RE Michael Ranjith was **the owner of the house and that portion of land** and George, the father was only the life interest holder. By Deed 4893, **the rest of the full land** of 4 Acres 2 Roods and 10 Perches was gifted to Michael Ranjith without keeping life interest only on 18.07.1982.

The High Court Judges state that ,"therefore on the date of the dismissal of case 888/RE, i.e. on 01.06.1981, the rights of the father of the Plaintiff had not been entirely alienated to the Plaintiff". This position is factually incorrect according to the facts before court placed by way of documents. The judges had failed to

recognize that by 01.06.1981, **the Plaintiff had been the legal owner of the portion of the land with the house for exactly one year** because Deed 14304 was executed on 01.06.1980. The house was situated on the portion of land which was firstly donated by the father to the Plaintiff. The other deed executed in 1982 was for **the rest of the land** in which he did not keep the life interest. This portion of the land taken together with the land in the first deed makes the extent as 4 Acres 2 Roods and 10 Perches. The High Court had erred in that finding as well.

The High Court Judges have held that the Plaintiff had failed to comply with Section 41 of the Civil Procedure Code by not having annexed a plan, sketch or a plan of the portion that the defendants are in possession, of which the District Judge had failed to pay attention to. I see no rationale for this conclusion of the High Court Judges because the Plaintiff had filed a re vindicatio action praying for a declaration of title to the land in the schedule to the plaint **which is clearly defined** and mentioning that the house in which the defendants are occupying is within the said land and prayed for eviction of the said defendants as well.The High Court had erred in that finding as well.

The High Court has failed to analyze the oral evidence of the witnesses who had given evidence at the trial and also failed to see the contents of the pleadings before court in case No. 888/RE.

The Defendants in their answer in the present case had pleaded res judicata and then claimed that they have prescribed to the corpus. They **had not prayed for any declaration that they are the owners of the whole land or part of the land on prescription.** They had prayed for only a dismissal of the Plaintiff's action and costs of the action. The Defendant's counsel in his submissions pointed out that the father, George had died only in September,1997; the Plaintiff had filed action in 1993 while the father was living and that the Plaintiff had claimed damages of Rs.1000/- per month only from 1st October , 1992. He submitted that the basis claimed by the Plaintiff asking for damages from 1992 has not been explained in evidence. He further submitted that while the father was living in the same house as the Defendants were also living, the Plaintiff had filed action to evict the Defendants.

In my view, it does not make any difference to the substantive action filed by the Plaintiff which is a re vindicatio action. The Plaintiff was qualified to file such an

action as the owner of the larger land of more than 4 Acres with the house on it which was occupied by the Defendants at the time of filing the action and it is to be noted that any Plaintiff can claim damages from whatever the date he decides to claim damages from. It is his discretion. Perhaps that might have been the date that Marcus and wife agreed to leave the house but did not leave the house as agreed at any prior discussion they had. I have considered these submissions as well as the case law that the Counsel for the Defendants have submitted along with the written submissions such as ***Sockalingam Chetty Vs Kalimuttu Chetty 1944 NLR 330 and Dharmadasa Vs Piyadasa Perera 1964 NLR 249.***

I have read the evidence given by the witnesses before the trial judge. The Plaintiff gave evidence and after marking the Deeds by which he got paper title as mentioned above, he went on to say that in 1992, he tried to take over possession of the house of which he was the owner. The Defendants had obstructed and prevented him. Since the Plaintiff and the 1st Defendant are brothers, the Plaintiff had tried to negotiate a settlement with the Defendants but had failed and as a result, he had filed this action. He stated further that at all times material, **he used the produce and crop of the land** meaning mostly that he got the money from the coconuts plucked from the trees on the whole land. This fact was confirmed by other witnesses namely M.G.Girigoris Calistus Fernando who carried out the task of gathering the coconut harvest and B.Lloyd Emmanuel Fernando who was one of the purchasers of the said harvest from the Plaintiff's father and then from the Plaintiff after he became the owner.

In evidence Girigoris said that he lives on the land adjacent to the land in question and being the uncle of both the Plaintiff and the 1st Defendant, he was aware of what went on between parties. He mentioned that when the Defendants tried to forcibly take the crop, he and the Plaintiff had to go to the police station and lodge entries. For the defense, only the 1st Defendant had given evidence and he had admitted that he came into occupation of part of the house with the leave and license of his father George in 1979. **His answer in 888/RE clearly stated so**. I am of the view that the trial judge in the District Court had considered the balance of probabilities on evidence before him and had decided in favour of the Plaintiff, having ruled out res judicata.

I answer all the questions of law enumerated above in favour of the Plaintiff Respondent Appellant and against the Defendants Appellants Respondents. I set

aside the judgment of the Civil Appellate High Court dated 11.01.2011. I affirm the judgment of the District Court dated 29.11.2002.

This 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 application for Special Leave to Appeal.

SC.Appeal No. 117/2012
SC.Spl. LA.No. 02/2012
Court of Appeal Case No. 721/2000(F)
DC. Galle Case No. 12261/L

Walpita Gamage Dharmadasa alias

Berty de Silva alias Berty Silva,
Modara.
Patuwatha, Dodanduwa.

Defendant-Appellant-Petitioner-Appellant

-Vs-

Manawaduge Ebert,
Agathuduwa, Dodandugoda,
Dodanduwa.

Plaintiff-Respondent-Respondent-Respondent

Before: Sisira J.de Abrew, J
Priyantha Jayawardena, PC, J &
K.T.Chitrasiri, J

Counsel: Widura Ranawaka with Indunil Bandara for the Defendant-Appellant-Petitioner-Appellant.
D.M.G.Dissanayake with Ms. L.M.C.D. Bandara and Ms. Namalee Perera instructed by B.C.Balasuriya for the Plaintiff-Respondent-Respondent-Respondent.

Argued on : 06.12.2016

Written submission
Tendered on : 9.10.2013by the Defendant-Appellant
10.1.2013by the Plaintiff-Respondent

Decided on : 1.3.2017

Sisira J.De Abrew J.

This is an appeal against the judgment of the Court of Appeal wherein it affirmed the judgment of the learned District Judge who held in favour of the Plaintiff-Respondent-Respondent. This court by its order dated 6.7.2012, granted leave to appeal on questions of law stated in paragraphs 22(a), (b) and (c) of the Petition of Appeal dated 4.1.2012 which are set out below.

a. Has the Court of Appeal erred in Law by failing to identify the District Judges failure to evaluate evidence to attendant circumstances of the transaction with a view to establish a constructive trust?

b. Has the Court of Appeal erred in Law by affirming the judgment of District Court entered on the basis of that the non-notarial agreement V1 could be treated as a supplement to deed P1?

c. Has the court of Appeal erred in Law by considering document V1 as a supplement to P1 in order to create a conditional transfer between the parties, since V1 was contrary to Section 2 of the Prevention of Frauds Ordinance?

Facts of this case may be briefly summarized as follows.

The Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) by deed No.6261 dated 26.2.1990 attested by SP Gunawardene Notary Public transferred the property in suit to the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-

Respondent) in a sum of Rs.110,000/- The deed No.6261 was marked as P1 at the trial. On the same day that the deed No.6261 was executed (26.2.1990), the Plaintiff-Respondent, by a letter dated 26.2.1990 marked P1, agreed to retransfer the property that he purchased by deed No.6261to the Defendant-Appellant if a sum of Rs.110,000/- is paid by Defendant-Appellant to the Plaintiff-Respondent within a period of one year from 26.2.1990. Thus it is clear that if the Defendant-Appellant wants to get the property back, he will have to pay Rs.110,000/- to the Plaintiff-Respondent within one year from 26.2.1990.

Learned counsel for the Defendant-Appellant contended that the Defendant-Appellant had borrowed a sum of Rs.80,000/- from the Plaintiff-Respondent and the deed No.6261 was executed only to provide security for the said amount and the interest. The interest for Rs.80,000/- was calculated to be Rs.30,000/-. He therefore contended that the Defendant-Appellant, by deed No 6261, had not transferred the property to the Plaintiff-Respondent. I now advert to this contention. It is in evidence that the Defendant-Appellant, after the execution of deed No.6261, made an application to the Debt Conciliation Board to get relief regarding this transaction but the Debt Conciliation Board rejected the said application. In deed No. 6261 there is nothing to suggest that it was executed to provide security for a sum of Rs.80,000/- that the Defendant-Appellant had borrowed from the Plaintiff-Respondent. Even in the document marked V1 there is no such indication. There is also no clear evidence by the Defendant-Appellant on this matter. When I consider all the above matters, I am unable to agree with the above contention of learned counsel for the Defendant-Appellant. Learned counsel for the Defendant-Appellant next tried to contend that the learned District Judge should not have considered document marked V1 as it is contrary to Section 2 of the Prevention of Fraud Ordinance. It has to be

noted here that the document marked V1 was produced by the Defendant-Appellant himself at the trial and that the Defendant-Appellant also, on the strength V1, relied on a constructive trust between him and the Plaintiff-Respondent. One of the important questions that must be considered here is that whether the court cannot consider the document marked V1 when the Defendant-Appellant relies on a constructive trust between him and the Plaintiff-Respondent. It is undisputed that the document marked V1 is not a document executed by a Notary Public and it relates to the property in suit. In considering the above contention of learned counsel for the Defendant-Appellant, I must consider the following question. In order to prove a constructive trust, is parole evidence permitted in view of the principles set out in Section 2 of the Prevention of Fraud Ordinance and Section 92 of the Evidence Ordinance? This question was discussed in the case of Dayawathi and Others Vs Gunasekara and Another [1991] 1 SLR 115. Before I discuss the said judicial decision, I would like to consider Section 83 of the Trust Ordinance which reads as follows.

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

The facts set out in the head note of Dayawathi and Others Vs Gunasekara and Another (supra) is as follows.

> *"The Plaintiff bought the property in suit in 1955. He started construction work in 1959 and completed in 1961. The Plaintiff, a building contractor, needed finances in 1966 and sought the assistance of the 2nd defendant*

with whom he had transactions earlier. This culminated in a Deed of Transfer in favour of the 1st Defendant, who is the mother of the 2nd Defendant and the 2nd Defendant being a witness to the Deed. The property was to be re-transferred within 3 years if Rs. 17,000/- was paid. The Plaintiff defaulted, in his action to recover the property, the Plaintiff succeeded in the trial Court in establishing a constructive trust. The Court of Appeal reversed the judgment on the sole ground that the agreement was a pure and simple agreement to re-transfer."

His lordship Justice Dheeraratne in the above case held as follows:

"(i) The Prevention of Frauds Ordinance and Section 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.

(ii) Extrinsic evidence to prove attendant circumstances can properly be received in evidence to prove a resulting trust."

In order to establish legal principles discussed in Section 83 of the Trust Ordinance, in my view, it is necessary to lead parole evidence between the parties. If this evidence is shut out, the purpose of Section 83 of the Trust Ordinance would be rendered nugatory. Applying the principles laid down in the above legal literature, I hold that Section 2 of the Prevention of Fraud Ordinance and Section 92 of the Evidence Ordinance do not operate as a bar to lead parole evidence to prove a constructive trust between the parties. Considering all the above matters, I hold that the learned District Judge was correct when he

considered the document marked V1 and that the court should consider the document marked V1. I therefore reject the above contention of learned counsel for the Defendant-Appellant.

The next question that must be considered is whether the Plaintiff-Respondent held the property in suit on behalf of the Defendant-Appellant on a constructive trust. In considering this question the document marked V1 is relevant. I have earlier discussed the contents of the document marked V1. It is important to note that the Defendant-Appellant did not, after the execution of deed No.6261, hand over the possession of the property in suit to the Plaintiff-Respondent. I have earlier held that the learned District Judge was correct when he considered the document marked V1. When I consider the contents of the document marked V1 and the fact that the Defendant-Appellant did not, after the execution of deed No.6261, hand over the possession of the property in suit to the Plaintiff-Respondent, I hold that the Plaintiff-Respondent held the property in suit on behalf of the Defendant-Appellant on a constructive trust for a period of one year from 26.2.1990 to 26.2.1991. The Plaintiff-Respondent, by the document marked V1, has agreed to retransfer the property in suit to the Defendant-Appellant if a sum of Rs.110,000/- is paid to the Plaintiff-Respondent by the Defendant-Appellant within a period of one year from 26.2.1990. But the Defendant-Appellant has failed to pay the said sum of money within the said period. When I consider all the aforementioned matters, I hold that the aforementioned constructive trust has come to an end on 26.21991 and was not in operation when the case was filed on 28.5.1992.

Learned counsel for the Defendant-Appellant relied on the judicial decision in the case of Premawathi Vs Gnanawathi [1994] 2SLR 171. In Premawathi's case (supra) the plaintiff, in her evidence, admitted the following

facts. (i) that she was in hospital for about 2 months from August 1976; (ii) that while in hospital the defendant came to see her and discussed with her the question of the retransfer of the property; (iii) that the hospital authorities did not permit the notary to come to the hospital and the deed of retransfer could not be executed; (iv) that she was willing to retransfer the property within the stipulated period of 6 months; (v) in answer to court, that the value of the property was about Rs. 15000/- in 1976. His Lordship GPS de Silva CJ held as follows.

> *"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 section 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 six 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. 15,000/-, 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."*

The facts of the said case are different from the facts of the present case. I therefore hold that the decision in Premawathi's case (supra) has no application to the present case.

For the aforementioned reasons, I answer the above questions of law in the negative and hold that the Plaintiff-Respondent is entitled to the relief calmed in

the Plaint. I affirm the judgment of the learned District Judge and the Court of Appeal and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court

Priyantha Jayawardena 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

S.C. Appeal No.118/2012

SC/HC/CALA No. 510/2012
H.C. Kalutara Civil Appeal
No. WP/HCCA/Kal/67/2005(F)
D.C. Panadura Case No.691/P

In the matter of an Application for Leave to Appeal under Section 5C(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with the Supreme Court Rules 1990 from the Judgment pronounced on 22.05.2012 by the High Court of the Western Province sitting in Kalutara in Civil Appeal No. WP/HCCA/Kalutara/67/2005 (F) in terms of Section 5A(1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 and now an Appeal upon leave having been granted on 06.07.2012.

Gamathige Dona Premawathie Perera
'Sinhalena', Hirana, Panadura.

PLAINTIFF

1. Kongaha Pathiranage Don Sarath
   Gunarathne Perera
   Hirana, Panadura.

2. Tantrige Neulin Peiris
   (Near Dispensary)
   Hirana Panadura.

DEFENDANTS

AND BETWEEN

Tantrige Neulin Peiris
(Near Dispensary)
Hirana Panadura.

2nd DEFENDANT-APPELLANT

Vs.

Gamathige Dona Premawathie Perera
'Sinhalena', Hirana, Panadura.

PLAINTIFF-RESPONDENT

Kongaha Pathiranage Don Sarath
Gunarathne Perera
Hirana, Panadura.

1ST DEFENDANT-RESPONDENT

AND NOW BETWEEN

Tantrige Neulin Peiris
(Near Dispensary)
Hirana Panadura.

2nd DEFENDANT-APPELLANT-PETITIONER-APPELLANT

Vs.

Gamathige Dona Premawathie Perera
'Sinhalena', Hirana, Panadura.

PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT

Kongaha Pathiranage Don Sarath
Gunarathne Perera
Hirana, Panadura.

1ST DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENT

BEFORE: B.P. Aluwihare P.C., J.
Anil Gooneratne J. &
Vijith K. Malalgoda P.C., J

COUNSEL: S. N. Vijithsing for the
2nd Defendant-Appellant-Petitioner-Appellant

Chandana Prematilleke with Yuran Liyanage
For the Plaintiff-Respondent-Respondent-Respondent
And 1st Defendant-Respondent-Respondent-Respondent

ARGUED ON: 27.07.2017

DECIDED ON: 04.09.2017

GOONERATNE J.

This was a partition action filed in the District Court of Panadura to partition the land morefully described in the schedule to the plaint. The said land is described in the plaint as two contiguous lands called Kosgahawatte. There was no contest between Plaintiff-Respondent-Respondent-Respondent (Plaintiff) and the Defendant-Respondent-Respondent-Respondent (1st Defendant). It was a contest between the Plaintiff and the 2nd Defendant-Appellant-Petitioner-Petitioner (2nd Defendant) who made a claim before the Court Commissioner on 17.02.1997. As such the 2nd Defendant was added as a party. The material placed before court indicates that the 2nd Defendant claims that, a strip of her land has been wrongfully included in the corpus. It is pleaded that land situated to the north of the land sought to be partitioned which was

earlier part of a ditch/drain including some alastonia trees (හිනිකුරු) along with other trees are wrongfully included in the land sought to be partitioned.

The main and the only dispute seems to be the strip of land which includes a ditch/drain according to the 2nd Defendant along with trees as stated above is the issue. Parties proceeded to trial on 11 points of contest. Further the 2nd Defendant does not claim any rights to the corpus itself but seeks an exclusion from plan produced marked V3, and to exclude 'Y' from the land sought to be partitioned. Both the District Court and the High Court Judgments have analysed the factual position to a great extent.

2nd Defendant states that the dispute arose when the Plaintiff had cut the Alastonia trees and claimed other trees which were in the drain. Disputed ditch/drain has been claimed by the 2nd Defendant before Surveyor, Kumarage at the preliminary survey. The 2nd Defendant did not give evidence.

The 2nd Defendant claim the strip of land on which the alastonia trees with other trees stood. This strip of land is to the north of the land sought to be partitioned. The 2nd Defendant further describes the strip of land by reference to some survey plans. It is said that lot 5 in plan V4, (3705) and superimposition of V4 and plans X 242 by Surveyor Malwenna on his plan V3, 1439 shows that the land to the north of the land sought to be partitioned is lot 5 in plan V4. In other words it is stated that the land to the north claimed by

Plaintiff is the land to which lot 5 of V4 applies according to the superimposition. 2nd Defendant's position is that as above lot 5 in plan V4 applies to the land to the north of Plaintiff's land which includes the strip of land claimed by the 2nd Defendant. At the hearing of this appeal it was suggested that parties explore the possibility of settling the dispute in view of the fact that the strip of land is a very small extent of land, but the Plaintiff's learned counsel was not willing to do so. The 2nd Defendant's learned counsel also argued that there was an old ditch between the land of the 2nd Defendant and the land of the Plaintiff. However as at present the so called ditch cannot be found and no signs of such a ditch. 2nd Defendant maintain that in the past there had been a drain. It is possible that after a long lapse of time ground situation is bound to change.

The 2nd Defendant also rely on plan 3705 marked V4 which is dated 19th March 1919. Plan of one J.N. Wickremaratne which shows ditch to the south and east of Lot 5. A ditch belonging to lot 5 that separated it from the land sought to be partitioned as far back as 1919. Does the ditch belong to the Plaintiff or the 2nd Defendant? Or does it merely separate the two lands as a boundary?

Plaintiff argue that PP 242 ('X') of Court Commissioner Kumarage's plan does not show any ditch/drain as the boundary between the corpus and 2nd Defendant's land lot 5, but a fence on which ගිනිකුරු and එරබඳු trees are found.

Plaintiff argue that 2nd Defendant's own plan No. 3705 also does not give the southern boundary of lot 5 as a drain/ditch but describes as "Kongahakurunduwatta of Carolis Peiris and Kosgahawatta of the heirs of late B.I. Eranis. A ditch is shown, not as a separate strip of land nor was it a part of lot 5, but it is a part of the corpus owned by the 1st Defendant and Plaintiff.

It was also submitted on behalf of the Plaintiff that the 2nd Defendant should have sought an exclusion of the strip of land alleged to be part of her land – lot 5. 2nd Defendant has not prayed for such exclusion but seek a declaration of title to lot 5 and that it is not possible to do so. 2nd Defendant prayer is misconcieved.

I note, as pointed out by the Plaintiff, points of contest No. 9 and 11 include a claim by the 2nd Defendant to the drain/ditch. It is also a point of contest that lots X, Y & Z in plan No. 1439, dated 10.08.1999 of Surveyor Malwenna is possessed by the 2nd Defendant. Whatever it may be having perused the evidence before the District Judge and the two Judgments I find that the Plaintiff and her father in law planted the alastonia and the erabadu trees. This was Plaintiff's evidence (uncontradicted). 2nd Defendant has not given evidence at the trial but relies on the evidence of Surveyor more particularly Surveyor Malwenna to whom a commission was issued. The Court Commissioner's plan and report does not indicate any ditch/drain was found at

the time of the survey. Only in 1919 according to plan V4 a ditch existed at that time which is almost 100 year ago. When Malwenna surveyed, accordingly to his evidence there was no ditch, in 1999.

I agree with the views of the learned High Court Judge and the District Judge that Surveyor Malwenna in plan V3 superimposed Wickremaratne's plan and there was no ditch between the corpus and 2nd Defendants Lot 5, and according to Surveyor Wickremaratne there was no ditch in 1995 between the two lands.

I also note that Surveyor Malwenna in his evidence, though called by the 2nd Defendant party who prepared plan V3 (1493) in his report states there was no ditch on the southern boundary to lot 5. What is found as stated by Surveyor Malwenna in his evidence is only a few trees, which could be found as shown in his plan in the boundary. He further states that in the eastern side of the southern boundary a ditch could be found. It is clear from his evidence that a ditch cannot be found on the southern boundary of lot 5. This Surveyor also shows lot Y is an extra portion of land surveyed by him. As such lot 5 does not form a part of lot 5 in plan V4. Further Surveyor Malwenna in his plan V3 emphasise that he superimposed Wickremaratne's plan. It does not show a ditch between the corpus and the 2nd Defendant's Lot 5. There was no ditch in 1995, between the lands and learned High Court Judge also states so.

Having considered all the material placed before this court I see no legal basis to interfere with the Judgment of the High Court. The learned District Judge has analysed all factual points very correctly. The land surveyed by the Court Commissioner Kumarage's plan depicts the land sought to be partitioned. Plan No. 242 marked 'X' correctly show the boundaries of the corpus. Land shown in V3 and V5 has not been included in the land sought to be partitioned. This court granted leave on 06.07.2012 on the following questions of law.

(i) Whether the learned High Court Judges erred in law by coming to the conclusion that the 2nd Defendant's land was not encroached by the Plaintiff in the circumstances of this case.

(ii) Did the learned High Court Judges err in law by not identifying of the corpus to the satisfaction of the Court in terms of Partition Act?

(iii) Whether the learned High Court Judges errd in law by the conclusion that the land surveyed was less than the extent given in schedule to the plaint there could not have been encroachment?

(iv) Whether the learned High Court Judges err in law by accepting the preliminary plan prepared according to the boundaries shown by the parties as against the superimposed plan No. 1439 prepared by Gamini Malwenna Licensed Surveyor?

All questions of law are answered in favour of Plaintiff-Respondent in the negative. I affirm the judgment of the learned High Judge. This appeal stands dismissed. In the circumstances of this case I make no order for costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT.

B.P. Aluwihare P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda 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 Colombo.

Samathapala Jayawardena,
No. 38, Maligawatta Road,
Colombo 10.

Plaintiff

S.C.Appeal No. 119/09
SC/HCCALA/175/09

Vs

WP/HCCA/COL/50/2007(F)
D.C.Colombo Case No. 25593/MR

People's Bank,
No.75,Sir Chittampalam A.Gardiner
Mawatha, Colombo 2.

Defendant

AND

People's Bank,
No.75,Sir Chittampalam A.Gardiner
Mawatha, Colombo 2.

Defendant Appellant

Vs

Samathapala Jayawardena,
No. 38, Maligawatta Road,
Colombo 10.

Plaintiff Respondent

AND NOW BETWEEN

People's Bank,
No.75,Sir Chittampalam A.Gardiner
Mawatha, Colombo 2.

Defendant Appellant Appellant

Vs

Samathapala Jayawardena,
No. 38, Maligawatta Road,
Colombo 10.

Plaintiff Respondent Respondent
(Deceased)

1. Ariyawathie Jayawardena
2. Tyronne Deepal Jayawardena
3. Buddhika Upamalika Jayawardena
4. Ryan Jayawardena
5. Rienzie Nalin Jayawardena
6. Surath Nilantha Jayawardena

All of No. 38, Maligawatta Road,
Colombo 10.

Substituted Plaintiff Respondent
Respondents

BEFORE **: S. EVA WANASUNDERA PCJ.**
ANIL GOONERATNE J. &
H.N.J. PERERA J.

COUNSEL : S.A. Parathalingam PC with Kushan D'Alwis PC and Kaushalya Nawaratne for the Defendant Appellant Appellant.
M.C.M.Muneer with Pubudu C. Withanage and Chandima Samarasiri for the Substituted Plaintiff Respondent Respondents.

ARGUED ON : 31 .01.2017.
DECIDED ON : 20.02.2017.

S. EVA WANASUNDERA PCJ.

This Court granted leave to appeal on the questions of law contained in paragraph 14 (a), (b) and (c) of the Petition dated 06.10.2009. The said questions read as follows:-

(a) Is the Petitioner as a banker entitled in law to recover the said sum of Rs. 5,532,546/40 from the Respondent on account of monies due from M/s International Rubber Industries Pvt. Limited?

(b)(i) Has the Respondent consented to and acquiesced to the Petitioner recovering the said sum of Rs. 5,532,546/40 from the monies payable to the Respondent?

(ii) If so, is the Respondent estopped in law and/or in fact from challenging the same?

(c) Has their lordships of the High Court of Appeal erred in law in holding that the said Appeal consisted of only questions of fact and therefore the judgment of the learned Additional District Judge should not be interfered with?

Samathapala Jayawardena was a customer of the People's Bank. He was a businessman who was the Managing Director of Nalin Enterprises (Pvt.) Ltd. as well as International Rubber Industries (Pvt.) Limited. He and his wife along with his son were the only Directors of Nalin Enterprises and all of them were Directors in the International Rubber Industries. He had different current accounts for both these business enterprises with the People's Bank. Samathapala obtained certain facilities from the said Bank on account of Nalin Enterprises Pvt. Limited. For this purpose, as he had to secure the repayment of the facilities granted by the Bank. He mortgaged premises No. 63, Kandy Road, Kiribathgoda of which he was the owner. Nalin Enterprises defaulted the payments due on the facilities granted to the company and the Bank passed a resolution to sell the property mortgaged by public auction to recover the monies due. Samathapala wanted to prevent the sale by public auction. Therefore he agreed to sell the mortgaged property and another property owned by his son with life interest reserved in him, to the Bank for a sum of Rs. 53 million.

The Bank purchased the properties by Deed No. 7838 attested on 25.02.1998 and Samathapala, the vendor and his son signed the said Deed of Transfer.

At the time of the transfer of the property to the Bank, the Bank gave Samathapala a pay order for Rs. 24.769241 million which later on, he had encashed. The Bank had deducted Rs. 22.698212 million as against the due amount from Nalin Enterprises as well as Rs. 5.532546 million as against the overdue overdraft facilities from International Rubber Industries.

The Bank's position is that Samathapala had agreed with the Bank to pay all monies due from him as managing director of both companies at the time of the transaction at which the Bank bought the property mortgaged by Samathapala to the Bank and another property which he offered to sell to the Bank. Samathapala filed action **two and a half years later** alleging that the Bank had wrongfully deducted monies due from International Rubber Industries, from and out of the amount which was due to him at the time of the transaction.

There is evidence before the trial court that Samathapala was invited to be present at the time the Board of Management of the Bank decided to deduct all monies due from both the business enterprises. The Board Paper of the Bank had sought from the Board of Directors of the Bank to decide on the deduction of dues from Nalin Enterprises and International Rubber Industries and the Board had decided in the affirmative on the same.

Samathapala's contention is that 'deduction of the monies due on overdraft facilities given to International Rubber Industries' from the purchase price was wrongfully done by the Bank but **he never contends that the said monies were not lawfully due** and that he had failed up to date to repay any money on the overdraft facilities taken by International Rubber Industries. Therefore while Samathapala claims that Rs. 5.532546 million should not have been deducted from the purchase price**, he admits that the said amount was due** from him to the Bank as overdraft facilities granted to International Rubber Industries. He contends that the Bank agreed to buy properties offered by him and recover from the purchase price only what was due from Nalin Enterprises. He states that the Bank had deducted the dues from International Rubber Industries as well and that act of the Bank was wrong. He claims the amount taken by the Bank which is Rs. 5.532546 million, back from the Bank even though that amount was due from him

to the Bank on account of the overdraft facilities granted to International Rubber Industries.

In the Director Board of both the companies Samathapala, his wife and their son were included. Samathapala was the managing director of both companies. He had been a big businessman in the trades that he dealt with in different companies as the managing director who always by himself had the dealings with the Bank. Being an educated man he had discussions with the Bank, applied for loans on mortgages and got overdraft facilities also from the Bank.

The impugned judgment of the Civil Appellate High Court dated 29.06.2009. is a very short one and has stressed only one point. The learned High Court Judge had concluded that the learned District Court Judge had arrived at the decision after hearing the evidence of the case which depends on proven facts and therefore any Court of Appeal should not disturb such a judgment in Appeal. He had quoted from four judgments as authorities one of which I would like to include herein. It is as follows: ***In Haneeda Vs Arasakularatne 1999 3 SLR 271*** it was held thus:
" This Court would interfere with the findings of the District Judge only if such a finding is **perverse or not supportable on the evidence that has been led**, or if the question of fact goes beyond the realm of the factual situation to assume the character of a question of law, or if the question of fact is complex, this Court should intervene. "

Even though the learned judge has quoted this case, he has failed to do exactly what it states. The Appellate Court should always analyze as to whether the conclusion of the lower court judge on the evidence placed before that court is perverse or not supportable on the evidence that had been led. On the face of the said judgment, the learned judge has not even made an attempt to analyze the evidence. He had only reiterated what the learned District Judge had stated in the District Court judgement and affirmed the District Court Judgment without analyzing the evidence by himself to assess whether the finding is perverse or not supportable on the evidence that had been led.

Since leave to appeal has been granted as to whether the Civil Appellate High Court has erred, I wish to state that this Court is burdened with that task, as a question of law. The Plaintiff Respondent Respondent, (hereinafter referred to as the Plaintiff), Samathapala had given evidence marking documents P1 to P5.The

Defendant Appellant Appellant (hereinafter referred to as the Bank), namely the People's Bank , had marked documents D1 to D8 through the Assistant Secretary to the Board of Directors. P1 is evidence of the fact that on 06.11.1977 the Board of Directors of the Bank had passed a resolution to sell the mortgaged property owned by Samathapala the Plaintiff on behalf of his company, Nalin Enterprises Pvt. Limited, by public auction. The said property was the building and land of 15 Perches (Lot B2/2) at No. 63, Kandy Road, Kiribathgoda. In the books of the Bank, the amount due and owing to the Bank from the Plaintiff was Rs.6.999400 million + 15.698812 million + interest at 28% per annum on Rs. 6.999400 million from 07.05.1996 to 06.11.1997 + interest on Rs. 10 million at 29% per annum from 22.08.1997 to date of sale and costs of sale.

Since the Plaintiff did not like the fact that the mortgaged property was to be sold by public auction, the Plaintiff negotiated with the Bank. He later agreed to sell to the Bank not only the mortgaged property belonging to him which was identified as the mortgaged property for the loan under two Bonds, namely Bond No. 6347 and 6663 but also to sell the adjoining property (Lot B1/3)which belonged to his son along with the Plaintiff having life interest therof. Then both the father and the son signed the transfer Deed No.7838 and thus transferred the two properties to the Bank on 25.02.1998. The Plaintiff's selling price was Rs. 53 million. At the end of the day on 25.02.1998 he received a pay order for Rs. 24.769241 million and he had received the said money into his hand. Deed 7838 was marked as P2.

Plaintiff's document P3 dated 14.05.1998, in its first paragraph confirms that he was called to attend a meeting of the Board of Directors and he thanks the Bank for having been able to solve the problems successfully. In the same letter he complains about the Bank having deducted money due on the overdraft facility pertinent to International Rubber Industries Pvt. Limited, for the first time. P4 is the reply to P3 sent by the Bank which informs that the decision to deduct the over due amount on the overdraft facilities regarding the International Rubber Industries was based on the decision of the Board of Directors. P5 is a letter again from the Plaintiff to the Bank to consider the letter P3 as an appeal for correction.

The Plaintiff had given evidence and having agreed that he was called for a Board Meeting stated that he never agreed to deduct the overdue overdraft facilities re International Rubber Industries from the purchase price. He further said, while admitting his signature in the transfer deed 7838 that his son's signature on the

deed was forged and therefore the said deed was a forgery. He admitted that his son had filed action separately to get the said deed annulled. Regarding the deduction of dues on the overdraft facilities, he stressed that he did not agree.

The **Defendant Bank** produced the same Deed 7838 as D1. The Bank produced a letter dated 25.02.1998 as D2 informing International Rubber Industries that the Overdraft Facility **was rescheduled on personal guarantees** of the three Directors. Then, the three Directors had applied for the rescheduled overdraft facility **on the same day** as evidenced by D6. Thereafter the three Directors had signed the surety Bond agreeing to the overdraft facility of **Rs.4 million** and that document was also dated the same day, i.e. 25.02.1998. It was **marked by the Defendant Bank as D7.** The said International Rubber Industries had been enjoying a **Temporary overdraft facility** for a long time at two branches of the Bank at Maligawatta and Kiribathgoda, **without any security** until the balance due and owing to the Bank went all the way up to Rs. 6.820185 million unpaid. When the Plaintiff went for discussions with the Bank, the Bank had been trying to recover all the dues from Samathapala the Plaintiff in one go and that is why at the request of the Plaintiff they had agreed not to sell his mortgaged property by public auction but had invited him to the Board meeting to decide on these matters which were pending in the books of the Bank, at that time as dues from his companies in business.

It is my view that in the normal circumstances there is no way that they would not have discussed about this overdraft overdue amount with the Plaintiff. The very reason for the Bank to have rescheduled the overdraft facility and done the background papers on the very same day, such as writing a **formal letter** informing that the overdraft facility is rescheduled bringing down the due amount from Rs. 6.820185 million to Rs.4 million; getting a **formal overdraft facility application** also signed on the same day and **then getting a formal surety bond signed by all the directors of the company International Rubber Industries** on the same day, amply show that the Bank got ready **to deduct a lesser amount than what was properly due from Samathapala the Plaintiff** regarding this overdraft facility granted to International Rubber Industries. **Why would the Bank have done all those things on one day for any customer.** There is no reason why the Bank had agreed and done a rescheduling of an overdraft facility all in one day. The reason is obvious. They had to do so before the Deed 7838 was signed to calculate the exact amount to be given to the Plaintiff. It may be that they signed

the Deed in the afternoon on the same day. **The overdraft facility which was a temporary one and not paid upto the amount due was above 6 million would not have come down to only Rs. 4 million for no good reason**.

This fact points in favour of the Bank submitting that the Plaintiff had agreed to deduct the amount due on the overdraft facility, **taken and made use of**, by International Rubber Industries. Most of all, the District Judge and the High Court Judges had failed to reckon **that the documents showing these facts were not the Plaintiff's documents but the Defendant's documents.** Therefore the Plaintiff cannot be heard or seen to hide behind the date of the documents produced on behalf of the Defendant Bank and argue that on the same day that the transfer deed was done, the overdraft facility was granted to the Plaintiff rescheduled , lessened etc. for him to pay later on at his own time. It is obvious that these documents were done to facilitate **the settlement to be effected in the proper manner according to the procedures of the Bank.** The Bank cannot in its Books of Accounts, just at once, all of a sudden reduce any amount and take a lesser amount from a customer. The documents had been prepared for that end and no other. I hold that the Plaintiff's evidence to the effect that he is at leisure to pay back his overdraft facility at a future date is sheer untruth.

D3 is a receipt by the Plaintiff to confirm that he received Rs.24.769240 million which is not denied. D5 is an affidavit by the Plaintiff to the effect that Lot B2/2 and his son's property Lot B1/3 , both of which were sold by both of them to the Bank are not affected by the Land Reform laws of this Country.

D8 is the much contested Decision of the Board of Directors. The Plaintiff accepts that he went before the Board of Directors. The Plaintiff accepts that his overdraft facility regarding International Rubber Industries was overdue. He only speaks out and state in evidence that he did not agree for deduction of the overdue overdraft facility. D8 consists of 7 pages. It contains the whole background of the case before the Board. The title to the Board Paper itself reads: " Buying the Property in which the People's Bank Kiribathgoda Branch is Situated. - Nalin Enterprises Pvt. Limited and International Rubber Industries Pvt. Limited – Ovedue Loan and Overdue Overdraft Facilities **Recovery at One and the Same Time**.- Selling of the Property Which is Being Bought." This Board Paper was marked as D8 by the Defense but rejected by the District Judge on the objections raised by the Plaintiff such as that the witness was not a member of the Board

(even though he was the assistant secretary to the Board for 11 years), that there is no seal of the Bank (even though there is a Board Paper number and a date and the signature and official seal of the Deputy General Manager of Domestic Operations of the People's Bank, Head Office, Colombo.) at the end of the Board Paper and the Recommendations. I hold that the rejection of the document D8 by the District Judge was bad in law and was wrong in the interest of justice.

I hold that the Civil Appellate High Court had not analyzed the evidence and assessed the same to see whether the District Judge's judgment was perverse or not and not supportable on the evidence led or not. I have now analyzed the same and hold that the Civil Appellate High Court has erred in its judgment. The Plaintiff had not proved his case and failed to adduce any evidence other than himself stating that he did not agree to pay the overdue overdraft facilities granted to him regarding International Rubber Industries Pvt. Limited. I hold that the balance of probabilities on evidence before the trial judge also stands in favour of the Defendant Bank.

I answer the questions of law enumerated above in favour of the Defendant Bank and set aside the judgment of the Civil Appellate High Court dated 29.06.2009 as well as the judgment of the District Court dated 11.01.2007. The Plaint is hereby dismissed.

Appeal is allowed. However I order no costs.

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

In the matter of an Appeal from a judgment of the Civil Appellate High Court.

Don Andrayas Rajapaksa,
No. 62, Hakmana Road,
Gabadaveediya, Matara.

SC APPEAL No. 120/09
SC/HC CA/LA No. 194/2009
SP/HCCA/Matara/0023/2001(F)
DC/Matara/358/RE

Plaintiff

Vs

Gnanapala Weerakoon
Rathnayake, Aluthkade
alias Middeniyekade,
Hettiyawala East,
Puhulwella,
Kirinda.

Defendant

AND BETWEEN

Don Andrayas Rajapaksa,
No. 62, Hakmana Road,
Gabadaveediya, Matara.

Plaintiff Appellant

Vs

Gnanapala Weerakoon
Rathnayake, Aluthkade

alias Middeniyekade,
Hettiyawala East,
Puhulwella,
Kirinda.

Defendant Respondent

AND NOW BETWEEN

Gnanapala Weerakoon
Rathnayake, Aluthkade
alias Middeniyekade,
Hettiyawala East,
Puhulwella,
Kirinda.

Defendant Respondent Appellant

Vs

Don Andrayas Rajapaksa,
No. 62, Hakmana Road,
Gabadaveediya, Matara.

Plaintiff Appellant Respondent

Shirantha Pushpalal Rajapaksa,
No. 62D, Gabadaveediya, Matara.

Substituted Plaintiff Appellant Respondent.

BEFORE : S. EVA WANASUNDERA PCJ,
ANIL GOONERATNE J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : Rohan Sahabandu PC for the Defendant Respondent Appellant.
Dr. S.F.A. Coorey with Ms. Sudarshani Coorey and Ms. Sithara Jayasundera for the Substituted Plaintiff Appellant Respondent.

ARGUED ON : 03.07.2017.

DECIDED ON : 01.08.2017.

S. EVA WANASUNDERA PCJ.

Leave to Appeal was granted on the questions of law enumerated in paragraph 24(a), (b), (c) and (d) of the Petition dated 25.08.2009. They read as follows:-

1. Has the Plaintiff established before Court that there was a tenancy agreement between parties?
2. Has the Plaintiff established before Court that the Defendant is in arrears of rent from 01.01.1986?
3. Could the High Court act on legally inadmissible and speculative evidence to prove the alleged contract of tenancy?
4. On a disputed question of fact, does the decision of the Learned District Judge attract more weightage than the opinion of the High Court?

The Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) instituted action in the District Court of Matara on 12.09.1995 against the Defendant Respondent Appellant (hereinafter referred to as the Defendant) to eject him from the business premises of which he was a tenant, for non payment of rentals from 01.01.1986. The rent was Rs.90/- per month and the Plaintiff had gone before the Mediation Board prior to action being filed as a pre requisite before filing action. The amount of rentals due was Rs. 10170/- . The non-settlement certificate issued by the Mediation Board was also filed of record.

The Defendant denied tenancy. It was accepted that the premises are governed by the provisions of the Rent Act. A quit notice had been sent on

17.02.1995 and the Defendant had refused to go and as such the Plaintiff had decided to file action. The Defendant's position was that he came into the occupation of the premises in 1977 as the tenant of one Rajapakse for a monthly rental of Rs. 25/- and since then he had been conducting his business in the said premises and paid rentals but however, he states that **he had no tenancy contract with the Plaintiff.**

The trial commenced with three admissions and 13 issues. The Plaintiff gave evidence and marked documents P1 to P5. The Plaintiff gave evidence on 13.07.1998, 16.06.1999 and on 22.03.2000 and he had been cross examined at length by the counsel for the Defendant. The Plaintiff's counsel closed his case marking in evidence, the documents P1 to P5 without any objection. Prior to closing the case, both parties agreed that the letter P1, which was the quit notice need not be proven by leading evidence through any other person. Theafter, the Defendant's lawyer requested that he be given another date to lead evidence for the defence. Court put off the case for further trial on 15.01.2001. On that day, the Attorney at Law for the Defendant had informed court that he did not have any instructions from his client to appear on his behalf any more. The documents were then submitted to court by the Plaintiff's counsel. The District Judge who heard the case fixed it for judgment on 24.01.2001. The Judgment was delivered on 24.01.2001 **dismissing the Plaint**. It was a short two A4 page judgment. The basis for the dismissal was that it was **not proved** that there was **a contract of tenancy** between the Plaintiff and the Defendant. The trial Judge also held that the evidence adduced in the action was not sufficient to establish that the Defendant had taken the premises on rent from the Plaintiff.

The Plaintiff appealed against the said judgment to the Civil Appellate High Court. The judgment in the Appeal was delivered on 29.07.2009 allowing the Appeal and granting what the Plaintiff prayed for in the Plaint, namely for ejectment, recovery of arrears of rent at a monthly rate lesser than claimed in the Plaint, recovery of damages with costs of the suit in Appeal.

The ground for filing action for ejectment of the Defendant was that there was arrears of rent for well over three months after rent became due and that the tenancy had then been terminated. The Defendant in his answer denied tenancy under the Plaintiff and asserted that he was the tenant of one Amarapala Rajapakse who was a brother of the Plaintiff. I observe that the Defendant defaulted in his appearance in Court on the day which was specifically granted by court for the defense.

The High Court Judges had pointed out that the **standard of proof is based on a mere balance of probability.** The High Court analyzed the evidence led in the District Court and determined that the Defendant was **the tenant of the Plaintiff in respect of the premises in suit.** The Defendant had admitted the receipt of the quit notice by which tenancy was terminated but did not respond to the same. The Defendant could have replied to the Plaintiff and easily stated that he was not the tenant of the Plaintiff, if it was in fact so. The Defendant had not replied at all. The documents supportive of the oral evidence of the Plaintiff were produced in evidence without any objections. Those documents confirmed the stance of the Plaintiff. The Plaintiff was the uncle of the Defendant and that was the reason for having kept on asking for arrears of rent and having waited for very long before action was finally filed to eject the Defendant. Within the course of this protracted suit in Appeal the Plaintiff has passed away and now there is a substituted Plaintiff Appellant Respondent.

The Defendant did not give evidence to contradict the position taken up by the Plaintiff at the trial. In the case of ***Edrick de Silva Vs Chandradasa de Silva 1967, 70 NLR 169,*** it was held that " Where the Petitioner has led evidence sufficient in law to prove his status, i. e. *a factum probandum*, the failure of the Respondent to adduce evidence which contradicts it adds a new factor in favour of the Petitioner. There is then an additional ' matter before court ', which the definition in Sec. 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the Petitioner is uncontradicted. The failure to take account of this circumstance is a non-direction amounting to a misdirection in law. " Then again, in the case ***of Cinemas Ltd. Vs Sounderarajan 1998, 2 SLR 16,*** it was held that **"** Where one party to a litigation leads prima facie evidence and the adversary fails to lead contradicting evidence by cross examination and also fails to lead evidence in rebuttal, it is a 'matter' falling within the definition of the word 'proof' in the Evidence Ordinance and failure to take cognizance of this feature and matter is a non-direction amounting to a misdirection." I find that the High Court has analyzed the evidence taking into account the fact that the Defendant had failed to give evidence or even failed to contradict the evidence on record by cross examination and thus, has correctly answered the issues in accordance with the evidence.

The Defendant's Counsel has quoted the dicta from **Fradd Vs Brown and Company Ltd. 20 NLR 282** and the cases which followed the said case, namely,

Munasinghe Vs Vidanage 69 NLR 97, A.G. Vs Gnanapragasam 68 NLR 49, Perera Vs Dias 59 NLR 1, to substantiate the position that the Appellate Court could not overrule or could very rarely overrule the opinion of a trial judge who has had the priceless advantage of having seen and heard and observed the demeanor of the witnesses. Yet, even though I do not wish to quote from all the four cases quoted by the Defendant's counsel, I wish to quote from the case of ***M.P.Munasinghe Vs C.P.Vidanage and Another 69 NLR 97***, which was decided by the Privy Council which consisted of Lord Guest, Lord Pearce, Lord Upjohn, Lord Pearson and Sir Frederic Sellers as Judges. It was held that 'the jurisdiction of an appellate court to review the record of the evidence in order to determine whether the conclusion reached by the trial judge upon that evidence should stand, has to be exercised with caution.' The said Judges quoted a paragraph from the case of **Watt or Thomas Vs Thomas 1947 A.C. 484 at pp 485-6** within the aforementioned Munasinghe case. It reads – per Viscount Simon " If there is **no evidence to support a particular conclusion** (and this is really a question of law) the **Appellate Court will not hesitate so to decide**. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the Appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. **This is not to say that the judge of the first instance can be treated as infallible** in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

I am of the opinion that in the case in hand, the High Court has read the oral evidence which was supported by proven documentary evidence in the District Court ; analyzed them in the proper perspective on a balance of probability and answered the issues correctly, thus granting the reliefs prayed for by the Plaintiff in accordance with the ratio decidendi of the aforementioned cases .

I answer the questions of law number 1 and 2 in the affirmative. With regard to question number 3, I hold that the High Court has correctly acted on the evidence led before the trial judge, on the basis of a correct balance of probability and arrived at the conclusion that there was a contract of tenancy between the Plaintiff and the Defendant. The question number 4 is answered

by me in this way, i.e. that, any disputed question of fact in any civil case has to be determined by taking the oral evidence as well as the documentary evidence before the trial judge **as a whole within the case** ; the decision of the District Judge depends on the analysis of evidence he makes on a balance of probability; the opinion of the Appellate High Court also depends on the analysis of the same evidence on a balance of probability; and therefore, it cannot be said that the decision of the District Judge attract more weightage than the opinion of the High Court Judge, even though the District Judge has had the advantage of seeing the demeanor of the witness. In the case in hand, the District Judge has not taken the advantage of having seen, heard and observed the witness when he decided that there was not sufficient evidence before court to prove his case when the documents produced by the Plaintiff were not objected to and cross examined to elicit evidence to the contrary by the counsel for the Defendant. Neither did the Defendant give evidence at the trial.

The Civil Appellate High Court has analyzed the evidence on paper with the contents of the documents proven in court without any objections by the other contesting party , on a balance of probability and concluded that the Plaintiff had proven his case to get the reliefs prayed for in the Plaint.

I confirm the judgment of the Civil Appellate High Court dated 29.07.2009 and set aside the judgment of the District Judge dated 24.01.2001. The Appeal is dismissed with costs of suit in all courts.

Judge of the Supreme Court

Anil Gooneratne J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda 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.

1. Navarajakulam Muthukumaraswamy, No.18, Lilly Avenue, Colombo 06.
2. Vaithilingam Muthukumaraswamy, No. 18, Lilly Avenue, Colombo 06.

Plaintiffs

SC APPEAL No. 122/2013.

SC HCCA (LA) No. 240/2012.

C.A. (FINAL) APPEAL No: WP/LACA/LA/116/06 Vs

D.C. Mt. Lavinia Case No. 1875/04/L

1. Suresh Thirugnanasampanthan, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda.
2. Gowreshwary Suresh, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda.

Defendants

AND

1. Navarajakulam Muthukumaraswamy, No.18, Lilly Avenue, Colombo 06.
2. Vaithilingam Muthukumaraswamy, No. 18, Lilly Avenue, Colombo 06.

Plaintiffs Appellants

Vs

1. Suresh Thirugnanasampanthan,
No. A/136, Maddumagewatte
Housing Scheme, Maddumagewatte,
Nugegoda.
2.Gowreshwary Suresh, No. A/136,
Maddumagewatte Housing Scheme,
Maddumagewatte, Nugegoda.

Defendants Respondents

AND NOW

1.Navarajakulam Muthukumaraswamy,
No.18, Lilly Avenue, Colombo 06.
2.Vaithilingam Muthukumaraswamy,
No. 18, Lilly Avenue, Colombo 06.

Plaintiffs Appellants Appellants

Vs

1. Suresh Thirugnanasampanthan,
No. A/136, Maddumagewatte
Housing Scheme, Maddumagewatte,
Nugegoda.
2. Gowreshwary Suresh, No. A/136,
Maddumagewatte Housing Scheme,
Maddumagewatte, Nugegoda.

Defendants Respondents Respondents

BEFORE : PRIYASATH DEP PC. CJ.
S. EVA WANASUNDERA PC. &
H. N. J. PERERA J.

COUNSEL : Harsha Soza PC with M. Jude Dinesh for the Plaintiffs Appellants Appellants.
Ikram Mohamed PC with S. Mithrakrishnan and Nadeeka Galhena for the Defendants Respondents Respondents

ARGUED ON : 20.03.2017.
DECIDED ON : 30.05.2017.

S. EVA WANASUNDERA PCJ.

This Court has granted leave to appeal on two questions of law contained in paragraph 19(a) and (g) of the Petition dated 25.06.2012. They read as follows:

1. Did the High Court err in law in holding that the said informal agreement P2 is enforceable in law, ignoring the fact that the said agreement was not duly attested by the Notary Public as required by Sec. 2 of the Prevention of Frauds Ordinance and as such was of no force or avail in law as expressly declared by Sec. 2 of the Prevention of Frauds Ordinance?
2. Did the High Court err in ordering specific performance of the informal agreement P2 without considering the submissions that it was not in any event a fit and proper case to order specific performance in view of the matters set out in paragraph 18(m) hereof?

Since the 2nd question refers to paragraph 18(m) it seems necessary to place herein the contents of the said paragraph. It reads as follows:

In any event the learned judge of the High Court erred in law in granting specific performance of the informal agreement sought by the Defendants totally disregarding the submission that,

(i) In any event, in the circumstances of the case after the intended date of performance, i.e. 22.09.1993, the said informal agreement stood

cancelled automatically, and thereafter no enforceable rights flowed from the said agreement. Hence the Defendants were not entitled to seek specific performance of the said agreement in 2004/2005.

(ii) Specific performance will not be granted when the Plaintiff has himself been guilty of delay in performing his part of the contract. In the instant case the Defendant (the party seeking specific performance) are themselves guilty of delay in performing their part of the contract.

(iii) Specific performance will not be granted unless it is fair and just. The price was agreed in 1993. To order the Plaintiffs to transfer the property for the same price after 20 years where the real value of Rs. 500,000/- is very much lower than what it was in 1993 is grossly unjust.

Mr. and Mrs. Muthukumaraswamy were living in No. 18, Lilly Avenue, Colombo 6 in 1993 and they have filed action on 04.06.2004 against Mr. and Mrs. Suresh Thirugnanasampanthan for a declaration of title to the Unit No. A/136, Maddumagewatte Housing Scheme, Maddumagewatta, Nugegoda and for ejectment of the Defendants.

By 2005, at the time evidence was placed before the trial court and even in 1993, Muthukumaraswamy and family had been living at No. 50, Brookmill Boulevard, Unit No. 34, Scarborough, Ontario, Canada. Mrs. Muthukumaraswamy entered into a sale agreement, No. 1147 dated 22.03.1993 to sell premises No. A/136, Maddumagewatte HousingScheme, Nugegoda to Mr. and Mrs. Thirugnanasampanthan. The agreed sale price was Rs. 750000/- and the purchasers agreed to complete payment within 6 months and paid as an advance Rs.250000. **Paragraph 7 of the said agreement provided for specific performance if the vendor failed to execute the deed.** However, the 1st Plaintiff had not received the title deed from her predecessor in title, namely the Commissioner of National Housing up until 13th December, 2002. So, **there was no title deed with the vendor to pass title to the purchaser** at the time of the sale agreement or even at the end of the 6 months period for payment by the purchaser or for the seller to execute the deed of sale.

Mr. and Mrs. Suresh Thirugnanasampanthan did not pay the balance Rs. 500000/- to Mrs. Muthukumaraswamy within six months because the seller who agreed to sell had no paper title in his hands. The Thirugnanasampanthan family has been

occupying the housing unit from 1993. Now the housing units have gone up in price. The seller who agreed to sell the housing unit does not want to sell the same to the agreed purchaser but wants the said agreed purchaser and his family who are occupying the premises, to be ejected. The Defendants claim that they are entitled to get specific performance effected from the 1st Plaintiff who agreed to sell. The position taken up **by the vendor who signed the sale agreement is that it is not a valid deed because it does not have a proper attestation.**

The District Judge held with the Defendants. The Plaintiffs appealed to the Civil Appellate High Court. The High Court affirmed the judgment of the District Court. Now the Plaintiffs are before this Court by way of an Appeal once again.

At the beginning of the trial, parties recorded the **admissions,** i.e. **paragraphs 1,3 and 4 of the Plaint**, **documents P3 and P4 and the fact that the 1st Plaintiff had received the title deed in December, 2002**. P3 is the letter of demand to vacate the premises and P4 is the reply to the same. Paragraph 1 of the Plaint states that the housing unit is owned by the 1st Plaintiff. Paragraph 3 states that the said housing unit was bought by the 1st Plaintiff from the National Housing Development Authority for Rs. 97500/- . The final instalment was paid in April 1991 but the **1st Plaintiff received the title Deed No. 893 dated 13.12.2002** which is marked as P1 with the Plaint. Paragraph 4 of the Plaint states **that " On or about 22.03.1993 the 1st Plaintiff entered into an Agreement with the *Defendant* and his wife whereby the Defendant and his wife agreed to purchase the aforesaid unit No. A/136 Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda from the 1st Plaintiff for a sum of Rs. 750000/-."**

Therefore, the stance taken up by the Plaintiffs, who are the Appellants in this case, is that **an agreement was entered into** between the 1st Plaintiff and the Defendants whereby the Defendants agreed to purchase the housing unit. I have noted that according to the proceedings in the District Court case, the Plaintiffs had moved court to add the 2nd Defendant who is the wife of the 1st Defendant who was the only Defendant when the case was originally filed. That application had been allowed and that is why both of them are parties to this action as Defendants.

The argument of the Plaintiffs at the trial was that the said agreement P2 dated 22.03.1993 is not a valid agreement in law because the Attorney at Law before

whom the document was signed has not attested the same in compliance with Sec. 2 of the Prevention of Frauds Ordinance. I find that the Attorney at Law has signed the said document in two places, once along with the parties, after the parties and the witnesses have signed and then at the end of the document mentioning in writing that " I certify that this document was signed in my presence".

Either party who has signed a document cannot claim at a later stage, that the document is not binding on either party taking advantage of the fact that the document was not duly attested. The basis of the Plaint commences with the admitted fact that Agreement P2 was signed by the parties. The intention of either party at the time of signing the same was to be bound by the terms and conditions of the same. Later by law they are estopped from claiming that the document is bad in law and that they are not bound by it.

The Plaintiffs Appellants Appellants (hereinafter referred to as Plaintiffs) argued that the said Agreement is not valid in law. They have, in their oral submissions as well as in their written submissions quoted from authorities, namely***, Kusumsiri Mohini Gunasekera Vs Nayavamitta Gunawathie Gunawardena and Others (unreported C.A.Appeal No. 77/88(F), G.P. Nathaniels Vs A.I.Nathaniels and three Others 2008 BLR 349 , Ausadahamy Vs Kiribanda Vol 5 CLW 57 and De Silva Vs De Silva Vol. 51 CLW 29.*** I have considered the material in the said cases.

Section 31 of the Notaries Ordinance provides that rules should be observed by the Notaries. Rule 20 of Section 31 deals with the form of the attestation. However, Section 33 of the Notaries Ordinance provides that " No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in Section 31 in respect of any matter or form. " In the case of ***Thiyagarasa Vs Arunodayam 1987 2 SLR 184*** it was held that the deed in question is not rendered invalid by an omission of the Notary to state the correct date in the attestation. ***In Wijeratne Vs. Somawathie 2002 1 SLR 19*** Justice Udalagama held that " non compliance with the rules in Sec. 31 of the Notaries Ordinance does not invalidate the Deed as provided for by Sec. 33 of the same Ordinance; that section protects the deed."

The facts of the case admittedly is that the Defendants Respondents Respondents (hereinafter referred to as the Defendants) had paid a sum of Rs. 250000/- and

the balance amount was due by 22.09.1993. The Plaintiffs claim that this sum was not paid to them before that date. The Defendants were placed in possession of the housing unit after the advance payment was done.

It is an admitted fact once again that the Plaintiffs did not possess a title deed at the time of the Agreement and the National Housing Development Authority had delayed in giving the title deed. The delayed Deed No. 893 dated 13.12.2002 is the basis of title of the housing unit claimed by the Plaintiffs. The 1st Defendant being the potential purchaser according to the Agreement cannot be expected to pay the balance of Rs.500000/- without getting a title deed. There was no title held by the Plaintiffs or no title deed or any form of passing title from the National Housing Development Authority to the Plaintiffs until the end of 2002 which was 9 years after the Agreement. In this scenario, there could never have been any way to pass title or receive title. The 1st Defendant cannot be expected to pay the balance and get no title. That was the reason for not paying the balance within six months from the date of the agreement.

Therefore I hold that the Defendants cannot be found fault with for not paying the balance. At the end of the trial when the Plaintiffs filed action to eject the Defendants, the trial judge held with the Defendants and dismissed the Plaint. At that time, the Defendants had deposited the balance Rs.500000/- in court. However the Plaintiffs Appellants Appellants have submitted that it is a serious omission on the part of the Defendants Respondents Respondents not to have deposited the money at the time this case was *instituted*. I hold that it is not an omission or a failure by the Defendants as the case was instituted by the Plaintiffs. The Defendants would not have expected the Plaintiffs not to pass title to them when the Plaintiffs finally received the title deed from the National Housing Development Authority in the year 2002. It is after nine years from the time the Defendants paid the advance to the Plaintiffs to buy the housing unit that in fact the Plaintiffs got title to the unit. Instead of passing title to the Defendants as agreed in 1993, the Plaintiffs had filed action to eject the Defendants. I am of the view that it was the first time and the first opportunity and the right time for the Defendants to deposit the money in the District Court when the Plaint was dismissed by the trial court. It has to be understood that they could not have deposited any money anywhere when they were not sure whether the vendor in the agreement, namely the Plaintiffs had in fact received title to the said property from the National Housing Development Authority.

Specific performance is what the Defendants had prayed for in their Answer to the Plaint. **The trial judge while dismissing the Plaint had granted the reliefs prayed for by the Defendants.** The District Judge had analyzed the evidence well and decided the case in favour of the Defendants. When the Plaintiffs appealed to the Civil Appellate High Court, the High Court Judges had also held with the Defendants Respondents by **affirming the judgment of the District Judge.** When the Agreement is valid in law, the parties should comply with the conditions as agreed. The Plaintiffs were living in Canada. The Defendants were in the housing unit. Possession was given when the advance was paid. There was no way to pay the balance and get title from the Plaintiffs simply because they did not have legal title to the said housing unit until the end of 2002. The passing of title was possible only at that time. The Defendants had been prevented from paying the balance and getting title to the housing unit due to the fact that the Plaintiffs had no legal title to transfer. I hold that it was not due to any fault of the Defendants that the balance purchase price got delayed to be paid. The balance could have only been paid at the time of the transfer deed being executed. **There was no opportunity created by the Plaintiffs to accept the balance and transfer the property due to the fault and lapses on the part of the Plaintiffs.**

The argument of the Plaintiffs that at the expiry of the six months from the date of the agreement which was the dead line for the transfer to take place, no legal right flow to either party is a fallacy. If that argument is upheld, no legal agreement could be given effect to. Anybody who wants to go against the conditions of any agreement, then , would only have to wait till the time limit passes by. I dismiss that argument as an invalid argument.

I also wish to state that whatever the arguments placed before the Civil Appellate High Court have been looked into prior to concluding the case. It may be that the counsel expect the judge to analyze each and every argument and specifically mention all the limbs of the argument and give reasons for setting each argument aside or holding up each argument right. This is an impossible task for a judge. The judge will definitely write the arguments which leads up to the conclusion. The Judge cannot be expected to break down each argument of each counsel. Counsel must remember that , the duty of the judge is to determine and decide the case to a conclusion. The Plaintiffs counsel has alleged that the arguments put

forward by him has not been considered. I hold that the High Court has considered all arguments and affirmed the judgment of the District Judge for good reasons.

After having considered the arguments and written submissions made by both parties, I answer the questions of law enumerated above at the commencement of this judgment, in favour of the Defendants Respondents Respondents. The Defendants are entitled to the reliefs prayed for in their answer in the District Court and get the Registrar of the District Court to execute and deliver a Deed of Transfer of the housing unit as they have already deposited the balance money to the credit of the Plaintiffs in the registry of the District Court. However the Defendants Respondents Respondents are further directed to deposit in the District Court, in favour of the Plaintiffs Appellants Appellants, legal interest on Rs. 500,000/- from the date on which the said balance money of Rs. 500,000/- was due to be paid, i.e. from 22.09.1993 up to the date hereof, prior to the execution of the Deed of Transfer.
The Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

Priyasath Dep PC.
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 125/2015

SC/HCCA/LA/ 24/2013 (LA)
WP/HCCA/GAMP/44/2013
D.C. Attanagalla Case No. 1253/M

In the matter of an Application for Leave to Appeal against the Judgment dated 03.12.2014 delivered by the Provincial High Court of the Civil Appeals of the Western Province (Holden at Gampaha) in Case No. WP/HCCA/GPH/44/2013 (LA)

Hatton National Bank PLC
No. 479, T.B. Jaya Mawatha,
Colombo 10.
and previously at 481, T.B. Jayah Mawatha, Colombo 10.
And having and maintaining a branch office at 22, Kandy Road, Nittambuwa (previously known as Hatton National Bank Ltd)

PLAINTIFF

Vs.

1. Sakalasuriya Appuhamilage Upul Aruna Shantha
   Kukulnape,
   Pallewela.

2. Senanayake Amarasinghe Mohotti Appuhamilage Sudath Denzil
   No. 64, Kirindiwita.
   Gampaha.

3. Subasinghe Dissanayake Appuhamilage
   Upul Hemantha Subsasinshge,
   No. 74, Marapola,
   Veyangoda.

DEFENDANTS

AND BETWEEN

Hatton National Bank PLC
No. 479, T.B. Jaya Mawatha,
Colombo 10.
and previously at 481, T.B. Jayah Mawatha, Colombo 10.
And having and maintaining a branch office at 22, Kandy Road, Nittambuwa (previously known as Hatton National Bank Ltd)

PLAINTIFF-APPELLANT

Vs.

1. Sakalasuriya Appuhamilage Upul Aruna Shantha
   Kukulnape,
   Pallewela.

2. Senanayake Amarasinghe Mohotti Appuhamilage Sudath Denzil
   No. 64, Kirindiwita.
   Gampaha.

3. Subasinghe Dissanayake Appuhamilage
   Upul Hemantha Subsasinshge,
   No. 74, Marapola,
   Veyangoda.

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

Senanayake Amarasinghe Mohotti
Appuhamilage Sudath Denzil
No. 64, Kirindiwita.
Gampaha.

2ND DEFENDANT-RESPONDENT-APPELLANT

Hatton National Bank PLC
No. 479, T.B. Jaya Mawatha,
Colombo 10.
and previously at 481, T.B. Jayah Mawatha, Colombo 10.
And having and maintaining a branch office at 22, Kandy Road, Nittambuwa (previously known as Hatton National Bank Ltd)

PLAINTIFF-APPELLANT-RESPONDENT

Vs.

1. Sakalasuriya Appuhamilage Upul Aruna Shantha
   Kukulnape,
   Pallewela.

2. Subasinghe Dissanayake Appuhamilage Upul Hemantha Subsasinshge,
   No. 74, Marapola,
   Veyangoda.

DEFENDANT-RESPONDENT-RESPONDENTS

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

Anil Gooneratne J.

Nalin Perera J.

COUNSEL: Ms. Sudarshani Cooray with Ms. Sithara Jayasundera
For 2nd Defendant-Respondent-Appellant

Viran Fernando for Plaintiff-Appellant-Respondent

ARGUED ON: 04.07.2017

DECIDED ON: 27.07.2017

ANIL GOONERATNE J.

This was an action on a Finance Lease Agreement entered between the Plaintiff-Petitioner-Respondent Bank and the 1st Defendant-Respondent. The 2nd and 3rd Defendants were the guarantors to the above agreement and action was filed in the District Court of Attanagalla. 1st and 3rd Defendant-Respondents did not appear in court and the case was fixed ex-parte against them. The 1st Defendant failed and neglected to pay the regular payment due to the Bank and Plaintiff-Petitioner-Respondent Bank filed action to recover a sum of Rs. 1,578,204/30 and interest thereupon at 36% p.a from 18.12.2008.

It is said that the evidence of the Plaintiff witness was led by the Plaintiff Bank and said Finance Lease Agreement, annexed to the plaint marked 'A' was sought to be marked in court and the counsel for the 2nd Defendant-Respondent objected for same being marked in evidence on the basis that the

said agreement has not been stamped. The learned District Judge by his order of 3.10.2013 upheld the objection of the 2nd Defendant and refused to mark and permit to produce the said lease agreement in evidence. On appeal by the Plaintiff-Respondent to the relevant High Court, the Plaintiff succeeded and the appeal was allowed. The 2nd Defendant-Appellant appealed to the Supreme Court and leave was granted on 21.07.2015 on questions of law referred to in paragraphs 7(a) to (d) of the petition filed of record. The said question read thus:

(a) Has their Lordships erred in failing to appreciate that upon the plain reading of the words in Gazette Extraordinary Notification. No. 1465/20 Item No.15 in the schedule to the gazette, exempts all Hire Purchase Agreements from stamp duty, except Agreements in relation to vehicles used for travelling;

(b) Has their Lordships erred in failing to appreciate that term "Private" being excluded from the latter Gazette Notification No. 1465/20 has been done to include all hire purchase agreements within the purview of the instruments required to be stamped;

(c) Has their Lordships of the Provincial High Court erred in failing to appreciate that the Deputy Commissioner of the Department of Inland Revenue has no authority to interpret a gazette issued by Minister of Finance and state that the term "Motor Vehicles Used for Travelling" does not include Motor Coaches and Lorries" and hence the said letters should not be considered by a Court of Law.

(d) Has their Lordships erred in failing to appreciate that when there arises a conflict in interpreting the gazette and the matter is before a Court of Law, a public officer should not be allowed to interpret the law and this duty is

vested only with the Court when two conflicting opinions are derived from the words of the legislature and hence this letter should not be considered at all;

The law relating to stamp duty is found in the Stamp Duty Act as Amended and the relevant Gazette Notification. The relevant Sections of the Act in a gist are as followoms:

Section 3(1) of Act No. 12 of 2006 permits the Minister to determine the stamp duty payable on "specified instruments".

Section 4 of the same Act identifies "a lease or hire of any property" as a specified instrument.

Section 5 of the Act also empowers the Minister to "by Order published in the Gazette specify the instruments, which shall be exempt from the payment of stamp duty.

Section 5 enacts that the Order published in the gazette specify the instrument which are exempt from stamp duty. The subject matter of the suit is a 'motor coach'.

My attention was drawn by learned counsel for Plaintiff party, of two gazettes. Vide Gazette Extraordinary No. 1439/2 dated 03.04.2006 and later Gazette Extraordinary 1465/20 dated 05.10.2006. Item 15 of Gazette 1465/20 reads as an exemption:

"Any instrument relating to any finance lease executed in respect of any property other than any such finance lease in respect of any motor vehicles used for travelling;"

The Sinhala version reads as follows:

"ගමන් බිමන් සඳහා යොදා ගන්නා මෝටර් වාහන සම්බන්දයෙන් වන මුල්‍ය කල් බදු ගිවිසුමක් හැර යම් දේපලක් සම්බන්ධයෙන් ක්‍රියාත්මක කරන ලද මුල්‍ය කල් බදු ගිවිසුමක් "

The earlier Gazette Extraordinary No. 1439/2 of 03.04.2006 reads thus:

"A finance lease executed in respect of any property (other than any such finance lease in respect of motor vehicles used for travelling);"

The Sinhala version reads thus:

යම් දේපලක් සම්බන්ධයෙන් ක්‍රියාත්මක කරන ලද මුල්‍ය කල් බදු ගිවිසුමක් (පුද්ගලික ගමන් බිමන් සඳහා යොදා ගන්නා මෝටර් වාහන සම්බන්ධයෙන් වන මුල්‍ය කල් බදු ගිවිසුමක් හැර)

The later gazette that was issued should prevail and the English version of the above gazettes are identical. The Sinhala version of Gazette 1439/2 carries an important qualification not explicit in the English version.

However, the Sinhala language version of the Gazette Extraordinary No. 1439/2 dated 03.04.2006 was in the following terms.

The words 'පුද්ගලික' has been omitted in Gazette – 1463/20 of 05.10.2006. Does the legislature intend to omit 'පුද්ගලික'? The later gazette also introduced some changes. Gazette 1439/2 of 03.04.2006 refer to පුද්ගලික ගමන් බිමන්. Thus an instrument which lease a motor vehicle that is used for private travel would be subject to stamp duty.

The omission as stated above may be a deliberate intent of the legislature (Gazette 1465/20). A careful comparison of the two gazette would make one realise of the slight change. The above change as stated above is not the only change. Earlier gazette refer to 20 items that are exempt and the later gazette exempt only 6 items. Therefore the argument that it cannot be said that the gazette issued for the purpose of charging stamp duty on leases of all type of vehicles, may not stand. It is questionable.

N.S. Bindra refer to the case of *Lord Herschell, Bank of England Vs. Vagliano Brothers (1891) AC 107.*

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

Learned counsel for Plaintiff party also emphasis on another aspect. It was argued that the word 'පුද්ගලික' may not make a substantial difference to

the order of the Minister. The simple reading of the gazette appears to state that Finance Leases on vehicles used for travelling would be liable for stamp duty. I would add that 'liable' would mean answerable, or exposed or subject or likely. As such can one state stamp duty would not be chargeable for finance leases on all vehicles but merely for those used for travelling. The simplest of the definition for travelling would be conveyance. Vehicles are used for travelling and not usually for any other purpose. There are no vehicles that are not used for travelling, but may be connected to some other purpose. The English words travelling does not exactly mean the word 'ගමන් බිමන්'. The term ගමන් බිමන් could be distinguished from ප්‍රවාහනය ගමන් බමන් connected to personal activity. Gazette 1465/05.10.2006 should be interpreted to make Motor Coach which is used for passenger transporting not liable to stamp duty. It is however arguable and a question of interpretation.

In any event Section 33 of the Stamp Ordinance reads thus:

> "33 (1) No instrument chargeable with stamp duty shall be received or admitted in evidence by any person having by law or consent of parties authority to receive evidence or registered or authenticated or acted upon by any person or by any officer in a public office or corporation or bank or approved credit agency unless such instrument is duly stamped.
>
> Provided that any such instrument may-
>
> (a) be admitted in evidence by any person having by law or consent of parties authority to receive evidence; or
>
> (b) if the stamp duty chargeable on such instrument is one thousand five hundred rupees or less, be acted upon by the Registrar General.

> Upon payment of the proper duty with which it is chargeable or the amount required to make up the same and a penalty not exceeding three times the proper duty."

The Plaintiff party could not have had any notice of the objection taken by 2nd Defendant as the pleadings filed of record does not refer to such an objection. It is essential to give an opportunity to the concerned party to cure such a defect and proceed with such suit. If there is a deficiency of stamping party concerned should be permitted to supply the deficiency. It would amount to an injustice if the concerned party is denied of such a right as the above section contemplates of curing the defect.

In *Wickremasinghe and others Vs. The Goodwill Marine Academy (Pvt) Ltd. 2001 (2) SLR 284*

> "Under the proviso to S. 33(1) such an unstamped bond may be admitted in evidence upon payment of the proper duty or the amount required to make up the same and a penalty not exceeding three times the proper duty".

Ceylease Financial Services Ltd. Vs. Sriyalatha 2006 (2) SLR 169

> "stamp duty should be paid prior to the admission of the relevant instrument. In the circumstances, 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".

In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should in all cases of doubtful significance, be presumed to be true

one. Maxwell on Interpretation of Statute 12th Ed Pg. 199. On General Principles of Interpretation 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".

The duty of court is to expound the law as it stands and to leave the remedy to others. *Suttars Vs. Briggs (1922) AC 1 at 8*.

The relevant gazette or the later one exempts all finance leased executed in respect of any property. The finance leased executed for motor vehicles used for travelling is not exempted. This seems to be the most ordinary simple meaning that could be given to the relevant exemption.

A court is not entitled to read words into an Act of parliament unless clear reasons for it is to be found within the four corners of the Act itself *Vickers Sons & Maxim Ltd. vs. Evans (1910) AC 444 at 445.*

Interpretation of a statute is a matter for a Court of Law. A Deputy Commissioner of the Department of Inland Revenue has given an interpretation to the relevant gazette and this court is not in a position to accept such an interpretation. The learned District Judge correctly disregarded it but not the High Court. I observe that the High Court was in gross error to rely on such an interpretation of the Deputy Commissioner. The relevant provision of the

gazette is very simple and could be given its ordinary meaning, and the words to be understood as it is. I am unable to give any extended meaning.

The questions of law 7(a) to (d) are answered as follows:

(a) yes.

(b) Answered as 'yes' in favour of the 2nd Defendant-Respondent-Appellant.

(c) Yes.

(d) Yes.

Upon a consideration of all the facts and circumstances, I set aside the Order of the High Court. Plaintiff-Respondent Bank is directed to correctly stamp the instrument and produce it in the District Court. Case remitted to District Court. The learned District Judge is directed to go ahead with the trial after receiving the instrument which has to be duly stamped. This appeal is partly allowed as aforesaid, with costs.

Appeal partly allowed.

JUDGE OF THE SUPREME COURT

S.E Wanasundera 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 appeal against the judgment of the
Court of Appeal in CA Appeal No. 1063/98(F) dated 27.9.2012

Nuwarapakshage Neelakanthi alias Baby
Wanduradeniya, Damunupla

Plaintiff

SC Appeal 129/2013
SC/SPL/LA/247/2012
CA 1063/98 (F)
DC Kegalle 4629/L

Vs

Nuwarapakshage Balasuriya
Wanduradeniya, Damunupla

Defendant

AND
Nuwarapakshage Balasuriya
Wanduradeniya, Damunupla

Defendant-Appellant

Vs
Nuwarapakshage Neelakanthi alias Baby
Wanduradeniya, Damunupla

Plaintiff-Respondent

And Now Between

Nuwarapakshage Balasuriya
Wanduradeniya, Damunupla

Defendant-Appellant-Petitioner-Appellant

Vs

Nuwarapakshage Neelakanthi alias Baby
Plaintiff-Respondent-Respondent-Respondent

Before : Sisira J De Abrew J
Priyantha Jaywardena PC J
Nalin Perera J

Counsel : Gamini Hettiarchchi for the Defendant-Appellant-Petirtioner-Appellant
Priyantha Alagiyawanna with Isuru Weerasuriya for the
Plaintiff-Respondent-Respondent-Respondent

Argued on : 8.3.2017
Written Submission
tendered on : By the Appellant on 27.3.2014
By the Respondent on 8.1.2014

Decided on : 30.6.2017

Sisira J De Abrew

This is an appeal filed by the Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) against the judgment of the Court of Appeal wherein it affirmed the judgment of the learned District Judge who held in favour of the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent). This court by its order dated 20.9.2013 granted leave to appeal on the following questions of law.

1. Whether the Judge of the Court of Appeal and the learned trial Judge have failed to properly evaluate the legal principle that in a rei vindicatio action the burden is on the Plaintiff to prove his title?
2. Whether the Judge of the Court of Appeal and the learned trial Judge have failed to properly analyze the fact that and thereby erred in law as the Petitioner (the Defendant-Appellant) has proved his prescriptive possession and title by cogent and independent evidence?
3. Is the Plaintiff-Respondent who had proved for declaration of title to the entire property entitled to a declaration of title to eject a trespasser on admission of the fact that he is entitled to 5/6 of the property?

The 1st and the 2nd question of law were raised by the Defendant-Appellant whilst the 3rd question of law by the Plaintiff-Respondent.

The Defendant-Appellant, in his evidence, claimed prescriptive title. One of the important questions that must be decided in this case is whether the Defendant-Appellant acquired prescriptive title to the property described in the plaint or not. I now advert to this question. It is an undisputed fact that the original owner of the property was Baalaya. The Defendant-Appellant admitted in evidence that his father Siriya came to occupy the property in 1970 with leave and licence of Baalaya; that he too came to this property with his father; and that after his father's death in 1974 he continued to possess the land and constructed a house in the land. If his evidence is accepted, it has to be presumed that act of continuation of possession of the property by him and construction of the house was on the basis of earlier permission granted to his father by Baalaya. Learned counsel for the Defendant-Appellant admitted at the hearing before us that Baalaya, the original owner, died in 1987. The Defendant-Appellant claims that after the death of his

father he continued his occupation in the property. His evidence shows that he continued to occupy the property on the permission granted to his father by Baalaya (pages 129 and 132 of the brief). Thus when the above evidence is considered, it can be concluded that the Defendant-Appellant continued his occupation in the property with leave and license of the original owner Baalaya. Baalaya leased the property to the Plaintiff-Respondent for a period commencing from 14.10.1971 to 11.10.1978 (vide P11 and P11a).

Baalaya's children by deed No.5017 dated 27.10.1990 attested by Chandra Aryaratne sold 5/6th share of the property to the Plaintiff-Respondent. The case was filed in the District Court in March 1991. Thus even if his evidence is considered to be true, his possession in the property (after the Plaintiff-Respondent became the owner) is only for a period of 1 ½ years. Learned counsel for the Defendant-Appellant contended that leasing out of property by Baalaya to the Plaintiff-Respondent could be considered as commencement of adverse possession by the Defendant-Appellant against Baalaya and the Plaintiff-Respondent. When Baalaya leased out the land he was the owner. Even at this time the Defendant-Appellant was a licensee of Baalaya. Thus how could the Defendant-Appellant commence adverse possession against Baalaya. In my view there is no merit to be considered in the above contention.

In the present case, the Defendant-Appellant and his father had commenced possession of the property with leave and license of the original owner. Now he claims prescription. If a person commenced his possession in a property with leave and licence of the owner can he claim prescriptive title against the owner and/or his children? In finding an answer to this question I would like to consider certain judicial decisions.

In the case of De Soysa Vs Fonseka 58 NLR 501 this court held as follows.

"When a user of immovable property commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises."

In the case of Siyaneris Vs Jayasinghe Udenis de Silva 52 NLR 289 Privy Council held as follows. "If a person gets into possession of land as an agent for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal."

In Reginald Fernando Vs Pabalinahamy and Others [2005] 1SLR 31 this court observed the following facts.

"The plaintiff-appellant ("the plaintiff") instituted action against the original defendant ("the defendant") for ejectment from a cadjan shed where the defendant and his father had resided for four decades. The evidence proved that the defendant's father J was the carter under the plaintiff's father. After the death of J the defendant continued to reside in the shed as a licensee. On 22.03.1981 the plaintiff had the land surveyed by a surveyor ;and on 06.01.1987 sent a letter to the defendant through an attorney-at-law calling upon the defendant to hand over the vacant possession of the shed which as per the said letter the defendant had been occupying as a licensee. The defendant failed to reply that letter without good reason for the default. The defendant also falsely claimed not to have been aware of the survey of the land. In the meantime the

plaintiff had been regularly collecting the produce of the land. The defendant claimed prescriptive title to the land. The District Judge gave judgment for the plaintiff. This was reversed by the Court of Appeal."

This Court held as follows.

"Where the plaintiff (licensor) established that the defendant was a licensee, the plaintiff is entitled to take steps for ejectment of the defendant whether or not the plaintiff was the owner of the land. 'The Court of Appeal erred in holding that the District Court had entered judgment in favour of the plaintiff in the absence of sufficient evidence to prove that the plaintiff was either the owner or that the defendant, was his licensee"

Applying the principles laid down in the above judicial decisions, I hold that when a person starts possessing an immovable property with leave and licence of the owner, the presumption is that he continues to possess the immovable property on the permission originally granted and such a person or his agents or heirs cannot claim prescriptive title against the owner or his heirs on the basis of the period he possessed the property. If such a person (licensee) wants to claim prescription, he must place clear and unmistakable evidence regarding the commencement of an adverse possession against the owner or his heirs. The period that he occupied as a licensee cannot be considered to prove his alleged prescription. The above principle applies to the heirs of the licensee too. For the above reasons, I hold that the Defendant-Appellant in this case is not entitled to claim prescriptive title. For the above reasons, I answer the 2nd question of law in the negative.

Learned counsel for the Defendant-Appellant submitted that the Plaintiff-Respondent by Deed No.5017 attested by Chandra Aryaratne on 27.10.1990 had purchased 5/6th share of the property from the children of Baalaya and that

therefore the Plaintiff-Respondent is not the owner of the entire property. He therefore contended that the Plaintiff-Respondent cannot ask for a declaration of title to the entire property. I now advert to this contention. In finding an answer to the above question, I would like to consider a passage of the judgment of Dr.Justice Bandaranayake in Attanayake Vs Ramyawathi [2003] 1SLR 401 which reads as follows.

> *"I am of the firm view that, if an appellant had asked for a greater relief that he is entitled to, the mere claim for a greater share in the land should not prevent him, having a judgment in his favour for a lesser share in the land. A claim for a greater relief than entitled to should not prevent an appellant from getting a lesser relief."*

In Premaratne Menike Vs Indra Irangani Kumari SC Appeal131/2009- decided on 12.7.2011 Justice Thilakawardene held as follows.

> *"The fact that the appellant has asked for greater relief than he is entitled to should not prevent him from getting the lesser relief which he is entitled to especially as he has discharged his burden of proving co-ownership of the allotment of land."*

In my view when a plaintiff who has asked for a bigger share proves by evidence that is entitled only to a lesser share the court should make an order allocating the lesser share to him. His claim for a bigger share should not operate as a bar for him to get a lesser share because he has, by evidence, proved his entitlement to the lesser share. In the present case, according to the evidence led at the trial, the Plaintiff-Respondent is only entitled to $5/6^{th}$ share of the land but has asked for declaration of title to the entire land. For the above reasons, I hold that

the Plaintiff-Respondent is entitled to get a declaration for 5/6th share of the land. For the above reasons, I reject the above contention of learned counsel for the Defendant-Appellant.

Now I consider the 3rd question of law which reads as follows.

"Is the Plaintiff-Respondent who had proved for declaration of title to the entire property entitled to a declaration of title to eject a trespasser on admission of the fact that he is entitled to 5/6 of the property?"

I have earlier held that the Plaintiff-Respondent is entitled to get a declaration for 5/6th share of the land thus it is clear that the Plaintiff-Respondent is a co-owner of this land. Earlier I have held that the Defendant-Appellant was not entitled to the prescriptive title. The Defendant-Appellant who occupies the land has challenged the title of the Plaintiff-Respondent. When Defendant-Appellant who is not entitled to prescriptive title challenges the title of the Plaintiff-Respondent, he becomes an unauthorized occupier of the land and gains the status of a trespasser. Now the question that must be considered is whether a co-owner is entitled to eject a trespasser. In finding an answer to this question I would like to consider the judgment of this court in Harriette Vs Pathmasiri [1996] 1SLR 258 wherein this court held as follows.

> *"Our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land because the owner of an undivided share has an interest in every part and portion of the entire land."*

It is a commonsense principle that a co-owner has an interest in every part of the entire land. Thus, when a trespasser enjoys the fruits of the property the co-owner's rights are affected and he becomes entitled to eject the trespasser.

When I consider the above legal literature, I hold that a co-owner of a land is entitled to eject a trespasser from the land. For the above reasons, I answer the 3rd question of law as follows. The Plaintiff-Respondent who had prayed for a declaration of title to the entire property is entitled to a declaration to eject a trespasser on admission of the fact that he is entitled to 5/6th share of the property.

In view of the conclusion reached above, the 1st question of law does not arise for consideration.

For the above reasons I affirm the judgment of the Court of Appeal and dismiss this appeal with costs.

Judge of the Supreme Court

Priyantha Jayawardena 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 SRI LANKA

In the matter of an application for leave to appeal to The Supreme Court in terms of section 5C 1 of the High Court of the Provisions (Special Provisions) (Amendment) Act no 54 of 2006

K.L.A. Kulathunga,
624/8, Godage Mawatha,
Anuradhapura.

Defendant-Appellant-Appellant

SC Appeal 130/10
SC/HC/CALA140/2010
NCP/HCCA/APR272/2007
DC Anuradhapura 16174/L

Vs,

Karthigesu Nagaligam,
Depot Road, Kanagapuram, Killinochchi.

(The Deceased Plaintiff)

(Appeared through his Power of Attorney holder Vairamuttu Thanapakyam)

Nagalingam Rasalingam,
10, Ananda Nagar, KIllinochchi.

Substituted Plaintiff- Respondent-Respondent

Before: Eva Wanasundera PC J

Priyantha Jayawardena PC J

Vijith K. Malalgoda PCJ

Counsel: Pubudu Alwis with K.A.D. Karasinghe for the Defendant Appellant-Appellant

Dr. Sunil Cooray for the Substituted Plaintiff Respondent-Respondent

Argued on: 06.06.2017
Decided on: 19.09.2017

Vijith K. Malalgoda PC J

Deceased Plaintiff Respondent-Respondent Karthigesu Nagalingam instituted action through his Power of Attorney holder Vairamuttu Thanapakyam against the Defendant-Appellant- Appellant Kamburugamuwa Loku Arachchige Kulatunga in the District Court of Anuradhapura on 10.09.1997 claiming inter-alia,

a) A declaration that the Plaintiff is the lawful lease permit holder of the land described in the schedule to the plaint
b) An order ejecting the defendant and his agents from the said land and to place the Plaintiff in peaceful and uninterrupted possession
c) Damages at the rate of Rs. 5000/- for month for the loss and damages caused by the defendant

When the defendant filed his answer to the said plaint filed against him, had prayed inter-alia,

a) For a dismissal of the action
b) If the case is decided in favour of the Plaintiff, a sum of Rs. 300,000/- as compensation for *bona-fide* improvement carried out by him

The trial before the District Judge of Anuradhapura had proceeded on the following issues raised by the parties;

Issues raised on behalf of the plaintiff are as follows:-

i. Is the Plaintiff, the lawful lease permit holder of the land described in the schedule to the plaint by permit No L/N/R/21 dated 25.01.1965
ii. Has the Plaintiff built a house on the land referred to in the above permit and occupied it
iii. From 1993 onwards has the defendant encroached on to the land in dispute and is he in unlawful possession of the land
iv. Is the defendant in unlawful occupation of the land in dispute up to now in spite of the demand made by the plaintiff to handover the said premises to him
v. Are the damage caused to the Plaintiff from the unlawful occupation of the defendant amount to Rs. 5000/- per month

vi. If the above issues are answered in favour of the Plaintiff, is the Plaintiff entitle to obtain the relief prayed for

vii. Is the Power of Attorney holder of the Plaintiff is entitled to appear on behalf of him and to proceed with the case as the Plaintiff is unable to appear before court due to war situation

Issues raised on behalf of the defendant are as follows:-

viii. Has the Plaintiff given his consent to the defendant to occupy the land in dispute and to carry out any development under the power of Attorney bearing No. 10/691 attested by Lionel P. Dayananda

ix. If the defendant in lawful and peaceful possession of the land in dispute due to the consent given by the Plaintiff

x. Has the Plaintiff given his consent to the defendant to develop the land and to be in lawful and peaceful possession of the land, according to the affidavit dated 16.08.1993

xi. If the above issues 8-10 are answered in favour of the defendant, is the defendant entitle to obtain relief prayed for in the answer

xii. Is the value of the development done to the land by the defendant is Rs. 300,000/-

xiii. If the above issue is answered in favour of the defendant, is the defendant entitle to Rs. 300,000/- as compensation from the Plaintiff

During the cause of the trial before the District Court the Plaintiff above named had died and an application was made to substitute the son of the Plaintiff in the room and place of the deceased and the defendant objected to the said substitution.

However Learned District Judge by his order dated 11.09.2003 had allowed the substitution.

The Learned District Judge by his Judgment dated 25.02.2005 decided the case in favour of the Substituted Plaintiff by answering issues 1-4, 6 and 7 in favour of the Substituted Plaintiff, granting the relief (a) and (b) referred to above.

Being aggrieved by the said decision of the Learned District Judge the defendant appealed to the Provincial High Court of Civil Appeal of the North Central Province holden at Anuradhapura and giving the judgment, the said High Court of Civil Appeal had dismissed the Defendant's Appeal. The

Defendant Appellant had appealed against the said decision of the High Court of Civil Appeal to the Supreme Court, and leave was granted on questions of law set out in paragraphs c, e, f, i, g, and m of the Petition by this court.

As observed by me the case for the Plaintiff, before the District Court of Anuradhapura had proceeded on the validity of the lease permit issued on the Plaintiff and the right of the Power of Attorney holder to represent the Plaintiff at the said trial. As against the said position the Defendant had tried to establish that he too had entered the land in question as the Power of Attorney holder of the Plaintiff and continued to be in possession of the said land ion the strength of the said Power of Attorney and during the said uninterrupted period, the Defendant had constructed a house in the said land.

The Petitioner's arguments before this court was mainly based on the validity of the Power of Attorney bearing No 394 dated 05.09.1996 and the validity of the Substitution of the son of the deceased as the Substituted Plaintiff during the pendency of the trial before the District Court. Questions of the law under which the leave was granted by this court was based on the above arguments.

During the arguments before us the Defendant-Appellant- Appellant challenged the validity of the Power of Attorney bearing No. 394 dated 05.09.1996. Section 2 of the Powers of Attorney Ordinance No 02 of 1902 as amended by Ordinances No 09 of 1913 and 13 1939 has interpreted a Power of Attorney as ;

> "any written power or authority other than that given to an Attorney at Law or Law Agent, given by one person to another to perform any work, do any act, or carry on any trade or business and executed before two witnesses, or executed before or attested by a notary public or by a Justice of Peace, Registrar, Deputy Registrar or by any Judge or Magistrate……

and section 3 of the said Ordinance provides for the said Power of Attorney may register with the Registrar General.

Section 4 of the Powers of Attorney Ordinance refers to the cancellation of a Power of Attorney but further provided that, ***until such notification and publication of the revocation, the grantor shall be held liable and bound by all acts of his attorney***. (emphasis added)

When considering the above provisions in the Powers of Attorney Ordinance No. 02 of 1902 an amended by Ordinances No. 09 of 1913 and 33 of 1939, it is clear that there is no restriction imposed by the said Ordinance to have only one Power of Attorney but the grantor shall be held liable and bound by all acts of such Attorneys until the Power of Attorney is cancelled or revoked under the provisions of section 4 of the said Ordinance.

In the said circumstances I see no merit in the argument raised by the Defendant-Appellant-Appellant challenge the validity of the Power of Attorney bearing No 394 as against the Power of Attorney bearing No 10691 granted to Defendant-Appellant- Appellant.

The Defendant-Appellant-Appellant had further argued that the Plaintiff (Deceased Plaintiff Respondent-Respondent) is not entitled to institute the present action based on a lease permit since the present application is a *rei- vindication* action.

However when going through the issues raised on behalf of the Defendant at the trial before the District Court of Anuradhapura, I observe, that defendant had failed to raise this point before the Learned District Judge.

When considering the issues 8 to 10 referred to above in my judgment, the Plaintiff had taken up the position that he entered the land in question with permission of the Plaintiff and was in peaceful possession or in other words with the leave and license of the Plaintiff.

In the case of ***Hanfi V. Nallamma 1998 (1) SLR 73*** Supreme Court held that,

> "Once issues are framed the case which the court has to hear and determine becomes crystallized in the issues and the pleadings recede to background,"

and therefore the decision which was challenged before Civil Appellate High Court of the North Central Province, was delivered by the District Judge of Anuradhapura determining the said issues framed before the District Court and the defendant in the said District Court proceeding is not entitled to raise new points during the appeal.

In the case of ***Setha V. Weerakoon 49 NLR 225*** Howard CJ 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."

As revealed before the District Court, the Plaintiff was issued with P-2 on 15.01.1962 which is the lease permit for the land in question and the said permit was in operation even at the time when the case was taken up for trial, and at the time witness Sandya Sri Jayampathi Ratnamalala, Land Officer gave evidence on 11th December 2003.

In this regard the Defendant-Appellant- Appellant challenges the lease hold rights of the Plaintiff and argued that a proper lease agreement or a permit issued either under the Land Development Ordinance or State Land Ordinance had not been produced before the District Court.

However the above position is contrary to his own issues which were to be determined at the District Court Trial, based on the evidence led before the trial court.

In the case of ***Alwis V. Piyasena (1993) 1 Sri LR 199*** G.P.S. de. Silva CJ held that,

> "It is well established that finding of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal."

The Defendant-Appellant- Appellant had challenged the permission granted by the Learned District Judge to substitute the son of the Deceased Plaintiff as the Substituted Plaintiff and submitted that the said permission was granted without considering the provisions of the Land Development Ordinance or the State Land Ordinance. It was further submitted on behalf of the Defendant-Appellant- Appellant that, until the succession rights are considered under the provisions of Law, the land in question vest with the State and therefore the said permission granted, to substitute the Deceased Plaintiff was bad in Law.

However the Defendant-Appellant-Appellant has failed to canvass against the decision of the Learned District Judge when he made the said order permitting the substitution. This position too

was considered in the decision of the High Court of Civil Appeal and I see no reason to interfere with the said findings.

It is further observed by me that the substitution effected at the District Court was to protect the rights of the deceased plaintiff and it has nothing to do with the succession rights of the deceased Plaintiff which has to be decided under the provisions of the relevant legislation.

As discussed above the Defendant-Appellant-Appellant has failed to establish any of the grounds under which leave had been granted by this court. I therefore answer the questions of Law in favour of the Substituted Plaintiff-Respondent-Respondent and dismiss this appeal with costs.

Appeal in dismissed with costs.

Judge of the Supreme Court

Eva Wanasundera 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 appeal in terms of Section 5(2) 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 /133/2010

SC (HC)CALA 229/2010

WP/HCCA/COL/164/2007(F)

DC. Colombo No. 25831/MR

Saifi Ismail Patel carrying on business under the name and style of "Saifi Trading Company",
No. 39, New Moor Street,
Colombo 01.

Plaintiff

Vs.

Commercial Bank of Ceylon Limited,
No. 57, Baron Jayathileka Mawatha,
Colombo 1.

Defendant

AND BETWEEN

Commercial Bank of Ceylon Limited,
No. 57, Baron Jayathileka Mawatha,

Colombo 1.

Defendant Appellant

Vs.

Saifi Ismail Patel carrying on business under the name and style of "Saifi Trading Company",
No. 39, New Moor Street,
Colombo 01.

Plaintiff Respondent

AND NOW BETWEEN

Commercial Bank of Ceylon Limited,
No. 57, Baron Jayathileka Mawatha,
Colombo 1.

Defendant Appellant-Appellant

Vs.

Saifi Ismail Patel carrying on business under the name and style of "Saifi Trading Company",
No. 39, New Moor Street,
Colombo 01.

Plaintiff Respondent-Respondent

BEFORE	:	B. P. ALUWIHARE, PC, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Harsha Amarasekera PC with Kanchana Peiris for the Defendant Appellant-Appellant Geoffrey Alagaratnam PC with Suren Fernando for the Plaintiff Respondent-Respondent
WRITTEN SUBMISSION ON:		29.10.2010 (Defendant Appellant-Appellant) 27.01.2011 (Plaintiff Respondent-Respondent)
ARGUED ON	:	31.05.2016
DECIDED ON	:	20.07.2017

UPALY ABEYRATHNE, J.

This is an appeal preferred by the Defendant Appellant-Appellant (hereinafter referred to as the Appellant) from the judgment of the High Court of Civil Appeal of the Western Province holden at Colombo dated 11.06.2010. By the said judgment, the High Court has upheld the judgment of the learned Additional District Judge of Colombo dated 29.03.2007. This court has granted leave on the

following questions of law set out in paragraph 16 (a), (b) and (c) of the petition of appeal dated 21st of July, 2010.

(a) When does a cause of action accrue to a customer of a Bank for the recovery of monies said to have been erroneously debited by such Bank from such customer's account?

(b) Is an action filed against a Bank by a customer after the lapse of three years from a date of a such transaction, prescribed?

(f) Is a Bank obliged to credit a customer's account at the time of the deposit of a cheque into such account, and before the Bank receives monies on such cheque?

The Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent) instituted an action against the Appellant in the District Court of Colombo seeking for a declaration that the Appellant is the trustee who holds a sum of Rs. 2,880,004.50/ in trust for the Respondent and for an order directing the Appellant to pay the Respondent the said sum held in trust together with the interests as prayed for. The Respondent has instituted the said case on the basis that the Appellant had charged the Respondent the aforesaid sum of Rs. 2,880,004.50/- as interest on an overdraft facility afforded by the Appellant Bank to the Respondent Company, in excess of the sum of which the Appellant was entitled to recover from the Respondent.

The Appellant, by his amended answer, has sought for a dismissal of the Respondent's action. Further the Appellant has set out a claim in reconvention for a sum of Rs. 249,935.12 on the basis that the Appellant Bank has undercharged interest on the money due from the Respondent by way of an overdraft in the Respondent's current account.

The case proceeded to trial on 30 issues. Issue No 21 has been raised by the Appellant on the basis that the cause of action of the Respondent was prescribed in law. I first deal with the question on prescription.

The Appellant's contention on the prescription was twofold. The Appellant contended on the merits:

a. that the monies claimed by the Respondent from the Appellant were not due on demand, and thus the Respondent's action was prescribed,
b. that even if a demand was necessary, such demand was contained in the document P 7 which was more than 3 years before the action was instituted, and therefore the Respondent's action was prescribed.

In the said premise, the learned President Counsel for the Appellant submitted that P 7 is clearly in unequivocal terms a demand for the monies sought for by the Respondent in the present action. By P 7 dated 16.08.1987, the Respondent had demanded the Appellant to pay a sum of Rs. 2,880,004.50 within one month of the date of the said letter. Said sum of money corresponds exactly with the relief prayed for by the Respondent in its plaint of the present case.

I reproduce the said letter P 7 below;

"REGISTERED 16th August 1997

The General Manager,
Commercial Bank of Ceylon Ltd.
City Office,
Colombo1.

Dear Sir,

Information Ref:- Saifi Trading Company
(M/S. Sarma & Co., Chartered Accounts)
Current Account No. 1503255501 Overdraft Interest.

We refer to our last letter dated 15th November 1996 and we have now received a final report from our Auditors subsequent to their verification of overdraft interest levied by yourselves on our Account No 1503255501.

Their report attached herewith indicates an excess charge of Rs. 2,880,004.50. You are hereby requested to verify the report and refund to us the overcharge amount further together with interest within a month of this letter.

We regret to inform you should fail to refund within a month we shall be reluctantly compelled to seek legal advice to claim together with further costs and damages.

We await your serious and immediate response.

Yours faithfully

SAIFI TRADING COMPANY

Proprietor

Cc to;- The Manager (City Office),
Assistant General Manager (Head Office),
M/S Sarma & CO., (Charted Accountants),
186, 2/1 Dam Street, Colombo 12."

In the completeness of the judgment I reproduce below the prayer 'a' and 'b' to the amended plaint of the said action instituted in the District Court of Colombo;

a. for judgment for a sum of Rs. 2,880,004.50 together with interests at 26% per annum from 25.11.1999 till decree and for interest on the aggregate sum decreed until payment in full,

b. as an alternative to 'a'

i. for a declaration that the Defendant is a trustee and holds a sum of Rs 2,880,004.50 in trust for the Plaintiff and/or,

ii. for an order directing the Defendant to pay to the Plaintiff the sum of Rs. 2,880,004.50 held in trust together with interest at 26% per annum from 25.11.1999 till decree and for interest on the aggregate sum decreed until payment in full and in the event of the Defendant failing to do so for an order directing the Registrar of the court to take appropriate steps.

The Respondent, in the said amended plaint dated 28th of September 2001 has set out three causes of action. With regard to the first cause of action, the Respondent in paragraph 15 of the said amended plaint has averred that by letter dated 16.08.1997 (aforesaid P 7) the Respondent wrote to the Appellant Bank that according to the Auditor's Report there had been an excess charge of Rs. 2,880,004.50. But the Respondent has not averred therein that by the said letter they demanded the Appellant to pay the said sum of Rs. 2,880,004.50.

It is manifest from the paragraphs 16 and 17 of the said amended plaint that subsequent to the discussions held with the Appellant Bank and the clarifications made by them, the Respondent has come to know the fact that his Auditors who prepared the aforesaid report, in preparing the same has not taken in to their consideration certain revisions in interests and rates levied by the Appellant Bank against the Respondent's said account. Also, the Respondent has admitted that he was unaware of such revisions/changes in interest and rates levied by the Appellant Bank against his said account. However, the Respondent has realized the fact that the said Auditors' Report was not prepared according to the revised interest, charges and rates of the Appellant's Bank and the sum demanded from the

Appellant by the said letter dated 16.08.1997 was incorrect and the amount, according to the Appellant's version, would be a sum of Rs. 1,874,392.76.

In the said premise the Respondent, in paragraph 18 of the said amended plaint has averred that by a letter dated 25.11.1999, demanded the Appellant to pay the Respondent the said lesser sum of Rs. 1,874,392.76 and the Appellant denied any liability.

Having urged so, the Respondent in paragraphs 19 and 20 of the said amended plaint has pleaded that the Appellant has acted contrary to the written agreement in making an excess charge of Rs 2,880,004.50 and therefore a cause of action has arisen for the Respondent to sue the Appellant in order to recover the sum of Rs. 2,880,004.50 together with other relief. Accordingly, the Respondent's said three causes of action in his amended plaint has set out the said sum of Rs. 2,880,004.50, as an amount computed on a wrong basis disregarding the revised interest, charges and rates of the Appellant's Bank.

Witness Vithanage Rathnasiri Perera, Chartered Accountant, Sarma & Co., in his evidence has stated that when a cheque is deposited into an account on the day of the deposit, it was shown in the statement of account that the sum indicated therein is credited to the account, on which basis the said auditors report was prepared. Nevertheless, the computation of interest on the said basis was wrong. This is because the statement shows that there was a credit balance but the bank statement did not show whether the cheques were cleared or uncleared. Hence there was a deficit between the actual balance and the available balance of the account. Hence the computation of interest on the basis of amounts shown in the statement of account was on a wrong basis.

In the circumstances, it is clear from the Respondent's own pleadings and the evidence led at the trial that the Respondent has failed to prove his case, as set out in the said amended plaint, on balance of probability.

The Respondent contended that his case was not prescribed in law since the demand had been made by the said letter dated 25.11.1999 (P 14) and therefore the prescriptive period of the action was to commence from 25.11.1999. The learned counsel for the Respondent submitted on the said basis that the Respondent had demanded the said amount by the said letter dated 25.11.1999 and the Appellant, by a letter dated 23.12.1999, (P 15), had denied the liability for the claim, and that has given rise to the cause of action and hence the action has been instituted well within the period of three years.

As I mentioned above by the said letter dated 25.11.1999 (P 14), the Respondent had demanded only a sum of Rs 1,874,392.76. Although the demand was such, the Respondent has not instituted the instant action to recover the said sum of money as demanded by P 14. The Respondent without filing the action on the said demand, has opted to institute the said action to recover a sum of Rs 2,880,004.50 according to his aforementioned 1st demand made by the letter dated 16.08.1997 (P 7). Accordingly, the period of prescription of the instant action had begun to run from the said date of P 7, i. e. 16.08.1997 and not from the date of P 14, i. e. 25.11.1999.

Although the original plaint bears the date 17.10.2000, the Respondent has filed the action in the District Court of Colombo on 20.10.2000. Thereafter the Respondent has filed an amended plaint dated 28.09.2001. It is crystal clear that since the demand P 7 had been made on 16.08.1997, the

Respondent has failed to institute the action within 03 years from the said date. Hence the Respondent's said three causes of action were prescribed in law.

The learned President Counsel for the Appellant submitted that in instituting an action of this nature, no demand is necessary, as the date of accrual of the cause of action would be the date of each wrongful debit, and not from the date of demand. Since, I have reached the conclusion that the Respondent's action was prescribed in law on the demand itself, it is not necessary to consider the said submissions at this stage.

In the said circumstances, I set aside the judgment of the learned Additional District Judge dated 29.03.2007 and the judgment of the High Court of Civil Appeal dated 11.06.2010. The Respondent's action instituted in the District Court of Colombo is dismissed. The appeal of the Appellant is allowed with costs in all courts.

Appeal allowed.

Judge of the Supreme Court

B. P. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court

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

In the matter of an appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 135/2015

SC/HCCA/LA/16/2015

WP/HCCA/COL/59A/2014 (F)

DC/Colombo No DLA/00048/09

Firoza Mohamed Hamza,
No. 15, Hill Castle Place,
Colombo 12.

Petitioner

Vs.

1. Road Development Authority,
   Office of the Land and Land Acquisition Officer,
   3rd Floor. 'Sethsiripaya',
   Battaramulla.

   Plaintiff Respondent

2. Ummu Waduda Meera Sahib,
   No. 22, Charles Place,
   Dehiwala.
3. Seyyad Oaman Meera Sahib,
   No. 22, Charles Place,
   Dehiwala.
4. Mohammed Fasulul Rahman Meera Sahib,
   No. 22, Gajaba Housing Complex,

2nd Lane, Kolonnawa.

5. Riyazur Rahman Meera Sahib,
   No. 24, Farm Road,
   Maatakkuliya,
   Colombo 15.
6. Siththy Navasiya Mohammed Rauf,
   No. 22, Charles Place,
   Dehiwala.

AND BETWEEN

Firoza Mohamed Hamza,

No. 15, Hill Castle Place,

Colombo 12.

Petitioner-Petitioner

Vs.

1. Road Development Authority,

   Office of the Land and Land Acquisition Officer,

   3rd Floor. 'Sethsiripaya',

   Battaramulla.

   Plaintiff Respondent-Respondent

2. Ummu Waduda Meera Sahib,
   No. 22, Charles Place,
   Dehiwala.
3. Seyyad Oaman Meera Sahib,
   No. 22, Charles Place,
   Dehiwala.
4. Mohammed Fasulul Rahman Meera Sahib,
   No. 22, Gajaba Housing Complex,

2nd Lane, Kolonnawa.

5. Riyazur Rahman Meera Sahib,
   No. 24, Farm Road,
   Maatakkuliya,
   Colombo 15.
6. Siththy Navasiya Mohammed Rauf,
   No. 22, Charles Place,
   Dehiwala.

Respondent-Respondents

AND NOW BETWEEN

Firoza Mohamed Hamza,

No. 15, Hill Castle Place,

Colombo 12.

Petitioner-Petitioner Appellant

Vs.

1. Road Development Authority,

   Office of the Land and Land Acquisition Officer,

   3rd Floor. 'Sethsiripaya',

   Battaramulla.

   Plaintiff Respondent Respondent-Respondent

2. Ummu Waduda Meera Sahib,
   No. 22, Charles Place,
   Dehiwala.
3. Seyyad Oaman Meera Sahib,
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   No. 22, Gajaba Housing Complex,
   2nd Lane, Kolonnawa.
5. Riyazur Rahman Meera Sahib,
   No. 24, Farm Road,
   Maatakkuliya,
   Colombo 15.
6. Siththy Navasiya Mohammed Rauf,
   No. 22, Charles Place,
   Dehiwala.

Respondent-Respondent-Respondents

BEFORE	:	SISIRA J DE ABREW, J.
		UPALY ABEYRATHNE, J.
		ANIL GOONARATNE, J.
COUNSEL	:	Faiz Musthapa PC with Hussain Ahamed for the Petitioner Appellant
		Mrs. Ashoka Siriwardena for the Plaintiff Respondent-Respondent
WRITTEN SUBMISSION ON:		27.11.2015 Petitioner-Petitioner Appellant.
ARGUED ON	:	23.09.2016
DECIDED ON	:	15.06.2017

UPALY ABEYRATHNE, J.

The Director (land) of the Road Development Authority, 3rd Floor, Sethsiripaya, Battaramulla, has instituted the said action bearing No DLA/00048/9

in the District Court of Colombo. According to the Journal Entry 01, the Director (land) being the plaintiff has sought to issue a Deposit Note enabling him to deposit a sum of Rs. 5,775,000/- to the credit of the case. Said Journal Entry indicates that the said application has been made upon a letter of the Acquiring Officer, Land, bearing No RDA/LA/CO/MAT/8917/2 dated 30.07.2009. The said letter of the Acquiring Officer has not been produced with the appeal to this court by the Petitioner-Petitioner Appellant (hereinafter referred to as the Appellant). As seen from Journal Entry No 3 a sum of Rs.5775/- had been deposited in the National Savings Bank, Pettah Branch. The Appellant has not produced the letter referred to in J.E. 3, with the appeal to this court in order to ascertain whether the amount sought to be deposited had been deposited to the credit of the case.

According to the Appellant (the Petitioner-Petitioner Appellant) of the present appeal to this court, has made an application to the District Court of Colombo, by way of a petition dated 14th May 2013, supported with an affidavit seeking an order to release the said amount of Rs 5.775,000/- to the Appellant and to 2nd to 6th Respondent-Respondent Respondents (hereinafter referred to as the Respondents) in proportion to the shares allocated to them by a final decree in a partition case bearing No. 18813/P, as prayed for in prayer (a) to the said petition.

It is seen from the proceedings of the case that an inquiry has been held in to the said application of the Appellant. The 2nd to 6th Respondents were absent and unrepresented at the said inquiry. After hearing the evidence of the Appellant and Surveyor and Court Commissioner J. G. Kammanangoda, the learned District Judge by order dated 30.04.2014, has dismissed the Application of the Appellant. The appellant has preferred an appeal from the said order to the High Court of Civil Appeal holden at Colombo, and the High Court has dismissed the said appeal. The present appeal is from the said order dated 01.12.2014.

This court has granted leave on the questions set out in paragraph 13 (a) and (b) of the petition filed on 08.01.2015. At the hearing, the learned President Counsel for the Appellant submitted that according to the final decree in partition case No. 18813/P of the District Court of Colombo, lot 7 in final partition plan bearing No. 2904 dated 25.10.2003 was allocated as an allotment of land earmarked for acquisition by the State for road widening and the said allotment was allocated in common to the Petitioner and the 2nd to 6th Respondents and a sum of Rs 5,775,000/- as compensation awarded for the said Lot 7 that was acquired. In the said premise, the learned President Counsel further submitted that the issue to be decided by this court is whether the soil rights and ownership of the said lot 7 acquired by the state, remain with the Petitioner and the 2nd to 6th Respondents and as such they are entitled to the compensation proportionately for the said lot 7 which is now deposited to the credit of the case.

As I have noted above the compensation deposited to the credit of this case has been made by the Plaintiff Respondent in terms of Section 33 of the Land Acquisition Act No. 09 of 1950. According to Section 33 the compensation shall be deposited in relevant District Court or Primary Court under the following circumstances, Namely;

a. The person to whom any compensation for the acquisition of a land or a servitude under the Act is payable declines to receive it when it is tendered to him,
b. When the person is dead,
c. When the person cannot be found after diligent search,
d. Where no person entitled to any compensation for the acquisition of a land or servitude is known.

In terms of Section 33 a notice of the payment of any sum to court as provided in the said Section shall be published in the gazette and in at least one Sinhala daily newspaper, one Tamil daily newspaper and one daily English newspaper. The appellant has averred that pursuant to a notice appearing in the newspaper he made the said application in the said case No DLA/00048/9, in terms of Section 33 of the Land Acquisition Act.

According to the documentation at pages 57 to 63 of the brief, the Land Acquiring Officer has held an inquiry in to an application made by 04 Claimants claiming the said compensation, and, has made an order in terms of Section 9 and 10 of the said Act. The caption of the said case bearing No DLA/00048/9 manifests that the said four Claimants have not made any claim before the District Court. The proceedings of the said inquiry at page 59 of the brief, indicate that the said four persons, namely, Mohamed Azver Mohamed Amshad, Mohamed Azver Mohamed Afthab, Mohamed Junaid Mohamed Azver and Zeenathul Munavara Azver have preferred their claims on the basis that they are the owners of Lots 1, 2, 5 and 3 respectively, depicted in the said final partition plan bearing No 2904.

Also, it is clear from the evidence of the Appellant that the said four Claimants have claimed the compensation awarded for said lot 7 on the basis that they had become the owners of said lots 1, 2, 5 and 3 by the deeds of transfers bearing No. 1754 of 02nd May 2005, No 108 of 02nd May, 2005 and No 109 of 02nd May, 2005, respectively. It is also an important fact to be noted that the Land Acquiring Officer, at the end of the inquiry in to the said application made by the said four claimants, has refused the said claim for compensation. But the said four claimants, in terms of Section 10(2) of the said Act, had not made an application

within fourteen days to the Land Acquiring Officer for a reference of the claim for determination by the District Court.

The Appellant and the 2nd to 6th Respondent have claimed the said compensation on the basis of the said final decree entered in the partition case bearing No. 18813/P of the District Court of Colombo wherein lot 7 in the said final partition plan bearing No. 2904 dated 25.10.2003 had been allocated as an allotment of land earmarked for acquisition by the State for road widening and the said allotment had been allocated in common to the Petitioner and the 2nd to 6th Respondents. The Appellant in his evidence has admitted the execution of the said deeds of transfer bearing Nos. 1754, 108 and 109. It is clearly seen that the said 03 deeds had been executed in consequent to the said final partition decree entered in the case bearing No 18813/P.

It was the contention of the learned President Counsel that a servitude is a *res incorporalis*, and may be defined as a proprietary right vested in a definite person or annexed to the ownership of a definite piece of land, overland or other property belonging to another person, and limiting the enjoyment by that person of his property in a definite manner. Lot 7 falls into such a category and certain persons enjoy a right to use lot 7 as a roadway. But however, the soil rights and ownership remains with owners of lot 7, who are the Petitioner and 2nd to 6th Respondents.

I now consider the said circumstances. It is clearly stated in the said three deeds bearing Nos. 1754, 108 and 109 that the transferees are entitled to "the right to use the road reservations marked over Lot 6 and 7 depicted in the said final partition plan bearing No 2904" and nothing more. Hence the said 3 deeds have to be construed according to its terms.

It must be noted that Servitudes are real rights that are "carved out of the full *dominium* of the owner" and confer benefit to another, either by affording him the power of use and enjoyment, or else by requiring the owner to refrain from exercising his entitlement. Conversely, the notion of servitude implies that the property serves either another property or another person, and that the *dominium* of the owner of the servient or burdened property must be diminished by the servitude. One cannot, by definition, have a servitude on one's own property (*nemini res sua servit*), because a servitude can only be a limited real right in the property of another.

The holder of the servitude has priority, in principle, as regards the exercise of the particular entitlement covered by the servitude. The servient owner may exercise all the usual rights of ownership, but he may not impair the rights of the servitude holder, and hence may not exercise those rights which are inconsistent with the servitude, or grant further servitudes that would infringe on the existing servitude.

R. W. Lee in his 'AN INTRODUCTION TO ROMAN-DUTCH LAW' (5th Edition) at page 164 state thus; "A real servitude is a fragment of the ownership of an immovable detached from the residue of ownership and vested in the owner of an adjoining immovable as accessary to such ownership and for the advantage of such immovable. Though ownership is thus divided and vested in two persons, the detached fragment is, as a rule, relatively insignificant in comparison with that remains. It seems natural, therefore, to speak of the person to whom the residue belongs as owner of the land, while the person in whom the detached right is vested is said to have a *jus in re aliena*."

The rights and duties of the dominant and servient owners depend primarily on the terms of the agreement that constitutes the servitude. That

agreement is construed strictly, and in a manner which is least burdensome for the servient owner. The dominant owner must exercise his rights *civiliter modo*, with due regard, that is, to the rights of the servient owner. Either party may approach the courts for a declaration of rights. Specific duties may be enforced by way of interdict, and damages may be awarded by a court where either party has exceeded the terms of the servitude and has suffered patrimonial loss.

"The servitude holder is entitled in principle to unrestricted enjoyment of the servitude, thus limiting the owner's exercise of powers of ownership to those that are not inconsistent with the servitude. However, the servitude holder must exercise the servitude *civiliter modo,* namely in a civilized, considerate manner, causing as little inconvenience as possible to the owner of the servient land and may not increase the burden on the servient land beyond the express or implied terms of the servitude" Wille's Principles of South African Law (Ninth Edition) 593.

In De Kock Vs Hanel & Others 1999 (1) SA 994 the court observed that "Utility is a requirement only for the constitution of a praedial servitude and not for its continued existence is unacceptable. Once a servitude is no longer of use for the exploitation of the dominant tenement, the servitude ceases to exist".

"The owner of land or a moveable may approach court for a declaration of rights, if a person who apparently has no rights asserts a servitude over the land or movable, or if the holder of a servitude acts in excess of his or her rights. Such a plea can be coupled with a mandatory or prohibitory interdict and, in suitable case, with a delictual claim for damages". Wille's Principles of South African Law (Ninth Edition) 616.

"If a person unlawfully claims a servitude over land or claims greater rights under the servitude than it actually comprises, the owner of land may bring

action against him, known as *actio negatoria,* for a declaration that his land is free from the servitude claimed, or free from the excessive burdens as the case may be". (Voet 8:5:5:)

When I consider the facts relevant to the case in hand in the light of the above basis, I am of the view that the ownership of lot 7, at the time relevant to the matter in question of this case, was remained on the Appellant and the 2nd to 6th Respondents. Hence the Appellant and the 2nd to 6th Respondents, as owners of lot 7, are entitled to the claim set out in the Petition preferred to this court on 08.01.2015. Hence, I answer the said questions of law in favour of the Appellant. Accordingly, the judgment of the High Court of Civil Appeal holden in Colombo dated 01.12.2014 and the order of the learned District Judge dated 30.04.2014 is hereby set aside. The Appellant is entitled to enter a decree as prayed for in the said petition filed in the District Court dated 14.05.2013 (X 2). The Appeal is allowed. The Appellant must bear costs in all courts.

Appeal allowed.

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 No. 139/2013
SC/HCCA/LA/11/2013
CP/HCCA/Kandy/LA/07/2011
DC Matale Case No. 4601/L

In the matter of an Appeal with leave of the Supreme Court first had and obtained in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read with Article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Mohamed Wahid
'Rock View', 9th Mile Post
Alawatugoda.

Probate holder of late Muhandiramge Aboobakkar Lebbe Mohamed Yusoof of
9th Mile Post,
Alawatugoda.

PLAINTIFF

Vs.

Rev. Wattegama Sumana Tissa
Sri Wijayaramaya, Kuriwela,
Ukuwela. **(Deceased)**

DEFENDANT

Rev. Wattegama Siri Sumana
Elwela Temple,
Elwela. **(Deceased)**

SUBSTITUTED-DEFENDANT

Rev. Kalundewe Chandrasiri
Elwela Temple,
Elwela.

SUBSTITUTED DEFENDANT

AND

Rev. Kalundewe Chandrasiri
Elwela Temple,
Elwela.

SUBSTITUTED-DEFENDANT-PETITIONER

Vs.

Mohamed Wahid
'Rock View', 9th Mile Post
Alawatugoda.

Probate holder of late Muhandiramge Aboobakkar Lebbe Mohamed Yusoof of 9th Mile Post,
Alawatugoda.

PLAINTIFF-RESPONDENT

AND NOW

Mohamed Wahid
'Rock View', 9th Mile Post
Alawatugoda.

Probate holder of late Muhandiramge Aboobakkar Lebbe Mohamed Yusoof of 9th Mile Post,
Alawatugoda.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Rev. Kalundewe Chandrasiri
Elwela Temple,
Elwela.

SUBSTITUTED-DEFENDANT-PETITIONER-RESPONDENT

BEFORE: Sisira J. de Abrew J.
Anil Gooneratne J. &
K. T. Chitrasiri J.

COUNSEL: Shabry Haleemdeen with Srimal Seneviratne
for Plaintiff-Respondent-Appellant

Kushan de Alwis P.C. with Rajiv Wijesinghe and B. Gamaarachchi
For the Substituted-Defendant-Petitioner-Respondent

ARGUED ON: 25.01.2017

DECIDED ON: 07.03.2017

GOONERATNE J.

This was an action filed in the District Court, Matale for a declaration of title and eviction of the Defendant-Petitioner-Respondent. Plaint was filed on 18.12.1992. Answer having being filed by the Defendant-Petitioner-Respondent, and thereafter the Plaintiff moved to file amended plaint for which the Defendant objected. However learned District Judge allowed the amended

plaint to be filed. Case proceeded to trial, and after trial action was dismissed. An appeal was preferred by the Appellant to the Civil Appellate High Court of Kandy. The Civil Appellate Court, set aside the Judgment of the District Judge and made order to hold a trial De Novo. Respondent appealed to the Supreme Court having sought Leave to Appeal which was allowed, and the Supreme Court by Order of 16.03.2008 dismissed the appeal of the Respondent.

Trial De Novo commenced on 21.10.2010 by raising 21 issues and issue Nos. 13, 14 & 15 were tried as preliminary issues. Preliminary issues relate to the date of filing plaint, (18.12.92) whether Plaintiff is entitled to rights on the amended plaint based on the stator determination published on 11.03.1994 as per the Land Reform Law, and the question of Plaintiff maintaining the action. Issues were answered in favour of the Appellate by the District Court. Being aggrieved by the judgment of the District Court, Respondent appealed to the Civil Appeal High Court, Kandy and the Civil Appellate High Court, allowed the appeal of the Defendant-Petitioner-Respondent and held that Plaintiff cannot maintain the action.

This court on or about 14.01.2013 granted Leave to Appeal to the Plaintiff-Respondent-Petitioner from the above order on the following questions of law.

> 16. (c) Have their Lordships in the Civil Appellate High Court erred in law in not appreciating that by operation of law that the said Usoof became the Statutory Lessee of the land owned by him, with the right to make a

declaration as to which portion of the land owned by him, he wishes to retain?

16 (f) Have their Lordships in the Civil Appellate High Court failed to appreciate that the Petitioner could proceed with the case to vindicate his title to the land which had been confirmed by the statutory determination?

In this case, according to the Land Reform Law, land in excess of the land ceiling as claimed by the Appellant vested in the Land Reform Commission. In brief the facts of this case are as follows. By a deed of transfer bearing No. 234 of 15.07.54 two persons namely Mohamed Ibrahim and Abdul Kapur transferred the property, the subject matter of this action to Abdul Hameed and Mohamed Yusoof (deceased). The Appellant is the probate holder or executor of late Mohomed Yusoof. As both Abdul Hameed and late Mohamed Yusoof owned more than 50 acres of land, by operation of law, according to provisions of the Land Reform Law, land which were co-owned in excess vested in the Land Reform Commission.

The scheme of the above law is that in terms of Section 5 of the said law after the date of commencement of this law, any person becomes the owner of agricultural land in excess of the ceiling, any such land owned by such person in excess shall as from that date deemed to vest in the commission and be held by that person under a statutory lease from the Land Reform Commission

Section 6 of the law states that when land is vested in the commission under the Land Reform Law, such vesting shall have the effect of giving the land vested in the commission absolute title to the commission, free from all encumbrances.

The above section of the law are plain and simple and needs no further interpretation to understand its contents. Plaintiff is claiming a declaration of title to the land in question. As such the important question to be decided is whether the Plaintiff-Appellant had title to the property when it was released to him and when action was filed in the District Court of Matale. To enable the Plaintiff to file a rei vindicatio action Plaintiff himself must have had title as observed by the learned High Court Judge. The material made available to this court no doubt suggest that by the time action was filed in the District Court, late Mohamed Yusoof in whose favour a declaration of title is sought had no title to the property in dispute. By that time property in dispute had vested in the Land Reform Commission. Action was instituted on 18.12.1992. Land Reform Commission published the statutory determination on 11.03.1994. (undisputed facts).

Section 18 of the law provides that every person who became a statutory lessee, within 1 month of publication in the Gazette by the

commission, call upon the statutory lessee to make a statutory declaration in a prescribed form of the total extent of the agriculture land so held by him on such lease. The next two sections viz. Sections 19 and 20 of the Land Reform Law are the important provisions which would have a direct bearing to the case in hand. 19 (1) reads thus:

The following provisions shall apply on the receipt by the Commission of a statutory declaration made under section 18 –

(a) The Commission shall, as soon as practicable, make a determination, in this Law referred to as a "statutory determination", specifying the portion or portions of the agricultural land owned by the statutory lessee which he shall be allowed to retain. In making such determination the Commission shall take into consideration the preference or preferences, if any, expressed by such lessee in the declaration as to the portion or portions of such land that he may be allowed to retain.
(b) The Commission shall publish the statutory determination in the Gazette and shall also send a copy thereof to such lessee by registered letter through the post. Such determination shall be final and conclusive, and shall not be called in question in any court, whether by way of writ or otherwise.

Section 20 reads thus:

Every statutory determination published in the Gazette under section 19 shall come into operation on the date of such publication and the Commission shall have no right, title or interest in the agricultural land specified in the statutory determination from the date of such publication.

The learned counsel for the Appellant took some pains to submit to us, that what is relevant is the date on which the commission decided to make

a statutory determination, and for that purpose it would be necessary to have lead evidence in the District Court and sought to demonstrate that this question cannot be decided in the way "trial Judge permitted preliminary issues to be raised and ruled on same. However learned President's Counsel for the Respondent opposed the above submissions of learned counsel for the Appellant and submitted to this court that the above Sections 19 and 20 of the said law need no further explanation and what is material is the date of publication of the Gazette as provided by Section 20 of the said law.

The Learned President's Counsel invited this court to consider the following authorities and submitted to court that the law is settled on this issue, which had been considered even by the learned High Court Judge. In Gangegoda Appuhamillage Don Edmund Ananda Seneviratne, Krishnajeena Seneviratne Vs. Rohan Tissa Anthony Weeratunga, Tissa Indika Weeratunga

S.C. Appeal No. 18/2010: S.C minutes of 15.03.2012

Per Bandaranayake CJ:

A plain reading of the said Section 20, clearly indicates that when a Statutory Determination is published in the Gazette in terms of Section 19, from the date of such notification is published, the Land Reform Commission shall not have any right, title or interests in the said agricultural land. Accordingly, when an agricultural land owned by a person in excess of the ceiling on the date of commencement of the Land Reform Law had been vested in the Commission, and the said land be deemed to be held by such person under a statutory lease from the Commission, thereafter on the basis of a Statutory declaration made by the statutory lessee, if a Statutory Determination is made, the Land Reform

Commission would not have any right, title or interest from the date of the publication in the Gazette of the Statutory Determination. Therefore when the Statutory Determination is made and the Gazette Notification is published, the person in whose favour the said Determination was made would become the owner of the land stipulated in the said Statutory Determination.

This position was considered in *Jinawathie and Others v. Emalin Perera ((1986) 2 Sri L.R. 121)* by a Divisional Bench of this Court. In that, the objectives of the Land Reform Law and the effects of a Statutory Determination were clearly considered and it was held that,

> Once the statutory determination is made the person in whose favour it was made becomes owner of the land specified in the determination with all the incidents of ownership".

The questions of law is answered as follows:

16 (c) No. High Court has not erred in law. Statutory lessee has a right to make a statutory declaration within 1 month as provided by Section 18 of the said law. The law is clear on this aspect but title will pass only on publication of the gazette by the commission as required by Section 20 of the Land Reform Law.

16(f) No. Appellant would not be entitled to relief as prayed for in his amended plaint.

In all the above circumstances of the case in hand, I affirm the judgment of the Civil Appellate High Court. Appellant no doubt commenced his action by filing plaint on 18.12.1992 and the statutory determination was made by gazette notification only on 11.03.1994. Therefore the action filed by the

Appellant in the trial court was not maintainable as he had no title to the property in dispute as at the date of filing action. Appeal is dismissed with costs.

Appeal dismissed.

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

In the matter of an Appeal from the Civil Appellate High Court.

1. M.R.Sanjeewani Seneviratne, No. 22/4, Mawilmada, Kandy.
2. M.D.Chandrasiri Seneviratne, No. 22/4. Mawilmada, Kandy.

Plaintiffs

Vs

SC APPEAL No. 140/2012
S.C.(L.A.) Application No. 486/2011
WP/HCCA/Mt. Lavinia – 126/06(F)
Mount Lavinia D.C. – 1846/04/L

M. Priyankara Samarajeewa, No. 253/1/8, Stanley Thillakeratne Mawatha, Nugegoda.

Defendant

AND BETWEEN

M. Priyankara Samarajeewa, No. 253/1/8, Stanley Thillakeratne Mawatha, Nugegoda

Defendant Appellant

Vs

1. M.R.Sanjeewani Seneviratne,
   No. 22/4, Mawilmada, Kandy.
2. M.D.Chandrasiri Seneviratne,
   No. 22/4. Mawilmada, Kandy.

Plaintiff Respondents

AND NOW BETWEEN

M. Priyankara Samarajeewa,
No. 253/1/8, Stanley
Thillakeratne Mawatha,
Nugegoda.

Defendant Appellant Appellant

Vs

1. M.R.Sanjeewani Seneviratne,
   No. 22/4, Mawilmada, Kandy.
2. M.D.Chandrasiri Seneviratne,
   No. 22/4. Mawilmada, Kandy.

Plaintiff Respondent Respondents

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In the matter of an Appeal from the Civil Appellate High Court

1 M.R.Sanjeewani Seneviratne,
No. 22/4, Mawilmada, Kandy.
2.M.D.Chandrasiri Seneviratne,
No. 22/4. Mawilmada, Kandy.

Plaintiffs

SC APPEAL No. 139/2012

SC/HC(CA) LA Application No. 231/12

WP/HCCA/Mt. Lavinia – 13/2010/LA

Mt. Lavinia D.C. – 1846/04/L

Vs

M. Priyankara Samarajeewa,
No. 253/1/8, Stanley
Thillakeratne Mawatha,
Nugegoda

Defendant

AND BETWEEN

1. M.R.Sanjeewani Seneviratne,
No. 22/4, Mawilmada, Kandy.
2. M.D.Chandrasiri Seneviratne,
No. 22/4. Mawilmada, Kandy.

Plaintiff Petitioner –
Judgment Creditors

Vs

M. Priyankara Samarajeewa,
No. 253/1/8, Stanley
Thillakeratne Mawatha,
Nugegoda

Defendant Respondent-
Judgment Debtor

AND NOW BETWEEN

M. Priyankara Samarajeewa,
No. 253/1/8, Thillakeratne
Mawatha, Nugegoda.

Defendant Respondent Appellant

Vs

1 M.R.Sanjeewani Seneviratne,
No. 22/4, Mawilmada, Kandy.
2.M.D.Chandrasiri Seneviratne,
No. 22/4. Mawilmada, Kandy.

Plaintiff Petitioner Respondents

……..

BEFORE: **S. EVA WANASUNDERA PCJ.,**
PRIYANTHA JAYAWARDENA PCJ. &
H.N.J. PERERA J.

COUNSEL: Lakshman Wickremaratne with Sirimewan Weerasuriya for the Defendant Appellant Appellant in SC Appeal 140/2012 and for the Defendant Respondent Appellant in SC Appeal 139/2012.

Gamini Perera with Wijitha Salpitikorala for the Plaintiff Respondent Respondents in SC Appeal 140/2012 and for the Plaintiff Appell--ant Respondents in SC Appeal 139/2012.

ARGUED ON: 30.08.2017.

DECIDED ON: 26.10.2017.

S. EVA WANASUNDERA PCJ.

Counsel for the Appellant in both the aforementioned Appeals and Counsel for the Respondents in the said Appeals agreed to abide by one judgment from this Court since parties are the same and the subject matter is also the same in both matters. SC Appeal 140/12 is the appeal against the judgment of the Civil Appellate High Cout. SC Appeal 139/12 is the appeal against the order made by the Civil Appellate High Court with regard to the application made to execute the writ pending appeal which sought relief to demolish the wall which had been built enclosing the land claimed by the Plaintiffs in the District Court case.

This Court heard submissions on the questions of law on which leave to appeal was granted. They are as follows:-

1. Did the Provincial High Court exercising Civil Appellate Jurisdiction err in failing to consider the fact that the original court had based its judgment on an assumption that **Lot 9 in Plan No. 834** is identical with **Lot 9 in Plan No. 967** without any issue being raised in this regard in the original Court?

2. Did the said Provincial High Court err in arriving at a conclusion in respect of the Plan 571 which depicted two larger lands that were amalgamated by Plan No. 416/98 and with the portions of land considered as material to the making of Plan No. 967 as claimed by the Respondents in their plan and the title Deed?

3. Did the Provincial High Court of Civil Appeal err in considering the Plan No. 1040 which is not based on verification of material facts on the basis of a physically executed Plan on the basis of a commission issued by the District Court?

The Plaintiffs had filed action against the Defendant in the District Court of Mount Lavinia praying for a declaration that they are the lawful owners of an allotment of land in the first Schedule to the Plaint which is of **an extent of 06 Perches** situated within the Municipal Council limits of Sri Jayawardenapura, Kotte , situated adjacent to the road named Ananda Balika Mawatha. The said allotment of land is marked as **Lot 9 of Plan No. 967** dated 08.04.1999 made by L.N.Perera

Licensed Surveyor. The Plaintiffs had bought the said land from Padmasena Mendis **Jayasinghe** on **23.08.1999 by Deed No. 4317** and attested by S.Chandra Silva, Notary Public. The said Padmasena Mendis **Jayasinghe** had claimed that he had got title to the same from Mahinda Priyankara **Samarajeeva** by **Deed No.1118 dated 04.06.1998** attested by L.K.N. Perera, Notary Public. The said **Vendor in Deed No. 1118** , Mahinda Priyankara **Samarajeeva** is the **Defendant** in the District Court in the instant case.

The Defendant, Mahinda Priyankara **Samarajeeva** had transferred **Lot A and Lot B in the Survey Plan No. 571** dated **25.03.1998** made by Licensed Surveyor M.L.N. Perera which said lots are respectively of A0 R2 P7 and A1 R0 P19 in extent, to **Padmasena Mendis Jayasinghe** by the aforementioned Deed No**. 1118**. Thereafter Padmasena Mendis Jayasinghe had amalgamated the **said Lots A and B of Plan No. 571** and got a Plan of the amalgamated big land done by another Surveyor, namely **E.K.Nanayakkara**. That Plan was numbered as **416/98 and dated 15.04.1998**. Once **again** the said M.P. Samarajeeva had got the **same land** surveyed by **Surveyor M.L.N. Perera on 25.11.1998 and made the Plan 834.** Thereafter Lots 1,2,3, and 10 of the said Plan 834 was amalgamated with Lot 1 of Plan 966 dated 08.04.1999 done by the same surveyor, M.L.N.Perera and Plan No. 967 was done. That Plan **No. 967 is dated 08.04.1999.** It divides the whole amalgamated lands into six allotments and names them as Lots A,B,C,D,8 and **9**. The said lots are respectively 9.6 Perches**,** 9 Perches, 24.40 Perches, 6.20 Perches, 10 Perches and **6 Perches**. It is thereafter only that **Padmasena Mendis Jayasinghe had transferred Lot 9 containing 06 Perches to the Plaintiffs by Deed No. 4317 dated 23.08.1999**, after about 4 ½ months from the date of blocking out the amalgamated land.

In Plan No**. 834**, the legend to the Plan reads as " Allotments of land marked Lots 1,2,3,4,5,6.7,**8,9**, and 10; Lot 7 being the identical Lot 7 in Plan No. 416/98 dated 15.04.1998, made by E.K.Nanayakkara Licensed Surveyor and Lots 1,2,3,4,5,6,8,9, & 10 being an amalgamation and subdivisions after resurvey of Lots 1,2,3,4,5,6,8,9, & 10 depicted in aforesaid Plan No. 416/98 of the land called ' Egodapothuwila Kumbura' situated at Pita Kotte within the Municipal Council Limits of Sri Jayawardenapura Kotte in Palle Pattu of Salpiti Korale , Colombo District, Western Province and partitioned on **25.11.1998."**

In Plan No**. 967 dated 8th April, 1999**, the legend to the Plan reads as **"** Allotments of land marked Lots A,B,C,D,8 and 9: **Lot 8 and 9 being the identical Lots in Plan No. 834:** Lots A,B,C,D, & D being an amalgamation and subdivisions of Lots 1,2,3,10 depicted in Plan No. 966 dated 8th April, 1999, both Plans made by M.L.N.Perera Licensed Surveyor of the land called Egodapothuwila Kumbura situated at Pita Kotte within the Municipal Council Limits of Sri Jayawardenapura Kotte in Palle Pattu of Salpiti Korale, Colombo District, Western Province**".**

Therefore it has to be clearly understood that land of the **Lots 8 and 9 of Plan 834 is identical with Lots 8 and 9 of Plan 967 because the Surveyor M.L.N. Perera who has surveyed and subdivided the Lots on the land has specifically mentioned so on the face of the Plan itself.** Whose Surveyor is M.L.N. Perera? He is the **Defendant's Surveyor** and not the Plaintiffs' surveyor.

The Plaintiffs claim that they are the legal owners of Lot 9 in Plan 967 by Deed 4317 dated 23.08.1999 . The Defendant claims that he is the legal owner of Lot 9 in Plan 834 by Deed No. 1443 dated 17.09.2001. **So it is the same allotment or block of land that each party is claiming.**

Plan 967 is dated **8.4.1999** and Plan **834 is dated 25.11.1998**. The Plaintiffs bought Lot 9 in Plan 967 by Deed 4317 dated **23.08.1999**. The Defendant Samarajeeva had received his alleged Deed of Transfer No. 4617 from Jayasinghe, passing title to Lot 9 in Plan 834 plus Lot 10 in Plan 834, bearing Jayasinghe's signature as vendor. It is obvious that Jayasinghe has passed title of the **same block of land twice**. The Plaintiff's Deed was registered in the land Registry in 1999 and the volume/folio has been marked in evidence. The Plaintiffs' legal claim to the said Lot 9 had stood valid in law and registered in the said volume/folio in the Land Registry in 1999, **for more than two years** before the Defendant's Deed came into being in 2001.

According to the aforementioned two deeds, the vendor **had first sold** the land to the **Plaintiffs on a later plan** and **secondly sold the same land** to **the Defendant on an earlier plan**. In fact the Defendant had known that **the Lot 9 had already been sold** according to his own statement to the Police, but when he got the same Lot 9 along with another portion of the same land, namely Lot 10, by deed No. 1443 , he has acted on it, knowing very well that the Plaintiffs were the owners of Lot 9. Having observed that the Plaintiffs were away from the

country , the Defendant had put up a parapet wall and a gate attaching Lot 9 to Lot 10, which is the other portion of land mentioned in his Deed 1443.
The Plaintiffs had been given possession of Lot 9 right after the sale by the vendor, Jayasinghe and it was fenced with barbed wire as mentioned by the first Plaintiff in her evidence before the District Court. The Plaintiffs are husband and wife and they had cleared the land and had got it prepared to build a house. Suddenly, due to a personal reason in June, 2000 , they had to go to Australia to stay on in that country for a length of time. Anyway, they had been in **uninterrupted possession from 1999 August to 2000 June.** They had told a known person to look after the land and gone out of the country. They returned about one year later in 2001 July and had gone to see the land and there had been no problem. Again they had visited the land in 2002 July and still there had been no problem. When they went to see the land in 2003 July, they had seen that there was a parapet wall built joining the Plaintiffs' land and the land adjoining the same. The Defendant had placed a well built gate also within the parapet wall and **had not allowed the Plaintiffs to enter into their land to put up a hut therein,** as a first step to build a house.

Thereafter the Plaintiffs had lodged an entry at the Police Station and the Defendant also had given a statement in that regard. In that statement of the Defendant which was marked as P5 and produced in Court by the first Plaintiff, the Defendant had stated that out of the two amalgamated blocks of land which he had sold to Padmasena Mendis Jayasinghe, **"** the said 6 Perches had been sold to another **"** , which means that **he had admitted in his statement to the Police that the Plaintiffs may be the party to whom Jayasinghe had sold the six perches of land.** But further more the Defendant had stated that Jayasinghe had wanted another roadway over the rest of the land that he was still owning, and **promised to give back** to him **14 Perches** out of the land he had sold earlier to Jayasinghe. The Defendant stated that, later on Jayasinghe had prepared a Deed and given the same to the Defendant. The Defendant had wanted the Police to get down Jayasinghe and inquire into the matter.

The Police had got down Padmasena Mendis Jayasinghe and he also had made a statement to the Police. It is recorded that **he has confirmed the sale of Lot 9 to the Plaintiffs by him** and that Lot 9 is part of the land which he had earlier bought from the Defendant. Jayasinghe also had stated that the Defendant **had quite wrongfully built a parapet wall attaching Lot 9** to the Defendant's land, namely

Lot 10 in Plan 834 dated 25.11.1999. I observe that the Defendant had stated to the Police in his statement that " Jayasinghe promised to give back to me **14 Perches and** later he had prepared a deed and gave me ". The Deed referred to here is the Deed No.1443 dated 17.09.2001 of the Defendant through which he claims Lot 9 of 6 Perches also, whereas he had got Lot 10 which is **14 Perches,** which he had stated in the Police statement that Jayasinghe promised to give him.

Nobody can fathom how this 6 Perches got into his title deed and how that Deed 1443 was executed or who instigated it etc. because Jayasinghe also states that he had sold Lot 9 of 6 Perches to the Plaintiffs. Neither party had led evidence with regard to these matters. **However, in the volume / folio which is allocated to Lot 9 of Egoda Pothuwila Kumbura , only the Plaintiffs' Deed No. 4317 is registered. There is no other entry in that volume/folio which was led in evidence and is part of the record before this Court.**

Anyway the Defendant had built a wall around the land he claims to have according to Deed No. 1443 dated 17.09.2001 which includes the Plaintiffs land and had refused the Plaintiffs any entry to the land claimed by the Plaintiffs.

By Deed 1443 dated 17.09.2001, which narrates that Padmasena Mendis Jayasinghe had sold **Lots 9 and 10 of Plan No. 834 dated 25.11.2000** done by surveyor M.N.L.Perera to the Defendant containing in extent of **20 Perches** with the roadway marked as Lot 1 in the same Plan 834. The said Deed also says that Lots 9, 10 and 1, are allotments of two blocks of land, namely Lots A and B in Plan 571 dated 25.03.1998 done by M.N.L.Perera Licensed Surveyor.

However I find the Plan 834 done by surveyor M.L.N.Perera which is part of the record is dated 25.11.1998 and **not 25.11.2000 as mentioned quite wrongly in the Defendant's title deed No. 1443.**

Having a look at the questions of law enumerated above, there is a mention of a Plan No. 1040 which was done by the Court Commissioner when the matter was before the District Court. The Appellant alleges that, this Plan was considered by the High Court erroneously prior to the conclusion reached in the Appeal before the High Court. The Appellant's stance is that the said Plan 1040 had been done without any basis on verification of material facts on the basis of a physically executed Plan.

The learned judges of the Civil Appellate High Court state as follows in page 4 of the Judgment dated 17.10.2011. **"** As regards to the identity of Lot 9 in P1, the trial judge has correctly decided that the said Lot 9 has been identified by plan No. 596 (P10) & Plan No. 1040 (P11). Therefore the question of identity raised by the Appellant will not hold good for the reason that Lot 9 in plan No. 834 claimed by the Appellant and the Respondents' Lot 9 in P1, are identical lands.**"**

Court Commissioner, Surveyor Stanley Ubayasiri had surveyed the land according to the commission issued to him to go to the land and survey and report. The Plan made by him is No. 596. It is marked as P10 and it is mentioned therein that the **surveyor went to the land and surveyed on two dates, i.e. on 24.08.2004 and on 04.09.2004**. He has surveyed the land and superimposed Plan. 834 as well as Plan 967 on the Plan he made and in cage 1 of the explanatory note, he specifically declares that " Lot 9 of Plan 834 and 967 are one and the same land and the Defendant is in possession of the said land." In his report attached to the Plan 596 marked as P10 (a) also he states the same. Before the evidence of the said surveyor could be taken by Court, the said surveyor, Stanley Ubayasiri had passed away.

Thereafter another surveyor , named Rajapaksha had prepared Plan No. 1040 , with the information on the plan drawn by surveyor Ubayasiri in Plan 596. The said surveyor Rajapaksha had given evidence in Court. He had well explained the contents of Plan 596 and the fact that Plan 1040 is a tracing done by him from the Plan 596 done by the deceased surveyor Ubayasiri eliciting the fact that Lot 9 of Plan 834 and 967 are one and the same land. The contention of the counsel for the Defendant is that Rajapaksha who gave evidence did not go to the land and survey the land and therefore his evidence is not correct. I find that the evidence given by him is truthful and it corroborates the evidence of the first Plaintiff. Moreover, in the earlier plans alone, on the face of the plans, **it is amply indicated that both Lot 9 in Plan 834 and Lot 9 in Plan 967 are one and the same.**

Moreover, the Defendant's counsel had not objected to any document produced in evidence by the Plaintiffs, at the closure of the Plaintiffs' case. When the Plaintiffs closed their case on 05.06.2006, as indicated at page 136 of the District Court brief the Defendant had not objected to any documents marked as P1 to

P12 which includes the document P11. The Plan 1040 done by Surveyor Rajapaksha is document P11.
Thereafter once again, at the end of the whole case, after the Defendant's evidence was also concluded on 28.09.2006, as indicated at page 207 of the District Court brief, when the Plantiffs' counsel closed the case marking in evidence P1 to P17 , the Defendant's counsel did not object to a single document. I find that in the next line, the Defendant's case was closed marking V1 to V11(a) and the Counsel for the Plaintiff had mentioned that V6 was not proved and therefore it should be noted.

Even though the questions of law in the case before this Court touches on Plan 1040, I conclude that, the said document cannot be challenged now, according to the law prevailing in this country, as laid by in the case of **Sri Lanka Ports Authority and Another Vs Jugolinija Boal East (1981) 1 SLR 18** where the Chief Justice Samarakoon held that "If no objection is taken, when at the closure of a case documents are read in evidence, they are evidence for all purpose of the law".

It is trite law in this country, as established by cases such **as Muththasamy Vs Seneviratne 321 CLW 91, Peris Vs Savunhamy 54 NLR 207, Wanigaratne Vs Juwanis Appuhamy 65 NLR 167 and Luwis Singho Vs Ponnamperuma (1996) 2 SLR 320** , that the Plaintiff should prove and establish his title to the property in a rei vindication action. In the present case the Plaintiffs have established their title to Lot 9 of Plan 967 without a doubt.

The Defendant is unlawfully and illegally in possession of Lot 9 which belongs to the Plaintiffs. There is no mistake in the identity of the land. The Defendant has to be ejected from the land and the Plaintiffs should get their land back. The Defendant has enjoyed the land of the Plaintiffs from the year 2001 by force, having put up a parapet wall around the land and refusing entry to the land to the Plaintiffs.

I answer the questions of law enumerated above in the negative against the Appellant and in favour of the Respondents.

I affirm the judgments of the Civil Appellate High Court and the District Court. I hold that the Plaintiff Respondent Respondents are entitled to the reliefs granted by the judgment of the Additional District Judge dated 14.12.2006. The damages should be calculated from the date of the Plaint up to the date of this Judgment and extending to the date of getting the possession of the land at the rate that the District Judge had ordered as Rs. 5000/- per month. The Plaintiffs are entitled to costs of suit in the District Court, Civil Appellate High Court and the Supreme Court.

The Appeal is dismissed with 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

Wickremagedera Ranhamy

N0-25, Megammana Road,

Wattegama. (Deceased)

PLAINTIFF

Wickremagedera Ukkumenika

No.25, Meegammana Road,

Wattegama.

SUBSTITUTED PLAINTIFF

Wickremagedera Karunaratne

Wickremage, No.25, Meegammana Road, Wattegama.

1st DEFENDANT-SUBSTITUTED-PLAINTIFF

SC Appeal No:- 144/2015

SC/HCCA/Kandy/54/2007

DC Kandy/11607/P

V.

2.Wickremagedera Abeysinghe

3.Wickremagedera Wickremaratne

4.Wickremagedera Indra Wickremaratne,

5.Wickremagedera Pragnarathna

6.Gunarathna Manike, All of Temple Road,Meegammana, Wattegama.

7.M.G.NettiKumara, No 51, Meegammana, Wattegama.

DEFENDANTS

AND

M.G.Netti Kumara, No 51.

Meegammana, Wattegama.

7th DEFENDANT-APPELLANT

7A.Kuragoda Gamlathge Gnanawathie

7B.N.M.G.Menaka Ranjan Netikaumara

7C.N.M.G.Kushan Chandana Nettikumara

7D.D.N.M.G.Venulin Sandya Nettikumara

All of No.51, Meegammana, Wattegama.

SUBSTITUTED 7TH DEFENDANT-APPELLANTS

V.

Wickremagedera Karunarathne Wickremage

No-25, Meegammana Road, Wattegama.

1st DEFENDANT-SUBSTITUTED-PLAINTIFF-RESPONDENT

2.Wickremagedera Abeysinghe

3.Wickremagedera Wickremaratne

4.Wickremagedera Indra Wickremaratne

5.Wickremagedera Pragnarathna

6.Gunarathna Menike

All of Temple Road, Meegammana.

DEFENDANTS-RESPONDENTS

AND BETWEEN

Wickremagedera Karunarathne Wickremage

No.25, Meegammana Road,Wattegama.

1st DEFENDANT-SUBSTITUTED-PLAINTIF-RESPONDENT-APPELLANT

V.

7A.Kuragoda Gamlathge Gnanawathie

7B.N.M.G.Menaka Ranjan Nettikumara

7C.N.M.G. Kushan Chandana Nettikumara

7D.N.M.G.Venulin Sandya Nettikumara

All of No. 51, Meegammana, Wattegama.

SUBSTITUTED 7TH DEFENDANT-APPELLANT-RESPONDENTS

2.Wickremagedera Abeysinghe

3.Wickremagedera Wickremaratne

4.Wickremagedera Indra Wickremaratne

5.Wickremagedera Pragnarathna

6.Gunarathna Menike,

All of Temple Road, Meegammana.

DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE:- PRIYASATH DEP, PC, CJ.

PRIYANTHA JAYAWARDENA, PC, J.

H.N.J.PERERA, J.

COUNSEL:-Samantha Ratwatte, PC, with R.de Rafayal instructed by

Ms.U.H.K.Amunugama for the 1st Defendant-Substituted

Plaintiff-Respondent-Appellant

Lal Wijenayake for the 7th Defendant-Appellant-Respondent

ARGUED ON:- 28.08.2017

DECIDED ON:- 20.10.2017

H.N.J.PERERA, J.

The plaintiff (deceased) instituted this Partition action in the District Court of Kandy to partition the amalgamated lands called "Polgahakumbura" and "Polgahakumburawatta" more fully described in the schedule to the plaint. The land described in the schedule to the plaint is lots 1 & 2 depicted in plan No 5204 dated 07.02.1991 made by Licensed Surveyor G.R.W. M. Weerakoon. 2 to 7 defendants intervened in the case.

The plaintiff's position was that the original owner of the subject matter was one Ranmal Hamy and he by deed marked P1 transferred his rights to one Siyathu. Upon the said Siyathu's death Ranhamy the original plaintiff and Kaluhamy inherited the said rights since the female children of Siyathu had been married in deega before the death of Siyathu. In proof of this the judgment entered in the District Court of Kandy in case No. P 9216 was produced marked P4 in respect of Siyathu's estate where the position of deega marriage had been established. It was the plaintiff's position that Ranhamy thereafter purchased the half share of Kaluhamy by deed marked P2 and transferred an undivided share to the 1st defendant. The original plaintiff sought a division of the subject matter between him and the 1st defendant.

The 6th defendant claimed that she had purchased rights from the deega married children of Siyathu upon the deed marked 6V2.The 7th defendant claimed that lot 1 of the preliminary plan marked X is a different land while claiming title to the entirety of lot No. 2 of the Preliminary plan by inheritance and prescriptive title.

The 7th defendant sought an exclusion of lot 1 of the preliminary plan on the basis that it was not a part of the land sought to be partitioned but a separate land called Polgaskumbure Wanatha. The 7th defendant further sought a declaration that lot 2 in the said preliminary plan is devolved on the 7th defendant as stated in the statement of claim.

The learned District Judge after trial delivered his judgment on 21.11.2006 holding that only lot 2 in the preliminary plan consists of the corpus and excluded lot 1 in the preliminary plan as it does not form part of the corpus. The learned trial judge also held that the 7th defendant has failed to establish that he had prescribed to lot 2 in the preliminary plan. It was also held that the original plaintiff is entitled to 3/8th share and the 1st defendant to 3/8 share of the corpus. It was also held that the 2nd to

6th defendants have failed to establish their right in respect of lot 2 in the preliminary plan.

Being aggrieved by the said judgment the 7th defendant appealed to the Court of Appeal and the said appeal was subsequently transferred to the Civil Appellate High Court of the Central province. The 1st defendant substituted-plaintiff too preferred a cross appeal in terms of section 772 of the Civil Procedure Code and both appeals were considered by the Civil Appellate High Court of the Central province.

The Civil Appellate High Court on 25.05.2011 allowed the appeal of the 7th defendant and rejected the cross appeal preferred by the 1st defendant substituted plaintiff. Aggrieved by the said judgment of the Civil Appellate High Court dated 25.05.2011 the 1st defendant substituted-plaintiff-Respondent-Appellant has preferred this leave to appeal application to this court and this court granted Leave to appeal on the following questions of law raised by the 1st defendant-substituted plaintiff-respondent-Appellant.

(1)Could a party to a partition action claim legal right to ½ share of the Land and claim the balance ½ share on prescriptive rights without Proving ouster?

(2)Could a party to a partition action claim a share on the basis of co-ownership in the District Court by way of a points of contest and thereafter claim ownership in appeal on the basis of transfer of rights and possessing against the rights of the vendees and thereby claim Prescriptive rights?

(3)(a) In any event has the 7th defendant claimed rights only to the Eastern ½ share of the subject matter before the District Court?

(b)If so, could the entirety of the subject matter be claimed by the 7th defendant by way of prescription?

(4)Is lot 1 in the preliminary plan a part of the corpus?

(5)In the circumstances pleaded is the judgment of the High Court According to law?

(6)Has the 7th defendant claimed prescriptive title to the entirety of the subject matter under issue 24 raised in the District Court?

The original plaintiff's position was that one Ranmalhamy was the original owner of the subject matter and that he by deed marked P1 transferred his rights to one Siyathu. Upon Siyathu's death it was Ranhamy the original plaintiff and Kaluhamy who had inherited since the female children of Siyathu had been married in deega before the death of Siyathu. In proof of this position the judgment in case No P 9216 Kandy District Courts marked P4 was produced. This document clearly established the fact that Siyathu's female children were given on deega marriage during the life time of Siyathu. The 6th defendant claimed that she had purchased rights from the deega married children of Siyathu upon deed marked 6V2.The learned District Judge has clearly held that the 6th defendant is not entitled to any rights on that basis. The 6th defendant has not appealed against the said decision.

It was also the plaintiff's position that Ranhamy thereafter had purchased the rights of Kaluhamy by the deed marked P2 and transferred a share to the 1st Defendant. Therefore the original plaintiff and the 1st defendant claims the entire land on the basis that they own ½ share each.

The 7th defendant claimed that lot 1 of the preliminary plan is a different land and sought an exclusion of lot No 1, while claiming rights by inheritance and prescriptive title to lot No. 2 in the preliminary plan.

The land described in the schedule to the plaint as two contiguous lands called “Polgahakumbura” and “Polgahakumbura Watta’ in extent 10 lahas. The preliminary plan X depicts the two lands as lots 1 and 2. Lot 1 above the main road is ‘Polgahakumbura Watta” and below the road “Polgahakumbura”. The 7th defendant claimed sole owner ship to lot 1 on the basis of the title set out in the statement of claim and on the basis of prescription. The 7th defendant also claimed title to lot 2 with others on the basis of paper title set out in the statement of claim and further on the basis of prescription claimed ownership to the whole of lot 2.

The surveyor in his evidence states that the boundaries of the land set out in the schedule to the plaint tallies with the boundaries and extent of lot 2. The 1st defendant admitted in evidence that in deed P1, P2 and P3 produced by him to prove his title the said land is described as “Polgahakumbura” and the northern boundary of the said land is “Polgahakumbura Watte Ella”.

Schedule 1 in the said deed P1 refers to Eastern one half share of the paddy field called “Polgahakumbura”. The schedule 2 of the said deed marked P1 refers to Western one half share of the paddy field called “Polgahakumbura.” Therefore it is very clearly seen that the said Ranmalhamy had transferred the Eastern one half share and the Western one half share of the land called “Polgahakumbura” to Siyathu by deed P1.In the deed marked P1 the said Ranmalhamy has stated that he became entitled to the land described in the two schedules by deed No 4398 of 1916 and by deed No 11 of 1928. The said deed 4398 had been marked as P6 at the trial. P6 is a deed of exchange of lands. On perusal of the said deed it is clearly seen that owners of several

contiguous of lands had exchanged amongst each other certain lands they own. And Neththikumaranehelage gedera alias Malhabaralegedera Ukkumenika,Neththikumarnehelage gedera alias Malhabaralegedera Appuhamy, Neththikumaranehelage alias Malhabaralegedera Tikiri Menika, and Neththikumarahelage gedera alias Malhabaralegedera Ranmalhamy has exchanged land amongst themselves and the lands described in the schedule D has been given to the said Ranmalhamy. The second land described in the said schedule is the Western ½ share portion of land called Polgahakumbura.

Neththikumaranehelage gedera alias Malhabaralegedera Appuhamy was given the lands described in the schedule B of the said deed and he became the owner of land called Eastern half share portion of "Polgahakumbura". The said Appuhamy by the deed marked P7 transferred his rights to one Sumanasara Thero in 1920.

And by deed No 11 of 1928 marked P8 Neththikumarehelagegedera alias Malhabaralegedera Ran Malhamy became the owner of the land described in the 1st schedule that is a divided half share on the East out of the field called Polgahakumbura about 5 lahas. Therefore it is very clearly established that Ranmalhamy became the owner of the two allotments of lands called Western half share portion and the Eastern half share portion from the said deeds marked P6, P7 and P8. And by deed No 1342 marked P1 the said Ran Malhamy had transferred the said rights to Wickremagedera Siyathu in 1941.Therefore it is very clear from the said deeds that Wickremagedera Sithu became the owner of the entirety of the land called Polgahakumbura in 1941 (both Western and Eastern portions).

It was the original plaintiff's position that upon the death of Siyathu , Wickremage Ranhamy and Wickremage Kaluhamy inherited the said land and that Wickremage Ranhamy thereafter purchased the share of

Kaluhamy by the deed marked P2. On perusal of the said deed marked P2 it is clearly seen that Kaluhamy has transferred only the rights he had to the land called Western half share of the field called Polgahakumbura. In the said schedule to the deed marked P2 the boundary to the East is the remaining portion of the same land. By the said deed P2 Ranhamy only became owner of the balance portion of the Western half share which Kuluhamy inherited after the death of Siyathu.

Therefore on perusal of the said deeds marked and produced by the plaintiff it is clearly seen that Kaluhamy continued to be the owner of the balance half share of the Eastern half share portion of the land called Polgahakumbura.

Therefore the plaintiff became the owner of the entire Western half share of the land called Polgahakumbura and was only entitled to half share of the land called Eastern half share of the said land. The other ½ share of the Eastern half share of the land called Polgahakumbura was owned BY Wickremage Kaluhamy. It is the heirs of Wickremage Kaluhamy who are entitled to the balance portion of the eastern half share of the land called Polgahakumbura. Therefore the Plaintiff has very clearly failed to establish that he became the sole owner the two allotments of lands called Western half share and the Eastern half share of the land called Polgahakumbura. The learned trial judge had therefore very correctly held that the plaintiff and the 1st defendant is entitled to only 3/8 share each to the corpus and the balance 2/8 should go to the heirs of Kaluhamy and be kept un-allotted.

It is very clearly seen that the said deed marked P1 relates only to the western half share and the Eastern half share of Polgahakumbura. The northern boundary of the said two lands are referred to as the Ella of Polgahakumburewatta. What had been dealt by the said deeds marked by the plaintiff in this case relates only to the Western half share and the

Eastern half share of the land called Polgahakumbura. Therefore it is quite obvious that the other land called “Polgahakumbure Watta” is situated north to the land called ‘Polgahakumbura”. And further that there was the Ella of Polgahakumbura Watta as a boundary. The deeds marked by the plaintiff P1, P2, P3 and P6 refers to a land called “Polgahakumbura”. Nowhere in the said deeds the said the land Polgahakumbura is referred to as “Polgahakumburawatta”.

On perusal of the deed marked P5 it is clearly seen that schedule 3 of the said deed refers to a land called Polgahakumbura”. And the northern boundary of the said land is referred as “Polgahakumburewatte Ella”. The 6th schedule in the said deed P5 refers to a land called “Polgahakumburewatta” and the Southern boundary is “Polgahakumbure Ella”. The deed marked P5 very clearly refers to two separate lands called “Polgahakumbura” and “Polgahakumbure Watta”. The Polgahakumbure ella is given as northern boundary of the land called “Polgahakumbura”. And the polgahakumbure ella is given as the Southern boundary of the land called “Polgahakumbure Watta”. Therefore it is very clearly seen that the said Polgahakumbure Ella separates the two adjoining lands “Polgahakumbura” and “Polgahakumburawatta”. The boundaries of Lot 2 in the said preliminary plan marked X clearly resembles the schedule given in the deed marked P1, P2 and P3 of the land called “Polgahakumbura.

The 7th defendant had claimed the lot 1 in the said preliminary plan as the land called Polgahakumbura Wanatha” and sought an exclusion of lot 1 in the said preliminary plan marked X as it is a separate land called “Polgahakumbure Wanatha.” In my view the 7th defendant has not been able to establish that the lot 1 in the said preliminary plan marked X is land called “Polgahakumbure Wanatha”. But the evidence led in this case clearly establish that it is another separate land called Polgahakumbure Watta”. The learned trial Judge in his judgment dated 21.11.2006 has

held that only lot 2 in the preliminary plan consists of the corpus and had excluded lot 1 in the preliminary plan marked X as it does not form part of the corpus. When an application is made to exclude a lot from a preliminary plan, the court if satisfied from the evidence that it does not form a part of the corpus, can act under section 839 of the Civil Procedure Code to exclude the said lot from the land sought to be partitioned. But the trial judge is not empowered to examine the title of the said lot but should only proceed to exclude the said lot from the land sought to be partitioned. Hevavitharana V. Themis de Silva 63 N.L.R 68. It is the view of this court that the learned District Judge was correct when he made the order to exclude the said lot 1 from the corpus. The deeds tendered by the plaintiff in this case clearly relate only to lot 2 of the preliminary plan and what the court has to consider in this case is the rights of parties to the said lot 2 in the preliminary plan marked X. The Judges of the Civil Appellate High Court too had held that having perused the reasoning of the learned trial Judge relating to his finding that lot 1 is not a part of the land sought to be partitioned that the said Court is of the opinion that his findings are not worthy to be disturbed.

The father of the 7th defendant, Appuhamy became the owner of the divided half share on the East out of the field called “Polgahakumbura” by deed No 4398 of 1916 marked P6. He by deed NO 8614 0f 1920 transferred the said rights to Sumanasara Thero. Thereafter the original plaintiff Ranmalhamy purchased the said rights from Sumasara Thero in 1928. Although the 7th defendant had claimed that his father was a co-owner of the land to be partitioned, it is very clear from the evidence led in this case that the 7th defendant’s father sold his rights to Sumanasara Thero in 1920. Appuhamy, the 7th defendant’s father was the owner of the said allotment of land called Eastern half share of Polgahakumbura only for a period of four years. It was sold to Sumanasara Thero in 1920 and thereafter Ranmalhmay became the owner of the Said lot in 1928.

The said Ranmalhamy became the owner of the entire land called Polgahakumbura in 1928. The said Ranmalhamy who was the owner of the entire land called "Polgahakumbura" transferred his rights to Siythu by deed No 1342 marked P1, in the year 1941. Although the 7th defendant had calmed to be a co-owner of the said land called "Polgahakumbura" under his father, the evidence in this case clearly show that his father Appuhamy had sold his rights to the said land in 1920 to Sumanasara Thero and thereafter seized to be a co-owner of the said land.

The evidence led in this case clearly establish the title of the original plaintiff. The original plaintiff and the 1st defendant are both entitled to 3/8 share each to the corpus to be partitioned in this case (lot No 2). The other un-allotted 2/8th share must go to the heirs of Kaluhamy.

The learned District Judge held that the 7th defendant has failed to establish prescriptive title to the Said lot 2 in Plan X. The learned Judges of the Civil Appellate High Court was of the view that there was sufficient evidence to prove prescriptive title of the 7th defendant to lot 2 of the preliminary plan marked X.

All the evidence led by the 7th defendant in this case show that his father was residing and he too was born in the house shown in lot 1 of the said preliminary plan marked X. The said lot 1 has been excluded from the corpus to be partitioned in this case. No doubt there is evidence to show that the father of the defendant the said Appuhamy and thereafter the 7th defendant had continued to live and possess the said lot 1 in the preliminary plan marked X. But what the court has to examine and see in this case is whether in fact the 7th defendant has prescribed to lot 2 of the preliminary plan which is the corpus of this case.

It is clearly seen that the Said lot No 2 is a paddy field. There must be cogent evidence to prove that the 7th defendant has cultivated enjoyed

and possessed the said paddy field. No buildings had been put up in lot 2. The only item of evidence that the 7th defendant had exercised some right in lot 2 is the fact that the grave of the 7th defendant's mother is in lot 2. The evidence indicate that the mother of the said 7th defendant has been buried in 1982.This action has been filed in 1985. Just prior to three years from the date of filing of this action the defendant's mother had been buried in lot 2. This is the only isolated act of the 7th defendant to prove prescriptive title to the said lot 2.

In Sirajudeen V. Seyyed Abbas 1994 2 SLR 365 it was held mere general statements by a party that he possessed was not sufficient to acquire prescriptive rights. It was further held in the said case that there should be specific acts of possession such as planting etc.

Further in Hassan V. Romanishamy 66 C.L.W Vol. LX VI at page 112 it was also held that mere statements of a witness, "I possessed the land" or "We possessed the land" and "I planted plantain bushes and vegetables ", are not sufficient to entitle him to a decree under section 3 of the Prescription Ordinance, nor is the fact of payment or rates by itself proof pf possession for the purposes of this section.

By his amended statement of claim the 7th defendant claimed one Koskolapitiye Wimala was the original owner of the land described in the schedule to the plaint and she transferred it to the four children who had executed a deed of Exchange. It was claimed that Eastern ½ share of the land described in the schedule to the plaint was given to one Appuhamy and the said Appuhamy was the father of 7th defendant. The 7th defendant had clearly tried to show that he was a co-owner of the Eastern and Western ½ of the subject matter but had thereafter proceeded to claim the entire land on prescriptive title. As stated before the evidence led in this case very clearly establish that the said Appuhamy who was the 7th defendant's father seized to be a co-owner

of the lot 2 in view of the deed marked P7 when he transferred his rights to Sumanasara Thero in 1920.

The fact that the 7th defendant lived with his father in lot 1 and continued to possess the said lot 1 is not disputed by the parties in this case. But whether the 7th defendant's father and thereafter the 7th defendant acquired prescriptive title to the adjacent land which was to the South of the lot 1, which is depicted as lot 2 in the said preliminary plan is the main issue to be looked into in this case.

The learned Judges of the Civil Appellate High Court too has held that it is clear that consequent to the execution of the deed marked P7 dated 19.01.1920 Appuhamy's co-ownership was terminated. And that he cannot be treated as a co-owner of the property thereafter. The Judges of the Civil Appellate High Court has further held that although the said Appuhamy's co-ownership was terminated resultant to the deed marked P7 executed in 1920 it is manifest that he never surrendered his possession to the vendee or any other person and continued to possess the said land as a co-owner.

The said Court has further held that it is abundantly clear that the 7th defendant's party had possessed the land for more than 65 years prior to the bringing of the action in 1985.Further the learned Judges of the Civil Appellate High Court has held that the 7th defendant is entitled to track on to his father's possession for the purpose of establishing such claim based on prescription. In my view the evidence led by the 7th defendant in this case does not support that position.

The 7th defendant-respondent has given evidence and stated that his father lived in lot 1 and that he too was born in the said house in lot 1 in plan X. The survey plan marked X and report mark X1 clearly shows that there are buildings which were claimed by the 7th defendant. The 7th defendant's age at the time he gave evidence before the District Court in this case on 12.06.2006 was 56 years. Therefore he was born only in the year 1950. He in his evidence has admitted that in 1916 by the deed

marked P6 his father Appuhamy became the owner of the allotments of lands described in the schedule D of the said deed and thereafter by deed marked P7 transferred the lot No. 2 in the preliminary plan X to Sumanasara Thero in 1920. i.e the ½ share of the Eastern portion of the land called Polgahakumbura. The said Sumanasara Thero thereafter transferred the said rights to Ranmalhamy by deed marked P8 in 1928. The said father of the 7th defendant-respondent therefore had seized to be a co-owner of the said land called Polgahakumbura in 1920. That is about 36 years prior to the birth of the 7th defendant. But the 7th defendant's father continued to live in lot 1 of the preliminary plan marked X and the 7th defendant-respondent was born in the house in the said lot 1 and continued to live there with his father until his father's death in 1958. Thus it is very clear from the evidence of the 7th defendant that he was only 8 years old at the time of his father's death. The brother of his father, Ranmalhamy has died in 1960 two years after the death of Appuhamy. Therefore the 7th defendant evidence clearly shows that he has remained in the house of Appuhamy as a child and he and the other family members of Appuhamy continued to live and possess lot 1 in the said preliminary plan after the death of Appuhamy. It is clear from the evidence given by the 6th defendant that the 7th defendant thereafter demolished his ancestral home which was situated in lot 1 of the preliminary plan and built a new up stair house in the same location and continued to possess the same. The 7th defendant's father Appuhamy became a co-owner of the land called Polgahakumbura only in the year 1916 by deed marked P6 and seized to be a co-owner of the said land after 1920 when he sold his rights to Sumanasara Thero in 1920. All these things happened thirty years prior to the birth of the 7th defendant in 1950. Therefore the evidence of the 7th defendant that his father possessed and acquired prescriptive title to the said Eastern ½ portion of the lot 2 in the preliminary plan and he too continued to possess and

acquired prescriptive rights to lot No 2 cannot be accepted and acted upon. In my view clearly there is no cogent independent evidence to prove that the said Appuhamy continued to possess the Eastern ½ portion of the said land as a co-owner after 1920 and continued to possess the entirety of the said land and acquired prescriptive title to lot 2 in plan X.

It was contended on behalf of the plaintiff-Appellant that the learned High Court Judges erred in law by holding that the law with regard to vendee occupying a land after having transferred the entirety was applicable to the facts of this case when there was no such position taken up by the 7th defendant in the original court by way of points of contest.

It was contended that the 7th defendant did not claim that his father Appuhamy in fact transferred his rights but continued to be in possession against the transferee. It was contended on behalf of the plaintiff-appellant that no such position was taken up in the original court and evidence to counter such a position was therefore not led in the original court.

In Candappa v. Ponnambalampillai 1993(1) S.L.R 184 it was 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.

Further in Setha V. Weerakoon 49 N.L.R 225 it Was held that a new point which was not raised in the issue or in the course of 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 Appel has before it all the requisite material for deciding the point, or the question is one of law and nothing more.

In the cases of Weerappa Chettiar V. Rabukpotha Kumarihamy 45 N.L.R 322, and Karuaratne V. Sirimalie 53 N.L.R 444, it was held that even in a partition case where parties raise points of contest, Court is only obliged to look in to the said contest raised and the parties cannot be permitted to go beyond those issues by relying on section 25 of the Partition Law.

It is very clear from the issues raised on behalf of the 7th defendant that it was claimed that his father Appuhamy became the owner of the Eastern ½ and thereafter prescribed to it. The 7th defendant did not claim that his father Appuhamy transferred the balance to a 3rd party and claimed prescriptive rights against a third party after such a transfer. Therefore it is very clear the 7th defendant has taken up a completely different position in the Appeal before the Civil Appellate High Court which should have been rejected by the Civil Appellate High Court.

Therefore the plaintiff-appellant's complain that the learned Civil Appellate High Court Judges went beyond the points of contest and thereby committed an error of law is of some merit.

The evidence led in this case clearly shows that the 7th defendants father Appuhamy and the 7th defendant lived and possessed lot No1 in the preliminary plan X. The Civil Appellate High Court Judges have been influenced by the fact that the 7th defendant's father and the 7th defendant had continued to occupy and possess the said lot 1 in plan X in coming to the conclusion that the 7th defendant had prescribed to the said lot 2 in the preliminary plan X. But when one consider the said evidence given by the 7th defendant it is very clear that there is no clear cogent evidence to establish the fact that, in fact, the 7th defendant possessed and prescribed to the said lot No.2 in plan X. There is no evidence to show that he had built anything in lot No.2 or done any other specific acts to hold that he had acquired prescriptive title to the said lot No.2 in plan X.

The learned District Judge had very correctly held in his judgment that the 7th Defendant-Respondent has failed to prove prescriptive title to lot No.2 in preliminary plan marked X.

In Sirajudeen and Others V. Abbas [1994] 2 Sri.L.R 365, it was held that:- "Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive title."

As regards mode of proof of prescriptive possession, mere general statements of witnesses that the defendant possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be such character as is incompatible with the title of the owner.

In my view in the present case there is significant absence of clear and specific evidence on such acts of possession as would entitle the 7th defendant-appellant to a decree in favour in terms of section 3 of the Prescription Ordinance. The findings of facts by the learned District Judge are mainly based on the trial Judge's evaluation of facts. I have considered the entire judgment and see no reason to interfere and the trial Judge has given cogent reasons. The trial Judge has arrived at a correct conclusion. An Appellate Court should not without cogent reasons interfere with primary facts.

For the above reasons I see no reason to disturb the judgment of the learned District Judge.

Accordingly I answer questions of law raised in the instant case in the following manner.

No. 1 & 2 in the negative.
No. 3(a) in the affirmative
(b) in the negative.
No. 4, 5 & 6 in the negative in favour of the Plaintiff-Appellant.

Accordingly I set aside the judgment of the Civil Appellate High Court dated 22.05,2011 and affirm the judgment of the learned District Judge dated 21.11.2006.The appeal of the 1st defendant-Substituted-Plaintiff-Respondent-Appellant is partly allowed. I make no order for costs.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, PC, CJ.
I agree.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC,J.
I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal from the Civil Appellate High Court of Colombo.

Menikdiwela Senevirathnage Chandrasiri Sisira Kumara,
No. 35/5, Rosmead Place,
Colombo 07.

Plaintiff

Vs

SC APPEAL 147/16
SC/HCCA/LA No. 78/16
WP/HCCA/COL/277/2008(F)
D.C.Colombo Case No. 20652/L

1. Hapuarachchige Jayaratne Perera, No. 279/1, Hospital Road, Kiribathgoda, Kelaniya.

2. Seylan Securities and Finance (Pvt.) Ltd., Galle Road, Colombo 03.

3. Registrar, Land Registry, Colombo 07.

Defendants

THEN BETWEEN

Hapuarachchige Jayaratne Perera, No. 279/1, Hospital Road, Kiribathgoda,Kelaniya.

1st Defendant Appellant.

Vs

Menikdiwela Senevirathnage
Chandrasiri Sisira Kumara,
No. 35/5, Rosmead Place,
Colombo 07.
Plaintiff Respondent

2. . Seylan Securities and
Finance (Pvt.) Ltd.,
Galle Road, Colombo 03.

3. Registrar, Land Registry,
Colombo 07

2nd and 3rd Defendants
Respondents

AND NOW BETWEEN

Menikdiwela Senevirathnage
Chandrasiri Sisira Kumara,
No. 35/5, Rosmead Place,
Colombo 07.

Plaintiff Respondent Appellant

Vs

Hapuarachchige Jayaratne
Perera, No. 279/1, Hospital
Road, Kiribathgoda,Kelaniya.

1ST Defendant Appellant Respondent

2. Seylan Securities and
Finance (Pvt.) Ltd.,
Galle Road, Colombo 03.

3. Registrar, Land Registry,
Colombo 07

2nd and 3rd Defendant Respondent Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.,**
H.N.J. PERERA J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : Jagath Wickremanayake with Aruna Jayathilaka for the Plaintiff Respondent Appellant.
S.N.Vijithsingh for the 1st Defendant Appellant Respondent.

ARGUED ON : 27.09.2017.

DECIDED ON : 24.11.2017.

S. EVA WANASUNDERA PCJ.

On 21.07.2016, Leave to Appeal was granted to the Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) on the questions of law enumerated in Paragraph 18(ii) and (iii) of the Petition dated 23.02.2016. The said questions are as follows:-

Has the learned High Court Judge of the Civil Appellate High Court,

1. gravely erred in failing to consider the Sections 84, 85, 86 and 144 of the Civil Procedure Code?
2. gravely erred in law by having allowed the Appeal of the Respondent when in fact his Lordship had reached the finding that, " … Therefore , there is nothing irregular in the court fixing the case for ex parte trial or hearing ex parte evidence on a subsequent date and the ex parte decree is not invalid on that basis."?

The facts of the case in summary are that the Plaintiff M.S.C. Sisira Kumara, filed action in the District Court against the Defendant H. Jayaratne Perera for specific performance on an Agreement to Sell bearing No. 751 dated 28.08.2003. Sisira Kumara had paid Rs. 9,44000/- as an advance and the purchase price agreed was Rs.3,500,000/-. The document was notarially executed. The extent of the land was 18 Perches situated in Thalawathuhenpita, Hospital Road, Kiribathgoda in the Gampaha District. Since Jayaratne Perera failed to act according to the said Agreement, Sisira Kumara filed action in the District Court in 2005. Thereafter answer had been filed and the trial had commenced with the issues of the parties.

The 2nd Defendant had filed a caveat some time ago, at a time the property was under a mortgage to the 2nd Defendant by the 1st Defendant. Later on the 2nd Defendant had withdrawn the caveat and the said company was discharged from the proceedings of the case.

The Plaintiff had given evidence and the **trial continued.**

On 25.08.2006, the **1st Defendant** who was the only Defendant remaining other than the 3rd Defendant, (the Registrar of the Land

Registry), **was absent** and his Attorney at Law had informed court from the bar table that he had **no instructions** from his client and **thus he does not appear any longer for the 1st Defendant**. The District Judge had then fixed the case for **ex parte trial**. Ex parte judgment was entered against the 1st Defendant on 14.12.2006.

According the court record **Ex parte decree** was **served** on the Defendant on 14.02.2007.

The 1st Defendant had filed an application to **set aside the ex parte decree on 13.06.2007** , i.e. after the prescribed period in law to do so, meaning within 14 days from the date of filing of the ex parte decree. The time period to make an application to set aside the ex parte decree had obviously lapsed. The Plaintiff filed objections. Then the inquiry commenced on 03.08.2007 in respect of **the Defendant's application to purge the default**. At the end of the inquiry on 07.11.2008 the Additional District **Judge refused to vacate the ex parte decree** and ordered further that the Plaintiff should file **an amended decree**.

The Defendant appealed from that order to the Civil Appellate High Court and **the High Court delivered judgment dated 13.01.2016 reversing the order of the District Court and allowing the application of the Defendant to purge the default.** The Plaintiff has now preferred this Appeal to the Supreme Court and leave to appeal was granted on the questions of law as enumerated above.

Section 84 of the Civil Procedure Code reads:
If the defendant fails to file his answer on or before the day fixed for the filing of the answer**, or** on or before the day fixed for the subsequent filing of the answer **or** having filed his answer , **if he fails to appear on the day fixed for the hearing of the action, and** if the court is satisfied that the defendant has been duly served with summons , or **has received due notice of the day fixed for hearing of**

the action, as the case may be**, and** if**, on the occasion of such default of the defendant, the plaintiff appears,** then the court shall proceed to hear the **ex parte forthwith, or on such other day as the court may fix.**

I would now consider the second question of law on which leave to appeal was granted. On **page 10 of the Judgment** of the Civil Appellate High Court, there is a short paragraph as the second paragraph on that page. It reads as " **Therefore**, there is nothing irregular in the court fixing the case for ex parte trial or hearing ex parte evidence on a subsequent date and the ex parte decree is not invalid on that basis." I observe that this sentence commences with the word "therefore" and due to that reason the **paragraph above that also should be taken into account** along with this short paragraph. The paragraph above that, reads as

"Despite Section 84 stating, ' then the Court shall proceed to hear the case ex parte forthwith', on which the 1st Defendant **had contended** that the court should have proceeded to hear the case then and there, the section further provides, ' or on such other day as the court may fix'."

In this context I am of the opinion that the learned High Court Judge had only **thrown light in a general way** regarding the meaning of Section 84 to explain that any case can be fixed for ex parte trial on another date as well as on the very same date whichever the court thinks fit at that time. He had only brought that matter up, due to the **contention** of the 1st Defendant that it is not so but otherwise. As such only on the contents of this paragraph it cannot be held to mean that the ex parte decree entered in this particular case is valid in law or not. It is a general comment made by the Judge regarding Section 84 of the CPC.

It is stressed by me herein that counsel who argue any matter in appeal should not try to take a portion of the judgment impugned and argue that , the judge having mentioned and /or stated at one point of the judgment in one way has come to the conclusion at the end of the case in another way **unless** it is quite obvious or blatantly seen that the final finding is not on the rationale the judge has been writing the judgment to arrive at that conclusion. While judges continue to write judgements they are entitled to place their response to any matter which is even slightly connected to the matter on focus. They should have that freedom while they write the judgments and it is only then that a judgment can be, not only read easily, but also understood easily and felt properly by those who read the judgments.

Even if the High Court Judge has held that the ex parte decree in the case in hand was valid in law, the second question of law raised cannot be answered in the affirmative simply because the decision of the High Court that the ex parte order is valid does not have, by itself alone, a bearing on the decision of the High Court allowing the said Appeal. The High Court has allowed the Appeal on another ground, i.e. specifically **because the ex parte decree had not been served to the 1st Defendant according to law**.

I firstly answer the second question of law in the negative and I hold that the High Court has not erred in law in having allowed the Appeal.

I will now consider the other matters raised in the first question of law. The said question refers to Sections 84, 85, 86 and 114 of the Civil Procedure Code.

Section 85 of the Civil Procedure Code reads:-

(1)The Plaintiff may place evidence before the court in support of his claim by affidavit, or by oral testimony and move for judgment, and the court , if satisfied that the plaintiff is entitled to the relief

claimed by him, either in its entirety or subject to modification, may enter such judgement in favour of the plaintiff as to it shall seem proper, and enter decree accordingly.

(2) Where the court is of opinion that the entirety of the relief claimed by the plaintiff cannot be granted, the court shall hear the plaintiff before modifying the relief claimed.

(3) Where there are several defendants of whom one or more file answer and another or others of whom fail to file answer, the plaintiff may move for judgement against such of the defendants as may be in default without prejudice to his right to proceed with the action against such of the defendants as may have filed answer. The provisions of this sub section shall apply notwithstanding that the defendants are jointly liable upon a bill of exchange, promissory note or cheque.

(4) The court shall cause a copy of the decree entered under this section to be served on the defendant in the manner prescribed for the service of summons. Such copy of the **decree** shall bear an endorsement that **any application to set aside the decree under sub section (2) of section 86 shall be made** to court **within fourteen days of such service.**

Section 86 of the Civil Procedure Code reads:

(1) Repealed by Act No. 53 of 1980.

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

(2A) At any time prior to the entering of judgment against a defendant for default , the court may, if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default

of the defendant and permit him to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the cout shall appear fit.

(3)Every application under this section shall be made by petition supported by affidavit.

Section 144 of the Civil Procedure Code reads:
If on any day to which the hearing of the action is **adjourned,** the parties or **any of them fail to appear**, the court may proceed to dispose of the action in one of the modes directed in that behalf by Chapter XII **or make such other order as it thinks fit.**

The learned High Court Judges have concluded in the case in hand that, " the learned Attorney at Law who appeared for the 1st Defendant on 25.08.2006 had clearly said that he does not appear. Therefore the 1st Defendant was neither present nor represented on that occasion which being the date for hearing , the court had every right to fix the matter ex parte against him." I agree with that finding of the High Court which has come to that conclusion after having considered the two judgments in the cases of **Andiappa Chettiyar Vs Shanmugam Chettiyar 33 NLR 217 and Isek Fernando Vs Rita Fernando and Others 1999 3 SLR 29.**

The next step being that of filing the decree and sending notice of the decree, it was contested by **the 1st Defendant** that he **never received** the **ex parte decree at any time**. He had submitted that when he came to know that the case had proceeded ex parte against him, his lawyer's advice was to await the filing of the decree and so he did. When he did not get served with the decree from court, after some time , he had got the record perused to find that the fiscal had mentioned that the decree was served on him, which was **false and incorrect on the record**.

The 1st Defendant's position was that he got delayed beyond 14 days as allowed in law to purge the default due to the **reason that he never received the decree.**

The 1st Defendant's application to vacate the decree was made after about 4 months from the date of the alleged service of the same on him. The main contention in the case in hand is that the **decree was not served on him.** On the date that the decree was supposed to have been served on him by the fiscal's process server, the 1st Defendant had not been at home from 5.30 a.m. to 8.30 p.m. and nobody else either had been at home. He had given evidence and stated the same because he had been employed as a private bus driver on a bus which ran between Colombo and Kadawatha. His evidence was corroborated by the employer K.S.D. Ariyarathne. The Plaintiff contested this evidence and stated that the employer was not proven to be the owner of the bus. Anyway two people before court had given evidence to confirm that the 1st Defendant had been driving a bus the whole day time of the day when the decree was supposed to have been served.

The **fiscal's process server gave evidence**. He admitted that he was assigned at that time to serve summons in addresses within Colombo 5 and Colombo 6. The address of the 1st Defendant is in Kiribathgoda. He had purported to serve the decree **outside the usual routine**. When cross examined, having stated that he had served the decree to the 1st Defendant on the orders of a superior officer, he was unable to mention the superior officer's name. **He was unable to show any documentary evidence to that effect despite his claim** that a register was maintained when fiscal's process servers are allocated such out of the routine duties. Thus the process server's evidence has created a **serious doubt** about whether the fiscal's process server had served the decree to the 1st Defendant.

Section 85(4) of the Civil Procedure Code provides that the court should cause a copy of the decree entered under this provision to be served on the defendant in the **manner prescribed for the service of summons**. Summons is **ordinarily served by registered post first** and **then by fiscal's process server.** According to the journal entries of the case record, the decree had been served, **only by personal service and not by registered post.**

The learned High Court Judges had considered the evidence before the District Court in detail and had **arrived at the conclusion that the service of the decree on the 1st Defendant had not occurred.** Due to that reason, the High Court has held that the **fiscal's process server's report is false.** The High Court Judges have further come to the conclusion that this is an instance in which there was false representation to court that the decree was served and the court acted on those incorrect representations to the detriment of the 1st Defendant.

In fact the Defendant had filed answer, the list of witnesses and documents etc. and the Plaintiff also had filed the list of documents. The pleadings were complete and after the issues were raised, the Plaintiff's case had commenced by his evidence. At this particular time when the 1st Defendant failed to be in court, his attorney at law had submitted in open court that he did not have instructions and that he was not appearing on that day for the Defendant.

I find it difficult to believe that any Defendant in a case would negligently or purposely have decided not to appear on a day when the trial was getting continued. It ought to be due to some unfortunate reason, some mishap or the other which would have resulted in the 1st Defendant not being present and the Attorney at Law having said that he had no instructions from his client.

The decree had not been served by the fiscal even though the fiscal came before court and gave evidence that he served the decree. Having analyzed the evidence before the trial court , I am of the opinion that a serious doubt arises as to whether the decree was served or not. I agree with the findings of the High Court Judges in that regard as stated above.

It was held in **De Fonseka Vs Dharmawardena 1994, 3 SLR 2,** that
" An inquiry on an application to set aside an ex parte decree is not regulated by any specific provision of the Civil Procedure Code. Such inquiries must be conducted consistently with the principles of natural justice and the requirement of fairness. Sec. 839 of the Civil Procedure Code recognize the inherent power of the Court to make an order as may be necessary for the ends of justice. "

In the case of **Ariyananda Vs Premachandra (1998) 2000, 2 SLR 218** also it was held that the provisions of Sec.839 should be used in such a situation for the ends of justice or to prevent any abuse of the process of court.

It is therefore correct to state that in the case in hand, the 1st Defendant should be granted an opportunity to purge the default in appearance.

At the purge default inquiry, the 1st Defendant has given evidence and was cross examined. His evidence is contained from page 299 to page 324. It is a lengthy explanation of how he met with an accident on 15.08.2006 and therefore he could not attend courts on 25.08.2006. He had informed his lawyer a few days before the 25th. He was treated by a doctor. He had produced a medical certificate but had not been able to get down the doctor because he had not deposited the money payable to the doctor even though summons to the doctor had been sent, on the final date given by court for calling the doctor when the

Plaintiff had objected for granting a further date. The court had not granted another date. Then, in those circumstances, now it is not just and equitable for the Plaintiff to allege that the Medical Certificate was not proved. Anyway the learned judges of the High Court have held that the reasons adduced for not having attended to Court is satisfactory. I am also of the view that, despite the doctor who treated him not having been called to testify, the 1st Defendant's evidence that on 15.08.2006 he had met with an accident and that he had informed the lawyer about his difficulty in attending court on 25.08.2006 is acceptable.

I hold that acting on the pertinent provisions of law contained in the Civil Procedure Code, the Judges of the Civil Appellate High Court had quite correctly granted relief to the 1st Defendant as prayed for by having set aside the ex parte judgment dated 14.12.2006 and the ex parte decree thereon.

I quite agree with the conclusions arrived at by the Civil Appellate High Court. I answer the first and the second questions of law in the negative, against the Plaintiff Respondent Appellant and in favour of the Defendant Appellant Respondent. I affirm the judgment of the Civil Appellate High Court dated 13.01.2016.

Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

H.N.J. Perera J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda 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 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 / 148/2013

SC/ HCCA/LA/ 497/2012

WP/HCCA/MT/17/09(F)

DC Nugegoda/138/08/L

1. Bulathsinghalage Gnanawathie,
2. Presanna Ramanayake,

Both of No. 211 A, Nawala Road,

Nugegoda.

Plaintiff

Vs.

1. Warnakula Patabendige Konrad Anthony Perera,
   No. 282, Badulla Road, Bandarawela.
2. Ivon Indrani Rupasinghe,
   No. 37/01, the Fonseka Road,
   Colombo 5.
3. Peoples Bank,
   Nugegoda Branch,
   Nugegoda.

Defendants

AND BETWEEN

1. Bulathsinghalage Gnanawathie,

2. Presanna Ramanayake,

Both of No. 211 A, Nawala Road,

Nugegoda.

Plaintiff Appellant

Vs.

1. Warnakula Patabendige Konrad Anthony Perera,
   No. 282, Badulla Road
   Bandarawela.
2. Ivon Indrani Rupasinghe,
   No. 37/01, the Fonseka Road,
   Colombo 5.
3. Peoples Bank,
   Nugegoda Branch,
   Nugegoda.

Defendant Respondents

AND NOW BETWEEN

1. Bulathsinghalage Gnanawathie,
2. Presanna Ramanayake,

Both of No. 211 A, Nawala Road,

Nugegoda.

Plaintiff Appellant Appellants

Vs.

1. Warnakula Patabendige Konrad Anthony Perera,
   No. 282, Badulla Road
   Bandarawela.
2. Ivon Indrani Rupasinghe,

No. 37/01, the Fonseka Road,
Colombo 5.

3. Peoples Bank,
Nugegoda Branch,
Nugegoda.

Defendant Respondent Respondents

BEFORE	:	B. ALUWIHARE, PC, J. UPALY ABEYRATHNE, J. K. T. CHITRASIRI, J.
COUNSEL	:	M.U.M. Ali Sabry PC with Shamith Fernando and Suranga Perera for the Plaintiff Appellant Appellants Kuvera De Zoysa PC with Aneen Maharoof for the 2nd Defendant Respondent Respondent
WRITTEN SUBMISSION ON:		24.01.2014 (the Plaintiff Appellant Appellants) 17.11.2014 & 10.11.2016 (2nd Defendant Respondent Respondent)
ARGUED ON	:	04.10.2016
DECIDED ON	:	11.07.2017

UPALY ABEYRATHNE, J.

The Plaintiff Appellant Appellants (hereinafter referred to as the Appellants) instituted an action against the Defendant Respondent Respondents (hereinafter referred to as the Respondents) seeking inter alia a declaration of title

to the property described in the schedule to the plaint dated 21.12.2001 and a declaration that the deed bearing No. 2071 dated 29.03.2001 is null and void. According to Journal Entry (J.E.) 6 dated 23.08.2002, the Appellants have tendered an amended plaint dated 20.08.2002, to which the Respondents have filed their statement of objections. By order dated 28.07.2004, the learned District Judge has refused to accept the said amended plaint. Thereafter the Appellants have made another application to amend the plaint for the second time and accordingly have tendered the second amended plaint dated 25.05.2005. Unfortunately, the learned District Judge, by order dated 30.09.2005, has refused to accept the the said second amended plaint as well.

As it appears in JE 8 dated 29.11.2002, the 1st and 2nd Respondents have filed their answers dated 28.11.2002 and 29.11.2002, respectively. The 2nd Respondent in her answer has made a claim in reconvention. Also on 13.06.2003, the 3rd Respondent has filed its answer dated 13.06.2003. All the Respondents have prayed for a dismissal of the Appellant's action. After the filing of the answer of the 3rd Respondent on the said date, the case has been fixed for trial.

In the meantime, on 25.01.2006, the Appellants have made an application to withdraw the plaint with liberty to file a fresh action to which the Respondents have objected to. The learned District Judge, by order dated 17.03.2006, has allowed the said application to withdraw the plaint without liberty to file a fresh action. The Appellants have not canvassed any of the said orders of the learned District Judge in appellate courts.

Thereafter, upon the claim in reconvention, the case of the 2nd Respondent has proceeded to trial on 11 issues. After trial, the learned District Judge has delivered the judgment dated 06.03.2009 in favour of the 2nd Respondent

as prayed for in prayer 'a' and 'b' of the said answer. Being aggrieved by the said judgment the Appellants have preferred an appeal to the High Court of Civil Appeal holden at Mount Lavinia. The High Court has dismissed the said Appeal of the Appellants. The Appellant sought leave to appeal to this court from the said judgment of the High Court dated 03.10.2012 and leave was granted on the questions of law set out in paragraph 16 of the petition of appeal dated 12.11.2012.

It is apparent from the plaint filed by the Appellant dated 21.12.2001, that he has transferred the property described in the plaint to the 1st Respondent by a deed of transfer bearing No 9146 dated 10.12.1996. He has averred that said deed of transfer was made as a security for a loan obtained from the 1st Respondent and he did not intend to transfer the beneficial interest of the land to the 1st Respondent. The Appellant's position was that the 1st Respondent had verbally agreed to retransfer the said property to the Appellant upon the repayment of the money borrowed from the 1st Respondent and the 1st Respondent has failed to do so. He further averred that in the meantime, the 1st Respondent, by deed of transfer bearing No. 2071 dated 29.03.2001, has transferred the said property to the 2nd Respondent and therefore the said deed of transfer was a forgery. But the Appellants, having thus pleaded, has withdrawn their action.

The 2nd Respondent in her answer has averred that the Appellants, who were the owners of the land in dispute, transferred the said property to the 1st Respondent by a deed of transfer bearing No. 9146 dated 10.12.1996 and the 1st Respondent transferred the same to the 2nd Respondent by the deed of transfer bearing No 2071 dated 29.03.2001. She has further averred that once she became the owner of the land in dispute, the Appellants agreed to vacate the premises and hand over the vacant possession thereof to the 2nd Respondent but the Appellant has failed to do so. Accordingly, the 2nd Respondent in her claim in reconvention

has prayed for a declaration of title to the said land in dispute and to eject the Appellants from the said premises.

The Appellants, in their replication has not levelled any allegation against the said deed of transfer bearing No 2071 dated 29.03. 2001. Also they have admitted the execution of the deed of transfer bearing No. 9146 dated 10.12.1996. They have only sought for dismissal of the claim in reconvention. On the other hand, all the allegations levelled against the said deed of transfer bearing No 2071 and the deed of transfer bearing No. 9146 dated 10.12.1996, now stand dismissed since the action has been withdrawn by the Appellant. Hence. I cannot see any forcible defence for the Appellants against the claim in reconvention of the 2nd Respondent.

In the aforesaid circumstances, I am of the view that both courts have correctly reached their respective conclusions. Hence, I see no reason to interfere with the judgment of the High Court of Civil Appeal dated 03.10.2012. Therefore, the appeal of the Appellants is dismissed with costs.

Appeal dismissed.

Judge of the Supreme Court

B. ALUWIHARE, 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 in terms of Section 5(2) 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 / 150/2011

SC (HC) LA 59/2011

HC/Civil/44/2006/(1)

Seylan Bank Limited

Presently known as Seylan Bank PLC

No. 69 Janadhipathy Mawatha,

Colombo 01.

Presently at Ceylinco-Seylan Towers,

No. 90, Galle Road, Colombo 03.

Plaintiff

Vs.

1. Construction and Personal Servicers (Pvt) Ltd,
   No. 88, Horton Place,
   Colombo 07.
2. Madhavan Lanka (Pvt) Ltd.
   No. 65/19,

Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

Defendant

AND NOW BETWEEN

Madhavan Lanka (Pvt) Ltd.

No. 65/19,

Sir Chittampalam A. Gardiner Mawatha,

Colombo 02.

2nd Defendant Appellant

Vs.

Seylan Bank Limited

Presently known as Seylan Bank PLC

No. 69 Janadhipathy Mawatha,

Colombo 01.

Presently at Ceylinco-Seylan Towers,

No. 90, Galle Road, Colombo 03.

Plaintiff Respondent

Construction and Personal Servicers (Pvt) Ltd,

No. 88, Horton Place,

Colombo 07.

1st Defendant Respondent

BEFORE	:	SISIRA J. DE ABREW, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Mayura Gunawansha instructed by K.U. Gunasekera for the 2nd Defendant Appellant S.R. De Livera instructed by De Livera Associates for the Plaintiff Respondent
WRITTEN SUBMISSION ON:		30.01.2012 (2nd Defendant Appellant) 15.03.2012 (Plaintiff Respondent)
ARGUED ON	:	27.10.2016
DECIDED ON	:	29.06.2017

UPALY ABEYRATHNE, J.

At the hearing of the evidence for the case of the Plaintiff Respondent before the Commercial High Court of Colombo, the 2nd Defendant Appellant made an application to issue a commission to ascertain the market value of the property of the mortgage bond bearing No 27 dated 04.04.1997. The said property had been sold in auction and the mortgage bond had been released by the Plaintiff Respondent. After hearing the objection raised by the Plaintiff Respondent the learned High Court Judge of the Commercial High Court has refused the said application. This appeal is from the said order dated 10.06.2011.

Leave to appeal has been granted on the grounds set out in paragraph 10 (b) and (e) of the petition of appeal dated 28.06.2011. In the said paragraphs,

the Appellant has averred that the learned High Court Judge has failed to consider the vital importance and relevance of evidence obtain through a commission for valuation of the mortgaged property in adjudication of the dispute between the parties and has failed to evaluate the true purpose of a commission in arriving at a conclusion.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted an action in the Commercial High Court of Colombo against the 1st and 2nd Defendant seeking for a judgment inter alia to recover a sum of Rs 17,093,036.95 with interest as prayed for and auction the property described in the Mortgage Bond bearing No 177 produced with the plaint marked 'C'. The 2nd Defendant Appellant (hereinafter referred to as the Appellant) has admitted the signing of the mortgage bond bearing No 177 dated 18.06.1996. The 1st Defendant Respondent has admitted the current account referred to in paragraph 3 of the plaint.

The Appellant in his answer averred that subsequent to executing the mortgage bond bearing No 177, the 1st Defendant Respondent on the request of the Plaintiff Respondent had executed mortgage bond bearing No. 27 dated 04.04.1997. On the said premise the Appellant contended that the consequent to entering in to the 2nd mortgage bearing No. 27, by novation of contract between the Appellant and the Plaintiff Respondent, the rights of the Plaintiff Respondent Bank has been restricted the said mortgage No 27. The Appellant's contention is that since the Plaintiff Respondent Bank has chosen the said mortgage bond No. 27 to recover the dues of the Appellant, the Bank is not entitled to sell the mortgaged property in the mortgage bond bearing No 177.

It was the position of the Plaintiff Respondent that the mortgage bond bearing No 177 marked 'C' is in the nature of a continuing security up to a value of Rs. 15 million. I carefully examined the said mortgage bond bearing no 177 dated 18.6.1996. The said mortgage bond 177 clearly states that Construction & Personal Services (Pvt) Limited as the Obligor and Madhavan Lanka (Pvt) Limited as the Mortgagor have entered in to the said mortgage bond with the Plaintiff Respondent Bank. In terms of clause (a), (b), (c), (d), (e) and (f) of the said mortgage bond, the Defendant Respondent have agreed to have the said mortgage bond as a continuing security for the purposes stated in the said clauses.

Clause (a) of the said mortgage bond No 177 reads thus;

> "All and every the sums and sum of money which shall or may at any time and from time to time and at all times hereafter be or become the owing and payable to the Bank by the Obligor/Mortgagor upon or in respect of any and every overdraft or overdrafts of or on the said current account now had by the Obligor/Mortgagor with the Bank at its Colombo office or branches or which hereafter may be opened by the Obligor/Mortgagor with the Bank whether at its Colombo office aforesaid or at any of its other officers or branches and whether in the name of the Obligor/Mortgagor or otherwise and the floating balance from time to time due upon all or any such accounts current or current account and the sum or sums of money which upon the closing of such accounts current and current account shall be found to be due owing and payable to the Bank".

Said clause and also clauses (b), (c), (d), € and (f) clearly stipulates that until the said bond No 177 is discharged, the bond is still valid. The mortgage

bond bearing No 27 does not contain any clause invalidating the effect of the said clauses of mortgage bond No 177 or restricting its scope to any sum of money which may due upon the Appellants' current accounts subsequent to entering of mortgage bond bearing No 27. The mere execution of the subsequent mortgage bond No 27 can in no way extinguish the rights under the mortgage bond bearing No 177.

It must be noted that the mortgage bond bearing No 27 marked '2 V 1 (G 1)' too is in the nature of a continuing security up to a value of Rs. 5 million. I examined the said mortgage bond bearing no 27 dated 04.04.1997. It is clearly seen from the said mortgage bond that Construction & Personal Services (Pvt) Limited as the Obligor and one Suppiah Alagaswamy Kandaswamy Naidu as the Mortgagor have entered in to the said mortgage bond with the Plaintiff Respondent Bank. In terms of clause (a), (b), (c), (d), (e) and (f) of the said mortgage bond, the Defendant Respondent have agreed to have the said mortgage bond as a continuing security for the purposes set out in the said clauses.

It is clear from the terms and conditions of the of the said two mortgage bonds that both are two separate securities provided for by the 1st and 2nd Defendant and one Suppiah Alagaswamy Kandaswamy Naidu in respect of the overdraft facilities obtained and to be obtained by them in future from the Plaintiff Respondent Bank. In fact, property in mortgage bond bearing No 27 had been sold and the proceeds of sale have been credited to the relevant account in a sum of Rs 4,750,000/=. The 2nd Appellant was not a party to the said mortgage bond No 27. Neither the sale of mortgaged property in mortgage bond No 27 nor the sale proceeds or the value of the said property has been disputed by the parties to the said mortgage bond.

On the other hand, according to Clause (b), at page 11 of the said mortgage bond No 177, the Appellant has specifically agreed that the mortgage bond No 177 will not be affected by any security that the Bank may at any time and from time to time thereafter hold.

Hence the 2nd Appellant has no status to call in question the said transaction or to seek permission of court to issue a commission to ascertain the market value of the property in the said mortgage bond No 27.

In the circumstances, I see no reason to interfere with the order of the learned High Court Judge dated 10.06.2011. Hence, I dismiss the appeal of the appellant with costs. The learned High Court Judge is directed to proceed with the trial.

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

In the matter of an appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 151/2011

SC/HCCA/LA/62/2011

NWP/HCCA/KURU/29A/2009 (F)

DC/CHILAW/25134/Ejectment

Ambagahage Vithorianu Basil Fernando,
C/O Canute Peiris,
Milagahawatta,
Mudukatuwa, Marawiwila.

Plaintiff

Vs.

Ambagahage Leslie Malcom Fernando,
Thalawila,
Marawila.

Defendant

AND BETWEEN

Ambagahage Leslie Malcom Fernando,
Thalawila,
Marawila.

Defendant Appellant

Vs.

Ambagahage Vithorianu Basil Fernando,

C/O Canute Peiris,

Milagahawatta,

Mudukatuwa, Marawiwila.

Plaintiff Respondent

AND NOW BETWEEN

1a. Poruthotage Mary Rose Hysinth Indrani Perera,

1b. Nirmalee Irosha Udayanganee Fernando,

1c. Werjin Ishanka Malshani Fernando,

All of Thalawila,

Marawila.

Substituted Defendant Appellant-Appellants

Vs.

Ponnamperumage Charlot Mary Matilda Fernando,

Milagahawtta,

Mudukatuwa, Marawila.

Substituted Plaintiff Respondent Respondent

BEFORE : PRIYASATH DEP, PC, J. (as he was then)

UPALY ABEYRATHNE, J.

ANIL GOONARATNE, J.

COUNSEL	:	Lashman Perera PC with Anjali Amarasinghe and Thilini Ratnayake for the substituted Defendant Appellant Appellants Dr. Sunil Cooray for the substituted Plaintiff Respondent Respondent
WRITTEN SUBMISSION ON:		03.01.2017 Substituted Defendant Appellant Appellants. 09.01.2012 Plaintiff Respondent Respondents
ARGUED ON	:	22.11.2016
DECIDED ON	:	01.06.2017

UPALY ABEYRATHNE, J.

The Defendant Appellant-Appellant (hereinafter referred to as the Appellant) has preferred this appeal from the judgment of the High Court of Civil Appeal, North Western Province, holden at Kurunegala dated 13th of January 2011. By the said judgment, the High Court has upheld the judgment of the learned District Judge of Chilaw dated 03.11.2008, delivered in favour of the Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent).

When the matter was supported for leave to appeal on 04th October 2011, this court has granted leave on the following questions of law:

1. Does the fact that journal entries 54 and 55 do not show that objection was taken to the documents marked P 1 and P 2 when the

case was closed for the Respondent necessarily preclude the Appellant in the context of a *Rei Vindicatio* action to rely on the alleged infirmities in the manner in which the said documents were proved after they were originally marked 'subject to proof'?

2. Can the *cursus curiae* recognized by our courts to the effect that the party who does not object to documents sought to be read in evidence at the close of a case, prevail in the face of Section 61 and 101 of the Evidence Ordinance, particularly in the absence of express provision to that effect in the Civil Procedure Code?

The Respondent (Plaintiff) has instituted the said action against the Appellant in the District Court of Chilaw, seeking inter alia a declaration of title to the land described in the schedule to the plaint. The Respondent has claimed titled to the land in suit upon a Crown Grant issued in terms of Section 19(4) Land Development Ordinance. He has produced the said Grant at the trial marked P 2. According to P 2 the Grant had been made on 30th of December 1982. Prior to the said Grant P 2, the Respondent had been given a land permit bearing No 14858 dated 29.09.1956 in respect of the same land under the Land Development Ordinance by the Assistant Government Agent of the Puttalam District. Said Land Permit has been produced at the trial marked P 1. According to P 1, the Respondent's father A. A. Austin Fernando had been nominated as the successor of the said land.

The Appellant took up the position that he was in continuous possession of the said land in suit since 1965 and said land permit P 1 and the Grant P 2 were not duly executed and they were forged documents. The Appellant contended before this court that;

- The High Court has failed to consider the burden of proof in relation to *Rei Vindicatio* action,
- The High Court has failed to consider the mandatory provisions of Section 101 of the Evidence Ordinance in relation to an action of *Rei Vindicatio*,
- The Respondent has not produced originals of P1 and P 2,
- The Respondent has not produced certified copies of P1 and P 2,
- The Respondent has produced only photocopies of P 1 and P 2,
- The photocopies of P 1 and P 2 has not been signed by the Grantor,

On the above basis, the Appellant contends that the burden of proof of title and P 1 and P 2 are not forged documents, is on the Respondent and the Respondent has failed to discharged the burden cast on him.

The learned Counsel for the Appellant relied on the following observation made at page 37 in Sabaratnam Vs. Kandavanam 60 NLR 35 in which Weerasooriya J. stated that "I am unable to agree with this submission, for it seems to me that if the failure to object to the reception, in evidence of PI constituted an admission by the 1st and 2nd defendants, the admission did not go beyond conceding that the original duplicate of Deed No. 11385, being in the custody of the Registrar of Lands, was a document of which a certified copy is permitted by law to be given in evidence on the basis that condition (6) of the conditions prescribed under Section 65 of the Evidence Ordinance for the admission of secondary evidence of the contents of an original document had been satisfied in this case. …….. In my opinion all that Section 2 of the Proof of Public Documents Ordinance means is that the production of the copy shall be evidence of the

contents of the original document. But proof of the contents of a document does not amount to proof of its execution, and notwithstanding the production of P I, the burden still lay on the plaintiff to prove the due execution of the original document in terms of the relevant provisions of the Evidence Ordinance."

In the said case, it was held that "the certified copy was not proof of the due execution of the deed, even though it was admitted in evidence at the trial without any objection by the defendants. Although, by section 2 of the Proof of Public Documents Ordinance, the production of a certified copy is evidence of the contents of the original document, it does not amount to proof of the due execution of the original document."

It is clear that, in the said case, their Lordships had dealt with the due execution of a deed. Their Lordships were of the view that the proof of the contents of a document does not amount to proof of its due execution. In the present case before us the documents P 1 and P 2 are not notarialy executed documents. Hence the due execution does not arise for determination of court. Therefore, the dicta of the said case has no relevance to the present case. It is clearly seen that P 1 and P 2 are documents forming the acts of the Sovereign Authority and of Public Officers. Therefore P 1 and P 2 are Public Documents within the meaning of Section 74 of the Evidence Ordinance and hence it can be proved in terms of Section 78 of the Evidence Ordinance.

I have carefully examined the said two documents marked P 1 and P 2. P 1 and P 2 are photocopies of certified photocopies of the originals. P 1 is the said land permit issued under the Land Development Ordinance. P 2 is the grant issued under Section 19(4) of the Land Development Ordinance. P 1 and P 2

contain relevant certifications as required by Section 78 of the Evidence Ordinance. Now the question to be dealt with is whether P 1 and P 2 could be admitted as evidence since the documents are photocopies. The Appellant has alleged that the documents are forged. Accordingly, at the trial he has raised issues No 19 and 20 in line with forgery.

Although the Appellant has made such serious allegation against P 1 and P 2, he has not made any attempt to adduce any evidence in relation to issues No 19 and 20. He has not made any application before trial court to send P 1 and P 2 for examination by the EQD. In this regard, at the hearing of this appeal the learned President Counsel for the Appellant contended that the burden of proof lies on the Respondent and he has to prove that P 1 and P 2 are not forged documents. In paragraph 07 of the written submission, the Appellant has stated that in proving the title of the Respondent, the burden is on the Respondent to prove the title as set out in issues 1 and 2, that, P 1 and P 2 are not forgeries. In this regard, the learned President Counsel heavily relied upon the provisions contained in Section 61 and 101 of the Evidence Ordinance which read thus;

> 61. The contents of documents may be proved either by primary or by secondary evidence.
>
> 101. Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of the facts which he asserts, must prove that those facts exists.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

At the trial the Respondent has raised issues No 1 to 15 which have been raised on the basis that the Respondent became entitled to the land in dispute

by P 1 and P 2 and after the death of his father the Appellant entered in to the possession of the said land and causing damages to him. The Respondent has not raised any issue on the basis that P 1 and P 2 were forged documents. The Respondent has sought a declaration of title upon P 1 and P 2. Hence, the Respondent's burden is to prove his legal right over the land in dispute on the existence of the facts which he asserts and to prove those facts exist. The Respondent must set out his title on the basis on which he claims a declaration of title to the land in suit and he must prove that title against the Appellant and nothing more. It is well settled law that the owner of immovable property is entitled, on proof of his title, to a decree in his favour for recovery of property and for ejectment of any person in wrongful occupation. Therefore, it cannot be contended that the burden of proof of alleged forgery as raised by the Appellant, is on the Respondent.

Section 103 of the Evidence Ordinance stipulates that "the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person". In terms of Section 103, since the Appellant has raised issues disputing that P 1 and P 2 is forgery he is the person who wishes the court to believe the existence of that fact. Hence the burden of proof lies on the Appellant to prove the existence of a forgery.

In this regard, it is important to note that in paragraph 16 of the written submission of the Respondent has stated that as the Appellant has been charged with forgery in the Magistrate's Court, whereby the Appellant has caused to enter his name as the nominated successor in P 1, the land permit, the original permit has been taken in to court custody in Magistrate's Court Case No 10289. The Respondent has obtained a certified copy from the Magistrate Court and

produced as P 1. The Appellant, in his written submission has not denied the said facts. In paragraph 11 of his written submission he has stated that "The Plaintiff has marked and tendered a permit and a grant as P 1 and P 2 respectively and both documents are photocopies certified by Registrar of the Magistrate's Court. The Plaintiff never tried to produce originals of the said documents. If originals had been filed of a case in Magistrate's Court of Chilaw by Plaintiff he had the opportunity to summon Registrar without much effort to produce the said originals." This is ample evidence to conclude that the Appellant was aware of the originals of P 1 and P 2 and its whereabouts.

On the other hand, the Respondent contended that at the trial court, the Appellant had not objected to P 1 and P 2 when it was sought to be read in evidence at the close of the case for the Respondent and therefore, the Appellant cannot now raise objection to P 1 and P 2 as said conduct of the Appellant amounts to an admission of P 1 and P 2. It is a well-recognized practice in law that a document which is produced at the trial subject to proof is not objected to when it is read as evidence at the time of closing the case, such document is deemed to have been admitted as evidence of the case by the opposing party.

This practice has been prevalent for well over centaury and can be said to have hardened into a rule of admitting documents as evidence. The maxim CURSUS CURIAE EST LEX CURIAE which means "The practice of the Court is the law of the Court would be most appropriate in a situation as has been presented in the present case before this court. In Halsbury's Laws of England 4th edition Vol 10 at para 703, it is stated that "A court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure

contrary to or inconsistent with rules laid down by statute or adopted by ancient usage".

Broom's' Legal Maxims – 10th Edition – at page 82 sets out the application of the maxim in England. "Every court is the guardian of its own records and master of its own practice" and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience."

In the said circumstances, I see no reason to interfere with the judgment of the High Court of Civil Appeal, holden at Kurunegala, dated 13.01.2011. Accordingly said questions of law is answered in favour of the Respondent. Hence the appeal of the Appellant is dismissed with costs.

Appeal dismissed.

Judge of the Supreme Court

PRIYASATH DEP, PC, J. (then he was)

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 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 / 151/2013

SC/ HCCA/LA/ 502/2012

WP/HCCA/LA/143/2005(F)

DC Colombo/18378/L

Thambachchi Ramiah Mallikanu Letchchumi,
No. 51, Kotahena Weediya,
Colombo 13.

Plaintiff

Vs.

Bambarendage Jimoris Jinadasa,

No. 255, Vihara Mavatha,

(Assessment No 17)

Hunupitiya Road, Wattala.

AND BETWEEN

Bambarendage Jimoris Jinadasa,

No. 255, Vihara Mavatha,

(Assessment No 17)

Hunupitiya Road, Wattala.

Defendant Appellant

Vs.

Thambachchi Ramiah Mallikanu Letchchumi,
No. 51, Kotahena Weediya,

Colombo 13.

Plaintiff Respondent

AND NOW BETWEEN

Thambachchi Ramiah Mallikanu Letchchumi,
No. 51, Kotahena Weediya,

Colombo 13.

Plaintiff Respondent Appellant

Vs.

Bambarendage Jimoris Jinadasa,

No. 255, Vihara Mavatha,

(Assessment No 17)
Hunupitiya Road, Wattala.

Defendant Appellant Respondent

BEFORE : B. P. ALUWIHARE, PC, J.

PRIYANTHA JAYAWARDENA, PC, J.

UPALY ABEYRATHNE, J.

COUNSEL	:	Athula Perera with Nayomi Kularatne for the Plaintiff Respondent Appellant Dr. Sunil Cooray with Ms. Sudarshani Cooray and K. de Mel for the Defendant Appellant Respondent
WRITTEN SUBMISSION ON:		05.12.2013 & 30.05.2017 (Plaintiff Respondent Appellant) 20.01.2014 (Defendant Appellant Respondent)
ARGUED ON	:	17.05.2017
DECIDED ON	:	04.08.2017

UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) instituted an action in the District Court of Colombo against the Defendant Appellant Respondent (hereinafter referred to as the Respondent) seeking inter alia 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. The Appellant has further sought an order declaring the deed of transfer bearing No 804 dated 23.02.1987 attested by R. C. B. Joseph, Notary Public, null and void.

The Respondent has filed an answer denying the averments contained in the plaint and praying for a dismissal of the Appellant's action. The Respondent

has not claimed title to the land in dispute nevertheless has claimed compensation for the improvements, in a sum of Rs 1,200,000/-.

The case has proceeded to trial on 22 issues. After trial, the learned Additional District Judge has delivered the judgment dated 26.05.2005 in favour of the Appellant. Being aggrieved by the said judgment the Respondent has appealed to the Provincial High Court of Civil Appeal holden at Colombo. The High Court, by judgment dated 05.10.2012, has allowed the appeal and has dismissed the Appellant's action. The Appellant sought leave to appeal to this court and leave has been granted on the questions of law set out in paragraph 20 (a) to (g) in the petition dated 15.11.2012.

According to the Appellant, she had derived the title to the land in suit by virtue of deed of transfer bearing No 4288 dated 22.12.1971. Thereafter she had commenced constructing a house on the said land in 1973 and had concluded the same in 1979. On or around 16.07.1982 she had gone to Middle East for an employment. For the said purpose, she had borrowed a sum of Rs. 5,000/- from one Sivagnanam Subramanium, entering into an agreement before an Attorney at Law and Notary Public V. Pushpadevi Joseph who was not known to the Appellant and leaving the original copy of the said deed 4288 in the custody of the said Attorney at Law. She had sent money to settle the said loan. Subsequent to her arrival from Middle East in 17.03.1983, she had requested said Attorney at Law to hand over the original copy of the said deed 4288, but the Attorney at Law had failed to do so. Since the said house had been damaged and the Appellant had been displaced during the 1983 July insurgency, she had been placed in a refugee camps located at St. Benedict College and Central College, Kotahena. Subsequently, as per directive of the government, the said land together with the house had been handed over to REPIA. In November 1983, when she returned to the said house

with permission to repair it, said Subramanium had forcibly entered into possession of the premises. At that time, she had learnt that said Subramanium, by using her signature had fraudulently executed a deed of transfer bearing No. 1809 dated 20.11.1981 in respect of the property in suit.

Thereafter, the Appellant had instituted an action against said Subramanium in the District Court of Colombo seeking a judgment declaring the said deed 1809 null and void and to eject said Subramanium from the land in dispute and a judgment had been entered in favour of the appellant and a writ of possession had been issued. Thereafter, the Respondent of the instant appeal had made an application in terms of Section 325 of the Civil Procedure Code and after inquiry he had been placed in possession on the basis that he had derived title to the land in dispute by virtue of a deed of transfer bearing No 804 dated 23.02,1987 and hence he was a bona fide possessor.

In the aforesaid premise, the learned counsel for the Appellant submitted that while the said case 4843/ZL was pending before court and also, whilst a caveat was in operation, said Subramanium, who was the defendant in the said case bearing No 4843/ZL, had fraudulently executed the said deed No 804. Since the deed bearing No 1809 had been declared null and void in the said case 4843/ZL, the subsequent deed No 804 is inevitably null and void since it had been executed on the strength of deed No. 1809.

On the other hand, the Respondent contended that the judgment of the said case No 4843/ZL was delivered on 27.10.1992. The sole Defendant in the said case bearing No 4843/ZL was said Subramanium. He had died on 29.04.1991, prior to the delivery of the judgment of the said case. Since the judgment of the said case 4843/ZL had been delivered without effecting substitution in place of the

deceased Subremanium, said judgment of the District Court is a nullity. In proof the said death, the Respondent has produced a death certificate marked V 6.

The Appellant has further contended that there was no evidence to establish the fact that S. Subramanium referred to in the death certificate marked V 6 was the same Sivagnanam Subramanium who was the 1st Defendant in case No DC/Colombo/4843/ZL and he died prior to the delivery of the judgment of the said case.

On this point the Respondent has raised the issue No 14 to wit; "has the defendant of the case bearing No 4843/ZL died on 28.04.1991?" As I mentioned above, the Respondent had produced a death certificate marked V 6. However, V 6 refers to a death of a person called S. Subramanium. Since, the death certificate does not bear the name of Sivagnanam Subramanium, evidence should have been adduced to prove that said Sivagnanam Subramanium, the Defendant of the case bearing No 4843/ZL, and S. Subramanium, the person referred to in the said death certificate marked V 6, is one and the same person.

In order to prove the said death, the Respondent had led the evidence of the Registrar of the District Court, Colombo. The Registrar, producing the said death certificate marked V 6 subject to proof, has stated that it was the death certificate of one S. Subramanium. As per the evidence of the Registrar, the death certificate V 6 was in Tamil language and the Registrar could not understand the contents of the said death certificate. It has been brought to the notice of this court that the said death certificate which was in Tamil language is not in the brief and instead a death certificate in sinhala language is available in the brief marked V 6, without bearing the signature of the learned District Judge.

Udawatthage Don Premalal Kumarasiri, Clerk, Divisional Secretariat, Thimbirigasyaya, has been called to produce the original death certificate of V 6. Said Officer, in evidence, has stated that according to the original death certificate a person named S. Subramanium had died on 29.04.1991. Particulars, such as the deceased's residence and parent's names were not available in the said death certificate. It is apparent from the said death certificate that the death had been informed to the Registrar of Births and Deaths by a Medical Officer of the Colombo General Hospital, in terms of Section 29(3) to be read with Section 30(1) of the Births and Deaths Registration Act No 17 of 1951. In terms of Section 30(1) of the said Act, a declaration has to be sent when a person required under Section 29 of the said Act to give particulars of a death occurring in the division cannot conveniently attend the office of the Registrar of that division. Accordingly, the said death certificate manifests that when the post mortem was held on the deceased body the relatives of the deceased were not present and there had been no claim for the dead body.

The Respondent has not led evidence of any relative or a friend or a known person of said Sivagnanam Subramanium in order to prove that the said S. Subramanium and said Sivagnanam Subramanium is one and the same person.

In the said circumstances, I hold that the Respondent has failed to prove the death of the said Defendant Sivagnanam Subramanium had occurred prior to the delivery of the judgment of the said case bearing No 4843/ZL. Therefore, the Respondent's contention that the said judgment of the case No 4843/ZL is a nullity stands to fail.

The Respondent further contended that the Appellant has failed to register *lis pendens* in terms of Section 11(5) of the Registration of Documents

Ordinance No 23 of 1927. Said Section 11(5) stipulates that "A *lis pendens* may be registered at any time after the plaint has been accepted by the court in accordance with the provisions of the Civil Procedure Code."

At the trial, the Respondent has not raised any issue on the matter of registration of *lis pendens*. Also, he has not raised this matter before the High Court of Civil Appeal. The Respondent has raised this matter for the first time in appeal before this court. The learned counsel for the Respondent submitted that this matter being a pure question of law could be raised for the first in appeal before this court.

The learned counsel for the Appellant submitted that if the question of *lis pendens* has been raised at the trial and if the *lis pendens* has not been registered in the said case 4843/ZL, the Appellant could have taken the position that even though the *lis pendens* has not been registered, there was a caveat filed in the correct folio. He further submitted that, if there was a "search dispensed with" before the date of the execution of the said deed bearing No 804 the Respondent could have seen that there is a dispute with regard to the ownership of Sivagnanam Subramanium. Having noted such circumstances if this court decides to entertain such a contention for the first time in appeal, then, the Appellant would lose the opportunity of adequately meeting this contention in appeal.

I am reluctant to agree with the said submission of the learned counsel for the Respondent. Whether the *lis pendens* had been registered is not a pure question of law, but a question mixed of law and fact. If the matter of *lis pendens* had been raised as an issue at the trial, the Appellant would certainly have defences open to him which he is now debarred from setting up. For example, the counsel for the Appellant submitted that there was a caveat filed in the correct folio. If

there was a "search dispensed with" before the date of the execution of the said deed bearing No 804 it could have been seen that there is a dispute with regard to the ownership of Sivagnanam Subramanium. If the matter was raised at the trial the Appellant could prove such fact by evidence.

In the case of Setha vs. Weerakoon [1948] 49 NLR 225 Dias J. (Howard C.J. agreeing) observed that "It is a question of fact in each case as to when *litis contestatio* arose so as to give rise to the doctrine of lis pendens. That fact has not been proved here. I am of opinion that the point sought to be raised on appeal for the first time is not a pure question of law but is a mixed question of law and fact. It is uncovered by any of the issues framed, and the defendant respondent has no opportunity of adequately meeting this contention in appeal. I am, therefore, of opinion that this is not a matter which can be raised for the first time in appeal. This being the only substantial question raised, the appeal fails and must be dismissed with costs."

The Respondent has claimed compensation for the improvements made on the house which was in the land in dispute. It was an admitted fact that the said house was there when the title was passed on to the Respondent. According to the schedule of the said deed No 804, the Respondent has got title to the land together with the trees, plantations and building thereon bearing assessment No 255, Vihara Mawatha. Issue No 14 has been raised on the claim for the improvements. The learned District Judge has concluded that the Respondent has failed to prove the improvements. Other than the Respondent's mere statement that he spent about ten lakhs on the improvements to the house standing on the land in dispute, there was no iota of evidence in order to compute the quantum of the compensation. Even the learned counsel for the Respondent, in the written submission, has admitted that the Respondent had failed to state the exact amount

he had spent on the above repairs. When I take in to consideration the said evidence of the Respondent's case, I cannot find fault with the findings of the learned District Judge. It is well established and settled by our courts 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 aforesaid circumstances, I am of the view that the learned High Court Judges have failed to consider the merit of the case in a correct perspective. Therefore, I hold that the Respondent is not entitled to raise the issue on registration of *lis pendens* for the first time in appeal, as, it is a mixed question of law and facts. Therefore, I set aside the said judgment of the High Court of Civil Appeal dated 05.10.2012 and uphold the judgment of the learned Additional District Judge dated 26.05.2005. I allow the appeal of the Appellant with costs.

Appeal allowed.

Judge of the Supreme Court

B. P. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

PRIYANTHA JAYAWARDENA, PC, J.

I agree.

Judge of the Supreme Court

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

In the matter of an Appeal from a judgment in the Civil Appellate High Court.

R.H.S.C. Soyza, Kimbulamaladeniya,
Berathuduwa, Gonapeenuwala.
Applicant

SC APPEAL 152/2014.
SC/SPL/LA/ 100/2014
HCALT/ 126/2012
LT /2/96/2010

Vs

Asiri Central Hospitals PLC, No. 37,
Horton Place, Colombo 07.
Respondent

A N D

Asiri Central Hospitals PLC, No.37,
Horton Place, Colombo 07.

Respondent Appellant

Vs

R.H.S.C. Soyza, Kimbulamaladeniya,
Berathuduwa, Gonapeenuwala.

Applicant Respondent

AND NOW BETWEEN

Asiri Central Hospitals PLC, No. 37,
Horton Place, Colombo 07.

Respondent Appellant Appellant

Vs

R.H.S.C. Soyza Kimbulamaladeniya,
Berathuduwa, Gonapeenuwala.

Applicant Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
H.N.J. PERERA J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : Uditha Egalahewa PC with Vishva Vimukthi and N.K. Ashokbharan for the Respondent Appellant Appellant.
Dr. S.F.A. Coorey for the Applicant Respondent Respondent Respondent.

ARGUED ON : 19. 07. 2017.

DECIDED ON : 19. 09. 2017.

S. EVA WANASUNDERA PCJ. – ACTING CHIEF JUSTICE

Leave to Appeal was granted on the following questions of law by this Court.

1. Was the order of the Provincial High Court of the Western Province not just and equitable?
2. Was the order of the Provincial High Court of the Western Province against the weight of the evidence led before the Labour Tribunal?

3. Did the order of the Provincial High Court of the Western Province fail to consider that a mere name change of a corporate entity does not in any manner effect or render ineffectual or invalidate contractual obligations entered into and between the corporate entity and an employee?
4. Was the order of the Provincial High Court of the Western Province ex facie wrong as the learned High Court Judge failed to consider breach of several terms of the contract of employment?

R.H.S.C. Soyza was employed in the first instance by Asha Central Hospitals PLC on 27.12.1999 in the post of Lab Technician. Asha Central Hospitals PLC was changed to Asiri Central Hospitals PLC. The letter of appointment which was issued by the employer had specifically stated the terms and conditions of the contract between the employer and the employee. On 18.11.2009, the employer company suspended the employment of the workman employee with immediate effect due to the reason that the **workman had got employed in another institution 'without having obtained prior approval of the employer'** which act was in contravention of the terms and conditions of the contract of employment.

Later on the employer issued a charge sheet and held an internal diciplinary inquiry and thereafter terminated the services of workman Soyza with effect from 18.11.2009 by letter dated 15.03.2010.

Soyza the workman made an application to the Labour Tribunal on the 2nd of June, 2010 alleging that the employer company had terminated his employment unreasonably and unjustifiably and prayed for only compensation. The employer company filed answer admitting the employment of Soyza and stated that he was charge sheeted and an inquiry was held where he was found guilty of the charges and it was only thereafter that his services were terminated. Since the Employer admitted the termination, the employer company had to commence its case on the basis that the burden of proof was on the employer company to justify the same.

The employer company, Asiri Central Hospitals Limited PLC, the Respondent Appellant Appellant (hereinafter referred to as the Appellant) commenced its case on 11.03.2011 and led the evidence of three witnesses and concluded the Appellant's case on 02.06.2011. Thereafter the employee, Soyza, the Applicant

Respondent Respondent (hereinafter referred to as the Applicant) commenced his case on 06.10.2011 and gave evidence and led the evidence of one witness from the Family Planning Association of Sri Lanka and concluded his case on 15.03.2013. The Labour Tribunal President delivered his order on 14.09.2014 holding that the termination of the Applicant's services were unjust and unreasonable. He ordered that the Applicant be paid Rs. 6,35760/- as compensation. The Appellant preferred an Appeal to the Provincial High Court against the order of the Labour Tribunal. That Appeal was dismissed on 13.05.2014. The Appellant is now before this Court against the decision of the Provincial High Court. Leave to Appeal was granted on the questions of law enumerated above.

The evidence before court demonstrates that the Applicant is a bachelor and he had preferred to work in the night shift of the Appellant company as a Lab technician. He had been working for 10 years in that post at the time his services was suspended on 16.11.2009, the alleged reason being that the Applicant had been working at the same time in another institution, namely the Family Planning Association of Sri Lanka. He had worked at the Family Planning Association during the day time and had taken the night shift work at the Asiri Central Hospital.

Even though the learned High Court Judges at the Appeal stage, and the President of the Labour Tribunal at the stage of writing his order, have specifically mentioned that ' it should be at the first instance decided whether there was an existing contract of employment between the Appellant employer and the Respondent Applicant employee', it is quite obvious that the Applicant in his Application **had not contested** that the Appellant, Asiri Central Hospitals PLC was **the employer**. **It was not contended at all**. In fact it has been recorded at the commencement of the inquiry before the Labour Tribunal that the parties agree that the relationship between them was that of an employer and an employee. The High Court is obviously in error.

Moreover, the High Court judgment pronounces that 'the said question, even though mentioned by the Labour Tribunal as a question to be decided at the very outset, but had failed to consider the same' and therefore the Labour Tribunal is in error. Right thereafter the High Court Judges state, quite contrary to the reasoning which preceded, " therefore the Appellant fails in his

argument". I observe that there was no such argument by the Appellant that the contract of employment is not valid. In fact the argument of the Appellant is that there was a valid contract of employment and Clause 14 thereof specifically mentions that the employee cannot get employed in another place during the tenure of his office in the employer company. The High Court Judges have erred in their reasoning and there exists an error on the face of the record.

Then again, the learned judges of the High Court has stated that even though the Applicant is bound by the contract of employment R1 , the employer has mentioned in R3 that the employee has acted against the regulations of service marked as A2 and his services were terminated for breach of the regulations and not for breach of the terms of the contract. The High Court judges have found out by reading A2, that according to the regulations laid down by the employer company, when an employee has violated the regulations, the employer has to comply with the action laid down when an employee is in breach of the regulation, namely , firstly, he has to be verbally warned, secondly he has to be warned in writing, thirdly again he has to be warned in writing and it is only then, that the employee's services can be terminated. Since this procedure was not followed by the employer, the High Court has held that the termination is unjust and unreasonable.

I find that the learned High Court Judges have totally failed to see that when any person is employed by any institution, the first and foremost document signed by the parties is the " contract of employment". The parties are totally bound by the contract. The regulations regarding how the place of employment should be run by the employer with regard to the conduct of the employees , are totally in the hands of the employer and the regulations are made to lay down the set of rules by which the employer's administration division could be guided, with regard to other employees of the institution. The employer **cannot be pointed to , as having not done any step of the disciplinary steps** tabulated in their system for handling their own employees and neither can the employer be found fault with for having terminated the services of the employee due to that reason. The employee in this instance is found to be in breach of the **contract of employment.** The contract of employment is the **primary document** and all other documents are ancillary.

The learned High Court Judges have analyzed the evidence before the Labour Tribunal in **quite the wrong way** and arrived at a wrong conclusion.

The Applicant had filed his Application dated 02.06.2010 which contains 8 paragraphs and the prayer. The Applicant had firstly stated that **Asiri Central Hospitals Limited** employed him by letter dated 27.12.1999 as a Lab Technician on a monthly salary basis subject to a probation period. He had mentioned that he was confirmed in his employment with effect from 01.12.1999 by a letter from the Secretary to the **Asiri Central Hospitals Limited** dated 08.03.2001. He had mentioned that his services were suspended temporarily for the reason that he was serving in another institution without prior approval from the Appellant and **to show cause as to his action against the contract of employment**. He had shown cause by letter dated 09.12.2009, and thereafter there had been a domestic disciplinary inquiry at the end of which it is alleged that his services were unreasonably and unjustly terminated on 15.03.2010. The Applicant's prayer is not for reinstatement but only for compensation. **The Applicant did not contest the contract of employment at all.**

Clause 14 of the Contract of Employment was signed by the Applicant on 16.03.2000. He was employed from 01.12.1999. The employer had verified from the Family Planning Association whether the Applicant was working for them and they had answered in the affirmative that the Applicant had been working for them on Locum basis for over one year or so. The Applicant had admitted that fact and stated further that Asiri Hospitals Limited PLC had benefitted by his working at FPA because he had directed the blood samples from FPA to Asiri Central Hospitals Lab bringing profits to the Appellant. His position was that everybody knew that he worked in the FPA during the day time and worked at Asiri Central Hospital in the night. The reason for doing so was also stated as wanting to earn more money due to personal family problems. However it was an **admitted fact that he was in breach of the contract of employment.** In his evidence before the Labour Tribunal the Applicant has answered under cross examination on 10.01.2012 that he was at that time employed at the Family Planning Association as a Lab Technician.

The Labour Tribunal had awarded three years salary as compensation to the Applicant holding that the Appellant had terminated the Applicant's services

unjustly and unreasonably. The learned High Court judges had affirmed the order of the Labour Tribunal. The President of the Labour Tribunal had held that the contract of employment marked as R1 is not a contract which can be implemented because it had been signed between Asha Central Hospital and the Applicant and not between the Appellant and the Applicant. It is quite an unnecessary and a wrong analysis since it was pointed out that the name of the employer had changed but it was the same company and moreover the **Applicant had not even contested that the Appellant was not holding the position as employer of the Applicant.**

I answer the questions of law enumerated above in favour of the Respondent Appellant Appellant and against the Applicant Respondent Respondent. I set aside the Order of the Civil Appellate High Court of the Western Province holden in Colombo dated 13th May, 2014. I set aside the award of the Labour Tribunal dated 14th September,2012 and dismiss the Application of the Applicant Respondent Respondent made to the Labour Tribunal bearing No. LT 2/96/2010.

The Appeal is allowed. However I order no costs.

Judge of the Supreme Court
Acting Chief Justice.

H.N.J.Perera J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda 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 Application for Special leave to Appeal in terms of Article 127 and Article 128 of the Constitution Democratic Republic of Sri Lanka

Mohiden Kasim Bibi
Golu Maradankulama, Nachchiduwa,
Anuradapura

Plaintiff

SC Appeal 154/2015
SC (SPL)LA 206/2013
CA 800/98 (F)
DC Anuradapura 15127/L

Vs

S M Ratnawathi Manike
Athuruwella, Nachchiduwa,
Anuradapura

Defendant

AND

Mohiden Kasim Bibi
Golu Maradankulama, Nacchaduwa,
Anuradapura

Plaintiff-Appellant

Vs

S M Ratnawathi Manike
Athuruwella, Nachchiduwa,
Anuradapura

Defendant-Respondent

AND NOW BEWEEN

S M Ratnawathi Manike
Athuruwella, Nachchiduwa,
Anuradapura

Defendant-Respondent-Petitioner-Appellant

Vs

Mohiden Kasim Bibi
Golu Maradankulama, Nachchiduwa,
Anuradapura

Plaintiff-Appellant-Respondent
(Now Deceased)

1. Moonafiya
   New Town, Nachchiduwa,
   Anuradapura
2. Poisa Umma
   New Town, Nachchiduwa,
   Anuradapura
3. Badurunisa
   No.107, Kandara, Katukaliyawa,
   Ihalagama,Mihimnthalaya,
4. Noorthaira Umma
   New Town, Nachchiduwa,
   Anuradapura
5. SooraThumma
   No.41 New,
   Golumaradan Kulama
   Nachchiduwa,
   Anuradapura
6. Muhamath Kamsadeen
   New Town, Nachchiduwa,
   Anuradapura
7. Saripdeen ge Pausul Janapdeen
   New Town, Nachchiduwa,

Anuradapura
8. Mohamad Asmeer Khan
New Town, Nachchiduwa,
Anuradapura

Substituted Plaintiff-Appellant-Respondent-Respondent

Before : Sisira J De Abrew J
Priyantha Jayawardena PC J
NalinPerera J

Counsel : Nuwan Bopage with Kenady Kodikara for the Defendant-Respondent-Petitioner-Appellant
NM Shaheid with Mohamad Rafi for the Substituted Plaintiff-Appellant-Respondent-Respondent

Argued on : 13.9.2017

Written Submission
Tendered on : 3.2.2016 by the Defendant-Respondent-Petitioner-Appellant
28.4.2016 by the Substituted Plaintiff-Appellant-Respondent-Respondent.

Decided on : 10.11.2017

Sisira J De Abrew J

The Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed DC Case No 15127/L in the District Court of Anuradahapura asking for a declaration of title to the land described in the Plaint and to eject the Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) from the said land.

The learned District Judge by his judgment dated 2.10.1998, dismissed the action of the Plaintiff-Respondent. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Respondent appealed to the Court of Appeal and the Court of Appeal by its judgment dated 2.7.2013 allowed the appeal and set aside the judgment of the learned District Judge. Being aggrieved by the said judgment of the Court of Appeal, the Defendant-Appellant has appealed to this court. This court by its order dated 16.9.2015 granted leave to appeal on the questions of law set out in paragraphs 13 (a),(b),(d) and (g) of the petition of appeal dated 7.8.2013 which are set out below.

1. Has the learned Judge of the Court of Appeal failed to consider the fact that the purported grant could not be considered as a valid grant before law?
2. Has the learned Judge of the Court of Appeal failed to evaluate the fact that the Petitioner's (Defendant-Appellant) right should be given priority in considering the ownership of the subsequence?
3. Has the learned Judge of the Court of Appeal failed and neglected to consider the Petitioner's (Defendant-Appellant) possession and improvements effected to the subject matter by the Petitioner (Defendant-Appellant)?
4. Has the learned Judge of the Court of Appeal failed to consider the fact that the Petitioner (Defendant-Appellant) was at least entitled for compensation for the improvements?

The Plaintiff- Respondent took up the position in her evidence that His Excellency the President on **9.8.1982** issued a Grant in terms of Section 19(4) of the Land Development Ordinance in her name in respect of the land described in the schedule to the Plaint and that therefore she is the owner of the said property. The Grant was marked as P2 in evidence.

The Defendant Appellant stated in evidence that she received a permit (marked V1) in respect of the land in dispute on **2.9.1988** and that she is the owner of the land in dispute. Although the grant marked P2 was issued on 9.8.1982 the Plaintiff-Respondent received it only in 1992. Before she received the said grant, permit marked V2 had been issued in the name of the Defendant Appellant in 1988. Considering the above matters the learned District Judge rejected the claim of the Plaintiff-Respondent. In order to answer the question whether the conclusion reached by the learned District Judge is correct or not, it is relevant to consider the evidence of Bandrage Somarathne who is an officer attached to the Divisional Secretary. He stated, in his evidence, that a permit issued under the Land Development Ordinance could not invalidate a Grant issued by His Excellency the President. But the learned District Judge disregarded this evidence and rejected the claim of the Plaintiff-Respondent.

Can a Grant issued by His Excellency the President in terms of Section 19(4) of the Land Development Ordinance be invalidated or cancelled by a permit issued in terms of Section 19(2) of the Land Development Ordinance? When a Grant under Section 19(4) of the Land Development Ordinance is issued by His Excellency the President, the grantee has been declared as the owner of the property. This declaration is found in the Grant. But when a permit in terms of Section 19(2) of the Land Development Ordinance is issued by the land Commissioner, the person who is given the possession of the land is declared as the permit holder. This declaration is found in the permit. Therefore when a person becomes an owner of a land on the basis of a Grant issued by His Excellency the President, another permit issued in terms of Section 19(2) of the Land

Development Ordinance in the name of another person whilst the Grant is in existence cannot invalidate or cancelled the Grant. When the court is invited to answer the question whether the Grant or the permit which has better status in the ownership of the land, the following observation will have to be made. A Grant issued in terms of Section 19(4) of the Land Development Ordinance has to be considered as a deed conveying the title to the grantee by the State. But the same status cannot be given in respect a permit issued in terms of Section 19(2) of the Land Development Ordinance. The permit holder has only permission to possess the land and he gets sufficient title to enable him to maintain a vindicatory action against a trespasser but not against the grantee. This view is supported by the judicial decision in Palisena Vs Perera 56 NLR 407 wherein His Lordship Justice Gratiaen held thus; "A permit holder under land Development Ordinance enjoys a sufficient title to enable him to maintain a vindicatory action against a trespasser."

Learned counsel for the Defendant-Appellant contended that the Plaintiff-Respondent had failed to discharge his burden regarding the identification of the corpus. But at the beginning of the case both parties had admitted that the subject matter of the case was the land described in the schedule to the plaint. Therefore the above contention cannot be accepted. Learned counsel for the Defendant-Appellant further contended that the Plaintiff-Respondent had not discharged his burden regarding the title of the land. But the Plaintiff-Respondent had, in his evidence, produced the Grant issued by His Excellency the President as P2. Therefore the above contention cannot be accepted. In any event the Defendant Appellant cannot make any claim to the land described in the plaint on the strength of the permit marked V2 as the land described in the said permit relates to Lot No.338H in Plan No. ISPH 1. It has to be noted here that that the land described in

the plaint and the Grant marked P2 is Lot No.771 in Plan No ISPH 1. It is therefore seen that the land described in the permit marked V2 is different from the land described in the plaint.

When I consider all the above matters, I hold that the learned District Judge was wrong when he reached the above conclusion (the conclusion reached in his judgment dated 2.10.1998) and that the Court of Appeal was correct when it reached the above conclusion. In view of the conclusion reached above, I answer the above questions of law in the negative. For the above reasons, I grant the relief claimed by the Plaintiff-Respondent in paragraphs (i), (ii) and (iii) of the prayer to the plaint. The learned District Judge is directed to enter decree in accordance with this judgment. I affirm the judgment of the Court of Appeal dated 2.7.2013 and dismiss the appeal of the Defendant Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court.

Nalin Perea 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 Honourable Supreme Court of the Democratic Socialist Republic of Sri Lanka

1. Malavi Pathirannahelage Vindya Ruwangi Perera
2. Malavi Pathirannahelage Rukshala Santhsini Perera
3. Malavi Pathirannahelage Tarindu Perera

All of No.86/9 Lesly Ranagala Mawatha Colombo 8

7th to 9th Defendant-Appellant-Petitioner-Appellants

SC Appeal 157/2013
WP/HCCA/COL 375/2007(F)
DC Colombo 17741/P

Vs

1. Walpola Mudalige Podihamine
   No.87, Walpola Watta, Kalanimulla, Angoda.

Plaintiff-1st Respondent-Respondent

2. MPRT Perera
3. MPS Perera
4. MPI Perera
5. MPP Perera

All of No.87/1, Walpola Watta, Kalanimulla Angoda

6. MPWD Perera
   No. 145, Siridamma Mawatha Colombo 8

2nd to 6th Defendant-Respondent-Respondents

Vs

No.

Before : Buwaneka Aluwihare PC J
Sisira J De Abrew J
Anil Gooneratne J

Counsel : Sunil Abeyratne with Thushara Gunatilake
for the 7th to 9th Defendant-Appellant-Petitioner-Appellants
Chandrika Morawake for the Plaintiff-Respondent-Respondent

Argued on : 3.3.2017

Written Submission
Tendered on : 1.11.2013 by the Defendant-Appellant-Petitioner-Appellants
20.12.2013 by the Plaintiff-Respondent-Respondent

Decided on : 13.09. 2017

Sisira J De Abrew J.

The 7th ,8th , 9th Defendant-Appellant-Petitioner-Appellants (hereinafter referred to as the Defendant-Appellants) in this case filed an appeal in the Civil Appellate High Court challenging the judgment of learned District Judge dated 20.8.2017. The learned Judges of the Civil Appellate High Court (hereinafter referred to as the High Court) by their judgment dated 15.3.2012 dismissed the petition of appeal on the ground that it had not been presented to the District Court within 60 days from the date of the judgment which is the stipulated time period prescribed to present a petition of appeal in Section 755(3) of the Civil Procedure Code (the CPC). Section 755(3) of the CPC reads as follows.

> *"Every appellant shall within sixty days from the date of the judgment or decree appealed against present to the original Court a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against, and containing the particulars required by section 758, which shall be signed*

by the appellant or his registered Attorney. Such petition of appeal shall be exempt from stamp duty:

Provided that, if such petition is not presented to the original Court within sixty days from the date of the judgment or the decree appealed against, the court shall refuse to receive the appeal."

Being aggrieved by the said judgment of the High Court, the Defendant-Appellants have filed this appeal. This Court by its order dated 20.9.2013 granted leave to appeal on the questions of law which are set out below.

1. Did the learned Judges of the Civil Appellate High Court err in concluding that the petition of appeal filed in that court had been filed out time?

2. Was there a valid notice of appeal and petition of appeal filed on behalf of the Appellants in the Civil Appellate High Court?

It is undisputed in this case that the petition of appeal should have been presented to the District Court on or before 19.10.2007. Learned counsel for the Defendant-Appellants contended that the petition of appeal had been presented to the District Court on 19.10.2007. But learned counsel for the Plaintiff-Respondent-Respondent-Respondents (hereinafter referred to as the Plaintiff-Respondents) contended that the petition of appeal had not been presented to the District Court on 19.10.2007. Therefore the most important question that must be decided in this case is whether the petition of appeal had been tendered to the District Court on 19.10.2007 or not. I now advert to this question. When the petition of appeal tendered to the District Court is examined, it appears that the said petition of appeal bears the date stamp of the Record Room of the District Court. According to the date stamp, the date is 19.10.2007. Learned counsel for the Defendant-Appellants relying on the said date stamp contended that the petition of appeal had been tendered to the District Court on 19.10.2007.

Although learned counsel for the Defendant-Appellants contended so, the Registrar of the Record Room of the District Court had made a minute addressed to the Chief Registrar of the District Court to the following effect.

"Chief Registrar. 23.10.2017.

This Petition of appeal had been put to the motion box of the Record Room by mistake. Submitted for necessary action.

Registrar in Charge of the Record Room."

The above minute clearly shows that the Petition of Appeal had not been handed over to the Registrar of the District Court or to the Registrar in Charge of the Record Room on 19.10.2007 although it bears the date stamp of the Record Room of the District Court indicting the date as 19.10.2007.

When a Petition of Appeal or a Notice of Appeal is handed over to the District Court, the accepted practice is to hand over the same to the Registrar of the District Court who shall state the date and time of presentation of the document and initial it. The other practice is when a Petition of Appeal or a Notice of Appeal is tendered to the Registrar of the District Court, he will place the date stamp of the District Court; state the time of presentation; and initial on the date stamp. The fact that there is a practice of this nature is evident when one examines the Notice of Appeal tendered to the District Court which bears the date and time of handing over of the document and the signature of the Registrar of the District Court. The fact that there is a practice of this nature is also established by the judgment of Justice SN Silva (as he then was) in the case of Nachchiduwa Vs Mansoor[1995] 2SLR 273 at page275 which reads as follows.

"We have carefully considered the submission of learned counsel. We note that in terms of Section 755(3) the appellant has to present to the original court a petition of appeal within a period of 60 days of the judgment. The act of the registered attorney of the defendants-appellants in tendering the petition of appeal to the Registrar and the act of the Registrar in placing the date stamp

and his initials on the petition of appeal constitute a presentation of the petition of appeal."

The petition of appeal submitted to the District Court does not bear a minute by the Registrar of the District Court stating the date and time of handing over the said document. It does not have any minute made by the Registrar of the District Court on 19.10.2007. It has a minute made on **23.10.2007** by the Registrar in charge of the Record Room which I have referred to above. There is another matter that should be considered in finding an answer to the question whether the petition of appeal had been tendered to the District Court on 19.10.2007 or not. The entries of the Motion Book of the District Court relating to 19.10.2007 had been produced marked 'A'in the High Court. The learned Judges of the High Court have considered this Motion Book. The last entry in page 318 of the Motion Book is entry No.46. Therefore the next entry in page 319 of the Motion Book should be entry No.47. The entry No.47 had been correctly entered in page 319 on the first line and this entry should be the first entry in page 319 of the Motion Book. But when page 319 of the Motion Book is examined it can be clearly seen that above the said entry No.47 there is another entry and the number of the said entry is also 46. Therefore it is seen in this Motion Book there are two entries under No.46. The second entry No.46 relates to the Petition of Appeal in this case and this entry had been made on the line where printed letters of the book are printed. This line is not meant for making entries.

When I consider all the above matters, I hold that the Petition of Appeal had not been handed over to the District Court on or before 19.10.2007. In view of the above conclusion reached by me, I answer the 1st question of law in the negative.

For the above reasons, I hold that that the Petition of Appeal had not been presented to the District Court within 60 days from the date of the judgment of

the District Court. In view of the conclusion reached above, I answer the 2nd question of law as follows.

"There was no valid petition of appeal filed on behalf of the Appellants in the Civil Appellate High Court."

For the above reasons, I hold that the learned Judges of the High Court were correct when they dismissed the appeal of Defendant-Appellants. For the above reasons, I dismiss the appeal of the Defendant-Appellants with costs.

Appeal dismissed.

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 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 / 158/2014

SC/ HC/CALA/ 235/2012

UP/HC (Civil) 04/2001(F)

DC Badulla No. L/645/96

1. Navaratnarasa Jayalingam,
2. Navaratnarasa Jeevalingam,
3. Navaratnarasa Jothilingam,

All of No.16 1/17, Mudalige Mawatha

Presently of No. 415/2A, Galle Road,

Mt. Lavinia.

Plaintiffs

Vs.

Kuda Bandara Wettewa,

No. 18/1, Eladaluwa Road,

Badulla.

Defendant

AND BETWEEN

1. Navaratnarasa Jayalingam,
2. Navaratnarasa Jeevalingam,

3. Navaratnarasa Jothilingam,
   All of No.16 1/17, Mudalige Mawatha
   Presently of No. 415/2A, Galle Road,
   Mt. Lavinia.

Plaintiff Appellants

Vs.

Kuda Bandara Wettewa,
No. 18/1, Eladaluwa Road,
Badulla.

Defendant Respondnt

AND NOW BETWEEN

1. Navaratnarasa Jayalingam,
2. Navaratnarasa Jeevalingam,
3. Navaratnarasa Jothilingam,
   All of No.16 1/17, Mudalige Mawatha
   Presently of No. 415/2A, Galle Road,
   Mt. Lavinia.

Plaintiff Appellant-Appellants

Vs.

Kuda Bandara Wettewa,
No. 18/1, Eladaluwa Road,
Badulla.

Defendant Respondent-Respondent

BEFORE	:	SISIRA J. DE ABREW, J. UPALY ABEYRATHNE, J. K. T. CHITRASIRI, J.
COUNSEL	:	Faiz Musthapha PC with Ms. T. Machado for the Plaintiff Appellant-Appellants Harsha Soza PC with Upendra Walgampaya for the Defendant Respondent Respondents
WRITTEN SUBMISSION ON:		27.01.2016 (Plaintiff Appellant Appellants) 05.12.2014 (Defendant Respondent Respondents)
ARGUED ON	:	08.02.2016
DECIDED ON	:	04.08.2017

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of the Uva Province holden at Badulla dated 18.05.2012. By the said judgment, the Civil Appellate High Court has dismissed the appeal of the Plaintiff Appellant-Appellant (hereinafter referred to as the Appellant) and allowed the appeal of the Defendant Respondent-Respondent (hereinafter referred to as the Respondent).

However, the bench comprised of two High Court Judges have held two different views as regard the judgment of the learned District Judge dated 12.03.2001. Whilst one of the learned High Court Judges has set aside the said judgment of the learned District Judge, the other Judge has upheld the said judgment of the learned District Judge subject to certain corrections and modifications.

This court granted leave on the following question of law;

"Did the learned Judges of the Civil Appellate High Court and the learned District Judge err by failing to take in to account the attendant circumstances which established possession on the part of the Defendant?"

According to the Appellant, the predecessors in title of the land in suit Annamalai Navaratnarasa and his wife Leelawathie, by an informal agreement, had agreed to sell the land in suit to the Respondent and the Respondent has agreed to purchase the same for a sum of Rs 45,500/-. Accordingly, the Respondent had paid a sum of Rs. 42,587.49 to said Annamalai Navaratnarasa and Leelawathie, and the Respondent had been placed in possession of the said land. Since, the said informal Agreement had been breached, the Respondent had instituted a case bearing No. 10415 against said Annamalai Navaratnarasa in the District Court of Badulla seeking specific performance of the said informal agreement or in the alternative to recover a sum of Rs. 42, 587.49 with the interest accrued thereon. Said Annamalai Navaratnerasa had died during the pendency of the action. The Appellants had been substituted in the room of said Navaratnarasa. Upon hearing the evidence of said case No 10415, a decree had been entered in favour of the Respondent (the plaintiff in said case No 10415) to recover the said sum of Rs. 42,587.49. Furthermore, the learned District Judge, answering to the issue No 18 in the said case No. 10415 had concluded that a separate action has to be instituted against the Respondent to recover the vacant possession of the land in suit.

Accordingly, the Appellants have instituted the present action bearing No. L. 645/96 against the Respondent in the District Court of Badulla seeking to recover possession of the said land in suit. The Appellants have averred that the Respondent was placed in possession of the land in suit in terms of said informal agreement with leave and license of said Navaratnarasa. By letter dated 18th

October 1995, they have terminated the said leave and license given to the Respondent.

At the trial, the Respondent has raised issues No 08 to 14. Said issues have been raised on the basis that at any time, said Navaratnarasa and Leelawathie did not place the Respondent in possession of the land in suit in terms of the said informal agreement. It is also pertinent to note that at the trial, the Respondent has not claimed title to the said land in dispute. The issues raised by the Respondent clearly demonstrate that the Respondent had no claim against the Appellants or he had no other right over the land in dispute. Also, the Respondent has not challenged the title of the Appellants.

Accordingly, in terms of the said informal agreement whether the Respondent has been placed in possession of the land in dispute is the sole question to be dealt with by this court. It has transpired from the evidence of the case that the Respondent and his wife, Mrs. Mallika Wettewa had executed a lease agreement bearing No 32377, dated 1st June 1979 (P 2) in favour of the Respondent's brother in law, A. M. Jayawardena in respect of the said land in dispute. It has transpired from the evidence that the said lease agreement has been executed by the Respondent in his capasity as the owner of the said land. In the said lease agreement, the Respondent and his wife Mallika Wettewa has declared that " … And which said premises have been purchased by us, the said lessors, from Annamalai Navaratnarasa and Leelawathie having paid the full purchase price to them".

The Respondent in his evidence has testified that he was not placed in the possession of the said property in dispute by Nawaratnarasa. He is in occupation of premises bearing No 18/1, Eladaluwa Road, as tenant under one Mrs. Padmanathan Sivanathan. Since said Jayawardena was in possession of the

property in dispute Appellants' parents could not sell the said property. For the said reason, the Respondent came forward to buy the said premises in question.

I am not inclined to accept the said evidence of the Respondent. The Respondents' standing as regards the land in suit is clear from the said lease agreement bearing No 32377. Having entered into the said lease agreement as the owner of the land in suit, he now cannot deviate from the capacity he demonstrated at the time of executing the lease agreement. The Respondent, as the owner, has entered in to the said lease agreement with his brother in law, said Jayawardena. Hence the nexus between the Respondent and said Jayawardena, as regards the land in dispute is concerned, Lessor and lessee.

Furthermore, it is clear from the said informal agreement dated 17.01.1976 that the Respondent had agreed to purchase the land in suit from said Navaratnarasa on payment of a sum of Rs 45,500/-. In the said informal agreement, said Navaratnarasa had agreed to hand over the vacant possession to the Respondent from the 1st of April 1976. The parties had further agreed, in event the arrangements could not be made to finalise the deal, to refund the deposit and to hand over the vacant possession back to said Navaratnarasa. Thereafter, on 1st June, 1979, the Respondent, acting as the owner of the said land, had leased out the said property to his brother in law Jayawardena. Just five months after the said lease agreement, the Respondent, by a plaint dated 30.10.1979, had instituted the action bearing No M/10415 against said Navaratnarasa in the District Court of Badulla seeking an order to execute a deed in favour of the Respondent as agreed in the said informal agreement or in the alternative to recover a sum of Rs. 42,587.49 which had been paid to said Navaratnarasa.

Although the said informal agreement is inactive as regards the immovable property is concerned, it has an evidential value in deciding the money

transaction and also can be used as corroborative evidence in deciding whether the possession of the land in suit had been changed or not. It is important to note that the Respondent, as the plaintiff of the said case No M/10415, has sought an order only to execute a deed according to the said informal agreement. But he had not sought an order, directing said Navaratnarasa, to hand over the vacant possession of the said land to him.

Also, it is important to note that the Appellant has sent the letter dated 18th October, 1995 to the Respondent terminating the leave and license given to him and requesting him to vacate the said premises in suit and to hand over vacant possession thereof to the Appellants on or before 30th November, 1995. But the Respondent has failed to reply to the said letter sent by the Appellants. Since the said letter had indicated contrary position to his claim, if the Respondent was not in possession of the said land in suit, a burden would cast on him to reply the said letter denying the averments contained therein. But he has failed to do so. It is well settled law that in business transactions failing to reply a letter would amount to an admission of the contents contained therein.

Said conduct of the Respondent has crystallised the fact that the Respondent was in possession of the said land in dispute at the time of executing the said lease agreement in favour of his brother in law, said Jayawardena. Hence the Respondent cannot now plead that said Jayawardena is in possession of the said land in suit and the Respondent is residing elsewhere.

In the case of Jayasundera Vs. Dantanarayana and Another [1981] 1 Sri L.R 1 it was held that "A landlord and tenant may both be considered to be in possession of the leased property and, subject to the tenancy, the landlord has the full and complete right to possession. If the tenancy is terminated by surrender of

possession by the tenant and acceptance thereof by the landlord, then the landlord's possession is enlarged to full and complete possession.”

In Harrison Vs. Wells, 1966 (3) All ER 524 at 530, Salmon LJ, in the Court of Appeal, observed that the rule of estoppel was founded on the well-known principle that one cannot approbate and reprobate. The doctrine was further explained by Lord Justice Salmon by holding "it is founded also on this consideration, that it would be unjust to allow the man who has taken full advantage of a lease to come forward and seek to evade his obligations under the lease by denying that the purported landlord was the landlord".

In Kok Hoong Vs. Leong Cheong Kweng Mines Ltd., (1964 Appeal Cases 993 at 1018), the Privy Council held that "a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."

Justice Ashutosh Mookerjee in Dwijendra Narain Roy Vs. Joges Chandra De, 39 CLJ 40 at 52 (AIR 1924 Cal 600), held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

In view of the said circumstances, I am of the view that both the learned District Judge and the learned High Court Judges have erroneously come to their respective conclusion that said Jayawardena was a tenant under the

Appellants. Lease Agreement P 2 was ample evidence to conclude that having entered in to the possession of the said property under the aforesaid informal agreement he had with said Navaratnarasa, the Respondent, as the owner of the said property in suit, has leased out the same to his brother in law said Jayawardena. Hence the Respondent, who had entered in to the land under the said informal agreement with leave and license of said Navaratnarasa, is now estopped denying his possession of the land in suit.

For the forgoing reasons, I set aside the judgment of the learned District Judge Dated 12.03.2001 and the judgment of the learned High Court Judges dated 18.05.2012. I make order to enter a decree in favour of the Appellants as prayed for in prayer 'a', 'b' and 'd, of the plaint. The Appellants are entitled to execute a writ against the Respondent, his servants and agents only upon the payment of the decreed amount in the said case bearing No M/10415. I allow the appeal of the Appellants without costs.

Appeal allowed.

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

In the matter of an Appeal from the Judgment of the Civil Appellate High Court of Uva Province holden in Badulla.

M.P.S. Wijesinghe,
Dambulamure Walawwa,
"Diyoguvilla", Ella Road,
Wellawaya.
Plaintiff

SC Appeal 159/2015
SC/HCCA/LA/638/14
Uva Province
Civil Appeal No. UVA/HCCA/BDL/ LA/02/14
District Court of Wellawaya
Case No. L / 2073

Vs

T.K.J. Chandrasekera,
Paragasmankada,
Ella Road, Wellawaya.
Defendant

AND

1. M.S.M. Sijaudeen
2. M.H.M. Insaaf
3. H.M.F. Mohamed
4. M.U.M. Vufraan
5. M.U.M. Rilwaan
6. M.H.M. Initiyas
7. S.H.J. Aabdeen
   (The present Board of Trustees of

Wellawaya Mohideen Jumma Mosque)

All of Monaragala Road,
Wellawaya.

Intervenient Petitioners

Vs

M.P.S. Wijesinghe,
Dambulamure Walawwa,
“Diyoguvilla”, Ella Road,
Wellawaya.

Plaintiff Respondent

T.K.J. Chandrasekera,
Paragasmankada,
Ella Road, Wellawaya.

Defendant Respondent

AND THEN

M.P.S. Wijesinghe,
Dambulamure Walawwa,
Diyoguvilla, Ella Road,
Wellawaya.

Plaintiff Respondent
Petitioner

Vs

1. M.S.M. Sijaudeen
2. M.H.M. Insaaf
3. H.M.F. Mohamed
4. M.U.M. Vufraan
5. M.U.M. Rilwaan
6. M.H.M. Initiyas
7. S.H.J. Aabdeen
   (The present Board of Trustees of Wellawaya Mohideen Jumma Mosque)

   All of Monaragala Road,
   Wellawaya.

Intervenient Petitioner
Respondents

T.K.J. Chandrasekera,
Paragasmankada,
Ella Road, Wellawaya.

Defendant Respondent
Respondent

AND NOW BY AND BETWEEN

1. M.S.M. Sijaudeen
2. M.H.M. Insaaf
3. H.M.F. Mohamed
4. M.U.M. Vufraan
5. M.U.M. Rilwaan
6. M.H.M. Initiyas
7. S.H.J. Aabdeen
   (The present Board of Trustees of

Wellawaya Mohideen Jumma Mosque)

All of Monaragala Road,
Wellawaya.

Intervenient Petitioner
Respondent Petitioners

Vs

M.P.S. Wijesinghe,
Dambulamure Walawwa,
" Diyoguvilla", Ella Road,
Wellawaya.

Plaintiff Respondent
Petitioner Respondent

&

T.K.J. Chandrasekera,
Paragasmankada,
Ella Road, Wellawaya.

Defendant Respondent
Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
UPALY ABEYRATHNE J &
H.N.J. PERERA J.

COUNSEL : M.U.M. Ali Sabry PC with Hazzan Hameed and Samhan Munzir for the Intervenient Petitioner Respondent Appellants

Vijaya Niranjan Perera PC with Mrs. Jeevani Perera and Ms. Oshadee Perera for the Plaintiff Respondent Petitioner Respondent.

The Defendant Respondent Respondent Respondent was not represented.

ARGUED ON : 30. 05. 2017.
DECIDED ON : 30. 06. 2017.

S. EVA WANASUNDERA PCJ.

In this matter, the District Court heard the case between the Plaintiff Respondent Petitioner Respondent (hereinafter referred to as the Plaintiff) and the Defendant Respondent Respondent Respondent (hereinafter referred to as the Defendant). It was a case where the Plaintiff had filed action **to eject the Defendant** from the land belonging to the Plaintiff. The land was a paddy field in which the Defendant's father had been working as the Ande Cultivator and when the father died the Defendant had continued to be in possession. The District Judge after hearing the case had entered judgment in favour of the Plaintiff. The Defendant had appealed against that judgment. The Plaintiff proceeded to file decree and **execute writ to eject the Defendant.**

It is **alleged** that the Fiscal officer of the District Court of Wellawaya, at the time of executing the writ against the Defendant, **had also ejected** the Intervenient Petitioner Respondent Petitioners (hereinafter referred to as the **Intervenient Petitioners)** from the property **adjoining the decreed property**.

The Intervenient Petitioners submit that they had made an application to the District Court under **Section 328 of the Civil Procedure Code** seeking for relief regarding their claim. The Plaintiff had objected to the said application. The matter was fixed for inquiry and later the District Judge had delivered order directing to **re – survey the land in dispute** and to **hand over the extent of land the Intervenient Petioners' claim** to the Intervenient Petitioners, which they had **alleged** to have been deprived of, by the execution of the writ.

The Plaintiff being dissatisfied with that order of the District Judge dated 19.12.2013 had preferred an Appeal to the Civil Appellate High Court. After hearing the Appeal**, the said High Court had delivered judgment on 29.10.2014 setting aside the order of the District Judge dated 19.12.2013**.

Being aggrieved by the High Court Judgment, the Intervenient Petitioners have filed a Leave to Appeal Application to this Court and leave to appeal was granted on the grounds set out in paragraphs 13(i) to (v) of the Petition.

The said questions of law are as follows:

i. Is the said order contrary to law and evidence placed before Court?
ii. Have the High Court Judges failed to understand the fact that the Plaintiff Respondent is not entitled to execute writ in respect of a property larger than the property granted by the judgment dated 08.11. 2012?
iii. Have the High Court Judges erred in law in failing to realize that under the pretext of executing the writ against the Defendant Respondent , the Plaintiff Respondent is not entitled to eject the Petitioners from their property and/or take over the possession of the property belonging to the Petitioners?
iv. Has the High Court failed to understand the real nature of the case in which an abuse of process of the law had occasioned a serious miscarriage of justice in which the Petitioners have been deprived of their property without a hearing?
v. Have the Judges of the High Court got misdirected in law in dabbling in technicalities when the facts placed before the Court established a severe miscarriage of justice which need to be rectified?

The Plaint in the District Court dated 16.08.2005 bears a Schedule of the paddy field which the Plaintiff claims, of an extent of 3 Acres 0 Roods and 31 Perches. The Answer of the Defendant has a Schedule with the same boundaries and almost of the same extent meaning only 3 Acres. The body of the Plaint explains how the Plaintiff became the owner of the paddy field. Paragraph 3 of the Plaint specifically narrates that the Plaintiff became the owner of the paddy field named Waduwela Hinna by Deed of Transfer No. 2319 dated 08.11.1979 from Steven Samarakoon Wijesinghe. That Deed is marked as P2 at the trial. The Schedule 4 to

that Deed describes the paddy field named Waduwela Hinna of an extent of 01 Acre 03 Roods and 13 Perches. That is the title deed through which the Plaintiff claims title to the said paddy field. Plan No. 1799 dated 25.04.2005 done by the surveyor Wilmot Silva and filed of record by the Plaintiff has stated that the land is of an extent of 3 Acres and 31 Perches. The District Judge had made a note that the Plan 1799 shows an extent in excess of the entitlement of the Plaintiff as per his title Deed. **Due to this reason, even though the identity of the corpus and the extent of the corpus was admitted by both the Plaintiff and the Defendant, the District Judge had directed a Court Commissioner to survey the corpus.**

The **Court Commissioner, Amarasekera made Plan No. 2933 according to the survey done on 09.12.2010** and filed the same in Court which was marked as P11 with a report which was marked as P11(a). He had found that there were certain portions of land which belonged to the State within this corpus. He had marked them as **Lot 119** in Final Village Plan 663, **Lot 118** of Final Village Plan 663 which is the Reservation to the Radapola Ara (water course) and **Lot 18** which is the Reservation kept along the Old Ella Road to the West of the corpus.

This Court Commissioner had specifically submitted to Court in his report, that the Plaintiff and the Defendant were informed of this survey through the Grama Niladari and at the time of the survey, the Plaintiff was present; the Defendant was absent (the excuse being that he goes to work as a regular office worker and is unable to be present on a working day); the Divisional Secretary's representative the Janapada Niladari , D.M.Chandradasa was present; and that the Grama Niladari of Division 151 Wellawaya , Jagath M. Hettiarachchi was present. **The Court Commissioner concludes that the corpus identified is of an extent of 2 Acres 2 Roods and 23 Perches.** It is interesting to note that the corpus is bounded on the North by the Magistrates Court of Wellawaya, East by the Radapola Ara, South by the Mala Ara and West by the Old Ella Road. On the day of the survey, i.e. on 09.12.2010, with all the state officials present, **no other person were found to be on the said property.**

The District Judge had delivered judgment on 08.11.2012. He had answered all the questions of law. In the body of the judgment he had analyzed the evidence referring to documents and oral evidence. He had mentioned that the Plaintiff had got title by deeds to an extent of 1 Acre 3 Roods and 13 Perches **but this**

extent is not according to any specific plan. There is no plan referred to in the title deeds of the Plaintiff. There is no explanation as to how that extent was calculated and mentioned in the title deed without referring to any plan done by any surveyor. It is stated by the District Judge that within the boundaries as specifically stated in the Plaint and the Answer, (which boundaries are not contested by the parties to the case and which land is identified as the land in question by both parties to the case) the **extent of land contained**, according to the Court Commissioner's **Plan 2933 marked as P11**, which the District Judge has been impressed to take as one hundred percent correct, **is of an extent of 2 Acres 2 Roods and 23 Perches**. The Court Commissioner specifically had mentioned that this land is equal to the **addition of Lots 69 and 70** of Title Plan 326322 Final Village Plan 663. The District Judge has analyzed the matters put forward by this Court Commissioner **without any challenge by either party to the case.** (write in Sinhala pgs. 17 & 18 of the judgment) Therefore I hold that the corpus which is the subject matter of the action before the District Court was **the block of land within the boundaries mentioned in the Schedule to the Plaint and also the boundaries mentioned in the Schedule to the Answer which are similar** and of the extent of **2A 2R 23P** according to the **Court Commissioner who had surveyed the land when the District Judge saw the discrepancy in the extent mentioned in the title deed** and on his own **directed** that a commission be issued to the Court Commissioner and Surveyor.

The District Judge held further, that the Plaintiff was entitled to eject the Defendant from the land. The Defendant appealed to the Civil Appellate High Court from the judgment of the District Court. This Appeal had been dismissed by the High Court. However prior to the aforementioned Appeal being heard, the Plaintiff sought to execute the writ. Execution of writ pending appeal was ordered by the District Judge on the application of the Plaintiff , by order dated 03.06.2013. **The writ was executed on 30.07.2013 by the Fiscal of Court and possession was handed over to the Plaintiff.**

The Intervenient Petitioner Respondent **Appellants** (hereinafter referred to as the Intervenient Petitioners) had come before the District Court after the execution of writ, by way of a **motion dated 01.08.2013** filed by an Attorney at Law. The District Judge had ordered that a proper application be made. Thereafter an Application under **Sec. 839** of the Civil Procedure Code had been filed. Later on, it is alleged that it was changed into an application under **Sec. 328**

of the Civil Procedure Code. After an inquiry under Sec. 328, the District Judge had held on 09.12.2013, **that "the extent of property claimed by the Intervenient Petitioners be surveyed and be granted** to them".

The Plaintiff had then appealed to the Civil Appellate High Court and **the High Court Judges had set aside the order of the District Judge**. Being aggrieved by the said High Court Judgment, the Intervenient Petitioners had appealed to this Court. **The impugned High Court Judgment is dated 29.10.2014.**

I observe that the order of the District Court at the end of the inquiry does not make **any mention of any specific extent** of land claimed by the Intervenient Petitioners be given to them. How can any surveyor survey and divide any property without any specific directions as to how much to be surveyed and the land be divided when there is no order as to the extent? Anyway, even if we take the extent that is claimed by the Intervenient Petitioners in their Petition, as the correct extent, the said extent being 2 Acres 2 Roods and 39.5 Perches, I do not understand how **that much of land , which is bigger than the decreed extent of the land in this case, can be carved out and given**, out of the corpus of the case which is decreed as 2 Acres 2 Roods and 23 Perches. In simple language, there is no way to carve out a bigger extent of land from and out of a smaller extent of land.

On the other hand, the land which is the subject matter of the trial that was concluded before the District Judge between the Plaintiff and the Defendant is correctly in place as decreed and had been handed over to the Plaintiff by the Fiscal of the District Court. The **name of the said land is Waduwelahinna**. It is situated in the village called **Wewalagama**. The **name of the land** that is claimed by the Intervenient Petitioners in their application is **"Weerasekeragama**". That land as described in the Schedule to the application before the District Court is situated in the **'town of Wellawaya**'. On the face of the application, it is evident that the two lands are not one and the same. It looks like that they are two different lands in two different areas in the District of Wellawaya.

The application before the District Court was under Sec. 839 of the Civil Procedure Code as evident from P5 at page 142 of the Civil Appellate High Court brief. P5 is dated 05.08.2013. The prayer reads as follows:

(අ) මෙම නඩුවේ පැමිනිලිකරුට නොතීසි නිකුත් කරන ලෙසටත්ද,

(ආ) **පැමිනිලිකාර වගඋත්තරකරුට පක්ෂව දි ඇති තීන්දුව " පරි ඉන්කියුරියාම් " සිද්ධාන්තය යටතේ වෙන් කරන ලෙසටත්,**

(ඇ) පෙත්සම්කරුවන්ගේ අයිතිය තහවුරු කිරීමට ගරු අධිකරණයෙන් දි ඇති අයිතිවාසිකම් ලබා දෙන ලෙසටත්,

(ඈ) ඉන් පසුව මෙහි උප ලේඛණයේ දක්වා ඇති ඉඩමේ අයිතිය තහවුරු කර දෙන ලසටත්,

(ඉ) කෙසේ වෙතත්, ඉඩම නිශ්චිතව හඳුවා ගැනීමට කොමිෂමක් නිකුත් කරන ලෙසටත්ද

(ඊ) ගරු අධිකරණයට සුදුසු යැයි හැගෙන වෙනත් සහ වැඩිමනත් සහන සලසා දෙන ලෙසටත් වේ.

The Schedule to the application of the Intervenient Petitioners under Sec. 328 describes the land of an extent of 2Acres 2Roods and 39.5 Perches according to a Plan done by surveyor G.E.M. Ratnayake. There is no date mentioned of the Plan even though there is a plan number and the name of a surveyor. However the four boundaries are **totally different** to the boundaries of the corpus of the case in hand regarding which the writ of execution was executed **in accordance with the decree in the D.C. Case No. L/ 2073**. I also observe that the Intervenient Petitioners claim the land in the Schedule to the application **on a title deed which is a Deed of Declaration No. 380 dated 11.01.2013.** Within this declaration they have referred to certain partition action and decrees of court in 1953. This Deed has been written as late as in the year 2013.

The Intervenient Petitioner's application had read as an Application under Sec. 839 of the Civil Procedure Code.
Section 839 of the Civil Procedure Code reads as follows:
" Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. "

Later on, the said application was captioned as one under Sec. 328 of the Civil Procedure Code by striking off 839 and writing 328 in its place.

Section 328 of the Civil Procedure Code reads as follows:
" Where any person other than judgment-debtor or a person in occupation under him is dispossessed of any property in execution of a decree, he may within fifteen days of such dispossession, apply to the court by petition in which the judgment-creditor shall be named respondent complaining of such dispossession. The court shall thereupon serve a copy of such petition on such respondent and require such respondent to file objections, if any, within fifteen days of the service of the petition on him. Upon such objections being filed or after the expiry of the date on which such objections were directed to be filed, the court shall, after notice to all parties concerned, hold an inquiry. Where the court is satisfied that the person dispossesd was in possession of the whole or part of such property on his own account or on account of some person other than the judgment debtor, it shall by order direct that the petitioner be put into possession of the property or part thereof, as the case may be. Every inquiry under this section shall be concluded within sixty days of the date fixed for the filing of objections. "

At the inquiry even though evidence was lead on behalf of the Intervenient Petitioners, there was **no proof of them getting dispossessed** from part of the land on which writ of execution was taken out. In fact at the time the writ was executed, the grama niladhari, the Plaintiff and the Janapada Niladari were present. As ordered by the District Judge, the state land and road reservation and the reservation of the water course were surveyed and separated from the corpus before handing over possession of the land decreed which was 2Acres 2Roods and 23 perches. **Nobody from any mosque were on the land alleged to have been dispossessed**. The land was surveyed **twice during the course of the case** and none of the Intervenient Petitioners were within sight of the land and nor did any person object to such a survey done by the court commissioner. **Dispossession of the Intervenient Petitioners was not proven.**

In ***Podi Menika Vs Gunasekera 2005, 2 SLR 207*** it was held that "An application under section 328 requires **only the proof of possession** and not title. All that had to be established is that the possession of the disputed land was bona fide on his own account or on account of some person other than the judgment debtor and that he was not a party to the action in which the decree was passed. "

At the inquiry, even though the Intervenient Petitioners produced documents to prove title to the land in the schedule to their application, claiming that the said property was an adjoining land to the property claimed by the Plaintiff, **they did not produce evidence of dispossession.** Instead, they kept on harping on one point, i.e. that the decree in the main case, L/2073 , was for a lesser extent than what was granted by the Fiscal at the execution of the decree and therefore court should order that the said lesser amount be separated and be given to the Plaintiff , leaving the other extent of the land as mosque property claimed by the Intervenient Petitioners.

The application of the Intervenient Petitioners had got initiated in the District Court in this way. The writ of execution was taken out on 30th July,2013 and without any objection of any other person or the Defendant, the land was handed over to the Plaintiff. On 05.08.2013 a motion was filed in Court by Attorney at Law , Farook with an application under Sec.839. This application was not submitted or filed in Court by the Intervenient Petitioners themselves under their signatures. It was through an Attorney at Law, namely Mr. Farook. There was no proxy filed along with the application either. According to the established law, as no proxy was filed along with the papers which were filed, there is no validity of those papers in law before the District Court. **On record, there was an order of court dated 01.08.2013 to make an application in the proper manner.** That was prior to filing the application on 05.08.2013. In spite of the order of the District Judge, **again papers had been filed without a proxy.** If it was an application signed by all the Petitioners alone, then there is, according to law , a valid application. Anyway later on, a proxy had been filed on 21.08.2013. Now, this date is later than the time allowed in law to file an application under Sec. 328. Further more, the proxy had not been stamped properly and the correct amount of stamps were submitted only on 26.08.2013. The professionals in law who had handled the matter on behalf of the Intervenient Petitioners had been quite negligent with regard to the way they had come before court.

However, even though the Plaintiff had objected to accepting the papers filed , the District Judge had commenced the inquiry under Sec. 328, after the caption of the papers under Sec.839 was struck off and Sec.328 written above that space in the application. The District Judge had quoted an authority in his order, namely ***Paul Coir (Pvt.) Ltd. Vs Waas 2002, 1SLR 13***. This is a case where it was held that **a defect** in a proxy can be subsequently cured. In this application the Intervenient

Petitioners had not filed a proxy until 21.08.2013 and that also stamped properly only on the 26.08.2013. So there was **no proxy** on record and no application filed under Sec. 328 within the legally stipulated time of 15 days from 01.08.2013. The case quoted by the District Judge does not apply in this instance.

However the District Judge had taken it up for inquiry under Sec. 328 and held the inquiry and had made order that ' the surveyor should survey the land and separate the extent of land claimed by the Intervenient Petitioners and grant the same to them. ' **The Plaintiff appealed to the Civil Appellate High Court against the order of the District Judge and the High Court reversed that order.**

I observe that in page 5 of the order of the District Judge dated 19.12.2013, it reads thus:

" මෙම නඩුවේ 328 වන වගන්තිය යටතේ කරන ලද ඉල්ලීම සඳහා බෙදුම් නඩුවට අදාළ විෂය වස්තුව වූ ඉඩම සහ මෙම නඩුවට අදාළ ඉඩමේ විෂය වස්තුව අතර **පැහැදිලිව කිසිදු සම්බන්ධතාවයක් නොමැති බව පෙනී යයි.** එකී ඉඩම් දෙක බැලු බැල්මට වෙනස් වන අතර මායිම සළකා බැලිමේදි,**දෙකෙහි මායිම් අතර ද වෙනස්කම් දක්නට ලැබේ.** මෙම ඉඩමට විෂය වස්තුව වූ ඉඩම " **වඩුවේලහින්න කුඹුර**" නැමැති ඉඩමට බලයලත් මානක විල්මට සිල්වා විසින් මැන සකස් කරන ලද 2005.04.25 දිනැති අංක 1799 පිඹුරෙහි අක්කර: 3 රූඩ: 8 පර්චස් 31 ක් විශාල ඉඩම වේ. ඉහතකි බෙදුම් නඩුවට විෂය **වූ ඉඩම වැල්ලවාය විරසේකර ගම** නැමැති අක්කර: 2 පර්චස්: 39.05 ක් විශාල ඉඩම වේ.

ඒ අනුවද මෙම ඉඩම් දෙත අතර පැහැදිලි වෙනසක් දැකිය හැකිය. "

It is crystal clear from this statement of the District Judge that the Judge did not see any resemblance of the two lands, i.e. the land which is the corpus of the main case 2037/L and the land which is in the Schedule to the Application under Sec.328. In spite of the fact that the judge had seen quite well and also recorded the same in the order, that the lands are different , she had concluded that the Intervenient Petitioners be given the portion of land they claim from and out of the corpus. It is incredible to see **that the reasons are different from the conclusion arrived at**, by the District Judge.

The Civil Appellate High Court Judges went into the matter and had firstly concluded that there was **no valid application under Sec.328** of the CPC for the District Judge to have inquired into. Thereafter they held that the District Judge had granted **relief which was not prayed for by the Intervenient Petitioners** because the prayer to the application was **' to set aside the judgement given in favour of the Plaintiff as per incuriam '.** The District Judge had granted what was not prayed for by the Intervenient Petitioners. The High Court had followed the authorities , namely, ***Surangi Vs Rodrigo 2003, 3 SLR 35 and Padmawathie Vs Jayasekera 1997, 1 SLR 248 .*** I am in agreement with this reasoning of the Civil Appellate High Court.

The main contention of the Intervenient Petitioners was that the judgment given by the District Judge was per incuriam. The reason behind that contention was that the Plaintiff was entitled only to a lesser extent of the land which was the subject matter of the case and the writ was executed on a larger amount of land than the entitlement of the Plaintiff. So, what the Intervenient Petitioners contend is precisely that the District Judge's Judgment given at the end of the trial between the Plaintiff and the Defendant was wrong. The question arises as to whether an outsider who was not a party to the case can legally complain against the judgment in that manner.

The Intervenient Petitioners **did not make an application to recall the writ** of possession at any time either. All that they prayed for is to set aside the judgement alleging that it is per incuriam. They also argued at the hearing as the second argument that the **decree was not in conformity with the judgment**. Neither the Defendant nor any other person or persons such as the Intervenient Petitioners made any application to the District Court under **Sec. 189 of the Civil Procedure Code to correct the decree to be in conformity with the judgment.**
Sec. 189 reads as follows:

(1) The Court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment.
(2) Reasonable notice of any proposed amendment under this section shall in all cases be given to parties or their registered attorneys.

The Intervenient Petitioners on the one hand argued that the **judgment** of the District Judge **was per incuriam** and on the other hand argued that the **decree was not in conformity with the judgment.** It is difficult to understand how one party take up these two arguments together. I am of the view that the Intevenient Petitioners were not quite sure what they wanted to challenge. In law one has to be certain of the facts regarding the matter in question as well as the law pertinent to what one claims. I opine that the arguments of the Intervenient Petitioners are untenable.

For the reasons I have explained above, I answer the questions of law raised at the commencement of this Judgment in favour of the Plaintiff Respondent Petitioner Respondent. I make order dismissing this Appeal. However I am not inclined to grant 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

In the matter of an Appeal from a Judgment of the Civil Appellate High Court of Colombo.

Ranjith Palipana,
No. 121, Telangapatha Road,
Wattala.
Presently at
46, 6/2, Seagull Apartments,
Collingwood Place,
Wellawatte.

SC APPEAL 161/2012 Applicant
HC Appeal No. HCALT 92/2008
L T Colombo Case No. LT/13/483/95 Vs

Celltel Lanka (Pvt.) Ltd.,
No. 25, Galle Face Centre Road,
Colombo 03.
Presently known as
Etislat Lanka (Pvt.) Ltd..
Mukthar Plaza,
No. 78, Grand Pass Road,
Colombo 14.

Respondent

AND BETWEEN

Ranjith Palipana,
No. 121, Telangapatha Road,
Wattala.
Presently at
46, 6/2, Seagull Apartments,
Collingwood Place,
Wellawatte .

Applicant Appellant

Vs

Tigo (Pvt.) Ltd., No. 78, Mukthar Plaza Building, 3rd Floor, Grand Pass Road, Colombo 14.

Presently known as
Etisalat Lanka (Pvt.) Ltd.,
Mukthar Plaza, No. 78, Grand Pass Road, Colombo 14.

Respondent Respondent

AND NOW BETWEEN

Ranjith Palipana, No. 121,
Telangapatha Road,
Wattala.
Presently at
46, 6/2, Seagull Apartments,
Collingwood Place,
Wellawatte .

Applicant Appellant Appellant

Vs

Etisalat Lanka (Pvt.) Ltd.,
Mukthar Plaza,
No. 78, Grand Pass Road,
Colombo 14.

Respondent Respondent Respondent

BEFORE **: S. EVA WANASUNDERA PCJ.**
UPALY ABEYRATHNE J. &
H.N.J. PERERA J.

COUNSEL : Sanjeeva Jayawardena PC with Charitha Rupasinghe for the Applicant Appellant Appellant instructed by Amarasuriya Associates.
Suren de Silva for the Respondent Respondent Respondent instructed by D.L. & F de Saram.

ARGUED ON : 03.03.2017.

DECIDED ON : 20.06.2017.

S. EVA WANASUNDERA PCJ.

The Applicant Appellant Appellant (hereinafter referred to as the Applicant) in this Appeal, Ranjith Palipana was working for Celltel Lanka (Pvt.) Ltd. from the 1st of March, 1993 as the Sales and Marketing Manager of the said company. The employer Celltel Lanka (Pvt.) Ltd. terminated his services on the 3rd of July, 1995. The Applicant made an application to the Labour Tribunal on 8th August, 1995 praying that he be **reinstated with back wages**, that he be paid **compensation for wrongful termination** and that the employer be ordered to **pay Rs. 3,332,505/- as commission earned by the Applicant while he was working .**

The Labour Tribunal had delivered its order on 29th August, 2008 **dismissin**g the application. Thereafter, the Applicant had appealed from that order to the Civil Appellate High Court. The High Court **affirme**d the order of the Labour Tribunal by the order of the High Court dated 24th February, 2011.

Being aggrieved by the order of the High Court, the Applicant appealed to this Court and leave to appeal was granted on the questions of law contained in paragraph 82(a), (b), (e) and (g) of the Petition dated 6th April, 2011 and on another question of law which reads as follows:

"In all the circumstances of the case, was the termination of service of the Petitioner by A10 justified in law?".

Paragraph 82(a) - " Did the High Court fall into substantial error by failing to appreciate that the termination of the Petitioner was without a show cause letter or a charge sheet, or a due opportunity being given to him to produce any witnesses or refute the allegations against him? "

Paragraph 82(b) - " Was the termination of the Petitioner based on the memorandum R8 and the alleged events at the Dealer's Meeting, totally unwarranted and unjust? "

Paragraph 82(e) - " Did the Labour Tribunal and the High Court err by taking into consideration matters outside the purview of the letter of termination A10 , against which the Petitioner sought relief? "

Paragraph 82(g) - " Without any prejudice to the foregoing , in any event, was the summary termination of the Petitioner without any form of relief whatsoever, justified in the circumstances of the case? "

The Respondent Respondent Respondent (hereinafter referred to as the Respondent) in this Appeal was at the inception known as Celltel Lanka (Pvt.) Limited and due to the change of ownership , it changed its registered name to Tigo(Pvt.) Limited on or about 17th April, 2007. Subsequently, again due to the change of ownership, it changed its registered name to Etisalat Lanka (Pvt.) Limited. Therefore, it has been at all times pertinent to this application, the lawful

successor to the original Respondent in the Application made to the Labour Tribunal by the Applicant.

The Applicant claims that his salary of Rs.120,000/- plus the commission at Rs.115 per each new connection, bonus and fuel allowance was approximately, Rs.300,000/- per month at the time of termination of his services. On 3rd July, 1995, apparently, the Applicant was served with a letter of termination, (marked **as A10** at the hearing before the Labour Tribunal), by Herman Ziegelaar when he refused to hand in a letter of resignation as requested . The Applicant alleges that the said letter of termination was signed and handed over by Herman Ziegelaar, the new incoming CEO, who commenced his work as CEO only on the 4th of July, 1995 and that it is not a valid letter of termination. The former CEO had been yet there on the 3rd of July, 1995.

The reasoning behind this letter of termination had been that in the back drop of the former CEO Jac Currie's services were to be terminated due to the poor performance figures of the Respondent company, by the Parent company named as Millicom International Cellular S.A. (hereinafter referred to as Millicom) , the Applicant as a **senior Manager** had issued a signed memorandum along with the other Managers of the Respondent company and sent by facsimile to the Directors of the Parent Company, without informing the Respondent company in Sri Lanka. The number of managers who signed the said memorandum were fifteen and the Applicant had been number one to sign the same. It is marked as **R8.** However, the evidence of the Applicant is that it was only in good faith that the said letter was sent in the interest of the Respondent company and just because he signed first in the list does not mean that he was the leader of the team who signed the same.

At the Labour Tribunal, the Respondent has brought forward many other reasons for the termination. One of those reasons was that there was an outstanding balance due from the Applicant to the company, from and out of the foreign travel money granted by the Respondent Company for the Applicant to go to U.S.A. and return. Allegedly he had not settled the accounts with regard to that foreign trip. There was a second reason for termination. That was with regard to the Applicant having been a Director of a Company by the name of Electro Dynamics (Pvt.) Ltd. without written authority being granted by the Respondent Company to launch the company or to continue to be engaged in such business.

This Company had been incorporated on 15.11.1994 and the Applicant was a Director and continued to hold that post. The Applicant had got engaged in that business after joining the Respondent Company and while working with the Respondent. By the time he launched Electro Dynamics (Pvt.) Ltd. , the Applicant had worked at the Respondent Company for about 1 year and 8 months. Moreover, the Applicant had held 50% of the shares of that company. One of the primary objectives of Electro Dynamics (Pvt.) Limited was " to carry out the business of import and retail distribution of telecommunication products ". The objectives of the Respondent Company is also " to carry out the business of import and retail distribution of telecommunication products".

The third reason for termination of services of the Applicant as alleged by the Respondent Company, is that the Applicant had hired out the first car given to him by the Respondent, to a company by the name Jin Hun Lanka (Pvt.) and received Rs. 100,000/- as hiring charges for two months without having promptly returned the car to the Respondent employer company. This was a car given to him at the very inception bearing No. 17-2444. Thereafter he was given another car with unlimited fuel and the first car had to be returned. It is alleged by the Respondent Company that the Applicant did not return that car but instead he had given that car for hire to Jin Hun Lanka (Pvt.) Ltd. and received money.

Sec. 31(C) (2) of the Industrial Disputes Act lays down that the function of a Labour Tribunal is **to inquire into all relevant matters** pertaining to the employment and termination of the services of a workman **and to determine whether or not it would be just and equitable to award the workman relief** (in the form of an award for reinstatement with or without back wages and / or compensation) in respect of **the termination of his services.**

In the case of ***Colombo Apothecaries Company Ltd. Vs Ceylon Press Workers Union 75 NLR 183*** , Justice C.G.Weeramantry observed that "……..Before a Labour Tribunal, one is not concerned with technicalities." In the case in hand, it was alleged by the Applicant at the Labour Tribunal that there was no charge sheet issued to him by the employer, no show cause letter, no opportunity to call witnesses to explain his position at the inquiry and that the allegations against him were not set out in the letter of termination handed over to him by the new CEO, in a hurry, even before the new CEO got properly appointed.

As and when a letter of termination gets delivered by the employer and accepted by the employee, the employee cannot complain that the said letter of termination is null and void on the footing that the CEO who signed it at that time was not the proper CEO in office. It is an internal matter of any working place to decide who should sign it and that person has a right to serve a letter of termination to any employee. Once it is accepted and the employee does not report to work any more, then it becomes an accepted fact that the letter of termination was accepted. If the employee rejects such a letter and keeps on coming to the work place and work at the work place, ignoring the letter of termination on the ground that it is null and void, then, the employer can once again serve him with another letter of termination. The Applicant in the case in hand had accepted it and complied with it. Now he cannot complain that it is null and void.

There is no requirement in law that a domestic inquiry should be held prior to the termination of services of an employee. The Labour Tribunal functions as an original Court or Tribunal. Any workman whose services are terminated by the employer has the opportunity of firstly making an application to the Labour Tribunal, giving evidence before the Labour Tribunal as well as being heard of his grievances against the termination of services. In the circumstances, a summary termination does not deprive any workman of his right and/or opportunity of adducing evidence to prove any alleged unjustifiability of the termination of his services, the moment he is before a Labour Tribunal.

The law in regard to termination of services is very much in favour of the employee and a workman can be granted relief even though the termination of services of an employee is held to be justified. It was so held in many cases before this Court. Some of that case law is contained in ***Caledonian Ceylon Tea and Rubber Estates Ltd. Vs J.S.Hillman 79 NLR 421, Saleem Vs Hatton National Bank 1994, 3 SLR 409 and Somawathie Vs Baksons Textile Industries Ltd. 79 NLR 204***.

However, in ***Thavarayan and Two Others Vs. Balakrishnan 1984, 1 SLR 189***, it was held that although a domestic inquiry is not statutorily required, an inquiry helps to establish the bona fides of the employer and dismissal without an inquiry may sometime be indicative that the employer has acted arbitrarily.

The stance of the Respondent employer in this case is that an inquiry was conducted in the best manner possible, given the volatile situation at that time. The witness Ronnie Weerakoon was accepted as a truthful witness by both parties. He stated that there was an inquiry; Herman Zieglaar, the new C.E.O. , Yves Farajot and Ronnie Weerakoon sat in the room; Ranjith Palipana was summoned into the said room and questioned about the memorandum which he has sent to the parent company Millicom ; requested to explain why he did so without first informing the Directors of the Respondent Company and queried him about the unrest within the workers of the company at the work place. When the inquiry was over the Applicant had been given the option of giving his resignation which he had refused. Then after a few hours of deliberation only the letter of termination was handed over to him by Mr. Zeiglar which was in turn **accepted by the Applicant**.

I observe from the document P4, contained in this Appeal Brief that the Applicant Appellant Appellant, Ranjith Palipana had filed another action under D.C.Colombo 17459/MR in the District Court of Colombo claiming a certain amount of money (which is not quite clear in exact figures) from the Respondent. At the same time this Application was also pending before the Labour Tribunal. In the year 1997, from an order / judgment of the District Court, the matter had reached the Commercial High Court of Colombo under HC No. 79/97(1). Thereafter, Celltel Lanka Ltd. had filed an Appeal in the Supreme Court, under SC Appeal No. CHC / 10 / 2002 against an order of the High Court. **When this matter came up before the Supreme Court on 24.05.2006, the matter had got settled on the basis that Celltel Lanka Ltd. had agreed to pay Rs. 2 million within one week from 24.05.2006 and deposit the money into the account No. 001448299001 of Ranjith Palipana maintained at the Hong Kong and Shanghai Banking Corporation**.

The **Labour Tribunal** had made order on **29.08.2008**, which date is two years after the date of settlement of the money claimed in the District Court. The Applicant appealed against the order of the Labour Tribunal to the High Court and **the High Court** affirmed the order of the Labour Tribunal by its judgment dated **24.02.2011**.

The Applicant Ranjith Palipana has now appealed to the Supreme Court by way of the Petition dated **6th April, 2011** in which he produced the said order of the

Supreme Court in SC Appeal 10/2002 marked **as P4** and mentioned in the **83rd** and the last paragraph of the Petition thus: **"**The Petitioner has not invoked the jurisdiction of Your Lordship's Court previously in respect of this identical matter, save and except to **the limited extent** as in SC Appeal 10/2002, a true copy of which settlement order is annexed hereto marked P4.**"**

I find that the Applicant in his application to the Labour Tribunal had claimed commission from the Respondent for the sales he had done during his working period. The Respondent in his answer in the Labour Tribunal had also claimed the monies due from the Applicant from some goods he was not returning to the company, the balance monies due from the foreign trip and some monies he had received by hiring the company car to a car-hiring organization etc. However the monies due from either party again had got adjudicated before the District Court, and the High Court and finally had got settled before the Supreme Court in SC Appeal 10/2002.

Therefore the **Labour Tribunal** had quite correctly gone into the only **question whether the termination of services of the Applicant was justifiable or not**.

Since termination was admitted by the Respondent, the Respondent, the employer had commenced leading evidence and had led the evidence of Welikela, Rajendran, Weerakoon, Dissanayake, and the OIC of the Police Station Ratnayake. The Applicant had led the evidence of himself and Abraham from Jin Woon Lanka.

The Labour Tribunal President who actually heard the case had retired from service, the Judicial Service Commission had appointed another Labour Tribunal President to write the order, after going through the evidence. The LT President who had written the order had **first analysed "the matter to be decided",** quite well and considered the charges in a methodical way by considering the evidence on every aspect. The employer's only stance had been that the company **had lost trust and confidence in the Applicant employee due to his actions and therefore his services had been terminated.** The main allegation was based on a document marked R8. It is a memorandum signed by the Applicant on top along with fourteen other workers sent as a fax to the parent company of Celltel without firstly informing Celltel as the company for whom the Applicant was working for. Reading R8, I find that it conveys the idea that Jac Currie who was the CEO at that time was the best person to hold that position and that the workers are with him

as the leader and if he is changed then the company will break down in ten months. The Applicant was allegedly acting unlawfully in concert with some others to create a disturbed situation at the work place.

The Labour Tribunal President **had not found him guilty to the charge of creating any disturbance** in the work place but had found him **guilty to the charge of sending the memorandum** by fax to the parent company complaining about a change in the management and the fabrication of reasons for the downfall of the company if Jac Currie is taken out of the position as CEO , without making representations to the Respondent, which is the locally based Celltel company. The Applicant had been **the senior most officer** who had signed first and who was the **person responsible for such an act.** When any person reads the said memorandum marked as **R8**, the wording and expression explicitly demonstrate that the Applicant was currying favour with the CEO, Jac Currie and wanted the parent company not to take Jac Currie away from Sri Lanka. It was something which any employee should never have done because the employment of the management level high officers such as Chief Executive Officers is up to the parent company. The workers of Celltell Company in Sri Lanka should never have even tried to interfere with the decisions of the Parent Company**. R8** gives the idea that if Jac Currie is taken away, the workers would not be able to work with any other. It is somewhat an intimidating.

The letter of termination **A10** refers to the letter of Appointment dated 22nd February, 1993. Paragraph 2 of Section 16 of the said letter of Appointment marked **as R1**, reads thus: " The Company may summarily terminate your service at any time without notice or any payment in lieu of notice for your conduct deemed by the Company to be misconduct and/or for a breach of any of the expressed or implied terms or conditions of your employment."

The Counsel for the Applicant made lengthy submissions at the hearing of this Appeal. The Counsel had also taken a lot of pains to make extensive written submissions on behalf of the Applicant. He has analysed the evidence of each and every witness of the Respondent and the evidence of the Applicant and also his witness who gave evidence at the Labour Tribunal. I have myself read through the evidence before the Labour Tribunal. I am not inclined to analyze the evidence at this instance and place the analysis herein as it is not necessary to do so. I find that the termination of the services of the Applicant was due to his conduct which

disturbed the confidence the Respondent employer had in him. The facts of the case show that the employee Applicant could not have been trusted any longer as he was already in breach of trust placed on him. The new CEO or the board of Directors could not have worked with him any longer due to the contents in R8 which was sent to the parent company for the sole purpose of retaining Jac Currie as the CEO. The other reasons regarding being a director of a company which had similar interests as that of the Respondent employer as well as non returning the car and retention of the company goods etc. added to the breach of the implied terms or conditions of the Applicant's employment with the Respondent.

The President of the Labour Tribunal as well as the High Court Judges were quite correct in holding with the Respondent employer. I agree with their decisions. I answer the questions of law enumerated above against the Applicant Apellant Apellant and in favour of the Respondent Respondent Respondent. As such this Appeal is dismissed. However I am not inclined to grant 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

SC Appeal No. 161/2015
SC (HCCA) LA No. 4/2015
WP/HCCA/KT/90/2008(F)
DC Mathugama Case No.1920/P

In the matter of an Application for Leave to Appeal to the Supreme Court against the Judgment dated 27th November 2014 delivered by the High Court of the Western Province (exercising Civil Appellate jurisdiction at Kalutara) in Appeal No. WP/HCCA/KT/90/2008(F) D.C. Mathugama Case No. 1920/P

In the District Court of Mathugama

Epage Suwaris of Meddekanda,
Rathmale, Polgampola.

PLAINTIFF

Vs.

1. Diyapaththugama Vidanelage Hendrick Samarasinghe **(since Deceased)**

1A Diyapaththugama Vidanelage Sirisena Samarasinghe

2. Seemon Suwandagoda of Kurupita, Polgampola.

3. Abraham Samarasinghe

4. Marynona Samarasinghe

5. Jayasinghe Siriwardanage Piyadasa

All of Rathmale Polgampola.

DEFENDANTS

AND BETWEEN IN THE PROVINCIAL HIGH COURT OF WESTERN PROVINCE

1A Diyapaththugama Vidanelage
Sirisena Samarasinghe

3. Abraham Samarasinghe

5. Marynona Samarasinghe

All of Rathmale Polgampola.

DEFENDANTS-APPELLANTS

Vs.

Epage Suwaris of Meddekanda,
Rathmale, Polgampola.

PLAINTIFF-RESPONDENTS

2. Seemon Suwandagoda of
Kurupita, Polgampola.

5 Jayasinghe Siriwardanage Piyadasa
Both of Rathmale, Polgampola.

DEFENDANTS-RESPONDENTS

AND NOW BETWEEN IN AN APPLICATION TO THE SUPREME COURT

3. Abraham Samarasinghe

5. Marynona Samarasinghe
All of Rathmale, Polgampola.

DEFENDANTS-APPELLANTS-PETITIONERS

Vs.

Epage Suwaris of Meddekanda,
Rathmale, Polgampola.

PLAINTIFF-RESPONDENT-RESPONDNET

2. Seemon Suwandagoda of
Kurupita, Polgampola.

5. Jayasinghe Siriwardanage Piyadasa
Both of Rathmale, Polgampola.

DEFENDANTS-RESPONDENTS-RESPONDENTS

BEFORE: Sisira J. de Abrew J.
Anil Gooneratne J. &
K. T. Chitrasiri J.

COUNSEL: J. A. J. Udawatta for the 3rd & 4th
Defendant-Appellant-Petitioner-Appellants

Razik Zarook P.C. with Chanukya Liyanage
For Plaintiff-Respondent-Respondent-Respondent

Rohana Deshapriya for the 5th Defendant-Respondent-
Respondent-Respondent

WRITTEN SUBMISSIONS OF THE
3rd & 4th APPELLANTS FILED ON:
09.11.2015

WRITTEN SUBMISSIONS OF THE
PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT
FILED ON: 15.12.2015

ARGUED ON: 11.11.2016

DECIDED ON: 09.02.2017

GOONERATNE J.

This was an action filed in the District Court of Mathugama to partition a land called "Delgahawatta" in extent of about 1 Acre, more fully described in the schedule to the plaint. Parties proceeded to trial on 15 points of contest. Learned District Judge Mathugama after trial entered Judgment in favour of the Plaintiff on 30.04.2008. The 1st, 3rd and 4th Defendants appealed to the Civil Appellate High Court, Kalutara and the High Court dismissed the appeal and affirmed the Judgment of the learned District Judge. The said Defendants being aggrieved by both the above Judgments sought Leave to Appeal from the Supreme Court and this court on 25.09.2015 granted Leave to Appeal on questions of law set out in paragraph 16(A) to (D) of the petition dated 05.01.2015. The said questions reads thus:

(a) Did the learned High Court Judges err in holding that the land sought to be partitioned is the land depicted in the Preliminary Plan

(b) Did the learned High Court Judges err in affirming the judgment of the learned District Judge thereby accepting that though the land sought to be partitioned are two different lands parties have possessed same as Delgahawatta which is the land sought to be partitioned.

(c) Did the learned High Court Judges err in failing to take in to cognizance of the principle of law that there is a duty cast on a Judge trying a partition suit to identify the land sought to be partitioned as decided in the case of Jayasuriya vs Ubaid 61 NLR 352.

(d) Did the learned High Court Judges fail to consider that the learned District Judge has not duly considered and evaluated the oral and documentary evidence with regard to the identity of the corpus sought to be partitioned.

The only point urged before the Supreme Court was on the question of identity of the land sought to be partitioned. Appellants, before this court fault the High Court and the District Court in their failure to evaluate oral and documentary evidence with regard to the identity of the corpus.

The learned High Court Judge observes, in a brief Judgment, on the preliminary plan the Commissioner states that the land surveyed do not tally with the boundaries described in the plaint, and the High Court Judge states the Commissioner does not state it is not the land sought to be partitioned. The learned High court Judge also state that the Defendant-Appellant moved for a commission to identify lands called 'Meegahawatta' and 'Migahaingewattegodella' depicted in Title Plan 269303 and Title Plan 339864

respectively and after superimposition, plan 'Y' (No 1050A) produced, and learned High Court Judge observes that identification of the corpus upon superimposition of Title Plan is acceptable and land sought to be partitioned is not called 'Meegahawatta' or 'Migahaingewattegodella'. It appears that the High Court Judge place emphasis on certain items of evidence of the Surveyor which according to Survey's evidence, land sought to be partitioned is called 'Delgahawatta'. However Surveyor's report X1 (folio 72) and item 5 of same clarifies the position. I will advert to same in this Judgment.

The Plaintiff-Respondent-Respondent in their written submissions support the views of Judgments of both lowers courts, and argues that boundaries in the schedule to the plaint are identified except the southern boundary and the extent almost same, variation being 3 perches. Further Surveyor's report on the eastern boundary (Dola) in the schedule to the plaint is about 4 chains away from the corpus. Plaintiff produced marked P4 partition plan No. 2125 filed in D.C. Kalutara Case No. P 1788. In that plan it is stated as the eastern boundary of preliminary plan 1050. But I observe that P4 does not seem to show "Delgahawatta" as any of its boundaries.

The learned counsel for 3rd and 4th Defendants-Appellants-Petitioners-Appellants, in order to stress the point on identity of the corpus, invited this court to consider the duty cast upon the trial court in this regard. He

drew the attention of this court to Section 25(1) of the Partition Law. i.e particularly on examination of title of land to which the action relates. He also cited important cases on the supervening duty and a fundamental duty of the trial court to satisfy itself as to identity of corpus. Jayasuriya Vs. Ubaid 61 NLR 352; Wickramaratne Vs. Alpenis Perera 1986 (1) SLR 190; Sopinona Vs. Pitipanaarachchi and other 2010 (1) SLR 91.

It was the learned counsel's further submission that except for the northern boundary in the land sought to be partitioned, none of the other boundaries of the preliminary plan correspond to the land described in the schedule to the plaint. As such it appears that the discrepancy in the boundaries of the land surveyed with that of the land described in plaint cannot be reconciled so easily. Even the Plaintiff-Respondent does not deny the above discrepancy nor provide an acceptable explanation but attempt to show that it is not a matter that has any bearing to the case in hand. I am unable to accept the contention of Plaintiff-Respondent in this regard.

I would as stated above incorporate as follows, survey's report (clause 5) which explains above.

> The boundaries of the land surveyed by me does not agree with the boundaries described in the schedule to the plaint. Eastern boundary of the land sought to be partitioned is described as Dola. But the actual Eastern boundary is Lot in partition plan No. 2125, dated 24th January

1968, prepared by Mr. W.R.B. Silva, Licd. Surveyor, filed of record in D.C. Kalutara case No. P 1788, which was produced by Plaintiff. As per same plan the name of the land surveyed by me is Metiokandegodella, whereas Delgahawattha as per schedule to the plaint.

Our attention was drawn to the statutory requirement in Section 18(1)(a) of the Partition Law. The Court Commissioner is required as per the said section to state, "whether or not the land surveyed is substantially the same land sought to be partitioned as described in the schedule to the plaint. As stated above the Court Commissioner very categorically state that the boundaries of the land surveyed by him do not agree with the boundaries described in the schedule to the plaint. This would no doubt cast a serious doubt on the question of identity of the corpus. Learned counsel for Appellant also referred to folio 320 of the brief, regarding lis pendens, registered where no prior entries were available and stated therein subject to 'decay' 'දිරාපත් බැවින්'

The material available to this court no doubt suggest that the boundaries of the land sought to be partitioned differ from the land described in the schedule to the plaint. The extent is also different and not the same as pleaded by Plaintiff. The Plaintiff produced marked P4 the partition plan No. 2125. Plan 2125 does not show 'Delgahawatte' as a boundary. In short the location, boundaries and extent differ. Plaintiff himself admits in evidence that

the land surveyed is in fact land depicted in Survey General's Title Plan No. 339864 and Title Plan 269302. Lots A, B & C is comprised in preliminary plan 1050 (X) and the commission plan 1050 A are filed of record. (By the same Surveyor) which has lots A, B1, B2, B3 & C. The lots A, B & C in plan 1050 are shown as A, B1, B2, B3 & C in plan No. 1050A. Lot A in plan 1050A is the same as lot A in plan 1050. This lot A is part of Title Plan 339864 which is called 'Migahaingewattegodella' lot B1 is part of lot B in plan 1050 and part of Title Plan 269302. Lot B2 is part of lot 'B' in preliminary plan 1050 are part of Title Plan 269303 called Metiokandegodella. Lot B3 is part of lot B in plan 1050 and is part of Title Plan 339864, called 'Migahaingewattegodella'. Lot 'C' is a path (part of T.P 269303 & 339864). As such the names of land are also different, and not the land called Delgahawatta.

The statutory requirement in a partition case is discussed in the case of Sopiya Silva Vs. Magilin Silva 1989(2) SLR 105. (Judgment of S.N. Silva J. as he was then). It refers to Section 16(1) of the Partition Law. It implies that the land Surveyed must confirm substantially, with the land as described in the plaint (in respect of which a lis pendens had been registered) as regards location, boundaries and the extent . It is for this reason that Section 18(1) (a) (iii) requires the Surveyor to express an opinion in his report.

The Commissioner has not identified the corpus. Learned District Judge should have, based on the Commissioner's report insisted upon due compliance with the requirement by the Surveyor. It has not been done. It is very clear that the land described in the plaint is different and at this stage it cannot be reconciled. The location, extent, boundaries and name of land are different. Both the District Court and the Civil Appeal Court erred in law and fact. As such I answer all questions of law in favour of the Appellant in the affirmative. Yes.

Judgments of the District Court and the Civil Appellate High Court are set aside. Appeal allowed with costs.

Appeal allowed.

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

In the matter of an appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 162/2012
SC/HCCA/LA/77/2012
WP/HCCA/KAL/125/2004 (F)
DC/HORANA/3449/P

1A. Godallawattage Somawathie
1B. Suduwadewage Wasntha Ramyalatha
1C. Suduwadewage Dekma Ramyalatha
All of Remuna Anguruwatota.

Substituted Plaintiffs

Vs.

1A. Hewahakuruge Evgin,
Thuththiripitiya, Halthota.
2A. Mahadurage Opisa,
Remuna, Anguruwathota.
3A. Mahadurage Ariyarathna,
Mahahena, Horana.
4. Mahadurage Opisa,
Remuna, Anguruwathota.
5. Mahadurage Saraneris,
Anguruwathota.
6. P. Leelawathie,
Remuna, Anguruwathota.
7. Godellawaththage Nandasena,
8. Godellawaththage Carolis,
9. Godellawaththage Darmasena,

10. Godellawaththage Caralain,
11. Godellawaththage Karunawathie,
12. Godellawaththage Seelawathie,
13. Godellawaththage Yasawathie,
    All of Mahagama.
14. Godellawaththage David,
14A. Godellawaththage Menso,
15A. Godellawaththage Upaneris alias
    Somasiri,
16. Panawannage Adwin,
17. Sarathchandra Hettiwatta,
17A. Hettipathira Kankanamlage
    Kusumawathie,
17B. Harsha Kumara Hettiwaththa,
17C. Yamuna Rani Hettiwaththa,
17D. Wimala Kumara Hettiwaththa,
17E. Padmanjali Hettiwaththa,
18. Bothalage Kirineris,
18A. Godellawaththage Cicilin,
    All of Remuna, Anguruwathota.
19. Bothalage Jayadasa,
20. Bothalage Wimaladasa,
20A. Prema samaranayaka,
    All of Gungamuwa, Bandaragama.
21. H. Ranjo,
21A. B. Wilson,
22. B. Wilbert,
23. B. William,
24. B. Disilin,
25. B. Melin Jayawqathie,
26. Suduwage Mulin,
27. Kodithuwakku Arachchige
    Jayathilake,
28. S. A. Edirisinghe,
29. Piyasena Edirisinghe,

30. S. D. Agnes,
31. S. Norman Edirisinghe,
31A. S. Chaminda Edirisinghe,
32. S. Magilin.
    All of Remuna, Anguruwathota.
33. H. Dharmasiri,
34. H. Sunil Chandrasiri,
35. H. Martin,
    All of Siriniwasa, Withanawatta,
    Mahagama North.
36. H. Geethani Dharmalatha,
    Temple Road, Neboda.
37. S. D. Admond,
    Pinnakolawatta, Walpita, Horana.
38. Thilaka Hewage,
    Dawasa, Temple Road, Neboda.
39. G. James Fernando,
    Arambakanda, Horana.
39A. C. Punnyadasa,
    Arambawatta, Remuna, Horana.
40. H. Noisa,
    Kaduganmulla, Kiriella.
41. G. Dayawathie,
    Kaduganmulla, Kiriella.
42. G Somawathie,
43. G. H. Hemasiri Wanigadewa.
    Both of Remuna, Anguruwathota.
44. G. Piyasiri Munidasa,
45. G. Hemantha Munidasa,
46. G. Premawathie Munidasa,
    All of 26, Uyankele Road, Panadura.
47. G. Nandawathie Munidasa,
    Bombuwala, Temple Road,
    Elhenakanda.

Defendants

AND BETWEEN

1A. Godallawattage Somawathie
1B. Suduwadewage Wasntha Ramyalatha
1C. Suduwadewage Dekma Ramyalatha
All of Remuna Anguruwatota.

Substituted Plaintiff Appellants

Vs.

1A. Hewahakuruge Evgin,
Thuththiripitiya, Halthota.
2A. Mahadurage Opisa,
Remuna, Anguruwathota.
3A. Mahadurage Ariyarathna,
Mahahena, Horana.
4. Mahadurage Opisa,
Remuna, Anguruwathota.
5. Mahadurage Saraneris,
Anguruwathota.
6. P. Leelawathie,
Remuna, Anguruwathota.
7. Godellawaththage Nandasena,
8. Godellawaththage Carolis,
9. Godellawaththage Darmasena,
10. Godellawaththage Caralain,
11. Godellawaththage Karunawathie,
12. Godellawaththage Seelawathie,
13. Godellawaththage Yasawathie,
All of Mahagama.
14. Godellawaththage David,
14A. Godellawaththage Menso,

15A. Godellawaththage Upaneris alias
Somasiri,
16. Panawannage Adwin,
17. Sarathchandra Hettiwatta,
17A. Hettipathira Kankanamlage
Kusumawathie,
17B. Harsha Kumara Hettiwaththa,
17C. Yamuna Rani Hettiwaththa,
17D. Wimala Kumara Hettiwaththa,
17E. Padmanjali Hettiwaththa,
18. Bothalage Kirineris,
18A. Godellawaththage Cicilin,
All of Remuna, Anguruwathota.
19. Bothalage Jayadasa,
20. Bothalage Wimaladasa,
20A. Prema samaranayaka,
All of Gungamuwa, Bandaragama.
21. H. Ranjo,
21A. B. Wilson,
22. B. Wilbert,
23. B. William,
24. B. Disilin,
25. B. Melin Jayawqathie,
26. Suduwage Mulin,
27. Kodithuwakku Arachchige
Jayathilake,
28. S. A. Edirisinghe,
29. Piyasena Edirisinghe,
30. S. D. Agnes,
31. S. Norman Edirisinghe,
31A. S. Chaminda Edirisinghe,
32. S. Magilin.
All of Remuna, Anguruwathota.
33. H. Dharmasiri,
34. H. Sunil Chandrasiri,

35. H. Martin,
    All of Siriniwasa, Withanawatta,
    Mahagama North.
36. H. Geethani Dharmalatha,
    Temple Road, Neboda.
37. S. D. Admond,
    Pinnakolawatta, Walpita, Horana.
38. Thilaka Hewage,
    Dawasa, Temple Road, Neboda.
39. G. James Fernando,
    Arambakanda, Horana.

39A. C. Punnyadasa,
    Arambawatta, Remuna, Horana.

40. H. Noisa,
    Kaduganmulla, Kiriella.
41. G. Dayawathie,
    Kaduganmulla, Kiriella.
42. G Somawathie,
43. G. H. Hemasiri Wanigadewa.
    Both of Remuna, Anguruwathota.
44. G. Piyasiri Munidasa,
45. G. Hemantha Munidasa,
46. G. Premawathie Munidasa,
    All of 26, Uyankele Road, Panadura.
47. G. Nandawathie Munidasa,
    Bombuwala, Temple Road,
    Elhenakanda.

Defendant Respondents

AND NOW BETWEEN

26. Suduwage Mulin,
27. Kodithuwakku Arachchige
    Jayathilake,

30. S. D. Agnes,
All of Remuna, Anguruwathota.

Defendant Respondent-Appellants

Vs.

1A. Godallawattage Somawathie
1B. Suduwadewage Wasntha Ramyalatha
1C. Suduwadewage Dekma Ramyalatha
All of Remuna Anguruwatota.

Substituted Plaintiff Appellant Respondents

1A. Hewahakuruge Evgin,
Thuththiripitiya, Halthota.
2A. Mahadurage Opisa,
Remuna, Anguruwathota.
3A. Mahadurage Ariyarathna,
Mahahena, Horana.
4. Mahadurage Opisa,
Remuna, Anguruwathota.
5. Mahadurage Saraneris,
Anguruwathota.
6. P. Leelawathie,
Remuna, Anguruwathota.
7. Godellawaththage Nandasena,
8. Godellawaththage Carolis,
9. Godellawaththage Darmasena,
10. Godellawaththage Caralain,
11. Godellawaththage Karunawathie,
12. Godellawaththage Seelawathie,
13. Godellawaththage Yasawathie,
All of Mahagama.
14. Godellawaththage David,

14A. Godellawaththage Menso,
15A. Godellawaththage Upaneris alias
Somasiri,
16. Panawannage Adwin,
17. Sarathchandra Hettiwatta,
17A. Hettipathira Kankanamlage
Kusumawathie,
17B. Harsha Kumara Hettiwaththa,
17C. Yamuna Rani Hettiwaththa,
17D. Wimala Kumara Hettiwaththa,
17E. Padmanjali Hettiwaththa,
18. Bothalage Kirineris,
18A. Godellawaththage Cicilin,
All of Remuna, Anguruwathota.
19. Bothalage Jayadasa,
20. Bothalage Wimaladasa,
20A. Prema samaranayaka,
All of Gungamuwa, Bandaragama.
21. H. Ranjo,
21A.B. Wilson,
22. B. Wilbert,
23. B. William,
24. B. Disilin,
25. B. Melin Jayawqathie,
28. S. A. Edirisinghe,
29. Piyasena Edirisinghe,
31. S. Norman Edirisinghe,
31A. S. Chaminda Edirisinghe,
32. S. Magilin.
All of Remuna, Anguruwathota.
33. H. Dharmasiri,
34. H. Sunil Chandrasiri,
35. H. Martin,
All of Siriniwasa, Withanawatta,
Mahagama North.

36. H. Geethani Dharmalatha,
Temple Road, Neboda.
37. S. D. Admond,
Pinnakolawatta, Walpita, Horana.
38. Thilaka Hewage,
Dawasa, Temple Road, Neboda.
39. G. James Fernando,
Arambakanda, Horana.
39A. C. Punnyadasa,
Arambawatta, Remuna, Horana.
40. H. Noisa,
Kaduganmulla, Kiriella.
41. G. Dayawathie,
Kaduganmulla, Kiriella.
42. G Somawathie,
43. G. H. Hemasiri Wanigadewa.
Both of Remuna, Anguruwathota.
44. G. Piyasiri Munidasa,
45. G. Hemantha Munidasa,
46. G. Premawathie Munidasa,
All of 26, Uyankele Road, Panadura.
47. G. Nandawathie Munidasa,
Bombuwala, Temple Road,
Elhenakanda.

Defendant Respondent Respondents

BEFORE : PRIYASATH DEP, PC, J. (as he was then)
SISIRA J DE ABREW, J.
UPALY ABEYRATHNE, J.

COUNSEL : Chandana Prematilake with Y. Liyanage for the 26th, 27th and 30th Defendant Respondent Appellants

Samanth Vithana with H. Mendis for the substituted Plaintiff Appellant Respondents

S.A.D.S. Suraweera for the 4th, 6th, 14th and 17th Defendant Respondent Respondents

WRITTEN SUBMISSION ON: 07.11.2012 by the 26th 27th & 30th Defendant Respondent Appellants.
07.01.2013 by the substituted Plaintiff Appellant Respondents

ARGUED ON : 09.08.2016

DECIDED ON : 29.06.2017

UPALY ABEYRATHNE, J.

The original Plaintiff instituted an action in the District Court of Horana against the Defendant Respondent Respondents seeking to partition a land called Bomaluwe Godella containing in extent of 02 acres as described in the schedule to the plaint. 04th and 17th Defendants, 6th Defendant, 7A to 13th Defendants, 26th 27th and 30th Defendants, 30th Defendant and 43rd Defendant have filed separate statements of claims seeking to partition the said land as averred in their statements of claims. Accordingly, the case proceeded to trial on 52 issues. At the end of the trial, the learned District Judge has dismissed the Plaintiff's action without answering the said 52 issues framed by the parties.

Being aggrieved by the said judgment dated 23.09.2004 the substituted Plaintiff Appellant Respondents (hereinafter referred to as the Respondent) preferred an appeal to the Court of Appeal. Said appeal was heard and concluded by the High Court of Civil Appeal of the Western Province holden at

Kalutara and the High Court by its judgment dated 23.09.2004 has set aside the said judgment of the learned District Judge directing him to deliver a fresh judgment on the evidence already led. In addition, the High Court has concluded that the District Judge may hear additional evidence if necessary, in order to arrive at a reasonable conclusion.

The 26th 27th and 30th Defendant Respondent Appellants (hereinafter referred to as the Appellants) sought leave to appeal to this court from the said judgment of the High Court and leave was granted on the questions of law set out in paragraph 18(i), (ii), (v) and (vi) of the petition dated 29.02.2012.

At the hearing of this appeal, it was contended before this court that the High Court has no power upon hearing an appeal to direct the trial judge to deliver a fresh judgment upon the evidence already led in the case. I first deal with this question of law raised at the hearing. Section 773 of the Civil Procedure Code deals with the provisions with regard to the powers of the Court of Appeal upon hearing of an appeal. Section 773 reads thus;

> "Upon hearing the appeal, it shall be competent to the Court of Appeal to affirm, reverse, correct or modify any judgment, decree or order, according to law, or to pass such judgment, decree or order therein between and as regards the parties, or to give such direction to the court below, or to order a new trial or a further hearing upon such terms as to Court of Appeal shall think fit, or, if need be, to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the court of the first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial."

Needless to state here, that Section 773 does not confer any power to the Appellate Courts, upon hearing of appeal, to order or to direct the trial judge to write a fresh judgment upon the evidence already led at the trial. The High Court is only empowered to order a new trial or further hearing as justice may require. Hence the said order of the High Court, to wit; to write a fresh judgment upon the evidence already led at the trial, contravenes Section 773 of the Civil Procedure Code.

The learned counsel for the Appellant further submitted that the learned District Judge has failed to answer the issues framed by both parties. The judgment manifests that the issues framed by the parties have not been answered by the learned District Judge. He has stated in the judgment dated 23.09.2004 that "since the pedigree has not been proved the land cannot be partitioned. Therefore, I hold that issues No 1 to 52 do not arise. For the above reasons, I dismiss the plaint."

I regret to note that the learned District Judge has blatantly ignored the provisions contained in Section 187 of the Civil Procedure Code. The paramount duty of the trial judge as required in law is to answer all the issues accepted by court. Section 187 of the Code stipulates the requisites of a judgment. In terms of the said Section, 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.

Hence a trial judge when writing a judgment should safely consider the points for determination and should record his decision thereon. He should answer the points of contest after due evaluation of the evidence led before court. Issues accepted by trial court should not be left unanswered. Trial judge is bound

by a legal duty under section 187 of the Civil Procedure Code to deliver a proper and complete judgment. In the case of Dona Lucihamy v. Ciciliyanahamy 59 NLR 214, L. W. De Silva A.J. observed that “There were 12 issues raised in this case. Some of them do not bring out the real points of contest. The learned District Judge has stated in his judgment: ‘All the issues that have been raised can be crystallized in this one contest’, that is, whether the land in suit is Dawatagahawatte or Hedawakagahawatte. In the result, the evidence germane to each issue has not been reviewed or discussed. No reasons precede or follow the answers which are mostly "yes" or "no" or "does not arise." Such a record has not disposed of the matters which the Court had to decide. 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. Section 187 of the Civil Procedure Code (Cap. 86) is in the following terms "The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

In the case of Warnakula Vs. Ramani Jayawardane [1990] 1 SLR 206 it was held that “Bare answers to issues without reasons are not in compliance with the requirements of s. 187 of the Civil Procedure Code. The evidence germane to each issue must be reviewed or examined. The judge must evaluate and consider the totality of the evidence. Giving a short summary of the evidence of the parties and witnesses and stating that he prefers to accept the evidence of one party without giving reasons are insufficient.”

For the forgoing reasons, I hold that the impugned judgment of the learned District Judge dated 23.09.2004 contravenes the provisions contained in Section 187 of the Civil Procedure Code. The failure of the trial judge to examine

and to evaluate evidence in order to arrive at a correct conclusion answering the issues raised at the trial has caused prejudice to the substantial rights of the parties.

In the circumstances, I hold that the High Court is correct in law concluding that the said judgment of the learned District Judge should stand dismissed. Also, I hold that the order of the High Court to remit the case back to the trial court for a delivery of fresh judgment on the evidence already led is bad in law. Hence, I vary the said judgment of the High Court by setting aside the said portion, namely; "refer to a fresh judgment by the learned District Judge basing on the evidence already adduced at the trial." I order a trial *denovo*. If the parties are willing to adopt the evidence already led, the learned District Judge is directed to adopt the evidence already led and to proceed with the trial from that point onwards. Parties are at liberty to adduce further evidence if necessary. Subject to the said variations the appeal is dismissed. I make no order with regard to costs.

Appeal dismissed.

Judge of the Supreme Court

PRIYASATH DEP, PC, CJ.

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 from a Judgment of the Civil Appellate High Court of Avissawella.

Dankoluwa Hewa Bulath Kandage
Dona Subashini Ruchira Manjari,
Of No. 396/4/A, Kotikawatta,
Angoda.

Plaintiff

SC APPEAL 167 / 10
SC/HC(CA)/LA/ 195/09
WP/HC/Avis/ 152/08(F)
DC/Homagama/4263/CD

Vs

Dangolla Appuhamilage
Wimalawathie,
Of Walawwatta, Kahahena,
Waga.

Defendant

AND BETWEEN

Dangolla Appuhamilage
Wimalawathie,
Of Walawwatta, Kahahena,
Waga.

Defendant Appellant

Vs

Dankoluwa Hewa Bulath Kandage
Dona Subashini Ruchira Manjari,
Of No. 396/4/A, Kotikawatta,
Angoda.

Plaintiff Respondent

AND NOW BETWEEN

Dangolla Appuhamilage
Wimalawathie,
Of Walawwatta, Kahahena,
Waga.

Defendant Appellant Appellant

Vs

Dankoluwa Hewa Bulath Kandage
Dona Subashini Ruchira Manjari,
Of No. 396/4/A, Kotikawatta,
Angoda.

Plaintiff Respondent Respondent

BEFORE : S. EVA WANASUNDERA PCJ.
SISIRA J. DE ABREW J. &
K. T. CHITRASIRI J.

COUNSEL : Rohan Sahabandu PC for the Defendant Appellant Appellant.
Ranjan Suwandaratne for the Plaintiff Respondent Respondent.

ARGUED ON : 01.12.2016.

DECIDED ON: 14.03.2017.

S. EVA WANASUNDERA PCJ.

This Court had granted Leave to Appeal on the 30th September, 2010 on the questions of law set out in paragraph 16(c) and (i) of the Petition of Appeal dated 26.08.2009. They are as follows:-

1. Did the High Court err in law in not appreciating that the issues accepted by Court do not impute fraud or trust and in such an instance could the High Court hold that, the impugned deed is a conditional transfer creating a mortgage?
2. Did the learned District Judge as well as the High Court Judges err in not appreciating that, as the plaintiff's position was that impugned deed is a mortgage, no evidence could be led to contradict or vary the attested document, the deed in question?

The facts pertinent to the matter in hand are as follows:

By Deed No. 5880 dated 25.11.1996 the Plaintiff Respondent Respondent (hereinafter referred to as the Plaintiff) had transferred her land with her partly built residential house on the said land, to the Defendant Appellant Appellant (hereinafter referred to as the Defendant). The consideration which passed before the Notary Public who attested the said Deed was Rs. 150,000/- only. On the same day and at the same time as the said Deed was signed and attested, another document was signed by the transferee, the Defendant and handed over to the Plaintiff giving her a promise that the said land and property will be re-transferred to her on the very same day that the money would be paid to the Defendant, when the principal amount of Rs. 150,000/- is returned with the collected interest at 8% per month within one year. This document was not a notarially executed document. It was signed by the

Defendant on revenue stamps in the presence of two witnesses who had also signed the same.

Plaintiff filed action against the Defendant when the Defendant refused to accept the money borrowed with interest and re-transfer the property after 6 months from the date of the said Deed. Prior to filing action, the Plaintiff had gone before the Debt Conciliation Board and there again, the matter did not get settled because the Defendant refused to accept the money and re-transfer the property. By the Plaint dated 10.07.1998 , the Plaintiff prayed for a **declaration that the Deed of Transfer No. 5880 is not a deed of transfer but it is a conditional transfer and therefore the said Deed No. 5880 to be set aside.**

The Defendant filed answer on the basis that the transfer was a valid transfer and that it did not amount to a loan transaction and totally **denied that it was a conditional transfer.**

The trial was taken up and concluded with the evidence of the Plaintiff, one of the witnesses to the deed in question, the Notary Public and the Defendant. The main documents were P1, the Deed No.5880 and P2 the document which was signed at the same place on the same day with the same persons signing as witnesses to both P1 and P2.

The trial judge delivered judgment on 24.09.2003 concluding that the said Deed 5880 is not a sale or a proper transfer and therefore there had not been a transfer of the property of the Plaintiff to the Defendant. The said Deed was held to be a conditional transfer pertinent to a loan transaction. The District Judge ordered that Rs.150,000/- and should be deposited in the District Court with legal interest from 25.11.1997 to the date of the deposit of the said amount in Court, by the Plaintiff; the Registrar was directed to execute a deed of retransfer from the Defendant to the Plaintiff; the money deposited in Court could be claimed by the Defendant only after the said Deed of retransfer was executed and that the stamp fees and other costs incurred should be born by the Plaintiff on or before 01.04.2004.

The Defendant appealed against this Judgment to the Civil Appellate High Court. The High Court Judges agreed with the District Judge and dismissed the Appeal. Hence, the Defendant is before this Court in Appeal, once again.

The only point of contest is " whether the said Deed 5880 is a conditional transfer pertinent to a loan transaction or not ". In this regard, Section 92 of

the Evidence Ordinance was discussed by both parties in their submissions. The case law contained in ***Wickremarathne Vs Thavendrarajah 82, 1 SLR 21*** was also discussed by both parties in comparison to the situation in the case in hand.

Section 91 of the Evidence Ordinance reads:

Evidence of terms of contracts, grants or other disposition of property reduced to form of document. - " When the terms of a contract, or a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained. "

Section 92 of the Evidence Ordinance reads;

" When the terms of any such grant or other disposition of property or any matter required by law to be reduced to the form of a document have been proved according to the last Section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms."

In simple language, the aforementioned provisions of the Evidence Ordinance provides that if two or more parties get together and sign a legal document with terms and conditions contained therein, binding each party, then, the same parties cannot give oral evidence to contradict the contents of the written document. Section 92 clearly excludes any oral evidence to vary, add , subtract or contradict what is included in the legally signed document.

What has the ' judge made law ' done with regard to these provisions?

In the case quoted by both the Appellant and the Respondent or the Defendant and the Plaintiff, namely the case of ***Wickremaratne Vs Thavendraraja 82, 1 SLR 21,*** Justice Atukorale analysed correctly that , " the question for our adjudication is a question of law namely, **whether** the provisions of **Section 92** of the Evidence Ordinance **prohibits the reception of**

oral evidence to show that **the purported lease** of the business of Modern Drapery Stores **is in reality not a lease** of the business at all **but was only a sham** ……circumventing the rent restriction laws "

Justice Atukorale, stated in the judgment, thereafter thus: " There is therefore, in my view, sufficient oral evidence by way of admissions by the Appellant himself to prove that there was ***no agreement*** between the parties as evidenced by P4 and **that P4 was only a ruse to conceal their true transaction** which was one of letting and hiring of the premises….much in excess of the authorized rent. "

He goes on further and states in the same judgment, that " the question that arises for consideration is **whether i**n a situation like this parole evidence of the Appellant which shows that **there was in fact *no agreement*** between the parties as set out in the document P4 **is excluded by Sec. 92** of the Evidence Ordinance. " He draws the difference in ' having a legal document with terms and conditions ' to which Sec. 92 applies and ' having a legal document which is in the true sense ***not a binding agreement***, with the terms and conditions which are truly not intended by parties to be intact, as binding the parties '.

In other words , in his judgment in the aforementioned case, Justice Atukorale brings up the position that **what the parties had in mind** when they signed that legal document **is what matters.** It is only upon proof of the fact that the document signed by parties contained **what they intended truly to take place**, it is only then, that the **document becomes subject to Sec. 92 of the Evidence Ordinance**.

There is nothing in Sections 91 and 92 of the Evidence Ordinance to exclude oral evidence being led to show that there was ***no agreement*** between the parties and therefore no contract exists. The party who wants to attract Sec. 92 **should in the first instance prove that the signed document truly contains clauses by which the parties truly agreed to be bound.** Parole evidence can be led to prove that there was no agreement which was intended to be so, contained in the document.

Justice Atukorale further said, " I am therefore of the opinion that neither Sec. 92 or 91 can have any application unless there has **been in the first instance a contract or a grant or any other disposition of property between the parties"**.

The position of law as expounded by the judgment in ***Wickremaratne Vs Thavendrarajah (supra),*** is to the effect that , any evidence which is intended to show that there was in fact **no contract, grant, or other disposition of property** would not offend against the provisions of Sections 91 and 92.

In the earlier case of ***Penderlan Vs Penderlan 50 NLR 513***, also it had been held that " the prohibition in Sec. 92 does not extend to a case where it is sought to prove that a transaction was a sham ". In the said case, it was sought to prove that the transaction was fictitious and not what it purported to be. The judges had observed that evidence of the fact that an **instrument was never intended to be acted upon, was not extended by Sec. 92.**

In ***Dayawathie Vs Gunasekera and Another, 1991, 1 SLR 115***, it was held that " The Prevention of Frauds Ordinance and Section 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 ."**

I find that in the case in hand, the evidence led before the District Court demonstrates that the parties who signed the Deed No. 5880 which is on the face of it, a Deed of Transfer cannot be regarded as a transfer of the property in question. The parties had never intended to act upon the said instrument. The Defendant had signed another document **P2, at the same time that the Deed 5880 was signed, promising a retransfer within one year when the money is paid back.** The money which was given to the Plaintiff by the Defendant was a loan taken by the Plaintiff at a very high interest at **8% per month.** The Plaintiff in her evidence stated that Rs. 12000/- was paid per month on the loan of Rs.150000/-. She had paid interest on two consecutive months. The Notary gave evidence and said that the Notary by himself wrote in his own handwriting, the second document which was not notarially executed **but the whole transaction was a proper loan**. The Defendant had promised to retransfer the land to the Plaintiff.

Moreover, the Notary, giving evidence stated that, it is the Plaintiff who was , on the face of the Deed 5880, the **purported Seller** of the land in question, who **had paid the stamp duty** and the Notary's charges **whereas if it is a true sale of land, it is the Buyer who has to pay the stamp duty** and the Notary's charges. The evidence before the trial judge was that the **Plaintiff had** remained **in possession** from the date of the Deed 5880 up to filing action against the Defendant and **up to the date of giving evidence**.

The trial judge had answered the first issue in favour of the Plaintiff stating that, " the said Deed 5880 although prima facie a deed of transfer is only a deed written in regard to a monetary transaction. The said deed is not a Transfer. " The Plaintiff had gone before the Debt Concilliation Board within one year of the said transaction in compliance with the provisions of law pertinent to loans and transactions because it was in deed a loan transaction, pledging the transfer of an immovable property as security for the said loan. Since the Defendant had totally refused to retransfer , the Board had not been able to settle the matter and therefore set it aside, as under the law, the Board could do nothing else.

The President's Counsel appearing for the Defendant Appellant argued that the District Judge as well as the High Court Judges had considered only the case ***of Wickremaratne Vs. Thavendrarajah (supra)*** and had concluded the case before them erroneously. The Counsel had commented on many other cases and argued that the said Deed 5880 was not a fraud, sham, sabotage or camouflage and that parole evidence cannot be led to disprove the contents of the said deed.

I have considered the cases the President's Counsel had referred to on behalf of the Defendant Appellant, in his written submissions, such as ***Setuwa Vs Ukkuwa 56 NLR 337, Palingu Menike Vs Mudiyanse 50 NLR 566, William Fernando Vs Roslyn Cooray 59 NLR 169 and Premawathie Vs. Gnanawathie 1994 2 SLR 172 etc***. The President's Counsel argued that there was no issue raised at the trial before the District Court on trust and therefore the Plaintiff is not entitled to argue that there was a trust between the Vendor and the Vendee in the case in hand. I observe that even though there had not been a specific issue on trust raised in that manner before the trial judge, the pleadings had revealed that there was **no actual transfer** of the property by Deed 5880. The notarially executed deed was not a document intended to be acted upon. It was only security given for the loan granted by the Plaintiff to the Defendant.

Chief Justice G.P.S.de Silva observed in **Premawathie Vs Gnanawathie (supra**) 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 at, as the Plaintiff was willing to transfer the property back. The attendant circumstances point to a constructive trust within the meaning of

Section 83. The attendant circumstances show that the defendant did not intend to dispose the beneficial interest."

Precisely, if there was no intention to act upon the notarially executed document, it is no proper transfer but a sham. The evidence in this case amply prove that the transaction was only a loan granted by the Plaintiff Appellant to the Defendant Respondent at an exorbitant interest rate per month, which was also secured by the transfer deed.

In the case of ***Thisa Nona and Three Others 1997 1 SLR 169***, Justice Wigneswaran had considered a similar matter as the case in hand before this Court and the Court of Appeal held that;

1. The fact that document 1V2 was admitted by the Plaintiff Respondent, the fact that the 1st Defendant Appellant paid the stamp and Notary's charges, the fact that P16 was a document which came into existence in the course of a series of transactions between the Plaintiff Respondent an the fact that the 1st Defendant Appellant continued to possess the premises in suit just the way she did before P16 was executed, all go to show that the transaction was a loan transaction and not an outright transfer.
2. The attendant circumstances show that the 1st Defendant Appellant did not intend to dispose of the beneficial interest in the property transferred.

"Law therefore declares under such circumstances that the Plaintiff Respondent would hold such property for the benefit of the 1st Defendant Appellant. "

In another case decided by the Court of Appeal, namely ***Piyasena Vs Don Vansue 1997 2 SLR 311*** also it was held that:

1. Even though a transfer is in the form of an outright sale, it is possible to lead parole evidence to show that facts exist from which it could be inferred that the real transaction was either,
    i. Money lending where the land is transferred as a security as in this case or
    ii. A transfer in trust, in such cases Sec. 83 of the Trusts Ordinance would apply.
2. A trust is inferred from attendant circumstances. The trust is an obligation imposed by law on those who try to camouflage the actual nature of a transaction. When the attendant circumstances point to a loan transaction and not a genuine sale transaction the provisions of Sec. 83 of the Trusts Ordinance apply.

I do not find fault with the lower court judges for not having considered any other cases because they have analysed quite well the evidence led before the trial judge and also considered the law contained in Sections 91 and 92 of the Evidence Ordinance as well as the law laid down by judge-made-law and followed the authority they thought was most suitable to be followed. The said judges had taken note of the fact that the **Defendant had admitted signing the document P2 in her evidence.** The Defendant had not refused to sign the said document P2 and it was not under duress either. Although the document P2 is not a notarially executed document, it clearly shows the intention of the parties that the transaction was merely a money transaction and Deed 5880 was never meant to be a deed of transfer and never meant to be acted upon. I hold that the Transfer Deed 5880 was a sham and never meant or intended to be acted upon as a transfer of the property which is the subject matter of this case.

I answer the questions of law enumerated above in the negative, in favour of the Plaintiff Respondent Respondent and against the Defendant Appellant Appellant. I am of the opinion that this court has no reason to disturb the judgments of the Civil Appellate High Court and the District Court. The Deed No. 5880 is hereby set aside. The Plaintiff Respondent Respondent is entitled to deposit the borrowed money of Rs. 150000/- (One Hundred and Fifty Thousand) in Court as directed in the District Judge's Judgment and get the property transferred back to her through the Registrar of the District Court. The Plaintiff Respondent Respondent is entitled to what was prayed for in the Plaint before the District Court.

This Appeal is hereby dismissed with costs.

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

In the matter of an Appeal from a judgment of the Civil Appellate High Court.

Mahadura Chandradasa Thabrew
alias Mahadura Chandradasa
Weerawardena, 'Allan Niwasa',
No. 47, Uposatharama Road,
Panadura.

Plaintiff

SC APPEAL No. 168/14
SC/HCCA/LA/ 160/2013
WP/HCCA/KAL/149/2004(F)
DC PANADURA 1198/L

Vs

1. Mahadura Padmini
   Hemalatha Thabrew,
   Uposatharama Road,
   Pinwatta, Panadura.

2. Seylan Bank PLC,
   Head Office,
   Sir Baron Jayathilaka
   Mawatha, Colombo 2.

Defendants

AND BETWEEN

Mahadura Chandradasa Thabrew
alias Mahadura Chandradasa
Weerawardena, 'Allan Niwasa',
No. 47, Uposatharama Road,
Panadura.

Plaintiff Appellant

Vs

1. Mahadura Padmini
   Hemalatha Thabrew,
   Uposatharama Road,
   Pinwatta, Panadura.

2. Seylan Bank PLC,
   Head Office,
   Sir Baron Jayathilaka
   Mawatha, Colombo 2.

Defendant Respondents

AND NOW BETWEEN

Mahadura Padmini Hemalatha
Thabrew, Uposatharama Road,
Pinwatta, Panadura.

1ST Defendant Respondent Petitioner

Vs

Mahadura Chandradasa Thabrew
alias Mahadura Chandradasa
Weerawardena, 'Allan Niwasa',
No. 47, Uposatharama Road,
Panadura.

Plaintiff Appellant Respondent

Seylan Bank PLC,
Head Office,
Sir Baron Jayathilaka Mawatha,
Colombo 02.

2nd Defendant Respondent Respondent

BEFORE : S. EVA WANASUNDERA PCJ
ANIL GOONERATNE J &
H.N.J. PERERA J

COUNSEL : M. U. M. Ali Sabry PC with Shamith Fernando and Nalin Alwis for the 1st Defendant Respondent Appellant.
Saliya Peiris PC with Varuna de Saram for the Plaintiff Appellant Respondent.

ARGUED ON : 04.07.2017.
DECIDED ON : 01.08.2017.

S. EVA WANASUNDERA PCJ.

The Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) filed action in the District Court of Panadura against his own sister, the 1st Defendant Respondent Appellant (hereinafter referred to as the 1st Defendant) and the Seylan Bank PLC named as the 2nd Defendant. The purpose of filing this action is

to get the land in the Schedule to the Plaint which is held by the 1st Defendant under a deed of transfer, retransferred to the Plaintiff, allegedly since the said land has been transferred and held by the 1st Defendant in trust for the Plaintiff. The Plaintiff claims that it was held on a constructive trust within the meaning of Sec. 83 of the Trusts Ordinance.

The Plaintiff's father, Allan Thabrew and mother, Darling Premawathie Thabrew and their nine children lived in " Allan Niwasa " at Uposatharama Road, Pinwatta, Panadura. The father died in 1965 due to a heart problem. He had many blocks of land which he had told his wife to sell and live with the money received from such sales. The Plaintiff had been 16 years old when the father died. The Plaintiff had one elder brother, two younger brothers and five younger sisters. The 1st Defendant is the second younger sister.

In 1974 Chandradasa the Plaintiff received by way of a transfer, only 1/14th share of the land of one and a half acres of the land on which their main house Allan Niwasa was existing including the whole house, from his mother, Darling Premawathie. The said deed was marked as P1. It is in evidence that Chandradasa wanted some money in the year 1978. Mother had told him not to borrow from any others but to get it as a loan from a Bank. For the purpose of getting a loan of Rs. 20000/- from the National Savings Bank, the Insurance Corporation had issued a title insurance to the owner, Darling Premawathie, for the land of one Acre depicted in a new plan No. 3524 dated 26.09.1978 made by R.W.Fernando Licensed Surveyor. The Plaintiff was the person named as purchaser and mother was named as the seller. The receipt of the money by the seller, the mother, is also marked in evidence. On the face of the document, the money was borrowed from the National Savings Bank by the Plaintiff to purchase the land owned by the seller who was his own mother Darling Premawathie. The Plaintiff had however repaid the money to the Bank. In reality, the mother had facilitated the son's need to get money from the National Savings Bank acting as the seller of the land. After the Plaintiff got the land redeemed from the NSB, he had been keeping the whole land for himself even though allegedly the promise to the mother had been to transfer the land to the two sisters after the land is redeemed. In cross examination he had admitted that **he never transferred the land to the mother back again or allegedly even to the sisters as promised by the son to the mother.**

In 1979 again, he received a transfer of other undivided portions of the same land of Delgahawatte Kattiya from his mother. The said deed was marked as P2. In 1981, he bought 30 and 1/3rd Perches from Nimal Jayathilake from and out of the land called Gorakagahawatte, which land was adjacent to Delgahawatte Kattiya. This deed was marked as P3. The whole area covered by **these three deeds** was **in his name as owner** and he got the area surveyed by L.W.L. De Silva on 05.03.1987.

The total extent of Delgahawatte Kattiya and Gorakagahawatte together was 1 Acre 0 Roods 27 Perches. By Plan No. 6904 dated 5.3.1987 done by Licensed Surveyor L.W.L. De Silva, the big land was blocked out into three larger lots and two smaller lots. Lot 1 and 2 were of equal extents , each containing 1 Rood and 21 Perches. Lot 3 with the house thereon was of an extent of 1 Rood and 16 Perches. The road 15 feet wide reserved to reach Lot 1 and Lot 2 was marked as Lot 4 of an extent of 6 Perches. There is a Lot 5 also on the other side of Uposatharamaya Road of an extent of only 3 Perches.

The Plaintiff transferred Lots 1 and 2 to the sisters, Malini Kusumalatha and Padmini Hemalatha with the roadway over Lot 4 on one and the same day, i.e. on 5.6.1987 by deed numbers 15397 and 15398. The Deeds were registered in the Land Registry properly according to the Plaintiff's evidence. He had not even placed a caveat at any time in the Land Registry for over ten years regarding Lot 2. He had registered a caveat in 1997, i. e. right before filing the District Court action against Padmini Hemalatha alleging that the transfer deed No. 15398 was signed and delivered to her on a constructive trust.

The subject matter of this application is the said **Lot 2** which he transferred to the 1st Defendant, Padmini Hemalatha by **Deed No. 15398 attested by Ranjith Weerasekera Notary Public and marked as P5 dated 05.06.1987.**

The 1st Defendant had mortgaged Lot 2 to the Seylan Bank, the 2nd Defendant and obtained a loan in the year, 1996. The Seylan Bank participated at the trial and stated that by Mortgage Bonds Nos. 1316 dated 8.5.1996 and 1466 dated 13.12.1996 , the 1st Defendant had mortagaged the said Lot 2 which was registered as her own land and that the 2nd Defendant Seylan Bank had accepted her as the true owner of the land. The Bank took up the position that these Bonds cannot therefore be declared null and void according to law.

The District Judge had heard the case and at the end of the trial given judgement **dismissing the Plaint**. The Plaintiff had appealed to the **Civil Appellate High Court** and the judges had over turned the judgment of the District Court and held that the **1st Defendant had held the land as the trustee of the Plaintiff under a constructive trust in terms of Sec. 83 of the Trusts Ordinance**. The High Court Judgment is dated 14.03.2013. Being aggrieved by the said judgment, the 1st Defendant had sought leave to appeal and the same was granted by this Court on the following questions of law contained in paragraph 14 (iii), (iv), (v),(vi) and (vii) of the Petition which read as follows:

1. Did the Judges of the Civil Appellate High Court of Kalutara err in law in failing to consider the material evidence and facts placed before the Court in correct perspective thus misdirected in law?
2. Did the Civil Appellate High Court fail to consider the fact that the Respondent has failed to prove basic requirements and tests related to a constructive trust?
3. Did the Civil Appellate High Court fail to consider the fact that, the Deed of Transfer marked as P5 which was a properly executed deed , cannot be challenged by parole evidence unless there were attendant circumstances?
4. Did the Civil Appellate High Court err in law in their opinion in place of that of the judge of the original court without possible reasons or rhymes?
5. Did the Civil Appellate High Court misdirect itself in law in failing to consider that the Respondent has failed to establish a case which falls within the ambit of Sec. 83 of the Trust Ordinance?

The primary question to be determined by this Court is whether deed No . 15398 dated 95.06.1987 marked as P5 was an outright transfer, or whether it was held on a constructive trust for the Plaintiff.

The trial judge in the District Court heard the Plaintiff giving evidence. He admitted that he received the bigger portion of the land and the ancestral house from the mother of both the Plaintiff and the 1st Defendant, Darling Premawathie for him to obtain a loan from the National Savings Bank in the year 1978. So, the transfer of the land from the mother to the son took place for a need of the son, Plaintiff. Even though he paid the loan to the NSB, he did not re-transfer the land to the mother or to the sisters as promised to the mother, according to the pleadings in the answer of the 1st Defendant. It was only in 1987 that the Plaintiff

transferred part of the land to the two younger sisters as promised to the mother in 1978 by Deeds numbers 15398 and 15399. Sister Malani Kusumalatha had thereafter mortgaged her portion of 1 Rood and 21 Perches to an outsider and finally after the mortgage was redeemed, she had sold the land to one Sirisena Liyanage. Sister Padmini Hemalatha was only 18 years old , according to the Plaintiff's evidence before court, in the year 1987 when the transfer deed 15398 was executed. However , the Plaintiff's contention is that Hemalatha wanted that block of land in her name as part of the future plan to produce to the school Sri Sumangala Vidyalaya, Panadura when she makes an application to send her child to school. The Plaintiff had mentioned so in his Plaint and gave evidence also to that effect. It was admitted that Hemalatha had no children at that time and that Hemalatha at the child bearing age, in 1992 had given birth to a child while living in the main house where even the Plaintiff was living at that time and that the child was not admitted to Sri Sumangala Vidyalaya. It is hard to believe that by getting a deed for a bare land with no house on it, how such a deed would be beneficial to any mother of a child to produce to the school with the application to get a school for the child. That seems to be a baseless reason for having the land transferred to Hemalatha by the Plaintiff. The Plaintiff claims that therefore the transfer deed is a trust and not an outright transfer. The Plaintiff further stated to court that even though the other sister sold her block of land to Sirisena Liyanage through Dimuthu Land Sales Company, the money received was taken by him without any problem from the other sister. Anyway that sister had not given evidence in court to support that stance taken by the Plaintiff.

The Plaintiff states that even though the land was blocked out with a roadway on the Plan 6004 on paper, such blocks were never barb wired or the road was not used. His position is that he held the beneficial interest of the whole land even though the transfer deeds were written to the sisters. He had produced certain deeds of lease where he had leased out some coconut trees on the land to a relation of his but in cross examination, he had admitted that the lands mentioned in the schedules to the said deeds of lease are different from the corpus of the case in hand. I find that in the evidence of the Plaintiff, it is obvious that he had tried hard to prove that he was holding the beneficial interest. The District Judge who heard the case had analyzed the evidence and held that if the transfer was on a constructive trust, the Plaintiff should have called the witnesses and the Notary which he failed to do. The consideration of Rs.7000/- had been nominal due to the fact that it was between family members. Even then, the

Notary states in the attestation that the Plaintiff, the transferor had admitted that the money was paid earlier to him by the transferee, Padmini Hemalatha.

Another stance taken up by the Plaintiff was that he blocked out the land and did the transfer to purify his ownership rights of the whole land. This explanation has no validity or recognition in the law relating to land. The other two witnesses who gave evidence were the surveyor and another Notary Public but their evidence has not touched upon a constructive trust at all.

I find that the Plaintiff who received the whole land owned by his mother at a time of his need to get a loan from NSB as a big favor from the mother to the son, never retransferred the land to the mother or gave any portion of the land to the sisters as promised to the mother in 1978. He had finally blocked it out and transferred two blocks of land to two sisters after about nine years in 1987. Later on, after ten more years, in 1997 he has filed action, not only against one sister who had held the land and who had applied for loans from the 2nd Respondent Bank and had received the loans by mortgaging the said land but also against the 2nd Respondent Bank.

Sec. 83 of the Trusts Ordinance specifically states that where the owner of the 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 benefit for the owner or his legal representative. Accordingly, the transferor is duty bound to adduce evidence to show that he did not intend to dispose of the beneficial interest of the property. He is obliged to adduce evidence to show the attendant circumstances that there was no intention to transfer the beneficial interest.

In the case in hand there was no evidence to show that there was an agreement on the part of the transferee to re transfer the property back to the Plaintiff. The Plaintiff's explanation that the transfer was done to clear the title to his property does not hold water because if one wants to have clear title which he is enjoying with others, all what had to be done was to file a partition action. I hold that the Plaintiff has failed to prove that he did not intend to transfer the beneficial interest.

The High Court of Civil Appeal has held that there was continuous possession by the Plaintiff of the said land but having gone through the evidence, I find that the evidence before court was not sufficient to come to that conclusion. The burden of proof vests in the Plaintiff to show that he was in continuous possession. That fact was not proved. The High Court has erred regarding the proper value of the land not having been placed as consideration in the transfer deed by not having seen the value as of that date and also not having taken into account that these were transactions within the family of the mother, brother and sisters. The District Judge who saw the witness, heard the witness and watched the demeanor of the witness had analyzed the evidence properly but the High Court had presumed many matters without having read the evidence in the proper perspective. In this regard I would like to **quote Somawansa J in Sumanawathie Vs Bandiya and Others 2003, 3 SLR 278 as follows:** " In deciding these questions of fact the learned District Judge was in a better position than me and had the advantage of seeing, hearing and observing the demeanor of the witnesses who were called to testify to the matter in issue."

I answer the questions of law in favor of the 1st Defendant Respondent Appellant and the 2nd Defendant Respondent Respondent, the Seylan Bank and against the Plaintiff Appellant Respondent. I do hereby set aside the judgment of the Civil Appellate High Court dated 14.03.2013 and affirm the judgment of the District Court dated 06.12.2004.

The Appeal is allowed with costs of suit.

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 Appeal Mo. 170/2015

S.C/HCCA/LA No. 14/2015
WP/HCCA/GPH/ No. 109/2007(F)
D.C. Gampaha Case No. 321/L

In the matter of an Application for Leave to Appeal in terms of Section 5C (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 against the Judgment of the Civil Appellate High Court of Gampaha.

H.D. Lionel Weeraratne of
No. 156, Walpola Road,
Ragama.

PLAINTIFF

Vs.

1. Velu Kannappan
2. Sawarimuththu Rajendra
3. Hakmana Kaluthanthrige Don Anthony Bernard Perera

All of Suraweera Mawatha,
Walpola, Ragama.

DEFENDANTS

AND BETWEEN

1. Velu Kannappan
   More correctly Velu Kannappan Thevar
   (now deceased)

1a. Kannappan Ranjith

2. Sawarimuththu Rajendra

3. Hakmana Kaluthanthrige Don Anthony Bernard Perera

   All of Suraweera Mawatha,
   Walpola, Ragama.

DEFENDANTS-APPELLANTS

Vs.

H H.D. Lionel Weeraratne of
No. 156, Walpola Road,
Ragama.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

H H.D. Lionel Weeraratne of
No. 156, Walpola Road,
Ragama.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

1. Velu Kannappan
   More correctly Velu Kannappan Thevar
   (now deceased)

1a. Kannappan Ranjith

2. Sawarimuththu Rajendra
3. Hakmana Kaluthanthrige Don Anthony Bernard Perera

   All of Suraweera Mawatha,
   Walpola, Ragama.

DEFENDANTS-APPELLANTS-RESPONDENTS

BEFORE: S.E. Wanasundera P.C., J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: S.A.D.S. Suraweera with P.K.C. Dilhan
For the Plaintiff-Respondent-Appellant

Chandana Wijesuriya
for the Defendant-Appellant-Respondents

WRITTEN SUBMISSIONS TENDERED BY THE APPELLANT ON:

14.06.2016

ARGUED ON: 29.06.2017

DECIDED ON: 12.07.2017

GOONERATNE J.

This was an action filed in the District Court of Gampaha for a declaration of title and ejectment/damages against the Defendants from premises described in the schedule to the plaint. The case before court is not so complicated. Plaintiff-Respondent-Petitioner rely on his paper title and Defendant-Appellant-Respondent plead prescriptive title. Parties proceeded to trial on 10 issues. Learned District Judge held with the Plaintiff and entered Judgment in favour of Plaintiff-Respondent-Petitioner. The Defendant being

aggrieved with the above Judgment appealed to the High Court and the learned Judge of the High Court set aside the District Court Judgment.

The Supreme Court on or about 07.10.2015 granted leave on the question of law raised in sub paragraphs ii, iii, iv & v of paragraph 13 of the petition, filed of record. It reads thus:

(ii) Did the learned Judges of the Provincial High Court misdirect themselves on the fundamental principles on the law prescription and does the said judgment have any force or avail in law?

(iii) Did the learned judges of the Provincial High Court have arrived at the erroneous conclusion that the Defendants have been in possession of the land for a period well over ten years at a time when the evidence of the Defendants themselves was to the contrary?

(iv) Did the learned Judges of the Provincial High Court have arrived at an erroneous conclusion that the evidence of the Plaintiff is contradictory and is against the pleadings which had greatly influenced the judgment and is the said judgment bad in law for the said reason?

(v) Did the learned Judges of the Provincial High Court have misdirected themselves on the facts of the case in arriving at the erroneous conclusion that the learned trial Judge had considered documents 'P7' to 'P9' which were not proved by misinterpreting the Judgment of the learned trial Judge?

I have read the evidence led at the trial which is supportive of the submissions of learned counsel for the Plaintiff-Respondent-Petitioner. The

evidence of the 1st Defendant was that he came into occupation of the land only in the year 1997 or 1998. This evidence is corroborated by the police statement dated 15.12.2000 marked P10(a) by the 1st Defendant. 3rd Defendant testified that he came into occupation on or about 1999. So was the 2nd Defendant. The Defendant's position was that they do not know who the owner of the property in dispute. The 2nd Defendant testified that they entered the land without knowing who the owner of the property in question. The Plaintiff filed action on or about 2001.

This court heard both counsel for the Plaintiff-Respondent-Petitioner as well as the learned counsel for Defendant-Respondent. We are unable to accept the submissions of learned counsel for Defendant-Appellant in the context of the case in hand that the case enunciated must reasonably accord with the pleadings vide explanation 2 of Section 150 of the Civil Procedure Code. No such issue was raised in the Trial Court, i.e a case materially different from that which was pleaded. When I consider the date of institution of action and the alleged date of possession of Defendants, it is very clear that the required 10 years as per Section 3 of the Prescriptive Ordinance have not been fulfilled by the Defendant party. As such all questions of law raised before this court are answered in the affirmative in favour of the Plaintiff-Respondent-Petitioner.

The Defendant party had never possessed the land for 10 years. In fact they do not know as to who the owner of the land in dispute. It appears that the Defendants are trespassers. The Provincial High Court Judgement is bad in law and in fact. There is no basis to set aside the Judgment of the learned District Judge. I affirm the Judgment of the District Court and set aside the High Court Judgment.

Appeal Allowed with costs.

JUDGE OF THE SUPREME COURT

S.E. Wanasundera 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 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 / 172/2012

SC/ HCCA/LA/ 271/2012

SP/HCCA/KAG/781A/2010(F)

DC Mawanella No/1143/MR

Kaluwalage Champika Kumari De Silva,
No 204, Vam Ivuru Yaya,
03, Mahawillachchiya,
Anuradhapura.

Plaintiff

Vs.

1. Kodithuwakku Arachchige Neville Kodithuwakku,
   No. 85, Nayapana Janapadaya,
   Gampola.
2. Commissioner General of Prisons,
   Department of Prisons,
   No. 50, Baseline Road,
   Colombo 09.
3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Defendants

AND

Kaluwalage Champika Kumari De Silva,
No 204, Vam Ivuru Yaya,
03, Mahawillachchiya,

Anuradhapura.

Plaintiff Appellant

Vs.

1. Kodithuwakku Arachchige Neville
   Kodithuwakku,
   No. 85, Nayapana Janapadaya,
   Gampola.
2. Commissioner General of Prisons,
   Department of Prisons,
   No. 50, Baseline Road,
   Colombo 09.
3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Defendant Respondents

AND NOW BETWEEN

Kaluwalage Champika Kumari De Silva,
No 204, Vam Ivuru Yaya,
03, Mahawillachchiya,
Anuradhapura.

Plaintiff Appellant-Appellant

Vs.

1. Kodithuwakku Arachchige Neville
   Kodithuwakku,
   No. 85, Nayapana Janapadaya,
   Gampola.
2. Commissioner General of Prisons,
   Department of Prisons,
   No. 50, Baseline Road,
   Colombo 09.
3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Defendant Respondent-Respondents

BEFORE	:	B.P. ALUWIHARE, PC, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Sudarshany Cooray for the Plaintiff Appellant-Appellant Rajitha Perera SSC for the 2nd & 3rd Defendant Respondent- Respondents
WRITTEN SUBMISSION ON:		02.10.2012 & 25.08.2016 (Plaintiff Appellant-Appellant) 24.12.2012 & 25.08.2016 (Defendant Respondent-Respondents)
ARGUED ON	:	18.07.2016
DECIDED ON	:	24.01.2017

UPALY ABEYRATHNE, J.

The Plaintiff Appellant-Appellant (hereinafter referred to as the Appellant) has sought leave to appeal to this Court from the judgment of the Provincial High Court of Civil Appeal of the Sabaragamuwa Province holden at Kegalle dated 31.05.2012, and leave was granted on the following questions of law

set out in paragraph 13(a), (b), (c). (d) and (h) of the petition of appeal dated 08.07.2012.

13(a). Did the learned High Court Judges err in holding that the 1st Defendant in his own evidence has proved that the accident occurred outside the scope of his employment?

(b). Did the learned High Court Judges err in holding that the 2nd and 3rd Defendants are not liable vicariously since the 1st Defendant had not obtained permission from the chief jailer or the senior jailor although the 1st Defendant had been ordered to take such bus on such day?

(c). Did the learned High Court Judges err in holding that the 1st Defendant was not acting within the scope of his employment since he had not obtained specific permission to deviate from the designated route, whereas he was ordered to transport the prison officers to the wedding function?

(d). Did the learned High Court Judges err in holding that the 1st Defendant's act was one of an independent act?

(h). Did the learned High Court Judges err in not appreciating the fact that the evidence led in this case proved that the journey in question on which the 1st Defendant drove the bus was a journey ordered or required by the superior officers of the 1st Defendant for the benefit of the other officers of the 2nd Defendant and it was not a journey for a private purpose of the 1st Defendant?

According to the Appellant, on or about 22.05.2004, the Bus bearing No WP GD 6597 belonged to the Department of Prison, which was driven by the 1st Defendant Respondent-Respondent in the direction of Colombo, on Colombo Kandy road, had collided with the van bearing No 62-7523 which was driven by the husband of the Appellant. The Appellant's husband succumbed to injuries received at the said accident. The Appellant had instituted the said action against the 1st 2nd and 3rd Defendant Respondent-Respondents (hereinafter referred to as the 1st 2nd and 3rd Respondents) seeking to recover a sum of Rs. 1,500,000/= as damages caused to the Appellant due to loss of her husband, a sum of Rs. 200,000/= as damages caused to the said van No 62-7523 and a sum of Rs. 120,000/= for inability of using the said van bearing No 62-7523 for a period of 06 months due to the said accident. The Appellant had averred that the 2nd and 3rd Respondent were vicariously liable for the damages caused as a result of the accident since the accident had occurred within the scope of the employment of the 1st Respondent.

The 3rd Respondents had averred that at the time of the said accident the 1st Respondent was not acting within the scope his employment. Although the proceedings dated 07.02.2007 indicate an *ex-parte* trial against the 2nd Respondent, the issue No 15 has been raised by the 2nd and 3rd Respondents on the basis that no cause of action had arisen to the Appellant against the 2nd and 3rd Respondent. Hence it is apparent from the issues raised at the trial that an *inter parte* trial had been held against the 1st 2nd and 3rd Respondents before the District Court. The case proceeded to trial on 15 issues. After the trial, the learned District Judge had delivered the judgment in favour of the Appellant against the 1st Defendant Respondent and dismissed the action against the 2nd and 3rd Defendant Respondents. The Appellant and the 1st Defendant Respondent both had preferred

two appeals to the High Court of Civil Appeal of the Sabaragamuwa Province holden at Kegalle from the said judgment of learned District Judge dated 30.09.2010. After the hearing, the High Court of Civil Appeal, by judgment dated 31.05 2012, had dismissed the said two appeals. The 1st Defendant Respondent had not appealed to this court from the said judgment of the High Court.

The Plaintiff Appellant has narrated her cause of action in sub paragraphs (i) to (vi) of the paragraph 02 of the petition of appeal to this court dated 8th of July 2002 as averred in her plaint dated 07.04.2006. I reproduce the said paragraph below.

i. The Plaintiff (Appellant) is the lawful wife of Konara Mudiyanselage Piyatissa Gamini.
ii. On or around 22.05.2004 whilst Konara Mudiyanselage Piyatissa Gamini was driving vehicle No 62-7523, such vehicle collided with Bus bearing No PGD 6597 and as a result of the said accident Konara Mudiyanselage Piyatissa Gamini succumbed to injuries on 10.09.2004.
iii. The Bus bearing No PGD 6597 was driven by the 1st Defendant and it belonged to the 2nd Defendant.
iv. The 1st Defendant was driving the Bus bearing No PGD 6597 in the scope of his employment.
v. Accordingly, 2nd and 3rd Defendants are liable for the actions of the 1st Defendant.
vi. The damage caused to the Plaintiff by the death of her husband is calculated at Rs. 1,500,000/-.

The Appellant's position according to the said paragraph was that the alleged accident occurred due to the negligence of the1st Defendant Respondent-Respondent (hereinafter referred to as the 1st Respondent) and at the time of the accident the 1st Respondent was acting within the scope of his employment.

The1st Respondent had filed his answer denying the said position of the Appellant and had averred that the alleged accident occurred due to the negligence of the Appellant's husband. In his answer the 1st Respondent had denied the fact that at the time of the accident he was acting within the scope of his employment.

The 2nd and 3rd Defendant Respondent-Respondents (hereinafter referred to as the Respondents) too had filed their answers denying the position of the Appellant and had averred that at the time of the accident the 1st Respondent was not serving within the scope of his employment.

The evidence of the case demonstrates the exact nature of the journey of the 1st Respondent which ended up with the fatal accident in question. At the time of the accident, the 1st Respondent was acting in the capacity of a driver attached to the Bogambara Prison, Kandy. It was not in dispute that on the day in question, the 1st Respondent had driven the bus belonged to the Department of Prison bearing No PGD 6597 with certain employees attached to the Bogambara prison on board, towards Mawanella to facilitate the said employees to participate at a wedding ceremony. However, the said function was not an official function. According to evidence, the 1st Respondent had not obtained any specific authority or permission from his superior officers for the said journey to Mawanella, which is a fact admitted by the 1st Respondent.

The 2nd and 3rd Respondents took up the position that the 1st Respondent had engaged in an unauthorized journey and therefore they were not vicariously liable for the damage caused to the Appellant. They had led evidence to prove the fact that the employees of the 2nd Respondent's Department are subject to the control of circulars issued by the Commissioner General of Prison and the Superintendent Circulars issued by the Superintendent of the relevant Prison. Accordingly, since the 1st Respondent was attached to the Bogambara Prison he was subjected to the control of circulars issued by the Commissioner General of Prison and also the Superintendent Circulars issued by the Superintendent of the Bogambara Prison. The 1st Respondent had not denied the said circulars of the Prison.

The 2nd and 3rd Respondent produced the Superintendent Circular No 42/2003 marked 3V2 issued by the Superintendent of the Bogambara Prison with regard to the use of the vehicles belonged to the Bogambara Prison. It appears that the said circular had been issued having considered the instances where the prison vehicles had been taken out of the prison premises without obtaining any prior approval. According to the said Superintendent Circular 3V2 when vehicles need to be taken out of the premises of the Bogambara Prison, the reasons for taking the vehicle out of the premises should be stated in the relevant register and the vehicles should be taken out subject to approval of the Superintendent or an Assistant Superintendent of the Bogambara Prison.

The 1st Respondent, in his evidence, admitted that he had not followed the said procedure laid down in the said circular 3V2 and also, he had not obtained the approval of the Superintendent or an Assistant Superintendent of Bogambara Prison prior to the taking the said vehicle out of the Prison Premises. The 1st Respondent had stated that he was ordered by the Transport Section to take the

said bus to facilitate the officers of the Prison to participate at a wedding ceremony to be held at Mawanella. But he had not produced such an order given by the Transport Section. It is interesting to note that the witness Wickremage Mahesh Janakantha Rathnayake, who testified for the case of the 1st Respondent, had stated at page 146 of the brief that he with Several Officers met the Jailor of the Transport Section and obtained the permission to take the vehicle out of the prison premises. Said evidence clearly demonstrate that the 1st Respondent had failed to comply with the procedure laid down in the circular marked 3V2.

It is important to note that the Superintendent Circular marked 3V3 contained specific directions given to the Jailor of the transport section when vehicles are being taken out of the City limits. According to the said circular 3V3, special permission of the Superintendent or an Assistant Superintendent of Prison should be obtained when vehicles are to be taken outside the City limits. It is apparent from the said circular 3V3, in order to take a vehicle outside the City limits written approval of the Superintendent or an Assistant Superintendent of Prison should be obtained. Such application should contain;

- The name of the applicant or the section,
- The nature of the duty involved,
- The name of the driver and the vehicle to be used, and
- A certificate verifying whether any other vehicle of another prison is coming to the Bogambara prison for the same duty.

No such application had been made for the purpose of taking the said bus to Mawanella. Accordingly, totality of evidence clearly establish that the 1st Respondent had not complied with the requirements of circulars 3V2 and 3V3 before taking the alleged vehicle out of the prison premises and outside the City

limits. This is ample evidence to conclude that the alleged journey to Mawanella was an unauthorized journey. At such instances, should the master be liable vicariously for the acts of his servants?

Although in the general run of cases, the duty of both master and servant is the same, for a master to be liable he must owe a duty of care to the deceased. Such a duty of care would arise only if the act of the servant falls within the scope of servant's employment.

As stated by Lord Denning MR in *Young Vs. Edward Box & Co. Ltd. (1951) 1 TLR 789, 793* "In every case where it is sought to make the master liable for the conduct of his servant, the first question is to see whether the servant was liable. If the answer is 'Yes', the second question is to see whether the employer must shoulder the servant's liability."

In the case of *De Silva Vs. Dharmasena 59 C.L.W. 92* the plaintiff was injured while travelling in a car owned by the 1st Defendant and driven by the 2nd Defendant. The 2nd Defendant, who was employed as a driver by the 1st Defendant while travelling on the 1st Defendant's business, picked up several passengers of whom the Plaintiff was one. The 2nd Defendant had been expressly forbidden to take such passengers. It was held that "Inasmuch as the 2nd Defendant was acting outside the scope of his employment the 1st Defendant was not liable to the Plaintiff."

In *Twine vs. Beans Express Ltd., (1946) 1 All RE 202, (1946) 175 LT 131 CA.* where the employers had expressly instructed their drivers not to allow unauthorized persons to travel on their vehicles and affixed a notice to this effect on the driver's van. Despite this, the driver gave a lift to a person who was killed by reason of the driver's negligence. The Court of Appeal held that "he was acting

outside the scope of employment and accordingly his employers were not liable. The act of giving a lift to an unauthorized person is not merely a wrongful mode of performing an act of a class which the driver is employed to perform but the performance of an act of a class which he was not authorized to perform at all and hence he was acting outside the course or scope of his employment. Where a servant acts outside the course of employment he ceases *Pro hac vice* to be a servant; an act done solely for the servant's own interests and purposes, and outside his authority is not done in the course of his employment, even though it may have been done during his employment."

This principle of law was followed in *Conway vs. George Wimpey & Co. Ltd., (1951) 2 KB 266.* A number of contractors were employed in work at the Heathrow Airport. The defendant company had instituted a bus service for their own employees and the driver was prohibited by the defendant company from giving lifts to anyone other than their own employees. A non-employee of the company had travelled in the bus and due to the negligence of the driver had been injured. Asquith, LJ held that the act of the driver in giving a lift to the plaintiff was outside the scope of his employment. It was not merely a wrongful mode of performing an act of the class which the driver was employed to perform but was the performance of an act which he was not employed to perform.

In the case of *Sarath Kumara Perera vs. Winifred Keerthiwansa and Others [1993] 2 SLR 274 (SC)* G.P.S. De Silva, CJ, quoting Salmond Law of Torts, observed that "The fact that the car carried a red number plate is a crucial, undisputed fact in this case. The red number plate constituted a representation that it was a car authorized to carry passengers for a fee. The secret instructions given by the defendant to Sally were unknown to the public. There was no notice inside the car prohibiting the presence of unauthorized passengers. It is significant that

Sally stopped the car in front of the bus stand at Kurunegala and it was there that the deceased got into the car with the consent of Sally. He was carrying 03 passengers picked up at different places.

Referring to the distinction between implied and ostensible authority Salmond States; "There is a difference between implied authority and ostensible authority. The servant's act may be an authorized act for the purposes of vicarious liability even if it is done solely for his own purposes if in the circumstances the permission of the master can be implied. Ostensible authority is different; it may be held to exist if, whatever the true state of affairs, the stranger had been misled by appearances." (Salmond Law of Torts 19th Edition page 524).”

Authorities clearly demonstrate that the answer to the question whether the master is vicariously liable for the act of his servant depends on the facts and circumstances of each case. In the present case before me, the question before the court was whether the 1st Defendant Respondent was acting within the scope of his employment by taking the said bus outside the 2nd Respondent’s premises for the wedding function. Having regard to the above legal authorities and also bearing in mind the specific regulations stipulated in 3 R 2 and 3 R 3, is it possible to say that the 1st Defendant Respondent was acting under the implied authority or ostensible authority of the 2nd Defendant Respondent. My answer is ‘no’.

“Unless the wrong falls within the scope of the servant’s employment the employer is not liable at common law…. The focus is not so much on the wrong committed by the servant as upon the act he is doing when he commits the wrong. The act will be within the scope of the employment if it has been expressly or impliedly authorised by the employer or is sufficiently connected with the

employment that it can be regarded as an authorised manner of doing something which is authorised, or is necessarily incidental to something which the servant is employed to do." (Winfield & Jolowicz on Tort – Seventeenth Edition at page 892)

Having regard to the facts and circumstances relevant to the instant case enumerated above, in particular the specific instructions stipulated in 3 R 2 and 3 R 3, I conclude that taking the said bus to Mawanella in contrary to the Regulations stipulated in 3R2 and 3R3 was an unauthorized act. I accordingly hold that the 1st Defendant Respondent was not acting within the scope of his employment in taking the bus to Mawanella and the 2nd and 3rs Defendant Respondent are thus not vicariously liable for the alleged act of the 1st Defendant Respondent.

For the forgoing reasons, I answer the said questions of law in favour of the 2nd and 3rd Respondents and dismiss the appeal of the Appellant. I uphold the judgment of the Court of appeal dated 31.05.2012 and the judgment of the learned District Judge dated 30.09.2010. I make no order as to costs in all courts.

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 a judgment of the High Court [Civil Appeal] of the North Western Province holden at Kurunegala.

S.C.Appeal No. 172/2013
SC HC (CA) LA No.228/2013
NWP/HCCA/KUR No. 03/2010/F
D.C.Kuliyapitiya Case No. 16166/07/M

KAHANDAWA APPUHAMILAGE DON TILAKARATNE
No.43, Negombo Road,
Banduragoda.

PLAINTIFF

VS.

1. **WIJESINGHE MUDIYANSELAGE CHANDRASIRI**
2. **CHANDRANI ADHIKARI**

Both of Makandura,
Gonawila.

DEFENDANTS

AND

1. **WIJESINGHE MUDIYANSELAGE CHANDRASIRI**
2. **CHANDRANI ADHIKARI**

Both of Makandura,
Gonawila.

DEFENDANTS-APPELLANTS

VS.

KAHANDAWA APPUHAMILAGE DON TILAKARATNE
No.43, Negombo Road,
Banduragoda.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

KAHANDAWA APPUHAMILAGE DON TILAKARATNE
No.43, Negombo Road,
Banduragoda.

PLAINTIFF-RESPONDENT-PETITIONER/APPELLANT

VS.

1. **WIJESINGHE MUDIYANSELAGE CHANDRASIRI**
2. **CHANDRANI ADHIKARI**
   Both of Makandura,
   Gonawila.

DEFENDANTS-APPELLANTS-RESPONDENTS

BEFORE:	Priyantha Jayawardena, PC, J. K.T.Chitrasiri J. Prasanna Jayawardena, PC, J.
COUNSEL:	H. Withanachchi with Shantha Karunadhara for the Plaintiff-Respondent-Petitioner/Appellant. M.C.Jayaratne with T.C.Weerasinghe and M.D.J.Bandara for the 1st and 2nd Defendants-Appellants-Respondents.
ARGUED ON:	19th September 2016
WRITTEN SUBMISSIONS FILED:	By the Plaintiff-Respondent-Petitioner/Appellant on 10th October 2016. By the 1st and 2nd Defendants- Appellants-Respondents on 10th September 2016.
DECIDED ON:	27th January 2017

Prasanna Jayawardena, PC, J.

The question to be decided in this appeal is whether the High Court [Civil Appeal] of the North Western Province holden at Kurunegala erred when it dismissed the Plaintiff-Respondent-Petitioner/Appellant's action. The High Court held that, the Plaintiff's Cause of Action was prescribed and set aside the judgment of the District Court of Kuliyapitiya which had been entered in favour of the Plaintiff.

The Plaintiff-Respondent-Petitioner/Appellant is a businessman and his trade is selling coconuts. The 1st and 2nd Defendants-Appellants-Respondents are husband and wife. The parties will be referred to in this judgment as "the Plaintiff, "the 1st Defendant" and "the 2nd Defendant" respectively.

On 15th October 2007, the Plaintiff filed this action against the 1st and 2nd Defendants stating that he sold coconuts to the 1st and 2nd Defendants on credit terms and praying for the recovery of a sum of Rs. 723,503/- from the 1st and 2nd Defendants, jointly and severally, which was due to the Plaintiff upon a writing filed with the Plaint marked **"පැ1"** signed by the 1st Defendant in connection with the monies due to the Plaintiff upon these sales of coconuts.

A perusal of the Plaint shows that, the Plaintiff's Cause of Action is averred in Paragraphs [5], [6], [7] and [8] of the Plaint. In Paragraph [5] of the Plaint, the Plaintiff pleads that, by the letter dated 28th August 2006 filed with the Plaint marked **"පැ1"**, which is signed by the 1st Defendant, the 1st and 2nd Defendants acknowledged their liability to pay a sum of Rs. 723,503/- which was due to the Plaintiff as at 28th August 2006 and promised to pay these monies to the Plaintiff before 30th June 2007. In Paragraph [6] of the Plaint, the Plaintiff pleads that, the agreement set out in **"පැ1"** makes both Defendants, jointly and severally, liable to pay this sum to the Plaintiff. In Paragraphs [7] and [8] of the Plaint, it is pleaded that, since the 1st and 2nd Defendants failed to pay this sum as agreed by them [*ie:* by **"පැ1"**], the payment of this sum has been demanded from the 1st and 2nd Defendants, who have wrongfully and unlawfully failed to make payment, thereby, giving rise to a Cause of Action to sue both Defendants for the recovery of this sum of Rs. 723,503/-.

Thus, it is clear from the Plaint that, the Plaintiff's Cause of Action was upon the writing marked **"පැ1"** by which, it is pleaded, the 1st and 2nd Defendants acknowledged their liability to pay a sum of Rs. 723,503/- to the Plaintiff and promised to pay this sum before 30th June 2007.

In their joint answer, the 1st and 2nd Defendants admit that the 1st Defendant purchased coconuts from the Plaintiff on credit terms but deny that the 2nd Defendant had any connection with these transactions. They plead that, all monies due to the Plaintiff had

been paid, albeit with some delays. They admit that the 1st Defendant signed **"ළ1"** but claim that he did so under duress. The Defendants did *not* plead in the answer that the Plaintiff's claim was prescribed.

When the trial commenced, it was admitted that, the 1st Defendant purchased coconuts from the Plaintiff on credit terms. The Plaintiff framed five issues based on his pleadings. The key issues are Issue No.s [3], [4] and [5] which ask whether the 1st and 2nd Defendant had, by the letter marked **"ළ1"** signed by the 1st Defendant, promised to pay the sum claimed in the Plaint before 30th June 2007; whether they have failed and neglected to make this payment; and whether, if the above issues are answered in the affirmative, the Plaintiff is entitled to judgment as prayed for.

The Defendants framed 12 issues. One of these issues was whether the letter marked **"ළ1"** was obtained by the Plaintiff by exerting duress on the Defendants. The Defendants did *not* raise an issue as to whether the Plaintiff's action was prescribed.

The Plaintiff gave evidence and recounted the transaction between him and the Defendants. He stated that, the 1st and 2nd Defendants carried on business together and purchased coconuts from him. The Plaintiff stated that, the details of the transactions relating to the sales he made to the Defendants were entered in a note book produced at the trial marked **"ළ2"** and that the entries therein were made by the 2nd Defendant and, thereafter, signed by the 1st Defendant. He said that when he went to the Defendants' home to collect payment of the sum of Rs. 723,503/- which was due from the Defendants to him as at 28th August 2006, the 2nd Defendant wrote the aforesaid letter marked **"ළ1"** stating that the Defendants would pay this sum before 30th June 2007 and that the 1st Defendant had then signed **"ළ1"** and given it to the Plaintiff. Since the Defendants did not pay this sum by 30th June 2007, the Plaintiff's attorney-at-law had demanded payment by the letter of demand marked **"ළ3"**. Since payment was not made despite the demand, this action had been instituted against the 1st and 2nd Defendants for the recovery of this sum of Rs. 723,503/-. The Plaintiff also led the evidence of J.H.A.J.L. Jayatilaka who had signed **"ළ1"**, as a witness. Jayatilaka also stated that, **"ළ1"** had been written by the 2nd Defendant and signed by the 1st Defendant.

The 1st Defendant gave evidence and claimed that he and the Plaintiff jointly carried on a business of selling coconuts to exporters in based in Colombo. The 1st Defendant also admitted that his wife (the 2nd Defendant) wrote **"ළ1"** and that he signed it. It is significant to note that, when the 1st Defendant was cross examined , he admitted that, the sum of Rs. 723,503/- stated in **"ළ1"** was payable to the Plaintiff. He admitted that, the entries in the notebook marked **"ළ2"** were written by the 2nd Defendant. The 2nd Defendant gave evidence. She also claimed that the Plaintiff and the 1st Defendant were engaged in a joint business and denied having any connection with that business. It

also has to be noted that, neither Defendant claimed that threats were made or that duress was exerted on them to write and sign **"පැ1"**.

The learned District Judge entered judgment for the Plaintiff, as prayed for in the Plaint, against the 1st and 2nd Defendants, jointly and severally. The learned Trial Judge held that the Plaintiff has proved that, the sum of Rs. 723,503/- was due and owing to him from both the 1st and 2nd Defendants. He also held that, the Defendants had failed to establish any duress was exerted on them to write and sign **"පැ1"**.

It has to be stated here that, the Defendants did *not* plead prescription as a defence. *No* issue regarding prescription was framed at the trial. There was *no* suggestion made at the trial that the Plaintiff's action was prescribed. Thus, the learned Trial Judge, very correctly, did not consider whether the Plaintiff's action was prescribed, since he was not required to do so.

The Defendants appealed to the High Court. It is to be noted that, the Petition of Appeal does *not* claim that the Plaintiff's action was prescribed and that it should have been dismissed by the District Court for that reason.

However, at the hearing of the appeal, learned Counsel appearing for the Defendants submitted that, the Plaintiff's action was one for 'Goods Sold and Delivered' which, by operation of Section 8 of the Prescription Ordinance, was prescribed after the expiry of one year from the date of the last sale which took place on 30th March 2005 [as per the entries in the notebook marked **"පැ2"**, the last sale was on 30th March 2005]. On that basis, learned Counsel for the Defendants urged that, the High Court was entitled to frame, in appeal, an issue on Prescription on the basis that such an issue is *"a pure question of law"*.

At the commencement of their judgment, the learned Judges of the High Court have observed that *"On the aforesaid issues of the Respondent and what has been submitted on behalf of the Respondent as quoted above the significance of the letter P.01 to the Respondent's case is clear. It appears the case of the Respondent rests on this alleged promise given on P.01***"**.*"* Thus, the learned High Court judges correctly identified that, the Plaintiff's Cause of Action was upon the writing marked **"පැ1"** which, as set out above, has been pleaded to be an acknowledgement of liability and promise to pay Rs. 723,503/- given by the 1st and 2nd Defendants to the Plaintiff.

However, the learned High Court judges then went on to hold that, according to the entries in the notebook marked **"පැ2"**, the last transaction on the sale of coconuts was done on 30th July 2005. In arriving at this finding, the learned High Court judges, inexplicably, overlooked two part payments made *after* that date – *ie:* on 25th June 2006 and 28th August 2006 – despite having referred to these two part payments in their judgment. On the basis of their erroneous conclusion that the last transaction was on

30th July 2005, the learned High Court judges held that, the Plaintiff's claim for payment became prescribed one year thereafter – *ie:* on 30th July 2006 – by operation of Section 8 of the of the Prescription Ordinance. On this basis, the High Court held that, at the time **"පැ1"** was written on 28th August 2006, the Plaintiff's claim for payment *"was already prescribed"*. The learned High Court judges then decided to disregard the writing marked **"පැ1"** taking the view that it relates to contracts for the Sale of Goods and *"does not have an independent existence from those contracts of sale of goods and those contracts with sums due on them have been prescribed."*.

Having reached these determinations, the learned High Court judges held that, the Court was entitled to frame, in appeal, an "Issue of Law" as to whether the Plaintiff's action was prescribed on the face of the entries in the notebook marked **"පැ2"**. Thereafter, the High Court held that, the Plaintiff's action was prescribed and set aside the judgment of the District Court and dismissed the Plaintiff's action against both Defendants.

Before proceeding further with this judgment, it will be appropriate to briefly deal with the decision of the learned High Court judges to accept and decide on an issue regarding the prescription which was raised for the first time in appeal. As mentioned earlier, prescription was *not* pleaded as a defence in the Answer, *no* issue regarding prescription was framed at the trial and there was *no* suggestion made at the trial that the Plaintiff's action was prescribed.

In this connection, I should first refer to the fact that, the provisions in Sections 5 to 10 of the Prescription Ordinance only set out defences available to a Defendant in cases where the Plaintiff is proved to have slept over his rights for a specified period of time. The invocation of such a defence is optional and a Defendant may chose not to invoke a defence of prescription. The successful invocation of these provisions of the Prescription Ordinance in an action, will only bar the Plaintiff's remedy in that action and entitle the Defendant to have that action dismissed. However, the Plaintiff's rights are not extinguished and he can seek to assert his rights in some other form of proceeding or action which may be available to him. Thus, in RAVANNA MANA EYANNA vs. COMMISSIONER OF INLAND REVENUE [46 NLR 121 at p.125], Jayetilake J cited the English case of EX PARTE COWLEY and stated [at p.125], *" A debt is still due notwithstanding that the Statute of Limitations may have run against it, for the statute only bars the remedy and does not extinguish the debt.".* The case of PERERA vs. DON MANUEL [21 NLR 81] is an illustration of an instance where a debt that was prescribed by operation of Section 11 [the present Section 10] of the Prescription Ordinance, was held to be recoverable in an action founded on a 'proctor's lien'. De Sampayo J stated [at p.83], *" An action might not be brought by reason of section 11 of the Prescription Ordinance, but, as pointed out above, the present proceedings do not constitute an action within the meaning of the Ordinance. A valid lien may, however, be enforced even after the debt is barred ….. For it was explained in London and Midland Bank v.*

Mitchel that the statute only barred the personal action, but that an action might be maintained, notwithstanding the statute, to enforce any security for the debt by sale or otherwise. The law so expounded equally applies to our Ordinance of Prescriptions, and, in my opinion, the proctor's lien in this case can be enforced by applying for payment out of the fund in Court.".

In view of the aforesaid nature of the defences of prescription set out in Sections 5 to 10 of the Prescription Ordinance, the long standing rule is that such a defence should be raised at the trial so that the Plaintiff has a fair opportunity of meeting it by leading evidence to counter the defence that his claim in that action is time barred or, if the Defendant has shown the action to be plainly time barred, choosing to abandon the action and seek another avenue of relief without delay. As Chitty [Contracts 25th ed. at p.1051-1052] points out, *"….. the effect of limitation under the Limitation Act 1980 is merely to bar the plaintiff's remedy and not to extinguish his right. Limitation is a procedural matter, and not one of substance, and it has to be specially pleaded by way of defence."*. Further, it hardly needs to be stated that, a Plaintiff who has no inkling that the Defendant intends to rely on a defence on prescription, will be unfairly subjected to grave prejudice if he has to confront an issue of prescription raised for the first time in appeal, which he had no opportunity of countering at the trial.

Consequently, it is settled Law that, a party is prohibited from raising an issue regarding prescription for the first time in appeal. As Bonser CJ described in the early case of TERUNNANSE vs. MENIKE [1 NLR 200 at p.202], a defence of prescription is a *"shield"* and not a *"weapon of offence"*. Adopting the phraseology used by the learned Chief Justice over a century ago, it may be said that, if a Defendant chooses not to pick up the shield of prescription when he goes into battle at the trial, the 'rules of combat' are that he forfeits the use of that shield in appeal.

Weeramantry [The Law of Contracts] enunciates this rule when he states [at p.866], *"A plaintiff cannot rely upon a ground of exemption from the law of limitation raised for the first time in appeal….. Where the point is not taken in the lower court and no issue is framed upon the question, it is too late for the point to be taken in appeal, more especially when it is not taken in the petition of appeal."*. I should add that, the only exception to this rule may be where the issue of a time bar is a pure question of law.

The rule that, a defence of prescription cannot be raised for the first time in appeal is well established and has been referred to in several decisions of this Court for over a century. Thus, in the early case of PERERA vs. PUNCHAPPU [VII SCC 71], Fleming ACJ held that, an issue of prescription cannot be raised for the first time in appeal. A similar view was taken by Lascelles CJ in DINGIRI MENIKA vs. DINGIRI AMMA [5 Leader Law Reports 49]. In SUMANGALA vs. KONDANNA [5 CWR 211 at p.212], Bertram CJ, referring to an attempt to raise an issue regarding prescription for the first in appeal, stated *"It does not appear that this point was raised in the court below. No issue of fact or law was framed upon this basis. The question does not appear to have*

been argued, and the District Judge says nothing about it. It is raised for the first time in appeal. If it were necessary to seriously consider the question, the right course would probably be to send the case back to the District Court in order to allow the point to be formally raised, argued and decided. But it is perfectly clear that there is no substance in the point and there is no occasion for us to take that course.". In HOARE & CO. vs. RAJARATNAM [34 NLR 219], Dalton J stated [at p.222], *" ….. a plaintiff is not to be allowed to rely upon a ground of exemption from the law of limitation raised for the first time in the Appeal Court."*.

In BRAMPY APPUHAMY vs. GUNASEKERA [50 NLR 253] where the Defendant-Appellant sought to raise an issue on prescription for the first time in appeal, Basnayake J held that an issue regarding prescription cannot be framed in appeal stating [at p.255], *"An attempt was made to argue that the defendant's claim was barred by the Prescription Ordinance (Cap. 55). The plea is not taken in the plaintiff's replication. There is no issue on the point, nor is there any evidence touching it. The plaintiff was represented by counsel throughout the trial. In these circumstances the plaintiff is not entitled to raise the question at this stage. It is settled law that when, as in the case of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, the effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right, the court will not take the statute into account unless it is specially pleaded by way of defence.".*

Thus, the learned High Court judges erred when they accepted and decided on an issue on prescription which was raised for the first time in appeal. The learned High Court judges also erred when they considered that the decisions in ARULAMPIKAI vs. THAMBU [45 NLR 457] and SETHA vs. WEERAKOON [49 NLR 229] were authority for accepting an issue on prescription which is raised for the first time in appeal. The decision in SETHA vs. WEERAKOON was that a new issue may be raised in appeal only if it is *"a pure question of law"* and that a *"mixed question of law and fact"* cannot be raised for the first time in appeal. However, the issue of prescription in the present case was a `mixed question of law and fact' since the effect of the entries in the notebook marked **"පැ2"** and the nature and purport of the writing marked **"පැ1"** are, very obviously, `mixed questions of law and fact'. The decision in ARULAMPIKAI vs. THAMBU was that a new issue may be raised in appeal only if *"….. it might have been put forward in the Court below under some one or other of the issues framed."*. However, in the present case, there was no issue framed at the trial from which an issue of prescription could be `extracted' at the stage of appeal. For the sake of completeness, it may be useful to cite Amerasinghe J's formulation in RANAWEERA MENIKE vs. SENANAYAKE [1992 2 SLR 180] of the circumstances in which a new issue can be raised in appeal. His Lordship stated [at p.191], *"A matter that has not been raised before might, nevertheless, be a ground of appeal on which an appellate court might base its decision, provided it is a pure question of law; or, if the point might have been put forward in the court below under one of the issues raised, and the court*

is satisfied (1) that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial, and (2) that no satisfactory explanation could have been offered by the other side, if an opportunity had been afforded it, of adducing evidence with regard to the point raised for the first time in appeal.".

Although the judgment of the High Court is liable to be set aside by reason of the aforesaid error, the Plaintiff does not appear to have pressed this point in the present appeal and has not obtained leave to appeal on the question whether the High Court erred when it framed and decided an issue on prescription in appeal. However, since this appeal can be decided on the questions of law in respect of which the Plaintiff has obtained leave to appeal, I am not required to consider whether this palpable error of law on the part of the High Court entitles us to frame an appropriate question of law at this stage so as to ensure that justice is done.

This Court has given the Plaintiff leave to appeal on the questions of law set out in paragraph [17] (ii), (iii) and (vi) of the Plaintiff's Petition filed in this Court. I will reproduce these paragraphs *verbatim*:

(ii) Have the learned Civil Appellate High Court Judges erred in law by not taking judicial notice that a fresh period of prescription would commence from the date of partial payment of debt in the event such payment is made prior to the expiration of the prescribed period ?

(iii) Had the learned Civil Appellate High Court Judges misdirected themselves by not taking cognizance in respect of the payments made by the Defendants on 01-10-2005, 25-06-2006 and 28-08-2006, when the learned High Court Judges held that the Plaintiff's case on sums of money referred to in "පැ1" was already prescribed when they were embodied in that document ?

(vi) Was the Civil Appellate High Court in error by holding that the claim of the Plaintiff was based on a contract of sale of goods when the Defendants by document "පැ1" which comes within the scope of the provisions of Section 12 of the Prescription Ordinance, had acknowledged the sum due to the Plaintiff and undertook to settle the sum within a period of time stated therein ?

It should be stated that, the reference to Section 12 of the Prescription Ordinance in Paragraph [17] ((vi) must be an inadvertent error or typographical mistake since the contents of that paragraph make it plain that the reference is to Section 6 of the Prescription Ordinance. Therefore, I will proceed on the basis that the provision of the Prescription Ordinance referred to in this question of law, is Section 6.

I will now consider the third of these questions of law [set out in (vi) above] since the answer to that question will determine this appeal. The issue to be determined is simply whether this Plaintiff's action was one based on the failure to pay in breach of the writing marked **"පැ1"** *or* simply an action for "Goods Sold and Delivered".

The pleadings in the Plaint make it very clear that, this is *not* an action for `Goods Sold and Delivered' since the pleadings do not contain the hallmarks of an action for 'Goods Sold and Delivered' such as specific averments with regard to the date or dates of the sale or sales, the quantity or quantities of the goods which were sold, the price or prices, the place or places of sale and delivery, that the goods were delivered to the Defendants, and the date or dates when payment was due. The Plaintiff's issues confirm that, this is not an action for "Goods Sold and Delivered" since issues have not been raised with regard to the abovementioned facts and circumstances which are the building blocks of an action for "Goods Sold and Delivered".

Instead, as referred to at the commencement of this judgment, the relevant pleadings in the Plaint are: an averment regarding the execution of the writing marked **"පැ1"**; an averment that **"පැ1"** is an acknowledgement of liability and promise to pay Rs. 723,503/- by 30th June 2007; an averment that, the Defendants have, in breach of this agreement, failed to make payment; an averment that, the Defendants have not made payment though it was demanded; and an averment that, therefore, a Cause of Action has accrued to the Plaintiff to sue the Defendants for the recovery of this sum of Rs.723,503/-.

Thus, it is evident that, as mentioned earlier, the Plaintiff's Cause of Action is upon the writing marked **"පැ1"**, which has been pleaded to be an acknowledgement of liability and promise to pay and that, the basis of liability is the failure to pay in breach of the agreement set out in **"පැ1"**. The issues raised by the Plaintiff are on the same lines and make it clear that, the Plaintiff's Cause of Action is the failure to pay in breach of the acknowledgement of liability and promise to pay set out in the writing marked **"පැ1"**.

However, the learned High Court judges failed to see that, this action was filed upon the writing marked **"පැ1"** and that, the Plaintiff's Cause of Action was that the Defendants had, failed to pay the sum of Rs. 723,503/- in breach of the acknowledgement of liability and promise to pay set out in the writing marked **"පැ1"**. They erred when they proceeded on the basis that this was an action for 'Goods Sold and Delivered' and disregarded the writing marked **"පැ1"** mistakenly considering it to be an adjunct of contracts for the Sale of Goods with no *"independent existence"*.

Instead, what the learned High Court judges should have done is to examine the writing marked **"පැ1"** and ascertain whether it constituted a written promise, contract, bargain or agreement as described in Section 6 of the Prescription Ordinance. If that

examination showed that, **"පැ1"** does falls within the description of a written promise, contract, bargain or agreement as contemplated by Section 6, the period of prescription will be six years. If it does not meet the requirements of Section 6, the period of prescription will be one year under Section 8 of the Prescription Ordinance or three years under Section 10, depending on the other evidence before the Court. [For purposes of clarity, I should mention here that, in answering the question of law which is being considered, these matters have to be considered on the footing that the issue of prescription was properly before the High Court. However, as determined earlier in this judgment, in fact, the High Court erred when it ventured to frame an issue on prescription in appeal.]

When determining whether **"පැ1"** constitutes a written promise, contract, bargain or agreement as described in Section 6 of the Prescription Ordinance, it has to be kept in mind that, Section 6 only requires that, the promise, contract, bargain or agreement should be in writing. No special form or manner of such writing is specified. As Vythialingam J observed in CEYLON INSURANCE CO.LTD vs. DIESEL AND MOTOR ENGINEERING COM. LTD [79 NLR 5 at p.8]*, "For the purpose of constituting a written promise, contract, bargain or agreement no special form of writing is required."*. Instead, what is essential is that, the writing must contain a promise by the Defendant to pay an identifiable sum to the Plaintiff. This promise may be contained in one document or be evidenced by more than one document or by an exchange of documents. Thus, in ADAMJEE LUKMANJEE AND SONS LTD vs. ABDUL CAREEM HALLAJE [63 NLR 407], a letter written by the Defendant in which he acknowledged that a sum of Rs. 4,300/- is due from him to the plaintiff and stated *"We shall definitely pay this bill by the end of this month "* was held to be a written promise to pay that sum which falls under Section 6 of the Prescription Ordinance; In URBAN DISTRICT COUNCIL, MATALE vs. SELLAIYAH [33 NLR 14], an exchange of letters by which the Plaintiff requested the Defendant to pay a specified sum on account of some construction work and the Defendant agreed to pay a lesser sum, was held to be a written promise falling under Section 6 [then Section 7] of the Prescription Ordinance; and in CEYLON INSURANCE CO.LTD vs. DIESEL AND MOTOR ENGINEERING COM. LTD, a written offer to carry out repairs to a motor car with an estimate of the cost sent by the Plaintiff and a letter written by the Defendant agreeing to pay a lesser sum specified by him was held to be a written promise to pay the lesser sum which falls under Section 6 of the Prescription Ordinance.

When the writing marked **"පැ1"** is examined, it is seen that, it states, "ඔහුට රුපියල් හත් ලක්ෂ විසි තුන් දහස් පන්සිය තුනක මුදලක් (723,503/-) ගෙවීමට ඇති බවත් එකී සම්පුර්ණ මුදල 2007.06.30. දිනට පෙර ගෙවා අවසන් කරන බවට පොරොන්දු වෙමි." The 1st Defendant has, admittedly, signed **"පැ1"**. Thus, by **"පැ1"**, the 1st Defendant has expressly acknowledged his liability to pay, a sum of Rs.723,503/- which was due to the Plaintiff as at 28th August 2006, and has promised to pay this sum to the Plaintiff by 30th June 2007. The 1st Defendant has invested a measure of formality on

the writing marked **"පැ1"** by placing his signature on stamps to the value of Rs.800/-. His signature has been witnessed by another person. The evidence of the 1st Defendant and the 2nd Defendant make it clear that, when the 1st Defendant signed **"පැ1"**, he did so with the deliberate intention of making a promise to pay Rs.723,503/- to the Plaintiff by 30th June 2007.

It is to be noted that, the facts in the present case are similar to the facts in ADAMJEE LUKMANJEE AND SONS LTD vs. ABDUL CAREEM HALLAJE where the Plaintiff sold 500 bags of cement to the Defendant on credit terms. When the Defendant delayed in making payment, he gave the Plaintiff the aforesaid letter promising to pay Rs.4,300/- by the end of the month. As mentioned earlier, it was held that, the letter amounted to a written promise falling under Section 6 of the Prescription Ordinance. K.D. De Silva J held [at p.408], *"In the letter P3 there is not only an acknowledgment that the amount is due but also a clear promise to pay this amount within a month. I would, therefore, construe this letter as a written promise to pay the amount: accordingly, Section 6 and not Section 8 of the Prescription Ordinance applies to the facts of this case.."*

I make a similar determination in the present case and hold that, the contents of the writing marked **"පැ1"** and the circumstances of its execution make it a written promise within the meaning of Section 6 of the Prescription Ordinance. As stated earlier, this action has been filed upon the writing marked **"පැ1"** which is dated 28th August 2006. The Plaint was filed on 15th October 2007, which is long before the expiry of the six year period specified in Section 6. Thus, this action is not prescribed.

Accordingly, I hold that, the learned High Court judges erred when they held that, the Plaintiff's action against the 1st Defendant was prescribed and when they set aside the judgment entered by the District Court against the 1st Defendant.

However, the learned High Court Judges were correct when they held that, there was no evidence to establish that the 2nd Defendant had any personal liability with regard to the transactions relating to this action and set aside the judgment entered in the District Court against the 2nd Defendant. In this regard, it is to be noted that, the 2nd Defendant gave evidence and denied that she had any connection with the business of the 1st Defendant. There was no reliable evidence placed before the District Court which established that, the 1st and 2nd Defendants were jointly carrying on the business of trading in coconuts. The mere fact that, the 2nd Defendant wrote the entries in the notebook marked **"පැ2"** or wrote **"පැ1"** for the 1st Defendant to sign it, cannot make the 2nd Defendant a partner in the business of the 1st Defendant. There was no reliable evidence to establish that, the 2nd Defendant has any personal liability to pay the monies claimed by the Plaintiff. Most significantly, the 2nd Defendant has not signed the writing marked **"පැ1"** upon which the Plaintiff has based his action.

For the reasons set out earlier, I answer the aforesaid third question of law in the affirmative in respect of the 1st Defendant only. In view of this determination, there is no need to consider the other two questions of Law.

Accordingly, the judgment of the High Court is varied in the following manner: (i) the judgment of the High Court dismissing the Plaintiff's action against the 1st Defendant, is hereby set aside and the judgment entered by the District Court in favour of the Plaintiff against the 1st Defendant, is hereby affirmed; (ii) the judgment of the High Court dismissing the Plaintiff's action against the 2nd Defendant, is hereby affirmed.

For purposes of further clarity, as a result of what I have held above, the Plaintiff has succeeded in his case against the 1st Defendant and has obtained judgment as prayed for in the Plaint against the 1st Defendant. The Plaintiff has failed in his case against the 2nd Defendant and the action against the 2nd Defendant stands dismissed. In the circumstances of this case, I make no order with regard to costs.

Judge of the Supreme Court

Priyantha Jayawardena, 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

Panambarage Jude Fernando
No.154, Chilaw Road
Manaweriya
Kochchikade.

Plaintiff

S.C. Appeal No.175/2010

WP/HCCA/GPH 177/03

D.C. Negombo Case No.5312/L

Vs.

1. Hetti Thanthirige Anesta Malani Fernando
2. Jayakodige Jerrad Fernando
Both of No.46
Owitiyawatte
Kochchikade.

Defendants

And Between

Panambarage Jude Fernando
No.154, Chilaw Road
Manaweriya
Kochchikade.

Plaintiff-Appellant

Vs.

1. Hetti Thanthirige Anesta Malani Fernando
2. Jayakodige Jerrad Fernando
Both of No.46
Owitiyawatte
Kochchikade.

Defendants-Respondents

And Now

In the matter of an appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provinces) (amendment) Act No.54 of 2006.

Panambarage Jude Fernando
No.154, Chilaw Road
Manaweriya
Kochchikade.

Plaintiff-Appellant-Petitioner

Vs.

1. Hetti Thanthirige Anesta Malani Fernando
2. Jayakodige Jerrad Fernando
Both of No.46
Owitiyawatte
Kochchikade.

Defendants-Respondents-Respondents

Before : Sisira J.De Abrew, J.
Upaly Abeyrathne, J.
Anil Gooneratne, J.

Counsel : Kuvera de Zoysa PC for the Plaintiff-Appellant.
Athula Perera for the Defendant-Respondents.

Written submission
filed on : 6.4.2011 by the Plaintiff-Appellant
25.7.20111 by the Defendant-Respondent

Argued On : 27.07.2016, 28.07.2016 and 04.08.2016

Decided on : 17.1.2017

Sisira J. De Abrew, J.

This is an appeal by the plaintiff-appellant-petitioner (hereinafter referred to as the plaintiff-appellant) against the judgment of the Civil Appellate High Court dated 29.10.2009 wherein the Judges of the Civil Appellate High Court affirmed the judgment of the learned District Judge. The learned District Judge by his judgment dated 25.04.2012, held in favour of the 1st defendant-respondent-respondent (hereinafter referred to as the 1st defendant). Being aggrieved by the judgment of the Civil Appellate High Court, the plaintiff-appellant has appealed to this Court. This Court by its order dated 8.12.2010 granted leave to appeal on the questions of law set out in paragraphs 9(b), (c) and (d) of the petition dated 23.03.2010 which are set out below –

b) Have the learned District Judge and the learned High Court Judge erred in deciding that the deed P2 is one which is executed as a mere trust and that it is not a legally valid document which transfers beneficial interest of property unto the Petitioner thus wrongfully analysing the law of trust as opposed to the law of ownership of property?

c) Based on 8 (b) above have the learned Judges of the District Court and the High Court wrongly analysed and misinterpreted section 83 of the Trust Ordinance and section 2 of the Prevention of Frauds Ordinance.

d) Have the learned judges failed to analyse the evidence which leads to the conclusion that all ingredients constituting the concept of the law on ownership of property has been established by the Petitioner in his evidence thus entitling him to the reliefs prayed for in the plaint?

The facts of this case may be briefly summarised as follows:-

The original owner of the property in suit was Maria Fernando and after her death, the 1st defendant Anesta Malani Fernando became the owner. The 1st defendant by Deed No.18580 dated 12.09.1995, transferred the property to Harold Appuhamy on a consideration of Rs.50,000/-. Thereafter, Harold Appuhamy and the 1st defendant on 10.10.1995, by Deed No.626 dated 10.10.1995 attested by Dilrukshi Fernando, Notary Public (P2), transferred the property in suit to the plaintiff-appellant. On the same day (10.10.1995) the plaintiff-appellant by Deed No.627 dated 10.10.1995

attested by Dilrukshi Fernando, Notary Public leased the property in suit to the 1st defendant for a period of one year. The 2nd defendant-respondent-respondent (hereinafter referred to as the 2nd defendant) is the husband of the 1st defendant. Since the 1st defendant and the 2nd defendant failed to handover the vacant possession of the property is suit, the plaintiff-appellant filed this action in the District Court seeking inter alia, a declaration of title; ejectment of the 1st and the 2nd defendants; and vacant possession of the property in suit.

The 1st defendant and the 2nd defendant filed answer denying the claims of the plaintiff-appellant. The position of the 1st defendant and the 2nd defendant was that the 1st defendant did not, by Deed No.18580, transferred the beneficial interests to Harold Appuhamy; that it was only a monitory transaction; that she (the 1st defendant) obtained Rs.50,000/- from Harold Appuhamy with an oral agreement that Harold Appuhamy would retransfer the property once the amount of Rs.50,000/- is repaid; that it was not an outright transfer; that Harold Appuhamy wanted back Rs.50,000/-; that 1st defendant had to seek Rs.50,000/- in order to repay the loan obtained from Harold Appuhamy; that the property in suit was transferred to the plaintiff-appellant by Deed No.626 and obtained Rs.50,000/- from the plaintiff-appellant; that the amount of Rs.50,000/- was paid back to Harold Appuhamy; that the property in suit was kept on security; that she (the 1st defendant) never transferred the beneficial interests of the property to the plaintiff-appellant.

Learned President's Counsel for the plaintiff-appellant referring to the issue No.12 submitted that the answer given by the learned District Judge to the said issue was wrong. Issue No.12 was to the effect that the agreement at the time of execution of Deed No.18580 between the 1st defendant and Harold Appuhamy was that Harold Appuhamy would be retransfer the property in suit to the 1st defendant once the amount of Rs.50,000/- with interest is paid back. The learned District Judge has answered the issue in the following language: "There has been an agreement to retransfer the property". Learned President's Counsel for the plaintiff-appellant submitted that the said agreement was contrary to Section 2 of the Prevention of Frauds Ordinance and invalid. Learned President's Counsel for the plaintiff-appellant relying on Section 91 and 92 of the Evidence Ordinance contended that no oral evidence could be led to contravene what is stated on the face of Deed No.626. He has taken up this contention in paragraph 34 of his written submissions. I now advert to this contention. He relied on the judicial decision in the case of **Perera vs. Fernando** 17 NLR 486 where it was held that -

> "where a person transferred a land to another by a Notarial deed purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage and that the transferee agreed to re-convey the property on payment of money advanced."

Learned President's Counsel for the plaintiff-appellant also relied on the judgment in the case of **Serimuttu vs. Thangavelanthan** 55 NLR 529 where the Privy Council held that in formal agreement relied on by A amounted not

to a trust but to a contract for the transfer of immovable property and was therefore invalid as it contravened the provisions of Section 2 of the Prevention of Frauds Ordinance.

In considering the contention of the learned President's Counsel, it is necessary to consider Section 83 of the Trust Ordinance which reads as follows:-

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

As stated by Dr. L.T.M. Cooray in his book on Trust (page 129) the pivotal words in the Section are "intended to dispose of the beneficial interest in the property".

If the principle set out in the above legal literature is to be followed how can an owner of the property in a case under Section 83 of the Trust Ordinance prove that he did not intend to dispose of the beneficial interest in the property?

In order to prove the legal principle discussed in Section 83 of the Trust Ordinance, it is necessary to lead oral evidence between the vendor and the vendee at the time of the Deed of Transfer was executed. If evidence relating to attendant circumstances that the vendor did not intend to transfer the beneficial interest is shut out, then the purpose of Section 83 of the Trust

Ordinance will be rendered nugatory. In this connection I would like to consider the judicial decision in **Muttammah vs. Thyagarajah** 62 NLR 559. The facts as set out in the headnote of the said judgment are as follows:-

> *In September1941, P. who was entitled to the entirety of a land, donated. to T. his son, an undivided half-share of the property. In October 1954, T donated the same half-share back to his father P to enable him, the more easily, to raise a loan of Rs. 20,000 on a mortgage of the entire land. No reservation was made: in To favour in the deed of gift of 19-54, but by parolevidence T proved interalia that he continued to remain in possession of his share of the land and 'that: it was expressly understood between the parties that the share should be reconvened to after payment of the mortgage debt. The loan of Rs. 20,000 was never raised, and P died in March 1956. In the present action instituted by T against the executrix de son tort of F's estate, T claimed that the defendant held the half-share in trust for him.*
>
> *It was held that the plaintiff was entitled under section 83 of the Trusts Ordinance to lead parol evidence of " attendant circumstances" at or about the time of the execution of the deed showing that although T transferred his half-share to P in 1954 by what was in form an absolute conveyance it was the intention of the parties that T should retain the beneficial interest in the property and that what was conveyed was only the nominal ownership to P.*

G.P.S. de Silva CJ in the case of **Premawathi vs. Gnanawathi** [1994] 2 SLR 171following the judicial decision in **Muttammah vs. Thyagarajah** (Supra) held as follows:-

"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 section 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 six 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. 15,000/-, 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."

In **Dayawathi and Others vs. Gunaskera and Another** [1991] 1SLR 115 the facts set out in the headnote are as follows:-

The Plaintiff bought the property in suit in 1955. He started construction work in 1959 and completed in 1961. The Plaintiff, a building contractor, needed finances in 1966 and sought the assistance of the 2nd defendant with whom he had transactions earlier. This culminated in a Deed of Transfer in favour of the 1st Defendant, who is the mother of the 2nd Defendant and the 2nd Defendant being a witness to the Deed. The property was to be re-transferred within 3 years if Rs. 17,000/- was paid. The Plaintiff defaulted, in his action to

recover the property, the Plaintiff succeeded in the trial Court in establishing a constructive trust. The Court of Appeal reversed the judgment on the sole ground that the agreement was a pure and simple agreement to re-transfer."

His lordship Justice Dheeraratne in the above case held as follows:

"(i) The Prevention of Frauds Ordinance and Section 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.

(ii) Extrinsic evidence to prove attendant circumstances can properly be received in evidence to prove a resulting trust."

I am in respectful agreement with a view expressed by His Lordship Justice Dheeraratne. After considering the above legal literature, I would like to follow the principle laid down in the case of **Dayawathi and Others Vs. Gunasekera and Another** (Supra) and I hold that Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not operate as a bar to lead parole evidence to prove a constructive trust and to prove that the transferor did not intend to dispose of beneficial interest in the property.

For the above reasons I reject the above contention of learned President's Counsel for the plaintiff-appellant.

It was the contention of the plaintiff-appellant before us that Deed No.626 dated 10.10.1995 was an outright transfer and the plaintiff-appellant by virtue of the said deed has become the rightful owner of the property in suit.

It was the contention of the defendant-respondents that the 1st defendant by Deed No.626 did not transfer the beneficial interest of the property in suit to the plaintiff-appellant and that the plaintiff-appellant held the paper title of the property subject to a constructive trust in favour of the 1st defendant. Therefore the most important question that must be decided in this case is whether the 1st defendant by Deed No.626 has transferred beneficial interest of the property in suit to the plaintiff-appellant.

In order to prove the contention of the plaintiff-appellant, he, among other things, relied on the evidence that is to say that prior to the execution of Deed No.626, he made an advance payment of Rs.100,000/- to the 1st defendant. He specifically states that on 20.01.1995 he paid an advance of Rs.50,000/- to the 1st defendant for the purpose of purchasing this property. The date of Deed No. 626 is 10.10.1995. Although, he takes

up the above position, the Notary Public in her attestation in Deed No.626 does not state this fact. The Notary Public Dilrukshi Fernando in her attestation states that an amount of Rs.50,000/-which was the consideration of the deed was paid in her presence. The plaintiff-appellant was specifically questioned as to why he did not tell the Notary Public that he had paid Rs.100,000/- to the 1st defendant. He failed to give an answer to this question (vide 78 of the brief). When the above evidence is considered, his evidence that he paid Rs.100,000/- as an advance payment to the 1st defendant prior to the execution of Deed No.626 cannot be accepted and no reliance can be placed on his evidence.

The Deed No.626 was executed on 10.10.1995. The plaintiff-appellant, in his evidence at page 69 of the brief, states that even after the execution of Deed No.626 on 11.10.1995, he paid Rs.100,000/- to the 1st defendant. If the Deed No.626 was an outright transfer, there is no obligation on the part of the plaintiff-appellant to pay further sum of money. Thus it can be contended that the plaintiff-appellant has not received the beneficial interest of the property in suit by Deed No.626. During the cross examination of the 1st defendant the plaintiff-appellant produced promissory notes marked P9 to P12 (vide page 158 of the brief). The details of P9 to P11 are as follows:--

Promissory Note	**Date**	**Amount**
P9	16.10.1995	Rs.100,000

P10	26.12.1995	Rs.52,000
P11	25.03.1996	Rs.40,000

The above details demonstrate that the plaintiff-appellant had made payments to the 1st defendant after the execution of Deed No.626 (P2) dated 10.10.1995. The position of the plaintiff-appellant is that by Deed No.626 (P2) he has received the beneficial interest of the property in suit and the 1st defendant had transferred the same to him (plaintiff-appellant). If he has got the full title of the property in suit by Deed No.626 and the 1st defendant has transferred the beneficial interest to him, why did he make the above payments to the 1st defendant after the execution of the deed?

The above evidence demonstrates that the plaintiff-appellant indirectly has admitted that he had not received the beneficial interest of the property in suit. Thus, from the evidence of the plaintiff-appellant itself conclusion can be reached that the plaintiff-appellant had not received the beneficial interest of the property in suit.

On the other hand what does the 1st defendant say on the promissory notes? She says that the plaintiff-appellant obtained her signature on empty pro notes as she could not pay the interest on the loan of Rs.50,000/- that she obtained from the plaintiff-appellant. The above evidence establishes that the 1st defendant had only obtained a loan and beneficial interest had not been transferred when the Deed No.626 (P2) was executed.

According to Deed No.626 (P2) Harold Appuhamy transferred the property to the plaintiff-appellant. For Harold Appuhamy to transfer the property he should be the owner of the property. But, what does Harold Appuhamy, in his evidence say on this point? He says that the 1st defendant requested a loan from him and he granted the loan of Rs.50,000/- keeping the deed of transfer (Deed No.18580) as a security (vide pages 185-190 of the brief). Harold Appuhamy, at page 186 of the brief, specifically states that he did not purchase the property in suit. He further states, in his evidence, that it was a transaction between the 1st defendant and him. This evidence clearly shows that Harold Appuhamy has not become the owner of the property and the 1st defendant had not passed the beneficial interest of the property in suit to Harold Appuhamy and that he (Harold Appuhamy) was only holding the property in suit on a constructive trust on behalf of the 1st defendant. If Harold Appuhamy was not the owner of the property in suit and he was holding a property on a constructive trust on behalf of the 1st defendant, the plaintiff-appellant cannot claim that he became the owner of the property in suit and the beneficial interest was transferred to him by Deed No.626 (P2). Therefore, the contention of the plaintiff-appellant that by Deed No.626 (P2) he became the owner of the property in suit fails. If the plaintiff-appellant did not become the owner of the property in suit, Deed No.627 (P3) whereby he is alleged to have leased the property in suit to the 1st defendant becomes an invalid deed.

The plaintiff-appellant claims that on 19.12.1996 the 1st defendant and the 2nd defendant both left the property in suit and they re-entered the property on 21.12.1996. The plaintiff-appellant has led the evidence of Grama Sevaka to prove that the 1st defendant and the 2nd defendant handed over the keys of the house on 19.12.1996 in his presence. The 1st defendant in his evidence admitted that she handed over the keys of the house to the Grama Sevaka but came back to the house on the same date. She vehemently rejected the suggestion that she left the premises. Her statement made to the police to prove that she had left the house on 19.12.1996 was produced marked P5. She admits that she made a statement P5 to the police but denies having made the particular statement that she left the house on 19.12.1996. I have carefully gone through her evidence and in my view it is difficult to consider that she (1st defendant) had left the house on 19.12.1996. She says in her evidence that the plaintiff-appellant on several occasions threatened her to leave the house but she did not leave.

There is also evidence that she (the 1st defendant) paid assessment tax to the relevant local authority even after the execution of Deed No.626; that she continued to occupy the house after the execution of Deed No.626 (P2); that she paid notary's fees when Deed No.626 was executed; that she attempted to get a loan from the State Mortgage Bank to repay the money obtained from the plaintiff-appellant.

Upon a consideration of the totality of evidence led at the trial I observe the following facts.

1) Harold Appuhamy says in his evidence that he only granted a loan of Rs.50,000/- to the 1st defendant and he did not purchase the land. From his evidence it is clear that he only kept the Deed No.18580 as a security; that the 1st defendant did not pass the beneficial interest of the land in suit to Harold Appuhamy; and that Harold Appuhamy held the property in suit on a constructive trust on behalf of the 1st defendant. Therefore, Harold Appuhamy by Deed No.626 could not have transferred the beneficial interest of the property in suit to the plaintiff-appellant.

2) The 1st defendant continued to occupy the property in suit after the execution of Deed No.626 dated 10.10.1995.

3) The plaintiff-appellant gave money even after the Deed No.626 (P2) was executed to the 1st defendant.

4) The plaintiff-appellant got the signature of the 1st defendant on empty promissory notes when the 1st defendant could not pay the interest on the money given by the plaintiff-appellant. This shows that the plaintiff-appellant had granted a loan to the 1st defendant keeping the property in suit as a security.

5) The plaintiff-appellant admitted in evidence that the value of the property in suit in January 1995 was Rs.340,000/-. Valuation report submitted by Joseph indicates that the value of the property in March

1996 was Rs.750,000/- (vide Joseph's evidence at pages 191-197) The consideration of the Deed No.626 dated 10.10.1995 was only Rs.50,000/-.

6) Valentine Appuhamy on the request of the 1st defendant made an application to the State Mortgage Bank with the consent of the plaintiff-appellant to get a loan in respect of the property in suit to repay the loan obtained from the plaintiff-appellant. The plaintiff-appellant in fact gave a copy of the relevant deed to Valentine Appuhamy. The bank approved a loan of Rs.350,000/-. But later the plaintiff-appellant withdrew his consent that he gave to obtain the loan. Therefore, the loan of Rs.350,000/- could not be obtained from the bank.

When I consider the entire evidence led at the trial and submissions of both parties, I am of the opinion that the 1st defendant by Deed No.18580 and/or Deed No.626 have not transferred the beneficial interest of the property in suit to the plaintiff-appellant and that the plaintiff-appellant is holding the property in suit on a constructive trust on behalf of the 1st defendant and that the plaintiff-appellant cannot be granted the relief asked for in his plaint and that more reliance can be placed on the case of the 1st and the 2nd defendants. I therefore hold that there are no reasons to disturb the judgments of the District Court and the Civil Appellate High Court. In view of the conclusion reached above, I answer the questions of law raised by the plaintiff-appellant in the negative.

For the aforementioned reasons, I hold that there is no merit in the appeal of the plaintiff-appellant, I affirm the judgments of the District Court and the Civil Appellate High Court and dismiss this appeal with costs.

The Learned District Judge in his judgment had granted 8 weeks' time from the date of his judgment to the 1st defendant to pay Rs.80,000/- and its interest to the plaintiff-appellant. This date should be read as the date that the learned District Judge pronounces the judgment of this Court in the District Court. However, the learned District Judge has a discretion to extend the above time period.

Appeal dismissed.

Judge of the Supreme Court

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

S.C. (LA) Appeal 175/2015

SC/HCCA/LA/187/2014
Civil Appellate High Court Ratnapura
SP/HCCA/RAT/29/2012(FA)

D.C. Ratnapura 16554/Money

In the matter of an application for Leave to Appeal made in terms of Article 127 of the Constitution read with Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006

Bank of Ceylon
York Street,
Colombo 1.

PLAINTIFF

Vs.

Aswedduma Tea Manufactures (Pvt) Ltd.,
No. 28, Park Road,
Jayanthipura,
Battaramulla.

DEFENDANT

AND BETWEEN

Bank of Ceylon
York Street,
Colombo 1.

PLAINTIFF-APPELLANT

Vs.

Aswedduma Tea Manufactures (Pvt) Ltd.,
No. 28, Park Road,
Jayanthipura,
Battaramulla.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Bank of Ceylon
York Street,
Colombo 1.

PLAINTIFF-APPELLANT-PETITIONER

Vs.

Aswedduma Tea Manufactures (Pvt) Ltd.,
No. 28, Park Road,
Jayanthipura,
Battaramulla.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: Priyantha Jayawardena P.C., J.

Anil Gooneratne J. &

Vijith K. Malalgoda P.C., J.

COUNSEL: Shaheeda Barrie S.S.C with Sureka Ahamed S.C
For the Plaintiff-Appellant-Petitioner

Defendant-Respondent-Respondent is absent and unrepresented

WRITTEN SUBMISSIONS OF THE APPELLANT FILED ON: 14.01.2016

ARGUED ON: 06.10.2017

DECIDED ON: 27.10.2017

GOONERATNE J.

The Plaintiff-Appellant-Petitioner is the Bank of Ceylon. This was an action filed in the District Court of Ratnapura by the Bank of Ceylon based on a temporary over draft facility granted to the Defendant-Respondent-Respondent (Aswedduma Tea Manufactures (Pvt) Ltd – Tea Company) to recover a sum of Rs. 4,818,582/52 with interest at 26% per annum from 22.08.1999.

Plaintiff-Appellant-Petitioner (hereinafter referred to as Plaintiff) had been engaged with the banking business with the Defendant-Respondent-Respondent (hereinafter referred to as Defendant) for some time and the Defendant maintained current account bearing No. 000310209724 in the Ratnapura Super Grade Branch of the Bank. Plaintiff Bank granted over draft facilities to the Defendant and the Defendant by letter marked P1 dated 21.11.1998 requested for a temporary over draft facility in a sum of Rs. 4.5 million for a period of three months and the said sum was paid from time to time by the bank to the Defendant. The Defendant submitted several cheques and withdrew money which was not repaid to the Plaintiff bank. As the Defendant defaulted in settling the dues the Plaintiff Bank filed action. Parties

proceeded to trial on 5 admissions and 17 issues. However the District Court dismissed the action on the following main grounds.

(a) There was no written contract between parties to grant over draft facilities, nor were the cheques presented to the Bank by the Defendant, produced at the trial.

(b) In the absence of clear evidence to prove that the statement of accounts marked P3 – P13, the fact that the Plaintiff Bank paid money to the Defendant by way of over drawing the account was not proved.

The Civil Appellate High Court affirmed the Judgment of the learned District Judge and set aside the portion of the District Court Judgment pertaining to prescription. Supreme Court on 12.10.2015 granted Leave to Appeal on questions of law referred to in paragraph 17 (1 – 15) of the Petition of Appeal. The journal entry of the said date indicates that the Senior State Counsel was permitted to select specific questions of law. Respondent party was absent and unrepresented. Accordingly the Senior State Counsel had selected 6 questions of law. This court having looked at the questions, is in a position to answer same to cover the position relied upon by the District Court and the Civil Appellate High Court.

The 1st question of law states as follows:

(1) Did their Lordships of the High Court of Civil Appeal misdirect themselves and err in law by misconstruing 'issue No. 1' stating that the Appellate Bank had essentially presented a case on a written

agreement? Issue No. 1 raised in the original court was whether Plaintiff Bank provided over draft facilities. I agree with the submissions of learned Senior State Counsel that this issue does not involve a written contract at all. It merely suggest that the Bank entered into a contract with the Defendant to grant over draft facilities. As such the High Court has erred in law and fact, by concluding that the District Court cannot be faulted for demanding the presentations of a written agreement in relation to the over draft facilities, since the Appellant's case was not based on the existence of a written contract.

(2) The 2nd question of law is whether the Judges of the Civil Appellate Court erred in law and act contrary to the weight of the evidence, by failing to hold that a legally binding agreement arose between the parties for the provision an overdraft facility by the Appellant Bank to the Respondent.

The important aspect of this case is that over draft facilities results in an existence of an oral or unwritten agreement between parties. Presenting a written agreement is not essential.

It is well established that, from a legal point of view, an over draft is a loan granted by the bank to the customer. When an account is overdrawn, the customer becomes the debtor and the Bank, the creditor. A point is made that a bank is obliged to let its customer overdraw only if it has contractually undertaken to do so. This would not mean only a written contract. The High

Court has erred in considering the basic tenants of the law of contracts. The formation of a contract depends an offer and acceptance. There is a meeting of minds. P1 document by the Defendant is a written requests for overdraft facility (TOD). Document P2 and P15 are Bank memorandums which prove that the customers facility has been approved by the Bank. The Defendant made a written request by P1 which is the offer. P2 & P15 are the acceptance of the Plaintiff Bank. What more do you need?

Another way to look at this problem is that the cheques offered by the Defendant would amount to an offer. If there are insufficient funds in the current A/C the bank could even ignore the cheques and reject payment. However if the bank honours the payment order of the Defendant by way of cheques, it will be deemed to have accepted when it executes the customers payment order, in this case the several cheques.

The position could be further elaborated by the following case law citied by the learned Senior State Counsel.

Peter Royston Voller V Lloyds Bank Plc No. B3/99/1177 Justice Wells of the Court of Appeal (Civil division) held that "In my judgment, the position is very simple and well established as a matter of banking law and practice. It is this. If a current account is opened by a customer with a bank with no express agreement as to what the over draft facility should be, then, in circumstances where the customer draws a cheque on the account which causes the account to go into over draft, the customer, by necessary implication, request the bank to grant the customer an overdraft of the necessary amount, on its usual terms as to interest and other charges. In deciding to honor the cheques the bank by implication accepts the officer".

Barclays Bank Ltd V. W.J. Simms son and Cooke (southern) Ltd and another (1977 B. No. 679) Rober Goff J held that:

"In other circumstances the bank is under no obligation to honour its customer's cheques. If however a customer draws a cheque on the bank without funds in his account or agreed over draft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide over draft facilities sufficient to meet the cheque. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. If however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed over draft facilities; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the Payee on the cheque".

Defendant never denied an existence of a contract, except a written contract. The Civil Appellate Court has failed to appreciate an existence of an unwritten agreement as observed above.

The 3rd question of law is on estoppel. Defendant is estopped in denying liability. The Defendant having overdraw the current account and having benefited from the facility cannot be heard to deny liability.

In Barclays Bank Ltd V. W.J. Simms son and Cooke (southern) Ltd and another (1977 B. No. 679) Rober Goff J held that:

"If a customer draws a cheque when there is insufficient funds in his account and without making prior arrangements with the bank, the position is that the drawing of the cheque is a request for overdraft facilities. The bank has no obligation to grant such facilities or to honour the cheque. It is free to choose. If the bank chooses to pay, this creates an enforceable obligation against the customer. By these means the banker pays with a mandate".

The 4th question of law is whether the Judges of the Original Court misconstrued the best evidence rule?

I do agree with the learned counsel for the Bank that the bank does not rely on Section 50 of the Civil Procedure Code, which require a litigant who relies on a document to produce the document or even annex it to the plaint. This was an arrangement between the Plaintiff Bank and the Respondent. This being a over draft facility the bank need not annex a document or the several cheques since there is evidence of the several bank statements placed and produced before court. These documents i.e the statement of A/c were produced in court and had been compared by witness No. 2 for the bank with the relevant ledger. This is not an action based on a cheques but on over draft facilities. In this regard I note the provisions contained in Section 53 of the Civil Procedure Code.

In *King Vs. Peter Nonis 49 NLR 16*

"In any case what is the meaning of "best evidence" in the English law sense? It certainly does not, and never did, mean that no other direct evidence of the fact in dispute could be tendered. Its meaning is rather that the best evidence must be given of which the nature of the case permits. If one were to apply that meaning of the phrase to the present case, it might be held that the entry in the register ought to have been produced, since it would appear from the evidence of the first wife herself that the marriage was registered. But the "best evidence" rule in England has been subjected to a whittling-down process for over a century, and today it is not true that the best evidence must be given, though its non-production where available may be a matter for comment and may affect the weight to be attached to the evidence which is produced in its stead."

I hold that the best evidence is the statement of accounts, which was compared with the original ledger, by the witness for the Bank.

Question No. 5 reads as "did the learned High Court Judge err in holding that secondary evidence was produced instead of primary evidence?

Plaintiff Bank's case is based on over draft facility. It is the position of the Bank that it need to prove that the account was over drawn. Bank statements P3 to P13 were produced to court without any objection, when it was produced. Further witness No. 2 for the Bank fortified the position of the Bank on statements by giving evidence and comparing P3 – P13 with the original ledger. Bank statements are in the custody of the A/C holder. As such secondary evidence could be received in evidence.

If there was a discrepancy in the monthly statement the customer is required to notify the bank immediately. Defendant Company did not give any evidence nor did it complain of any fault in A/C etc. In fact the Defendant benefited but a huge monetary loss had been caused to the bank, by the Defendant over drawing the account. There cannot be an objection for leading secondary evidence. Further the statements produced at the trial is permissible to be led in terms of Section 90A of the Evidence Ordinance.

Question No. 6 did the High Court err in failing to take cognisance of the fact that there was no evidence in denial.

Respondent never led evidence to establish their position. Law permits to draw necessary inferences in the event of the Respondent's failure to lead evidence.

Rodrigo Vs. St. Anthony's Hardware Stores 1995 (1) SLR 7

"The 1st Defendant did not give evidence and the court is entitled to draw the presumption that had he given evidence; such evidence would have been unfavourable to the case of the Defendants – see Section 114 illustrations (f) of the Evidence Ordinance"

I wish to observe that both courts had erred in coming to a conclusion that the original written contract and the several cheques were not produced. I have already in this Judgment demonstrated that by offer and acceptance a contract comes into existence. In law there is the express and implied contracts. Both are recognised in law. In the case in hand the initiative was taken by the customer by letter P1. (request for O/D facilities in a large sum). Bank accepted such proposal and went ahead and permitted the Defendant to overdraw the account. As observed secondary evidence of the Statements of Accounts were led without any objection. In fact in cross-examination the learned counsel for the Defendant fortified the position of the Bank in giving the cheque numbers to the witness and questioned the witness about the cheques (Folio 69/70 of the brief). Witness willingly answered the question by saying that Defendant was paid on the cheques. I also note as stated above that the statements of accounts marked and produced in this case were

compared with the original ledger by witness No. 2 for the Bank. Section 90A of the Evidence Ordinance has made provisions to deal with bank books, ledgers, statements etc. Courts must consider the proper utilisation of the provisions, in the Evidence Ordinance.

In all the above circumstances I allow this appeal. Plaintiff-Appellant-Petitioner would be entitled for relief as per paragraphs d, e, f, g & h of the prayer to the petition. I also allow sub-paragraph 'c' of the prayer to the petition except that part of the Judgement dealing with prescription; Questions of law are answered in favour of the Plaintiff-Appellant.

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda 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 Civil Appellate High Court.

1. Galagedarage Don Chandrawathie, No. 12, Chandralekha Mawatha, Colombo 08.
2. Galagedarage Don Premaratne alias Pemaratne, No. 109, Dr. N.M.Perera Mawatha, Colombo 08.
   Now of, No. 12, Chandralekha Mawatha, Colombo 08.
3. Galagederage Don Manel, No. 20, Chandralekha Mawatha, Colombo 08.
4. Galagederage Don Dammika Priyantha, No. 105, Dr. N.M.Perera Mawatha, Colombo 08.

SC APPEAL 179/2015 **Plaintiffs**

SC/HCCA/LA/152/2015

WP/HCCA/COL/27/2015/LA Vs

D.C.COLOMBO Case No. DLM/ 203/2014

1. Carmen Angeline de Silva alias Angeline Naidu
2. Fathima Farzana Rafik alias Shafik

   Both of , No. 109, Dr. N.M.Perera Mawatha, Colombo 08.

Defendants

A N D

1. Galagedarage Don Chandrawathie, No. 12, Chandralekha Mawatha, Colombo 08.
2. Galagedarage Don Premaratne alias Pemaratne, No. 109, Dr. N.M.Perera Mawatha, Colombo 08.
   Now of, No. 12, Chandralekha Mawatha, Colombo 08.
3. Galagederage Don Manel, No. 20, Chandralekha Mawatha, Colombo 08.
4. Galagederage Don Dammika Priyantha, No. 105, Dr. N.M.Perera Mawatha, Colombo 08.

Plaintiff Petitioners

Vs

1. Carmen Angeline de Silva alias Angeline Naidu
2. Fathima Farzana Rafik alias Shafik
   Both of , No. 109, Dr. N.M.Perera Mawatha, Colombo 08.

Defendant Respondents

A N D N O W

1. Galagedarage Don Chandrawathie, No. 12, Chandralekha Mawatha, Colombo 08.

2. Galagedarage Don Premaratne alias
Pemaratne, No. 109, Dr. N.M.Perera
Mawatha, Colombo 08.
Now of, No. 12, Chandralekha
Mawatha, Colombo 08.
3.Galagederage Don Manel, No. 20,
Chandralekha Mawatha,
Colombo 08.
4.Galagederage Don Dammika
Priyantha, No. 105, Dr. N.M.Perera
Mawatha, Colombo 08.

Plaintiff Petitioner Appellants

Vs

1. Carmen Angeline de Silva alias
Angeline Naidu
2.Fathima Farzana Rafik alias
Shafik
Both of , No. 109, Dr. N.M.Perera
Mawatha, Colombo 08.

Defendant Respondent Respondents

BEFORE: **S. EVA WANASUNDERA PCJ,**
B. P. ALUWIHARE PCJ &
VIJITH K. MALALGODA PCJ.

COUNSEL: Eraj de Silva with S. Janagan for the Plaintiff Petitioner Appellant.
Ikram Mohamed PC with Padma Bandara PC and Nadeeka Galhena for the 1st Defendant Respondent Respondent.

ARGUED ON: 17.07.2017.

DECIDED ON: 18.09.2017.

S. EVA WANASUNDERA PCJ. - ACTING CHIEF JUSTICE

Leave to Appeal was granted on 29.10.2015 by this Court on the questions of law contained in paragraph 12 (a) to (h) of the Petition dated 24.04.2015. They are as follows:-

a. Did the High Court wrongly hold that there was no material before court to establish that the Defendant took steps and/or were taking steps to dispose the property?
b. Did the High Court fail to take account of the fact that the 1st Defendant had already purported to transfer a share in the property to the 2nd Defendant after the death of the said Galagederage Don Gunapala?
c. Has the High Court failed to properly consider that the District Judge had erred in the reasoning?
d. Has the High Court failed to properly consider the grounds of appeal urged in the Petition for Leave to Appeal before the High Court?
e. Has the High Court failed to properly consider the irreparable loss and/or damage would be caused to the Plaintiffs unless the interim relief was granted?
f. Has the High Court wrongly failed to consider that the Plaintiffs were still co-owners of the property in question?
g. Has the High Court erred in not granting leave to appeal in the circumstances of this case?
h. Has the High Court erred in not granting the interim relief sought?

This Court has also granted interim relief preventing the Defendants Respondents Respondents from alienating and/or selling and/or transferring and/or leasing out and/or otherwise disposing of the land and premises more fully set out in the schedule to the plaint or any part thereof. However the trial in the District Court is proceeding as at present.

The facts of the case in hand are pertinent. The Plaintiffs and their brother named Galagederage Don Gunapala were co-owners of a land in Colombo 8.

G.D.Gunapala died on 26.04.2014 without leaving a Last Will. The Plaintiffs have submitted that a Testamentary Case has been filed and the 2nd Plaintiff has received the letters of administration. There is documentary evidence that the case number is DTS/176/2014 and in that case it was submitted to court that the deceased Gunapala had owned as a co-owner, 9/40th share of the land which is an amalgamation of the land called Gorakagahawatta and Laymawatta, bearing Assessment numbers 20 and 12, Chandralekha Mawatha and premises bearing Assessment numbers 105, 107 and 109, Dr. N.M.Perera Mawatha, situated along Chandralekha Mawatha and N.M.Perera Mawatha within the Municipal Council Limits of Colombo, which land is marked as Lot 5 in Plan No. 1351 dated 08.03.1989 drawn by the Licensed Surveyor and Leveller, S. Rasappah **containing in extent 0A 1R 04.94P.**

Then, the 1st Defendant had filed a case under Sec. 66 of the Primary Court Procedure Act against the all the Plaintiffs for the continuation of peaceful possession of the premises where she claims that she was living with the deceased Gunapala and her daughter and family. She had produced five complaints after the death of Gunapala to the Police, which she had made during the period from 1st May, 2014 to 28th May, 2014 against the Plaintiffs. In the affidavit placed before the Magistrate's Court, she had claimed that she was occupying the premises for over 25 years continuously. However the learned Magistrate had dismissed the said action on the ground that the subject matter had not been properly identified.

In the instant case the Plaintiffs had filed action in the District Court of Colombo under case No. DLM / 203/ 2014 pleading inter alia for a **declaration of title** to the particular property described in the schedule to the Plaint and **to eject the Defendants** and others who are holding under them. The Defendants are mother and daughter residing in the premises No. 109, Dr. N.M.Perera Mawatha, Colombo 8 which is on the particular property. The basis alleged for seeking ejectment is that the 1st Defendant was living in the premises as a licensee of G.D.Gunapala and when Gunapala died, **the license to live there comes to an end** and therefore she has to be ejected along with her daughter who holds the property under the 1st Defendant. The 1st Defendant takes the stance that **she is the legal wife of the deceased G.D.Gunapala**. Having produced the marriage certificate, mentioning the date of marriage as the 6th of March, 2002, she claims that **she is entitiled to half of what was co-owned by Gunapala.** The Plaintiffs'

position is that the marriage certificate is false and the signature of their brother is forged in the said marriage certificate.

However, the Plaintiffs have conceded , according to their pleadings, that the deceased Gunapala was a co-owner of the property in question and that the 1st Defendant and her daughter, the 2nd Defendant, along with Gunapala had been in occupation of premises No. 109, Dr. N.M.Perera Mawatha, Colombo 8. According to the evidence by way of affidavits and documents before the trial court, it is obvious that Gunapala, the 1st Defendant, the 2nd Defendant who is the daughter of the 1st Defendant and the 2nd Defendant's husband and their children have been living in the said premises for quite some time and that the place has a boutique by the name 'Carmen Tea Room' which was carried on by the 2nd Defendant. The documentary evidence before the District Court show that Gunapala had been living with the others as a family for a long time in the premises in question.

In the Plaint filed by the Plaintiffs for a declaration of title and ejectment of the Defendants, the Plaintiffs also **prayed for interim injunctions** restraining the Defendants from alienating the property, from receiving any income out of the property, from making any structural alteration to the premises and from alienation of the movable property described in a list marked 'Y' attached to the Plaint. **The District Judge refused** the granting of **interim injunctions** sought by the Plaintiffs. Then they sought leave to appeal from the said refusal by an application made to the Civil Appellate High Court and on 27.03.2015, the **High Court refused leave to appeal affirming** the order of the District Court **refusing the grant of interim injunctions**. The Plaintiffs Petitioners Appellants have appealed to this Court from the order of the Ciivil Appellate High Court refusing leave to appeal.

The question to be decided revolves around the law pertinent to granting of interim injunctions.

Sec. 54(1) of the Judicature Act No. 2 of 1978 as amended reads as follows:-

Injunctions.

(1) Where in any action instituted in a High Court, District Court or a Small Claims Court, it appears –

(a) From the Plaint that the Plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff; or

(b) That the defendant during the pendency of the action is doing or committing or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or committed, an act or nuisance in violation of the plaintiff's rights in respect of the subject matter of the action and tending to render the judgment ineffectual, or

(c) That the defendant during the pendency of the action threatens or is about to remove or **dispose of his property with intent to defraud the plaintiff,** the Court may, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, grant an injunction restraining any such defendant from -
    (i) Committing or continuing any such act or nuisance;
    (ii) Doing or committing any such act or nuisance;
    (iii) Removing or disposing of such property.

Sections 662 to 667 of the Civil Procedure Code apply to "Injunctions".

Sec.662 reads:-
Every application for an injunction for any of the purposes mentioned in Section 54 of the Judicature Act No. 2 of 1978, except in cases where an injunction is prayed for in a plaint in any action, shall be by petition, and shall be accompanied by an affidavit of the applicant or some other person having knowledge of the facts, containing a statement of the facts on which the application is based.
Sec. 663 deals with how disobedience to an injunction or an enjoining order could be punished. Sec. 664 to Sec. 667 deal with different aspects of action by court with regard to injunctions.

In the case of **Felix Dias Bandaranayake Vs the State Film Corporation and another 1981, 2 SLR 281** it was held that in deciding whether or not to grant an interim injunction the following **sequential tests** should be applied:-

1. 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 serious question to be tried in relation to his legal rights and that the **probabilities are that he will win**.

2. In whose favour is the **balance of convenience** – the main factor being the **uncompensatable disadvantage or irreparable damage** to either party?

3. 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? The material on which the Court should act are as the affidavits supplied by the plaintiff and the defendant. Oral evidence can be led only of consent or upon acquiescence.

In the case of **Seelawathie Mallawa Vs Millie Keerthiratne 1982, 1 SLR 384,** Jutice Victor Perera reiterates what was laid down by the Supreme Court in **Jinadasa Vs Weerasinghe 31 NLR 33.** He states at page 388 that " The principles which the Court must take into account when deciding whether to grant an injunction or not, have been formulated from time to time in decisions of our Courts and have sometimes been re-formulated on the basis of decisions of the English Courts. Generally the line of approach in exercising the Court's discretion whether to grant an interim injunction or not has been**, first to look at the whole case before it.** The primary consideration was the relative strength of the parties' cases. The Court must have regard not only to the nature and strength of the **plaintiff's claim** and demand but also to the **strength of the defence.** It is when the Court has formed the opinion that the plaintiff had a strong prima facie case, that the Court had then to decide what was best to be done in the circumstances. No doubt this exercise entailed **a close examination of the merits** at times almost bordering on a trial of the action, but without deciding the main issues that will be raised at the trial. In deciding on the nature or terms of such an interim injunction, the underlying principle to be considered is that **the status quo must be maintained.** Initially the plaintiff therefore needs only to satisfy the Court that there is a serious matter to be tried at the hearing."

In the amended Plaint the Plaintiffs prayed for **four interim injunctions**, namely, as follows:-

i. An interim injunction restraining the Defendants and all those holding under them **from alienating**, leasing or disposing the property described in the Schedule to the plaint.

ii. an interim injunction restraining the Defendants and all those hold ing under them **from obtaining an income** or benefit from the said property described in the Schedule to the plaint.
iii. an interim injunction restraining the Defendants from making any **structural alteration** on the premises described in the Schedule to the plaint.
iv. an interim injunction restraining the Defendants from transferring or **disposing the movable property** described in the attachment marked 'Y'.

The District Court had at the first instance **issued enjoining orders** and notices on the Defendants. Later on, after having held the inquiry the Additional District Judge of Colombo by his order dated 02.03.2015 had dissolved the enjoining orders and refused to grant any of the interim injunctions. The Civil Appellate High Court had made order refusing the application made by the Plaintiffs for leave to appeal on 27.03.2015.

This Court is bound to have a look at the **merits of both parties** in complying with the provisions of law with regard to interim injunctions as well as the legal authorities on interim injunctions as quoted above.

I find that the Plaintiffs' arguments are all on the basis that the deceased Gunapala, who was their brother was unmarried. The 1st Defendant has produced a marriage certificate dated 06.03.2002 which is prima facie proof of Gunapala being married to the 1st Defendant. It is seen from the documents that there had been many quarrels between the Plaintiffs on one side and Gunapala and the 1st Defendant on the other. At the inquiry regarding the interim injunction, the 1st Defendant had produced an I.B. extract of a complaint lodged by her at the Borella Police Station in the year 1994 with a heading 'Trouble Created', marked 'Pe 6 G' which illustrates that the 1st Defendant had been living together with Gunapala in Gunapala's house from the time that she was 42 years or earlier. She had complained that some other man living in Gunapala's grandmother's house had come in the night to her tea room asking for cigarettes and when she said that cigarettes are not available, he had scolded her in bad language. She had not known the name of the said man but had complained that he had done so at the instance of Gunapala's mother. The document 'Pe 6 H' is another I.B. extract from the Borella Police Station dated 01.11.2003 which is a complaint made by

Gunapala against his brother, the 4th Plaintiff who had run a record bar within the premises. Gunapala had lodged the complaint in fear of his threats and for his safety in the future. In that complaint Gunapala had mentioned to the Police that in his house, he is living with his wife and the daughter and placed the names of the 1st and 2nd Defendants as his wife and daughter.

So, it is evident that Gunapala had been living with the 1st Defendant for a long time and had legally got married in 2002 and in 2003 he had mentioned to the Police that she was his wife and from that time onwards upto the date of death of Gunapala in 2014, the 1st and the 2nd Defendants had been in occupation of the premises in question. The Defendants had produced receipts from tenants to whom three rooms were rented out to for over 10 years by Gunapala and the 1st Defendant. On the other hand, if the Plaintiffs challenge the authenticity of the Marriage Certificate, the burden of proof that it is a forged marriage certificate lies on the Plaintiffs. Until it is disproved, the marriage has to be presumed to be valid according to the marriage certificate. Then the 1st Defendant gets half of what belonged to Gunapala, her husband and she becomes a co-owner of the property.

After the death of Gunapala, the 1st Defendant had gifted her rights of the property to the 2nd Defendant who is her daughter by a properly executed deed. It is so alleged by the Plaintiffs and the Defendants have admitted the same.

The list of movables in the attachment marked 'Y' with the Plaint are household furniture and goods belonging to Gunapala and used by Gunapala when he was living and even though the Plaintiffs claim that they are the owners of those movables, there is no evidence to show any proof of the same. There does not seem to be any reason why any movements of those movables should be stopped by an interim injunction.

The Plaintiffs have failed to establish a strong prima facie case against the Defendants for the purpose of getting interim injunctions against the Defendants as prayed for. The affidavit of one of the witnesses to the marriage stating that he never signed as witness to such a marriage cannot be taken as full proof of there not being a legal marriage between the 1st Defendant and Gunapala. The trial of the case will decide whether the Defendants are legally entitled to the property rights or not. If there is no valid legal title held by the Defendants, if they dispose

of their rights to third parties, the legal title shall not pass and therefor there is no irreparable loss which could happen to the Plaintiffs.

On the other hand the Plaint has claimed quantified damages at Rs. 50000/- per month from the Defendants until the final relief is granted as prayed for. Further more there is no imminent infringement of a legal right of the Plaintiffs, which right if infringed would cause irreparable damage to the Plaintiffs. The balance of convenience is also in favour of the Defendants. The property rights of the land and premises are admittedly still with the Defendants who are mother and daughter and they have been in possession of the premises for a very long time.

I cannot see any act of the Defendants which would render the final judgment ineffectual if the Defendants are not restrained by interim injunctions. I answer all the questions of law enumerated above, in favour of the Defendant Respondent Respondents and against the Plaintiff Petitioner Appellants. Therefore I hold that the learned High Court Judges were correct in having refused leave to appeal.

This Appeal stands dismissed. However I order no costs.

Judge of the Supreme Court

B.P.Aluwihare PCJ.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda PCJ.
I agree.

Judge of the Supreme Court

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

S.C. Appeal 182/2014
S.C/HCCA/LA/28/2012
UVA/HCCA/BAD/59/2002 (F)
D.C. Bandarawela Case No. 222/L

In the matter of an Application for Leave to Appeal from the Judgment dated 07.12.2011 in Appeal No. UVA/HCCA/BAD/59/2002(F) in terms of Section 5C (1) of the Act No. 54 of 2006

1. Kahandage Colman Edward Silva
2. Paul Felix Silva
3. Raymond Joseph Silva
4. Anthony Silva

All of Pallethennegedara
Kurukudhegama, Pattiyegedera

PLAINTIFFS

Vs.

1. A.M. Punchibanda **(Deceased)**

ORIGINAL DEFENDENT

2. A.M. Gunasekera
3. A.M. Appuhamy
4. A.M. Wijesekera
5. A.M. Rathnayake
6. A.M. Siriwardena
7. A.M. Dingiribanda
8. A.M. Kumarihamy
9. A.M. Sudubanda (**Deceased)**

All of Hapukanuwa, Kurukudhegama,
Pattiyegedera.

SUBSTITUTED-DEFENDANTS

AND

1. Kahandage Colman Edward Silva
2. Paul Felix Silva
3. Raymond Joseph Silva
4. Anthony Silva

All of Pallethennegedara
Kurukudhegama, Pattiyegedera

PLAINTIFFS-APPELLANTS

Vs.

1. A.M. Punchibnada **(Deceased)**

ORIGINAL DEFENDENT

2. A.M. Gunasekera
3. A.M. Appuhamy
4. A.M. Wijesekera
5. A.M. Rathnayake
6. A.M. Siriwardena
7. A.M. Dingiribanda
8. A.M. Kumarihamy
9. A.M. Sudubanda

All of Hapukanuwa, Kurukudhegama,
Pattiyegedera.

SUBSTITUTED-DEFENDENT-RESPONDENTS

AND NOW BETWEEN

2. A.M. Gunasekera
4. A.M. Wijesekera

Both of Hapukanuwa,
Kurukudhegama, Pattiyegedera

SUBSTITUTED 2ND AND 4TH DEFENDANT-RESPONDENT-PETITIONERS

Vs.

1. Kahandage Colman Edward Silva
2. Paul Felix Silva
3. Raymond Joseph Silva
4. Anthony Silva

All of Pallethennegedara
Kurukudhegama, Pattiyegedera

PLAINTIFF-APPELLANTS-RESPONDENTS

3. A.M. Appuhamy
5. A.M. Rathnayake
6. A.M. Siriwardena
7. A.M. Dingiribanda
8. A.M. Kumarihamy
9. A.M. Sudubanda

All of Hapukanuwa, Kurukudhegama,
Pattiyegedera.

SUBSTITUTED 3RD AND 5TH – 9TH DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE: Sisira J. de Abrew J.
Anil Gooneratne J. &
Prasanna S. Jayawardena P.C., J.

COUNSEL: H. Withanachchi for Substituted 2nd & 4th Defendant-Respondent-Appellants

Manohara de Silva P.C., for the Plaintiff-Appellant-Respondents

ARGUED ON: 02.12.2016

DECIDED ON: 22.02.2017

GOONERATHNE J.

This was an action filed in the District Court of Bandarawela for a declaration of title to the land described as 'Neludande Agatha' by a plaint presented to the District Court on or about 24.07.1978 under the Administration of Justice Law. (folio 89/93) Land is in extent of one pela of paddy sowing. By the said plaint the Plaintiffs have sought to evict the Defendants and they also claim damages as pleaded. Learned District Judge dismissed the Plaintiffs' action. However issue Nos. (1) to (9) raised by the plaintiffs were answered in favour of the Plaintiffs. Though Plaintiff's action was dismissed the trial Judge in his Judgment states (last paragraph) without prejudice to the dismissal of the action, based on evidence and on a balance of probability Plaintiffs' case is proved.

When I consider the Judgment it is apparent that the action was dismissed by the learned District Judge (answering issue Nos. 14, 15, 16 & 18 & 19 in favour of the Defendant) for want of jurisdiction i.e failure to comply with Section 14 of the Conciliation Board Act to produce a non-settlement certificate from the relevant Conciliation Board, and due to a settlement entered before the Conciliation Board for the same corpus prior to the date of the present cause of action and District Court entered Decree based on the settlement. The appeal to the High Court was only on the question of dismissal of Plaintiffs' action. High

Court set aside that part of the Judgment (Dismissal) and allowed the appeal of the Plaintiff-Appellants.

The Supreme Court on or about 26.09.2014 granted Leave to Appeal on the following questions of law set out in paragraphs 15(i), (v), (vi), (vii)& (viii) of the Petition.

(i) Did the High Court err in law by applying the principles laid down in R. Arnolis and two others Vs. R. Hendrick in relation to the Certificate of non-settlement in the circumstances of this case?

(v) Did the High Court misdirect itself by failing to consider the fact that the Plaintiffs have not pleaded in the plaint or led evidence to establish the fact that there was no valid settlement between the parties?

(vi) Did the High Court err in law by reversing the findings of the learned Trial Judge arrived at against the Plaintiffs on the question of jurisdiction?

(vii) Did the learned High Court Judges err with regard to the validity of the settlement arrived at before the Conciliation Board?

(viii) Whether the High Court misdirected itself with regard to the constructions of the provisions of Section 14(1) of the Conciliation Boards Act No. 10 of 1958?

Learned President's Counsel for Plaintiff-Appellant-Respondent raised the following questions

(i) Whether issue Nos. 14, 15 and 16 could have been answered in favour of the Defendants in the event of the admission of document P14 without any objection by the defendants?

(ii) In any event, even, since the Defendants have failed to specifically raise any issue under Section 14 of the Conciliation Boards Act, can the Defendants challenge the maintainability of the Plaintiff's action?

It would be necessary to ascertain the very basic facts in a case of this nature which is now subject to an appeal in the Supreme Court. The material available suggest that the plaint was filed on or about 24.07.1978 pertaining to a land called "Neludande Agatha".

Defendants filed answer on 27.06.1979, and inter alia pleaded that Plaintiffs' land called "Neludande Agatha" does not give a clear description of the land and that the Defendants are the owners of a land called as "Neludande Penapotha Kumbura" in extent of paddy sowing of 1 amuna and 5 kurinis. The names of the lands as pleaded suggest two different lands. The records also indicates that thereafter, the Defendants filed amended answer on 14.06.1990 i.e 11 years after having filed the original answer. (folio 109-X2). In paragraph 9 of the amended answer it is pleaded that lot 2 in Surveyor Ariyasena, plan No. 3029 was subject to a settlement in the 'Atampitiya' Conciliation Board in terms of section 12 of the Conciliation Board Act and the Defendants are the owners and as per Section 13(3) (a) of the above Act, it is a settlement to be deemed to be a Decree of the District Court in terms of the said Act and for that reason District Court has no jurisdiction to hear and determine this action and Plaintiffs

cannot maintain this action. The certificate relied upon the Defendant parties is at folio 445, 446, 447 & 448 (වි3,වි 4, වි4a වි4b).

In paragraph 10 of the amended answer it is also pleaded that unless a certificate under Section 14 of the Conciliation Board Act is produced by the Plaintiffs, the present action cannot be maintained by Plaintiffs and District Court has no jurisdiction to hear and determine this action. It is further pleaded that no such certificate has been produced with the plaint or with the pleadings concerning the appointment of a guardian, or next friend and as at the time 4th Plaintiff was a minor.

Let me examine වි3 to වි4b (folios 445 – 448) namely the Conciliation Board Certificate issued under Section 12 of the said law.

Folio 445 refers to a complaint made by A.M. Punchibanda against K. J. Silva regarding forcible possession of Kurukude Pennapatha Kumbura in 1968. Both K. J. Silva and A.M. Punchibanda agreed to partition (බෙදා වෙන් කර ගැනීමට) 'Penapoth Kumbura' and 'Neludande Agatha' paddy fields. But K.J. Silva objects to pay Government Surveyor's fee, but A.M. Punchibanda agrees to bear the cost. The land to be separated as follows.

To A.M. Punchibanda as in transfer deed No. 30206which show an extent of 1 Amuna and 5 Kuranis. To K. J. Silva as in title deed 7068 of 20 May 1908 of 1 pala paddy sowing. Both parties agree to partition the land, according

to Government Surveyers plan (settlement entered on 25.101.1975) V3 – folio 446, refer to the information that is required to be sent to court as per Section 13 of the Act. It states that complaint was made against K.J. Silva by A.M. Punchibanda regarding forceful possession of ‘‘Penapoth Kumbura” Since 1968. The Conciliation Board inquired into the matter and settled the dispute. As stated above it is recorded that K.J. Silva and A.M. Punchibanda agreed to partition. “Neludande Agatha” and ‘‘Penapoth Kumbura”, respectively. In the same manner as stated in folio 445. K.J. Silva did not agree to pay Surveyors fees but Punchibanda agreed to bear the cost. Both parties agree that the partition of the land in dispute is to be done by a survey of a Government Surveyor.

Folio 447 – It refers to notes of Attampitiya Conciliation Board. Notes pertaining to settlement of dispute. It is recorded that a settlement was possible and parties on 25.01.1975 agreed to settle the dispute, as follows. As stated above surveyor fees to be paid by A.M. Punchibanda.

Folio 448 – It is a continuation of folio 447. The manner of separation of lands are stated viz. ‘‘Penapoth Kumbura” and “Neludande Agatha (both paddy fields). As in deed No. 30206 attested by D.W.C. Ekanayake Notary, of land in extent of paddy sowing of 1 amuna and 5 kurinis to A.M. Punchibanda. The land depicted in transfer deed No. 7068 of 20th May 1908 an extent of land

of 1 pela paddy sowing to K. J. de Silva. Parties agree to a Surveyor as above to partition the land by a survey to be done by a Government Surveyor.

On perusing all above papers of the Attampitiya Conciliation Board it is apparent that K. J. de Silva and A.M. Punchibanda entered into a settlement on 25.01.1975 subject to the land being partitioned and shown by a survey plan to be surveyed by a Government Surveyor. Though the matter was settled, there is no indication of a Survey done and a plan executed as agreed between parties. That shows that the agreement had been conditional on execution of a plan, which material is not available to this court. (No plan was produced to prove agreement as above)

In the submissions of learned President's Counsel this court was informed that K.J. Silva is not a Plaintiff to the action before court since he parted with title to the property in dispute in the year 1974 in favour of his children the present Plaintiffs. Original Defendant Punchibanda was a party to the suit but is now deceased. There is this question which has not been properly addressed to this court by learned counsel for 2nd and 4th Defendant –Respondent-Appellant, the validity of the purported settlement which was agreed upon and entered by the original Defendant with K.J. Silva who had parted with title. As such can the Appellant party place any reliance on such a settlement or agreement? Even the learned District Judge has not considered this aspect. Learned District Judge in

his Judgment in this regard refer to the settlement between the original Defendant and K.J. Silva (who is not a party to the suit). Learned District Judge no doubt referred to the relevant law under the Conciliation Board Act, viz Section 13(2) & 13(3). Therefore based on such a settlement by way of an agreement would not bind a minor. (4th Plaintiff). As such the Conciliation Board decision conveyed to court which is in document V3 produced by the Defendants to support their position that the dispute was settled between parties cannot be permitted to stand, or same to be filed of record as in Section 13(3) of the Conciliation Board Act which is deemed to be a decree of that court.

Section 13 of the said law reads thus:

13(1) Any party to a civil dispute which is settled by a Conciliation Board in any Conciliation Board area may, within thirty days after the date of settlement of such dispute, in writing notify to the Chairman of the Panel of Conciliators constituted for such Conciliation Board area that, with effect from such date as shall be specified in the notification, the settlement effected by such Board will be repudiated by him for the reasons stated in the notification, and, where such notification is made with such reasons stated therein, such settlement shall cease to be in force from the date specified in such notification.

(2) Where the written notification referred to in subsection (1) is not received by such Chairman within thirty days after the date of settlement of such dispute, such Chairman shall forthwith transmit to the District Court or the Court of Requests or the Rural Court, as the case may be, having jurisdiction to hear and adjudicate upon such dispute, a copy of the settlement recorded by that Board. Such copy shall be signed and certified by the President of that Board.

(3) (a) Immediately upon the receipt by the District Court or the Court of Requests, as the case may be, of the copy of the settlement referred to in subsection (2), the District Judge or the Commissioner of Requests of that court shall cause such copy to be filed of record in such court. Such settlement shall, with effect from the date of such filing, be deemed to be a decree of that court, and such of the provisions of the Civil Procedure Code as relate to the execution of decrees shall, as far as may be practicable, apply mutatis mutandis to and in relation to such settlement which is deemed to be a decree.

(b) Immediately upon the receipt by the Rural Court of the copy of the settlement referred to in subsection (2), it shall be the duty of the President of such court to file such copy in the records of such court. Such settlement shall, with effect from the date of such filing, be deemed to be a judgment of such court, and such of the provisions of the rules made under section 52 of the Rural Courts Ordinance as relate to the execution of judgments shall, as far as, may be practicable, apply mutatis mutandis to and in relation to such settlement which is deemed to be a judgment.

However documents V1 to V7 produced by the Defendant party do not show that the settlement was filed of record by the District Court or by any other document, filed of record. Even if the Appellant party in the manner they did continue to urge that there is a decree in their favour, it was held in *Somasunderam Vs. Ukku (44 NLR 446); 26 CCW 47. Section 480* applies not only to orders, but to decrees as well. It has been held that where a decree is entered against a minor who is not duly represented by a guardian, he may move to have the proceedings set aside under Section 480 of the Code even after he attains

majority. Section 480 of the Code enacts that no order to affect a minor not represented.

In the purported settlement of the Attampitiya Conciliation Board which is claimed to be referred to court, the 4th Plaintiff who was a minor and a co-owner of land in dispute along with the other 3 Plaintiffs were not parties to the settlement. The minor was not a party or represented by a next friend or guardian for the action at the relevant time, in the manner argued by the Appellants that there was a decree of court. K. Julian Silva transferred the land in dispute on 06.03.1974 to the four Plaintiffs by deed which was accepted by the learned District Judge who pronounced that Plaintiffs have title (vide answers to issue No. 1 – 9). In fact none of the Plaintiffs were parties in the Conciliation Board application relied upon by the Defendant party. On this question I fully agree with the views expressed by the High Court.

The Appellants states the corpus was partitioned by a settlement of the Conciliation Board (V3/P11). When the case in hand was filed in the original court, 4th Plaintiff was a minor and V3/P11 indicates that the settlement entered, was not between the actual owners. (Guardian of 4th Plaintiff in the District Court by that time had transferred the title to property to the four Plaintiffs). Prior to the Conciliation Board agreement, K. Julian Silva parted with title and as such had no status to enter into a settlement on behalf of any other

Plaintiffs although he was made guardian or next friend of the 4th Plaintiff very much later and subsequent to institution of the District Court case in Bandarawela by the Plaintiffs. As such V3/P11 is of no force or avail in law and Plaintiffs are not bound by the settlement between their predecessor in title and the original Defendant. As such a question of repudiation may not arise, though Plaintiff-Respondent rely on document P14 to prove repudiation. In the circumstances I observe that the learned District Judge was in error in answering issue Nos 14 to 19 incorrectly. In any event issue Nos. 14, 15 & 16 should have been answered in the negative, and the rest of the issues would be consequential to issue No. 14, 15 & 16.

The main question before this court, though the above matters need to be discussed in order to get to the bottom of this case, is whether there was a non-production of a certificate of non-settlement and if so whether non-production of same is fatal to maintain the case in hand.

Defendant-Appellant very confidently argue that there was no, non-settlement certificate produced and P14 relied upon by the Plaintiff party relates to some other dispute. Whatever it may be P14 is a certificate of non-settlement and it discloses a repudiation of the earlier settlement V3. I am unable to accept the position of the Defendant-Appellant that P14 refers to some other dispute. This court cannot be confused on such a submission. It is

evident on perusing all the available documents of the Conciliation Board inclusive of certificates, that it is a land dispute relating to “Neludande Agatha” and ‘‘Penapoth Kumbura”. It is a land dispute referring to the above named lands. The certificates and documents relied upon by the Defendant-Appellant වි3 to වි4b (folios 445 – 448) refer to the above mentioned lands. It is the same dispute that arose over and over again between the original Defendant and the father of Plaintiffs, K.J. de Silva.

This was a continuing dispute between the original Defendant and K.J. Silva. Dispute culminated into a cause of action from the date of issuance of non-settlement certificate marked P14, which according to the available material produced at the trial, was before the District Court. When P14 was produced and marked in evidence, there had been no objection to P14 being produced by the Defendant-Appellant. As such it is evidence for all purposes of the law. P14 indicates it is a non-settlement certificate, issued to court as per Section 14 of the conciliation Board law, regarding a complaint by A.M. Punchibanda (original Defendant) against K.J. Silva pertaining to lands described as above i.e Nildande Agatha and Nildande Pennapatha Kumbura, after the survey to separate the lands were done and the refusal of K.J. Silva to partition the land. P14 is dated 20.12.1975. It is further stated in P14 that the dispute had been inquired into on 20.12.1975 but the Board was not successful in settling

the dispute. Having issued such a non-settlement certificate the Board may be functus?

On the other hand Defendant-Appellant did not move court to review issue Nos. 1 to 9 answered in favour of the Plaintiff-Respondent by way of appeal or by any other methods of review. In the appeal only the jurisdictional issue had been considered by the Defendant-Appellant, which the High Court rejected. Further document P13 suggests that there were numerous complaints to the relevant Conciliation Board, by the original Defendant and K.J. Silva and the Chairman of the Conciliation Board in P13 and P13a observes that there is no possibility for the Board to settle the dispute. Having said so the Board had again requested the parties to be present for an inquiry finally on 76.12.11 at 9.00 a.m.

I have to observe that the High Court Judgement at Pg. 7 refers to P13 as stated above but the dates reflected in the Judgment shows a slight difference. Perusal of P13 indicates that a further inquiry was fixed for 11.12.1976. The High Court Judgement also refer to that date, but goes on to state that after inquiry on 11.12.1976, P14 non settlement certificate dated 20.12.1976 was issued. Such a statement looks more probable in keeping with the date reflected in P13. All other documents relied upon by the Defendant-Appellant gives the 1975 date. It is unfortunate that Defendant-Appellant has

not filed the entirety of the Conciliation Board proceedings, before this court but only relies on somewhat illegible documentation. As such certificate P14 is evidence for all purposes of the law, and it cannot be accepted as argued by the Defendant-Appellant that there was no repudiation. Therefore I am of the view that P14 repudiated the settlement in V3. In the absence of material to contradict P14, only conclusion was that V3 was lawfully repudiated by P14 and such a position is acceptable in view of Section 114 of the Evidence Ordinance i.e court may presume that judicial and official acts have been regularly performed.

I have to once again observe that the learned District Judge was in error in answering issue Nos. 14 & 15 and I have to say the same as regards issue Nos. 16 to 19(b).

Document P14 is a certificate of non-settlement which is issued under the Conciliation Board Law. In the manner described in P13 dispute has been a long standing continuing land dispute which remains unsettled. The questions of law referred to this court do not raise a question of Plaintiff's title. In the absence of the record of the Conciliation Board being produced as evidence and failure to lead evidence from a person in authority from the Conciliation Board, to establish the position of Appellant, P14 needs to be acted upon, and accept that settlements relied upon by the Appellant was repudiated.

If repudiation was not done, Chairman of the Board should transmit the record to the District Court.

In view of above it is necessary to once again look at Section 13 of the Conciliation Board Act. If repudiation has not taken place Chairman of the Board is required to transmit the settlement of record to the District Court (Section 13(2). Was it done in that way, as evidence does not clearly reveal so. If any such communication is received a settlement would have to be filed of record and the settlement would be deemed to be a decree of court (Section 13(3)) VI to V7 being documents of the Defendants does not give a clear indication that a settlement was filed of record. Even if it was filed the so called settlement was entered not between Plaintiffs and Defendants but between K.J. Silva who parted with tittle and the original Defendant. Such a decree or settlement is of no force or avail in law. In these circumstances P14 and Plaintiff's position is fortified and more probable.

It is also necessary to comment on the following matters before I proceed to answer the question of law raised before the Supreme Court. Pleadings both plaint and answer according to submissions of parties were filed in or around 1978/1979 (under law No. 25 of 1975) and the amended answer filed on 14.06.1990. Trial commenced with framing of issues on 06.10.1993, and in fact leading of evidence commenced on 03.04.1995. By the time trial

commenced, the Administration of Justice Law No. 25 of 1975 was repealed, and the Civil Procedure Code was in operation. None of the parties addressed court on this point, and on transitional provisions, nevertheless the main question to be decided in this appeal proceeded on a jurisdictional issue which in fact emanates from the provisions of the Conciliation Board Act (now repealed and replaced by the Mediation Board Act). I note that the case cited by the learned High Court Judge in the Judgment of the High Court, *Arnolis Vs. Hendrick 75 NLR 532* cannot be ignored so easily or consider it to be irrelevant as the Defendant Appellant argued. In the said case it was held by *H.N.G. Fernando C.J*

"An action for partition of land can be instituted without the production of the certificate from a Conciliation Board which is referred to in section 14(1) of the Conciliation Boards Act.

This dicta is very important, as the Judgment was delivered during the period the Conciliation Board Act was in operation.

Pg. 533 of the said Judgment and 534 reads as follows.

> For practical purposes, a decision that s. 14 of the Conciliation Boards Act applies to partition actions will lead to absurdities which Parliament could not have intended or tolerated.
>
> Let me take for example an instance in which one co-owner of a land, who is in possession of a lot on the east of the land, has a dispute with the owner of the neighbouring land concerning the boundary between the two lands or concerning a claim by the neighbouring, owner to a right of way. Could Parliament have reasonably intended that the existence of this dispute derogated from the right of any other co-owner of the land to seek a sale or partition, even if he is unaware of the dispute or even if he concedes the claim of the neighbouring owner?

> The purpose of the Conciliation Boards Act is to secure that disputes are settled as far as possible by the method of conciliation. Let me suppose therefore, that in the example which I have taken the dispute between one co-owner of a land and the owner of the neighbouring land is settled by a Conciliation Board, and the settlement declares that the boundary is that claimed by the neighbouring owner, or that the neighbouring owner does have a right of way. According to the provisions of the Conciliation Boards Act, a Court will then be bound to give effect to the terms of this settlement, despite the fact that only one co-owner was a party before the Conciliation Board. I cannot think that Parliament intended any such absurdity or injustice.
>
> The purpose of the Partition Act is to authorise a Court to enter a decree *in rem* declaring the ownership of allotments of land binding on all persons, subject only to certain narrow limitations. Such a decree cannot be entered unless the Court is satisfied that no person who is not a party has any right or interest in the land. If then, it is correct that a Conciliation Board does have jurisdiction to settle a dispute as to co-ownership, and that such a settlement will bind a Court of Law, the Court will be compelled to enter a decree for partition in terms of the settlement before the Board, despite knowledge or suspicion that proceedings were taken before the Board with a view to defeating the rights of persons who were not parties to the settlement.

The above dicta in no uncertain terms suggest that a partition suit can be instituted without a Conciliation Board Certificate. The Conciliation Board Certificates relied upon by the Defendant-Appellant seems to proceed on the basis of partitioning the land in dispute "පෙනපොත කුඹුර හා නෙඵදණ්ඩ අගත කුඹුර බෙදා පහත සඳහන් අන්දමට බෙදා වෙන්කර ගැනීමට එකග වුහ". (vide V3, V4, V4අ & V4ඇ). The dispute referred to the Conciliation Board was a land dispute. The members of the Conciliation Board may not be lawyers or persons

with knowledge of land law. On the other hand setting up of Conciliation Boards and Mediation Boards, by the legislature was to ease the burden of litigants and in a way to avoid prolonged court procedure, and pave the way to settle not so complex or complicated disputes between parties. Therefore it may have been open to hear further arguments on this aspect by learned counsel on either side. There is nothing definite on this point, as there was no attempt by either counsel to address court on this aspect on the date of hearing. It became necessary for this court to consider same as the record before us indicates so and reference made by the High Court Judge to the above Judgment of *H.N.G. Fernando C.J*

I would answer the substantial questions of law as follows:

(1) No – The High Court no doubt considered the dicta in R. Arnolis Vs. Hendrick which deals with an important question i.e partition of land can be instituted without the production of the Conciliation Board Certificate. The purported certificates produced by the Appellants suggest partitioning of lands (P3/P11). Learned District Judge merely accepts the settlement and entered decree. There is nothing to indicate that the learned District Judge examined the settlement and decided to enter decree as a valid decree of the District Court as per the Provisions of Chapter XX of the Civil Procedure Code and or Section 466 of the Administration of Justice (Amendment) Act No. 25 of 1975 and or Section 13(3) of the Conciliation Board Act. Nor did the learned District Judge consider whether the settlement was between parties to the suit.

If the so called Decree was a Partition Decree, a Conciliation Board Certificate is not essential or a pre-requisite in view of Arnolis Vs. Hendrick. Partition Decree would bind the parties and the whole world. If the decree in question is merely a decree in a land dispute, still it cannot bind the parties to the suit as they were not parties to a settlement before the Board.

(v) No – There is no misdirection since evidence was led and non-settlement certificate was produced and marked P14 which remains as evidence.

(vi) No – Trial Judge has not properly examined the question of jurisdiction and or considered whether a settlement was entered between parties to the suit.

(vii) No and (viii) No

The additional question raised by the learned President's Counsel are also answered in favour of the Plaintiff-Respondents.

(i) P14 is evidence for all purposes of the law, as such trial Judge could not have answered that question in the affirmative. There was no settlement between the party to the suit.

(ii) No. Defendants cannot challenge the maintainability of the action.

I affirm the conclusion of the High Court Judgment. It is possible to fault any Judgment delivered by a court of law, and the Apex Court need to concentrate only on the real issues between parties, and the substantial questions of law raised in the appeal to ensure justice is done. Plaintiff party never entered into a settlement with the Defendants. Even the so called settlement entered never reached finality as document P13 indicates it was a

continuing dispute between the original owners, to the land in question. The real factual position seems to be that parties concerned never settled the issue between them, and the material suggests that their disputes continued from one generation to the other. Therefore this appeal stands dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew 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 Appeal from an **Order of the Court** of Appeal.

N.L.D. Ariyaratne,
No. 21/3, 2nd Lane,
Galpotte Road,
Nawala.

Petitioner

SC APPEAL No. 182/16
CA (Writ) No. 139/2012 (Writ)
Arbitration Case No. A 2832

Vs

1. P.B.P.K. Weerasingha,
   The Commissioner of
   Labour, Labour Secretariat
   P.O.Box 575, Kirula Road,
   Narahenpita,
   Colombo 5.
2. D.A.Wijewardena,
   Arbitrator,
   Labour Secretariat,
   P.O. Box 575, Kirula Road,
   Narahenpita,
   Colombo 5.

3. Kahawatte Plantation Ltd.,
   No. 52, Maligawatte Road,
   Colombo 10.

Respondents

AND NOW BETWEEN

Kahawatte Plantation Ltd.,
No. 52, Maligawatte Road,
Colombo 10.

3rd Respondent Petitioner

Vs

N.L.D. Ariyaratne,
No. 21/3, 2nd Lane,
Galpotte Road,
Nawala.

Petitioner Respondent

1. P.B.P.K. Weerasingha,
   The Commissioner of
   Labour, Labour Secretariat
   P.O.Box 575, Kirula Road,
   Narahenpita,
   Colombo 5.

2. D.A.Wijewardena,
Arbitrator,
Labour Secretariat,
P.O. Box 575, Kirula Road,
Narahenpita,
Colombo 5.

Respondent Respondents

BEFORE **: S. EVA WANASUNDERA PCJ,**
SISIRA J DE ABREW J &
ANIL GOONERATNE J.

COUNSEL : Ms. Manoli Jinadasa for the 3rd Respondent Petitioner instructed by Sudath Perera Associates .
Ajantha Athukorala with V.K.Choksy for the Petitioner Respondent.
Ms. Chaya Sri Nammuni, Senior State Counsel for the 1st Respondent Respondent.

ARGUED ON : 09.05.2017.
DECIDED ON : 29.06.2017.

S. EVA WANASUNDERA PCJ.

The 3rd Respondent Petitioner in the case in hand , has made this Appeal to this Court **from an interim order of the Court of Appeal** rejecting the preliminary objection taken up by the said 3rd Respondent stating that 'the Petition before the Court of Appeal was flawed and the Petition should be dismissed in limine'.

To consider the question of law before this Court in this matter, the background to the arising of this matter has to be considered to a certain extent so that the

facts pertaining to the case can be seen as the back drop to be born in mind. Therefore I would like to narrate the same before taking up the task of deciding on the question of law.

N.L.D. Ariyaratne had commenced his carrier as an Assistant Superintendent on 1.1.1972 in the Pooranuwa Estate. Then he became a Superintendent in 1980 and thereafter he was appointed as Group Manager in charge of nine estates of Kahawatte Region by the State Plantations Corporation. The 3rd Respondent Petitioner, Kahawatte Plantations Ltd., after the privatization of the estates confirmed by letter that Ariyaratne's employment with the company would continue until he reached 60 years of age. On 1st of June, 1995 he was promoted as Deputy General Manager in charge of Kahawatte and Nawalapitiya Regions comprising of 21 estates.

Forbes Plantations Pvt. Ltd. took over the management of Kahawatte Plantations Ltd. in 1997 and then Ariyaratne was directed to report for duty at the Colombo Head Office from Oct. 1997. His good vehicle was withdrawn and a non road worthy vehicle was given to him. When that vehicle was broken it was taken back and not repaired and no vehicle was given to him from the company.

Kahawatte Plantations Ltd. the 3rd Respondent Petitioner, made an application dated 2nd November,1999, to the Commissioner of Labour **seeking approval to terminate the services of Ariyaratne** who is the Petitioner Respondent in this case, **on the basis of redundancy**. An Inquiry commenced on 21st of September, 2000 and while the inquiry was pending the 3rd Respondent Petitioner Company withdrew several monthly benefits amounting to Rs. 22500/- which had been granted to Ariyaratne. The Ceylon Planter's Society wrote to the Commissioner of Labour , on behalf of Ariyaratne, that such withdrawal of benefits amounts to **constructive termination.** At this point, the 3rd Respondent Petitioner withdrew the Application seeking approval to terminate the services of Ariyaratne by letter dated 6th December, 2000 stating that the Petitioner Respondent Ariyaratne had admitted termination and therefore stopped paying any salary with effect from 1.12.2000.

It is only then that Ariyaratne made an Application to the Commissioner of Labour for **reinstatement with back wages** and benefits against the 3rd Respondent Petitioner on the basis that **his services were terminated illegaly.** Ariyaratne was

then 53 years old and he had 7 years more to work, according to the letter of appointment.

After hearing the evidence and submissions the Asst. Commissioner of Labour made order awarding compensation in lieu of reinstatement in a sum of Rs. 640000/- which was calculated for 50 months on the basic salary of Rs. 12800/-. The Applicant Ariyaratne then invoked the jurisdiction of the Court of Appeal under case number CA 787/2004 for enhancement of compensation on the basis that in computation of the compensation, the allowances had not been taken into account and the compensation formula as published in the gazette and revised in 2005. The said **Court of Appeal case No. 787/2004** was concluded prior to 12.05.2010, with the consent of parties with an order from the Court of Appeal directing the Commissioner of Labour to re - calculate the compensation awarded to Ariyaratne taking into consideration the basic salary, cost of living allowance or any other similar allowances in terms of the prevailing law that gives the formulation for compensation. The Commissioner was further directed to **hold a limited inquiry into the matter expeditiously**. Accordingly, the Commissioner of Labour held an inquiry having re-opened Inquiry TEU/C/28/2001. Then, by a written communication to Ariyaratne, it was informed that an order awarding Rs. 2,071,000/- was awarded to him on **12.05.2010**. There was already Rs. 640,000/- deposited according to the first award and therefore the **balance amount of Rs. 1,431,000/-** had to be deposited by the 3rd Respondent Appellant, the employer company.

The 3rd Respondent Appellant, the employer was dissatisfied with **the new order** of the Commissioner of Labour and came before the Court of Appeal by way of an Application for a **Writ of Certiorari and Mandamus** to quash the Order of the Commissioner of Labour and to compel him to make order according to the prevailing law contained in the Gazette Notification as amended. That matter was considered under **Court of Appeal Application No. 449/2010**. The same was decided on 16.03.2012 quashing the award made by the Commissioner of Labour dated 12.05.2010 and **awarding a reduced sum of Rs. 5,79,880/-.**

Ariyaratne, the workman had appealed to the Supreme Court against that order in SC (Spl) Leave to Appeal Application No. 85/2012 and this Court had **refused** Special Leave to Appeal on 25.07.2012. I have verified the same from the said case record. I opine that the grievances that Ariyaratne had, on which he litigated

all this time with regard to his services as a workman having been terminated, has come to a closure.

However, In the year 2000, on 07.11.2000, the registered Trade Union , Ceylon Planters Society had made an application on behalf of Ariyaratne, to the Minister of Labour to refer the dispute between Ariyaratne and the Kahawatte Plantations Ltd. to an Arbitrator for Arbitration. The Minister referred the matter for arbitration on 14.12.2000. Inquiry before the Arbitrator had commenced on 23.02.2002 and proceeded till 25.07.2005. On 01.12,2000, the employer company brought to the notice of the Arbitrator that Ariyaratne had filed a Writ Application under case No. **CA 787/2004** challenging the quantum of compensation granted by the Commissioner of Labour for wrongful termination and prayed that the Arbitration proceedings be **laid by**, until the Court of Appeal case is over. The Arbitrator gave an **order laying by the Arbitral proceedings on 19.01.2006**. In his order which is in the brief, under the numbered paragraph 5, he specifically mentions thus**: "** Thus it would appear if the Writ Application succeeds, most of the relief sought would have been obtained by the Applicant. On the other hand, if this Writ Application is by any chance **dismissed**, the Arbitrator would be placed in a difficult situation as to making a decision as to **granting of the identical relief**, if necessary, which has been denied by a Superior Court. The question of **Res Judicata may also come up for consideration, then."**

In fact that matter under **CA 747/2004** was concluded directing that compensation be re-calculated. The Commissioner of Labour re-calculated the same and granted an enhanced amount. Then the employer moved the Court of Appeal for a writ again under **CA 449/2010** stating that it was done wrongly. The Court of Appeal heard the case and awarded a reduced amount fixing the same as Rs. 579880/-. The employee, Ariyaratne moved the Supreme Court to grant special leave against the judgment of the Court of Appeal but it was refused on 25.07.2012. Finally Ariyaratne had to be satisfied with that amount.

Yet, I observe that he had made an Application on 09.09.2008 to resume the Arbitration inquiry which was laid by. That application had been made after the conclusion of CA 747/2004 in the Court of Appeal and before the re-calculation was done by the Commissioner of Labour. It is obvious that after many postponements of the hearing of the Arbitration (which was ordered by the Minister at the request of the employee, Ariyaratne), when the Arbitration

proceedings actually commenced on 25.11.2011, the Court of Appeal had concluded the proceedings on the same matter on the same complaints and similar pleadings with regard to the same subject matter. The fact that the grievances of Ariyaratne had already been decided upon and concluded finally by the Court of Appeal , had not been brought to the notice of the Arbitrator at that time. It seems to me that the employer, the 3rd Respondent Appellant could have raised the position as 'res judicata' at that time but it had not been done.

The Arbitrator proceeded to hear the matter and the witnesses of Ariyaratne had been led and thereafter the employer's witness concluded his evidence and he was cross examined on 24.02.2011 and the matter was postponed for further hearing on 19.04.2011. According to the Appellant's pleadings in this case in hand, on that day, the Registrar had informed that the Arbitrator would not be coming and the inquiry was postponed for 10.05.2011. Thereafter as the date was not suitable for both parties, further hearing was put off for 30.05.2011. The employer Appellant had moved for another date by way of a motion and that date for hearing was fixed for 04.07.2011. On that day when Ariyaratne went there the Registrar had informed him that the Arbitrator had a personal difficulty and that the inquiry would be postponed and it is alleged that the Registrar had said that the next date will be informed to the parties after having consulted the Arbitrator. It is alleged that the hearing had been fixed for 19.07.2011 ; the Registrar had not informed the employee Ariyaratne; inquiry had been taken up on 19.07.2011 and the Application was dismissed as the Petitioner to the said Application was not present or represented notwithstanding the fact that the Registrar had sent a notice under registered cover by post. The said Order is before this Court marked as **P5.** The request to resurrect the Arbitration was made to the Commissioner General on 17.04.2012 was also turned down.

The narration of facts by me comes to an end at this juncture.

The employee, Ariyaratne had come before the Court of Appeal praying to set aside the order of the Arbitrator marked **as P5**. The employer had submitted as a **preliminary objection** that the Application before the Court of Appeal cannot be maintained due to many reasons. The Court of Appeal had made an order rejecting the preliminary objections and held that **substantive merits of the Application must be gone into and therefore the matter should proceed to be fixed for argument.**

The 3rd Respondent Appellant had sought Special Leave to Appeal from that order of the Court of Appeal and Special Leave was granted by this Court on 10.10.2016 on one question of law as narrated in paragraph 14(a) of the Petition dated 22.10.2015. which reads as follows:

" Has the Court of Appeal erred in law by rejecting the preliminary objection that the Application is fatally flawed by the failure of the 1st Respondent to make the Honourable Minister a party to this Application ? "

The Industrial Disputes Act provides for the Minister to refer a **minor dispute** for settlement by arbitration in Sec. 4(1) of the Act. Section 4(1) reads as follows:-
" 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 that the parties to such dispute or their representatives do not consent to such reference. "

When the Ceylon Planter's Society a registered Trade Union made an application to the Hon. Minister to refer the matter for arbitration, on behalf of the workman Ariyaratne , the Minister on 14.12.2000 made order to refer the matter to arbitration. There was no consent between parties for this reference. Ariyaratne applied and the Minister made order.

The workman Ariyaratne had sought relief from the Court of Appeal against an order made by the Arbitrator on 19.07.2011 dismissing the Application before him for non appearance and for not having diligently prosecuted the same before the Arbitrator by the workman Ariyaratne. He had prayed mainly for two reliefs, i.e. to " grant a mandate in the nature of a Writ of **Certiorari quashing the decision** and/or Award of the 2nd Respondent Arbitrator dated 19.07.2011 contained in P5 " and to "grant a mandate in the nature of a Writ of Mandamus directing the **1st Respondent** to re-commence the Arbitral proceedings de novo with a **new Arbitrator** ".

The 2nd Respondent in the Court of Appeal is the Arbitrator who dismissed the workman Ariyaratne's application on 19.07.2011 marked P5. If that decision is quashed, then, the 1st Respondent, the Commissioner of Labour cannot on his

own re-commence proceedings **because another Arbitrator has to be appointed by the Minister.** Without the Minister as a party to the case, the Commissioner of Labour has no power to re-commence with a new Arbitrator. The workman Ariyaratne has not secured any relief when the decision is quashed because there is no way that the Commissioner of Labour can get another Arbitrator appointed as the Minister is not made a party to the case and the 2nd Respondent will not be available even to continue with the Arbitration.

In the case of **Rawaya Publishers and Others Vs Wijedasa Rajapakse and Others 2001, 3 SLR 213,** it is mentioned thus with regard to Writ Applications: " In the context of writ applications, a necessary party is one without whom no order can be effectively made." In the case of **Gnanasambanthan Vs Rear Admiral Perera and Others 1998, 3SLR 169**, it was held that it is both the law and practice in Sri Lanka to **cite necessary parties** to applications for Writs of Certiorari and Mandamus. Failure to make REPIA , the divesting authority to divest the Petitioner's property to the Petitioner, a party to that writ application was held to be a fatal irregularity.

Where the necessary parties have not been made a party in any application, it is fatal to the reliefs sought for and it is liable to be dismissed. It was so held in **Ramasamy Vs Ceylon State Mortgage Bank 78 NLR 510**. In that case the Bank made a determination which was challenged before Court whilst the vesting order was made by the Minister. The Court held that even though in the provisions of the Finance Act No. 33 of 1968, the Minister is interposed merely for making of the Vesting Order, it is however that Order which affects the rights of parties and enables the aggrieved person to come to Court. Accordingly an attack on the determination of the Bank alone is insufficient without the presence of the Minister also as a party to the application for relief. **In British Ceylon Corporation Vs C.J.Weerasekera and Others 1982, 1 SLR 180** where the Award as well as the reference to arbitration by the Minister was being challenged the Supreme Court held that the Minister was a necessary party to the application and the failure to make the Minister a party was fatal to the application.

When the Minister, Alavi Mowlana made the reference to the Arbitration in the case in hand under Sec. 4(1) of the Industrial Disputes Act, he appointed the 2nd Respondent, Wijewardena as the Arbitrator with a direction that the dispute be settled by arbitration. If a new Arbitrator is to be appointed and the Arbitration is

to be held de novo, a fresh reference is necessary. The Minister who has the power to do the reference should be a party to the case when specifically the relief sought is for a fresh arbitration setting aside the order of the Arbitrator.

In the case of **Central Cultural Fund Vs Lanka General Services Union and three others 2008, BLR Vol. XIV Part II pg. 269**, a writ of certiorari was sought to quash the award of an Industrial Arbitrator on the premise that the Award was unreasonable. It was the Award and not the reference to Arbitration that was challenged. The Minister who referred the dispute to Arbitration was not made a party to the case. The Court of Appeal held that the failure to make the Minister a party was fatal to the Application.

The reasons given in this case, by the Court of Appeal Judges for not agreeing with the preliminary objection taken up by the 3rd Respondent Petitioner have to be considered. The Court of Appeal states that no relief is sought against the Minister, regarding his exercise of powers in the past or future and that no relief is sought against the Minister to make a reference a second time and therefore the Court of Appeal had held that the failure to make the Minister a party is not fatal to the Application before Court.

I observe that the primary relief sought in the Application before the Court of Appeal was for a writ of Mandamus to recommence the Arbitration de novo with a new Arbitrator. To recommence the proceedings, the Commissioner has no power under the provisions of the Industrial Disputes Act. It has to go through the hands of the Minister because it is the Minister who has the power to appoint an Arbitrator. The Application before the Court of Appeal was to grant a writ of Mandamus on the Commissioner of Labour. If Court grants a writ of mandamus directing him to recommence the proceedings, that would be futile since he cannot act in commencing the fresh arbitration without power conferred on him by any of the provisions of the Act. The Court can issue a writ of mandamus only to the Minister to recommence arbitration proceedings afresh. When the Minister is not a party to the case, granting a mandate in the nature of a writ of mandamus to the Commissioner of Labour is legally incorrect. So, the workman Petitioner's application before court was improper without the Minister as a party. The relief is wrongly set down in the prayer. No writ will be issued by Court to result in futility.

However, in addition to what was argued before this Court as mentioned above, at the hearing of this case, I observe that the workman Ariyaratne had gone through litigation regarding his grievances about termination of his services by the employer company under the provisions of the Industrial Disputes Act and contested in two Court of Appeal cases and finally made an Application to the Supreme Court seeking special leave to appeal against the amount of compensation granted to him in lieu of reinstatement which was refused. He cannot make use of the provisions of the Industrial Disputes Act once again to get any further relief legally before any forum. He is **estopped in law from seeking any other relief from the Arbitration** which was initiated by the then Minister at his request which was done simultaneously at the same time he was going through the inquiry before the Commissioner of Labour on **one and the same subject matter** , which is his termination of services unreasonably by the employer. The concept of res judicata applies in this matter.

I answer the question of law raised as mentioned above in the affirmative in favour of the 3rd Respondent Petitioner and against the Petitioner Respondent. The Minister of Labour was a necessary party before the Court of Appeal and should have been made a party to the Application before the Court of Appeal in the Writ Application. The Court of Appeal had erred in its order rejecting the preliminary objection raised by the 3rd Respondent Petitioner. I set aside the interim Order of the Court of Appeal dated 10.09.2015. I dismiss the Writ Application filed by the Petitioner Respondent in the Court of Appeal due to the aforementioned reasons.
The Appeal is allowed. 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 an application for Leave to appeal under article 128 of the constitution read along with section 5 (1) (C) of the High Court Special Provisions Act No.1990 Amended by Act 54 of 2006

SC APPEAL/185/15
SC HCCA LA 669/14
CP/HCCA/Kandy 88/2012 FA
D.C. Kandy Case No.21558/05

Watagodagedara Mallika Chandralatha
88A, Ihagama, Madawala
Harispattuwa

Plaintiff

Vs.

1. Hearath Mudiyanselage Punchi Banda
   Doranegama Road,
   Medawela
   Harispattuwa
2. Watagode Gedara Dhammika Ranjith Watagodage
   26, Ihagama
   Medawela,
   Harispattuwa

Defendants

And

Watagodagedara Mallika
Chandralatha
88A, Ihagama,
Medawela
Harispattuwa

Plaintiff-Appellant

Vs

1. Hearath Mudiyanselage Punchi Banda
Doranegama Road,
Medawela
Harispattuwa

2. Watagodgedara Dhammika
Ranjith Watagodage
26, Ihagama
Medawela,

Defendants-Respondents

And now between

Watagodagedara Mallika
Chandralatha
88A, Ihagama, Medawala
Harispattuwa

Plaintiff-Appellant-Petitioner

Vs.

1. Hearath Mudiyanselage Punchi Banda
Doranegama Road,Medawela,
Harispattuwa

2. Watagode Gedara Dhammika
Ranjith Watagodage
26, Ihagama
Medawela,
Harispattuwa

Defendants-Respondents-Respondents

BEFORE: **B.P.ALUWIHARE, PC. J,**
ANIL GOONERATNE, J &
K.T.CHITRASIRI, J.

COUNSEL: S.N..Vijithsingh with Abindra Perera for the Appellant.
Respondents are absent and unrepresented

ARGUED ON: 15th July, 2016.

DECIDED ON: 04 December 2017

ALUWIHARE, PC, J:

The Plaintiff-Appellant-Appellant (hereinafter referred to as the Plaintiff) filed action in the District Court against the 1st and 2nd Defendant-Respondents-Respondents (hereinafter referred to as 1st and 2nd Defendants, respectively) and sought a declaration against the 1st Defendant that the property which is the subject matter of this case is held by the 1st Defendant in trust for her, and to declare the deed of transfer executed by the 1st Defendant in favour of the 2nd Defendant, null and void.

The learned District Judge gave judgment in favour of the defendants and dismissed the action of the Plaintiff on the basis that the Plaintiff had failed to prove her case on a balance of probability.

The High Court of Civil Appeals by its judgment dated 11thNovember,2014, dismissed the appeal of the Plaintiff and affirmed the judgment of the learned District Judge which judgement the Plaintiff is challenging before this court.

This court granted leave to appeal on the following questions of law:

i. Did the Honourable Judges of the High Court of Civil Appeal err in law by coming to the conclusion that there was no proof of a constructive trust as the Honourable Judges of the High Court of Civil Appeals failed to consider the evidence in relation to the attendant circumstances which are sufficient to prove a constructive trust, in that the Petitioner remained in possession of the property for nearly 10 years after executing the Deed of Transfer marked 'P5'.

ii. Whether the Honourable Judges of The High Court of Civil Appeals erred in law by not considering the questions that the Petitioner never intended to part with the beneficial interests (of the property) in the circumstances of the case.

iii. Whether the Honourable Judges of the High Court of Civil Appeals err in law by holding that no constructive trust exists in the circumstances of this case.

The facts relating to this action are as follows:

The Plaintiff became the owner of the property in suit through inheritance and the transfer to her of their shares by some of her relatives. She, along with her husband lived in the house that was standing thereon, approximately 27 perches in extent. In addition, there is one other building standing there on that was used by the plaintiff and her husband who were engaged in the business of running a bakery.

There had been two distinct transactions germane to this action where the Plaintiff was involved.

According to the Plaintiff, in the year 1999, she borrowed a sum of Rs. 20,000/- from the 1st Defendant whom the plaintiff claimed, is a money lender. This assertion remains un-assailed. In furtherance of this transaction the plaintiff executed a deed P5, which is dated 5th July, 1999. The deed P5, is ex facie, a deed of transfer for a consideration of Rs.20, 000. Plaintiff in her evidence had said that the value of the property is approximately Rupees five hundred thousand (Rs.500, 000).

The Plaintiff, however entered into a second transaction in December of that year with the 2nd Defendant, who happened to be her own cousin, the 2nd Defendant being the son of the Plaintiff's mother's brother.

Whereby the Plaintiff leased an undivided portion of the property in suit, an extent, 30 feet by 20 feet to the 2nd Defendant for a sum of Rs.15, 000, for a period of 15 years in 1999. The lease which had been notarialy executed, was produced at the trial (P6). The said indenture (P6) permits the lessee (2nd Defendant), at his expense, to put up a structure with a concrete roof on the portion of the land leased out to him. Further the indenture estops the 2nd Defendant from demanding any payment in respect of the expenses incurred for the construction of the building.

It appears that, as per the lease agreement, the 2nd Defendant has put up a structure and has been carrying on his business activities from that location since then.

In the year 2005, a dispute had arisen between the 2nd Defendant and the Plaintiff when the 2nd Defendant made an attempt to prepare a building site on the property in suit and the 2nd Defendant had disclosed that he had purchased the property from the 1st Defendant. Plaintiff had promptly lodged a complaint to that effect with the Galagedara Police which had been produced at the trial marked P8.

In the said statement the Plaintiff had taken up the position that she borrowed Rs.20, 000 from the 1st Defendant and that she continued to pay the interest and when she approached the 1st defendant to settle the amount borrowed and to have the property redeemed, the 1st Defendant had informed that he had sold the property in question to the 2nd Defendant.

It was then that the Plaintiff had taken the initiative to file an action in the District Court against the 1st and 2nd Defendants.

The 1st Defendant after filing answer had not participated in the trial. The trial against the 1st Defendant had proceeded *ex parte* while the 2nd Defendant had contested the case, claiming the land and had taken part in the proceedings.

Both the 1st and 2nd Defendants did not respond to the notices issued by this court when this matter was supported for leave to appeal and also at the hearing. Both were throughout absent and unrepresented. That had been the case before the High Court of Civil Appeals as well

At the hearing of this case, the learned counsel for the Plaintiff-Appellant, strenuously argued that both the District Court and the High Court of Civil Appeals, had totally misdirected themselves with regard to the requirement of attendant circumstances which are vital to bring a transfer of property within the meaning of Section 83 of the Trust Ordinance.

It was pointed out by the learned counsel that there had been a total failure on the part of the learned District Judge to evaluate the evidence in the correct perspective and on the other hand had failed to consider vital items of evidence in arriving at his conclusions. The learned counsel submitted that the misdirections on the part of the District Judge and the same lapses, had permeated the judgment of the High Court of Civil Appeals and they too failed to appreciate evidence placed before the court by the Plaintiff which had gone largely unchallenged.

The learned counsel drew the attention of the court to a passage of the judgment of the High Court wherein the learned judges of the High Court of Civil Appeals had referred to the position taken up by the Plaintiff which is reproduced below:

> *"The second contention of the appellant is that the 1st respondent (1st Defendant) had not appeared in the trial court, therefore, since his (her) evidence was unchallenged, the learned District Judge could have acted on his (her) evidence. But what the appellant (Plaintiff) has forgotten is that the same evidence had been challenged by the 2nd respondent (2nd defendant) as he had totally denied of the existence of a trust between the parties.* (The emphasis is mine)

I am of the view that the High Court of Civil Appeals fell into the same error made by the learned District Judge, when they too made the same observation, and if the learned District Judge had decided the non-existence of a trust, based on the denial by 2nd Defendant of the existence of the same, as claimed by the judges of the High Court of Civil Appeals, their finding cannot be correct, for the reason that the 2nd Defendant was not privy to any of the transactions that took place between the Plaintiff and the 1st Defendant which were solely between two of them.

The 2nd Defendant came into the picture only seven months after the transaction between the Plaintiff and the 1st Defendant and seven months after the deed P5 was executed as well. He came to the land only as a lessee and that transaction was also confined to the plaintiff and the 2nd Defendant as the 1st Defendant was not even in the picture as far as the transaction relating to the lease. Similarly that transaction was confined to the plaintiff and the 2nd Defendant. The 1st Defendant was never privy to the lease in question.

Then, what knowledge did the 2nd Defendant had to speak with regard to the existence of a trust? If at all, it would have been necessarily based on knowledge gained from third parties and would tantamount to hearsay and cannot be acted upon in the absence of any other person who had first-hand knowledge giving evidence on the issue.

The main issue that this court is called upon to decide is whether the facts adduced in this case are sufficient to establish a constructive trust and whether the High Court of Civil Appeals gave its mind to the said issue in the correct perspective.

Before I consider the issue referred to above, I wish to refer to the evidence of the 2nd Defendant, albeit briefly.

2nd Defendant admitted that the Plaintiff is in possession of the impugned property and she was living there even on the date he testified in court. He also admitted that a portion of the land was given to him on a lease by the Plaintiff for a period of 15 years and as per the Indenture of lease, he put up a structure. It is significant that the 2nd Defendant had said, that after the lease was executed, he came to know that the Plaintiff has transferred the property in favour of the 1st

Defendant. In the year 2004, the 2nd Defendant says he bought the property from the 1st Defendant, but did not request the Plaintiff to vacate the same, nor did he take any steps to cancel the lease, even after he bought the property. In his evidence, the 2nd Defendant had stated that he requested the Plaintiff to have the property redeemed, but he was told by the Plaintiff that she is not in a position to do so and it was thereafter that he got the property transferred in his name. What is also significant is, upon coming into occupation of the land consequent to the lease and before he bought the property from the 1st Defendant, the2nd Defendant had put up a building on the land and had carried on business for about three years, but the 1st Defendant neither raised any objection nor took any action to evict him from the property.

With regard to the inaction on the part of the 1st Defendant, the 2nd Defendant had said that the 1st Defendant complained to him and he in turn requested the Plaintiff to get the property redeemed, but the Plaintiff did not do so. The 2nd Defendant had said that after a lapse of about 2 to 3 years he (the 2nd Defendant) bought the property from the 1st Defendant.

The applicable law:-

Section 83 of the Trust Ordinance states that:

> *"Where the owner of a property transfers or bequeaths it, and it cannot reasonably be inferred consistently with 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"*

One needs to bear in mind that where a constructive trust within the meaning of Section 83 of the Trust Ordinance is asserted, it is incumbent on the court to meticulously examine the evidence placed before the court, the reason being, on the face value the evidence placed may give the appearance of a straight forward transaction of a sale but the real intention of the parties can only be gleaned from a close scrutiny of the circumstances under which the transaction was effected. And the intention of the parties is of paramount importance.

It is in this context that our courts have consistently held that the provisions of the Prevention of Fraud Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to be led to establish the attendant circumstances

contemplated in Section 83 of the Trust Ordinance, when a court is called upon to decide on the intention of the parties, in relation to transfer of property.

This aspect was considered in the case of *Dayawathie and others Vs. Gunesekera and another* 1991 1SLR 115 as well as in the case of *Muttamma Vs. Thiagaraja* 62 NLR 559. In the case of Thiagaraja (supra) Fernando J (as he then was) in reference to Section 2 of the Prevention of Fraud Ordinance and Section 92 of the Evidence Ordinance stated that;

> *"The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise, but only to establish an "attendant circumstances" from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on section 92 of the Evidence Ordinance are to be accepted, then it will be found that not only section 83, but also many of the other provisions in chapter IX of the Trusts Ordinance will be nugatory. If for example "attendant circumstances" in section 83 means only matters contained in an instrument of transfer of property, it is difficult to see how a conveyance of property can be held in trust unless indeed its terms are such as to create an express trust".*

As referred to earlier in a case of this nature a court cannot ignore the attendant circumstances adduced and is required to give its mind to circumstances established and decide, as to whether it can be reasonably inferred that the parties concerned did not intend to part with the beneficial interest of the property.
At this point I wish to refer to the views expressed by L.J.M Cooray with approval, in his book "***The reception in Ceylon of the English Trust 1971"***

> *"No doubt as held in the case of Sinna Lebbe v. Pathumma 3. C.L R 98 and Fernando v. Fernando 35 N.L.R 154, where a person has a notarial conveyance in his favour, courts have placed a burden on the transferor to prove facts bringing himself within Section 83 of the Trust Ordinance. Once a party adduces facts (circumstances) in that respect, the court, however,*

has a duty to consider the cumulative effect of circumstances so placed before arriving at a finding on the issue. Although our courts have in several judgements referred to several facts that a court ought to consider in deciding this issue, one must bear in mind it is not an exhaustive list of attendant circumstances, as, a circumstance is attendant or not would depend on the facts of each case.

Thus, the court cannot move away from its responsibility of scrutinising these facts in the backdrop of the peculiarities of the case before it. In most of these transactions, the transferor or the borrower if it's a case of loan, is motivated by the need to overcome a dire financial circumstance and a money lender on the other hand will endeavour to secure the collateral with minimum of conditions. *It is in that context that we see, even in a case of lending money, the transfer is one that is straightforward, bereft of any conditions." (Emphasis added)*

Scrutiny of the judgment of the learned District Judge reveals that, apart from a sweeping statement holding that the Plaintiff had failed to establish a constructive trust, the learned District judge had failed to give his mind to numerous "circumstances" that the court ought to have given its mind to, in order to draw inferences as to the intention of the parties.

The High Court of Civil Appeals in its albeit brief judgment had also not referred to any of the attendant circumstances adduced on behalf of the Plaintiff.

On the face value of the impugned deed P5, the land in extent of 27 perches, with two buildings standing thereon had been sold for Rs.20,000/-. The Plaintiff had stated that its true value is around Rs.500,000/-.The 2nd Defendant in his evidence, presumably giving evidence with an intention to safeguard his rights had said that, the value of the property is between Rs.50,000 or Rs.100, 000. Even going by the conservative estimate of the 2nd Defendant, the value of the property is five times more than what is stated in the deed of transfer P5.

Furthermore, the Plaintiff had leased out a portion of 30 feet by 20 feet out of the land 27 perches in extent to the 2nd Defendant for a period of 15 years for a sum of Rs.15, 000. If that be the case, the actual value of the land necessarily has to be far in excess of Rs.20, 000.

On the other hand, the Plaintiff by leasing out a portion of the land to the 2nd Defendant even after the execution of the deed of transfer in favour of the 1st Defendant (P5) demonstrates that the Plaintiff had acted as the owner of the impugned property.

Even when one considers the conditions of the lease, which says the lessee (2nd Defendant) is required to leave the improvement made to the leased-out portion of the land and the lessee is not entitled to claim any payment for such improvements from the Plaintiff. This condition of the lease is another factor that demonstrate again, that the Plaintiff intended to enjoy the property, after the expiry of the lease. The 1st Defendant, the purported owner, on the other hand did not raise a whimper of protest when the 2nd Defendant put up a structure on the property in suit and carried on business, which could hardly considered as the natural and a probable conduct of an owner of a property.

The impugned deed P5 was executed in 1999. Neither the 1st Defendant nor the 2nd Defendant who claims he purchased the property in suit from the 1st Defendant, had taken any step to evict the Plaintiff from the property.

It was the Plaintiff who lodged a complaint in 2005 (P7) with the Police, when the 2nd Defendant made an attempt to clear a portion of the land and sought the intervention of the Police in preventing the 2nd Defendant effecting any changes to the property.

Plaintiff in her evidence has said that the 1st Defendant is a moneylender, which has not been controverted. It is the position of the Plaintiff that they continued to pay the interest as agreed and when they approached the 1st Defendant to have the property re-transferred upon accepting the capital which was Rs.20, 000/-, the 1st Defendant avoided them. There appears to be some credence to this assertion of the Plaintiff. The Defendant after filing an answer, did not take part in the trial before the District Court nor did he appear before the High Court of Civil Appeals.

The 2nd Defendant (the lessee) who happened to be a cousin of the Plaintiff admitted in his testimony that he did not keep the Plaintiff informed from whom he leased the property that he is planning to buy the land from the 1st Defendant.

The suppressing of this transaction exposes the sinister motives on the part of the 1st and 2nd Defendants.

Neither the learned District Judge nor the judges of the High Court of Civil Appeals, had discredited the evidence of the Plaintiff. The only reason both courts held in favour of the Defendants was that the plaintiff had not adduced attendant circumstances from which could be drawn the inference that the Plaintiff had not intended to dispose of the beneficial interest of the property.

It appears that both the District Court and the High Court of Civil Appeal ignored all the circumstances referred to above, and fell into error, treating the transaction between the Plaintiff and the 1st Defendant as a straight forward sale.

I have mentioned earlier in this judgement that the 1st Defendant did not challenge the evidence adduced by the Plaintiff which evidence High Court of Civil Appeals have ignored. To reiterate, the High Court of Civil Appeals fell in to the same error when it concluded that there was no trust on the basis of the 2nd Defendant`s evidence, whereas the evidence clearly showed, that the 2nd Defendant was not privy to the transaction between the Plaintiff and the 1st Defendant.

It was only the 1st Defendant who was capable of shedding a different light on the transaction between the parties and the failure of the 1st Defendant to do so strongly militate against any argument that deed of transfer (P5) was an out and out transfer between the Plaintiff and the 1st Defendant.

Considering the attendant circumstances, I am of the view that the transaction was only a nominal transfer and the Plaintiff had only pledged her property to obtain a loan. Accordingly, I answer the questions of law on which leave was granted as follows:

(i) The High Court of Civil Appeal erred in law by arriving at the conclusion that there was no proof of a constructive trust.

(ii) The High Court of Civil Appeal erred in law by not considering the question that the Plaintiff never intended disposal of the beneficial interest of the impugned property.

(iii) The High Court of Civil Appeal erred by holding that there was no constructive trust exists in the circumstances of this case.

Accordingly, both the judgment of the High Court of Civil Appeals dated 11th November, 2014 and the judgment of the learned District Judge dated 29th July, 2011 are hereby set aside.

I further hold that Plaintiff is entitled to relief prayed in prayers (ඈ) and (ඉ) of the plaint of the plaintiff dated 10th February, 2005. The learned District Judge of Kandy is directed to enter decree accordingly.

The Plaintiff is entitled to the cost of this court and the courts below.

JUDGE OF THE SUPREME COURT

JUSTICE ANIL GOONARATNE

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 after granting of Leave to Appeal in terms of Article 172 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 5C of the High Court of the Provinces (Special Provision) Act N0.19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006**.**

SC APPEAL NO:-193/2012

SC/HC/CALA/18/2013

PHC Kandy No.CP/HCCA/CA/49/10

DC Gampola D 82/06

W.D.M.Ganga Prasath Tikiri Banda Dissanayake,
Pethum Uyana, Pallekelle, Kundasale

PLAINTIFF

V.

R.G.R.M Hemali Priyantha Menike Ratnayake,

50, Keerapane, Gampola.

DEFENDANT

AND BETWEEN

W.D.M.Ganga Prasath Tikiri Banda Dissanayake. Pethum Uyana,

Pallekelle, Kundasale.

PLAINTIFF-APPELLANT

V.

R.G.R.M. Hemali Priyantha Menike Ratnayake.

50, Keerapane, Gampola.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

W.D.M.Ganga Prasath Tikiri Banda Dissanayake, Pethum Uyana,

Pallekelle, Kundasale.

PLAINTIFF-APPELLANT-APPELLANT

V.

R.G.R.M. Hemali Priyantha Menike Ratnayake.

50, Keerapane, Gampola.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE:- B.P.ALUWIHARE, PC, J.

UPALY ABEYRATHNE, J.

H.N.J.PERERA, J.

COUNSEL:-Sunil Abeyratne with Thashira Gunatileke for Plaintiff-Appellant-Appellant.

Thishya Weragoda with Chinthaka Sugathapala instructed by Thamila Dinushi Perera for the Defendant-Respondent-Respondent.

ARGUED ON:-24.05.2017.

DECIDED ON:-04.08.2017

H.N.J.PERERA, J.

The Plaintiff-Appellant-Appellant(here-in-after referred to as Plaintiff) instituted action in the District Court of Gampola seeking inter alia a Divorce dissolving the marriage between the Plaintiff and the Defendant-Respondent-Respondent(here-in-after referred to as the Defendant).

The Defendant filed answer and sought a dismissal of the Plaintiff's action and counter sued for a dissolution of marriage between the parties on grounds of desertion on the part of the Plaintiff.

At the trial both the Plaintiff and the defendant reached a settlement and accordingly, the Plaintiff agreed to pay permanent alimony to the Defendant, the Defendant to leave from the house situated at Keerapne, Gampola and handover possession of the same and three vehicles and documents relevant to the same and other items mentioned in the schedule of the plaint to the Plaintiff. As a result, the Plaintiff had to deposit Rs.2,950,000/- in favour of the Defendant. The parties to fulfil their respective obligations on or before 1st December 2007. On such basis the marriage between the Plaintiff and the Defendant to be dissolved on the matrimonial fault of constructive desertion of the Defendant by the Plaintiff. Accordingly the Defendant's evidence was led and the learned trial Judge delivered judgment and entered decree Nisi on 08.10.2007.

Thereafter the Plaintiff by way of a petition supported by affidavit sought an order or judgment declaring that the settlement entered into on 8th October 2007 is declared null and void, to re-fix the case for re-trial and to permit the Plaintiff to withdraw the said sum of Rs.2,950,000/-deposited in court. The Plaintiff also sought an interim order preventing the Defendant from withdrawing the said Rs.2,950,000/-until the determination of the said application.

The plaintiff pleaded that he granted a Power of Attorney in favour of the Defendant in 2005 when he was out of the country from 18th March until 5th April 2005.The Plaintiff states that the Defendant using the said Power of Attorney had transferred a land to the Defendant's father on or about 10th May 2006 and thereafter the Defendant's father had transferred the said land in favour of the Defendant on or about 9th June 2006. It is the Plaintiff's position that he was unaware of the said transaction at the time of entering into the settlement in the divorce case on 8th October 2007.

The learned District judge rejected the said application of the Plaintiff summarily without holding an inquiry on 10.12.2007 and being dissatisfied with the said order the Plaintiff filed a Leave to Appeal application against the same before the High Court of Province, Kandy (Civil Appellate) and upon the agreement of both parties to refer the case back to the District Court for a proper inquiry in to the said application of the Plaintiff, the said court made order vacating the order made by the District Judge on 8.10.2007 and sent back the case for a fresh inquiry. The learned District judge thereafter after inquiry delivered the order on 2.10.2008 rejecting the application of the plaintiff once again.

Being aggrieved by the said order made by the learned District Judge on 02.10.2008 rejecting the said application made by the Plaintiff, the Plaintiff has preferred an appeal to the Civil Appellate High Court Kandy and the said appeal was dismissed by the Civil Appellate High Court on the basis that the Plaintiff has no right of appeal under section 754(1) of the Civil Procedure Code against the order dated 02.10.2008.

Being aggrieved by the said judgment of the High Court of Province (Civil Appellate), Kandy, the Plaintiff sought leave to appeal from this court and this court granted leave on the following questions of law.

(1)Whether the order dated 02.10.2008 was in the nature of final order and the Petitioner has a right of appeal against the same?

(2)Whether the learned judges of the High Court of Province (Civil Appellate), Kandy erred in facts and law of this case?

(3)Whether the learned judges of the High Court of Province (Civil Appellate) Kandy and the learned District Judge , Gampola have been misled by the submission of the Respondent and failed to consider that the Appellant has entered into terms of settlement before the judgment

without the knowledge of the aforesaid fraudulent act of the Respondent?

(4)Whether the learned Judges of the High Court of Province (Civil Appellate) Kandy have failed to consider the fact that if the Appellant had known the said fraudulent act of the Respondent, the Appellant would have not entered into terms of settlement of the said case?

(4)Whether the learned judges of the High Court of Province (Civil Appellate) Kandy have erroneously declared that the Appellant cannot challenge the order of the District Court dated 02.10.2008 under provisions of section 754(1) of the Civil Procedure Code?

The main contention of the plaintiff in this case is that the order dated 02.10.2008 is an order having the effect of a Final judgment and therefore the Plaintiff is entitled to canvass the same by way of a Final Appeal in terms of section 754(1) of the Civil Procedure Code.

The Defendant submits that the position of the Plaintiff is untenable in law and that the order dated 02.10.2008 is an interlocutory order.

The Counsel of the Defendant has sighted the decision of the Supreme Court in the case of S. Subramanium Chettiar V.S.Narayan Chettiar and Others SC Appeal Nos 101/A/2009, 101B/2009(SC HCCA LA 174/2008, 175/2008) In support of his contention that the order dated 02.10.2008 is not a final order having the effect of a judgment within the meaning of sub-section 754(1) and 754(5) of the Civil Procedure Code, but is only an inter-locutory order.

In Chettiar's case the Supreme Court held that:-

"In terms of section 754(5) of the Civil Procedure Code a judgment would mean any judgment or order having the effect of a 'final judgment' made by any civil court and an order would mean the final expression of any decision in any civil action, proceeding of matter, which is not a

judgment. Although section 754(5) of the Civil Procedure Code had laid down the meaning of the judgment and order, it had not been easy to give a comprehensive definition of the term 'final judgment'.

The question of the test that should be applied to decide as to whether an order has the effect of a final judgment was considered by the Supreme Court in Siriwardene V. Air Ceylon Ltd (1984)(1) S.L.R. 295 and Ranjith V. Kusumawathie and others 1998 (3) S.L.R.232. In Siriwardenea and Air Ceylon Ltd in his judgment Sharvananda, J. had referred to a number of cases and had held that for an order to have the effect of a final judgment and to qualify to be a 'judgment' under section 754(5) of the Civil Procedure Code:-

(1)It must be an order finally disposing the rights of the parties;

(2)The order cannot be treated to be a final order if the suit of action is still left a live suit or action for the purpose of determining the rights and liabilities of the parties in the ordinary way;

(3)The finality of the order must be determined in relation to the suit;

(4)The mere fact that a cardinal point in the suit has been decided or even a vital or important issue determined in the case, is not enough to make an order a final one.

The meaning of ' judgment' for the purpose of appeal was also examined by Dheeraratne, J in Ranjit V. kusumawathie and others. Justice Dheeraratne ,J. in Ranjit V. Kusumawathie had examined several cases including those which were referred to by Sharvananda, J. and had referred to the two tests, which was referred to as the 'order approach' and the 'application approach' by Sir John Donaldson MR; in White V. Brunton. (supra)

At the time leave to appeal was granted in 'Chettiar's case both learned Presidents Counsels who appeared in that case had invited the Court that in order to resolve the apparent conflict between the two judgmnts; viz Siriwardene V. Air Ceylon Ltd and Ranjith V. Kusumawathie that the appeal be referred to a Bench of five judges . Accordingly a Bench of five judges were nominated by the then Chief Justice to consider this matter.

The Supreme Court after considering all these cases has held in Chettiar's case that:-

"It is therefore quite obvious that final judgment or order should be interpreted for the purpose of Chapter LV111 of the Civil Procedure Code not according to the meaning given in section 5 of the Civil Procedure Code, but that of the definition given in section 754(5) of the Civil Procedure Code.

Considering the provisions contained in section 754(5) of the Civil Procedure Code, it is abundantly clear that decision of an original civil court could only take the form of a judgment or an order having the effect of a judgment or of the form an interlocutory order……

Accordingly in terms of section 754(5) there could be only a judgment, order having the effect of a final judgment and an order, which is not a judgment and therefore only an interlocutory order.

The Court further held:-

"In these circumstances, it is abundantly clear that, in interpreting the words, judgment and order in reference to appeals and revisions, it would not be possible to refer to any other section or sections of Civil Procedure Code, other than section 754(5), and therefore an interpretation based on the procedure of an action cannot be considered for the said purpose. Therefore to ascertain the nature of the decision made by a civil court as to whether it is final or not, in keeping with the

provisions of section 754(5) of the Civil Procedure Code, it would be necessary to follow the test defined by Lord Eshert MR in Standard Discount Co. V. La Grange (supra) as follows:-

'The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

Considering the decision given by Bandaranayake, J. in S. Subramanium Chettiar V. S. Narayan Chettiar and others this court cannot agree with the submissions made by the learned Counsel for the Plaintiff that the order made by the learned District Judge have the effect of a final judgment under section 754(5) of the Civil Procedure Code and therefore appeal lay direct to this court under section 754(1). Had the District Judge answered the issue in Plaintiff's favour he would have to continue with the case and would have allowed the action to go on. In such circumstances it would not be probable to state that the said order made by the learned District Judge had finally settled the litigation between the Plaintiff and the Defendant. It is abundantly clear that the order dated 02.10.2008 is not a final order, having the effect of a judgment within the meaning of sub-sections 754(1) and 754(5) of the Civil Procedure Code, but is only an interlocutory order.

Therefore plaintiff is not entitled make a final appeal as the Plaintiff's remedy was to make an application by way of a leave to appeal. Therefore the learned Provincial High Court Judge was correct in holding that the order dated 02.10.2008 was not an order having the effect of a

judgment but an interlocutory order and that the Plaintiff had no right of appeal in terms of section 754(1) of the Civil Procedure Code.

Accordingly I answer the questions of law No. 1, 2 and 5 in the negative in Defendant's favour. In view of the above findings I see no reason to consider questions of law No. 3 and 4. Therefore for the aforementioned reasons I dismiss the Appeal of the Plaintiff-Appellant-Appellant with 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 SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Special Leave to Appeal in terms of Article 127 read with 128 of the Constitution.

The Head Quarters Inspector,
Ratnapura Police Station,
Ratnapura.

COMPLAINANT

SC Appeal Case No:- 195/2011

SC SPL Apl 200/2011

CA (PHC) 182/2000

HC Avissawella HC (APN) 88/99

MC Avissawella 68396

V.

Galaudakanda Watukarage Siripala
Deheragoda, Ellawala.

ACCUSED

AND

Totapitiya Arachchige Abeypala,
Deheragoda, Ellawala.

PETITIONER

V.

1.The Head Quarter's Inspector,
Ratnapura Police Station,
Ratnapura.

COMPALINANT-RESPONDENT

2.Galaudakanda Watukarage
Siripala,
Deheragoda, Ellawala.

ACCUSED-RESPONDENT

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

RESPONDENT

AND BETWEEN

Galaudakanda Watukarage
Siripala.
Deheragoda, Ellawala.

ACCUSED-RESPONDENT-APPELLANT

v.

Totapitiya Arachchige Abeypala,
Deheragoda, Ellawala.

PETITIONER-RESPONDENT

AND NOW BETWEEN

Galaudakanda Watukarage

Siripala.

Deheragoda, Ellawala.

ACCUSED-RESPONDENT-APPELLANT-PETITIONER

v.

Totapitiya Arachchige Abeypala.

Deheragoda, Ellawala.

PETITIONER-RESPONDENT-RESPONDENT

BEFORE:-S.E.WANASUNDERA, PCJ.

UPALY ABEYRATHNE, J. &

H.N.J.PERERA, J.

COUNSEL:-Darshana Kuruppu with Mrs. Chandrasekera for the Accused-Respondent-Appellant-Petitioner

Ranjan Mendis with B.S Peterson & Asoka C.Kandambi For the Petitioner-Respondent-Respondent

ARGUED ON:-05.07.2016

DECIDED ON:-04.11.2016

H.N.J.PERERA, J.

The Petitioner was charged before the Magistrate Court of Avissawella for committing the following offences.

a. That the accused with persons unknown to prosecution on or about 29.05.1991 did voluntarily cause grievous hurt to Thotapitiya

Arachchige Abeypala by physically assaulting and thereby committed an offence punishable under section 316 of the Penal Code.

b. That the aforesaid person on or about 29.05.1991 did voluntarily cause grievous hurt to Lekamlage Dayananda Jayaweera by assaulting him with clubs and thereby committed an offence punishable under Section 314 of the Penal Code.

The Magistrate after trial delivered judgment on 25.09.1998 acquitting the Accused and being aggrieved by the said judgment the Respondent preferred a Revision Application to the High Court of Avissawella.

It was contended on behalf of the Petitioner that the judgment of the Learned Magistrate was illegal, contrary to law, and the Accused-Respondent should have been convicted at least on the principle of the common intention as charges were framed on that basis as there was evidence of police assault. It was further submitted that the Learned trial Judge had gravely misdirected himself on a very vital matter, when he stated that the Doctor's evidence corroborated with the defence position, when in fact in his evidence, though the Doctor has said, when it was suggested to the Doctor that the injuries could have resulted from a fall, he finally expressed the view that the injuries were most probably the result of an assault.

It was also the position of the Petitioner that the learned trial Judge has failed to consider the effect of a charge based on common intention, a vital omission which has necessarily resulted in miscarriage of justice in the light of the findings of the Judge.

The learned High Court Judge on 14.06.200 delivered his judgment ordering a re-trial. The learned High Court Judge in his judgment held that a substantial error of law has been committed and that the erroneous decision reached by the learned trial Judge could be

considered as exceptional circumstances. It was further held that the learned trial Judge has clearly failed to consider the evidence based on common intention and failed to consider the applicability of Section 32 of the Penal Code and that the failure of the Magistrate to consider the effect of the charges based on common intention amounts to a miscarriage of justice.

Aggrieved by the said judgment of the Learned High Court Judge, the Petitioner preferred an appeal to the Court of Appeal. The Court of Appeal delivered judgment on 06.10.2011 dismissing the Petitioner's appeal and affirming the High Court Judge's order of re-trial.

Aggrieved by the said Judgement of the Court of Appeal the Petitioner filed a special leave to appeal application stating that the facts and law have been erroneously applied to dismiss the Petitioner's appeal, resulting in a grave miscarriage of justice.

This Court having heard the submissions of the Counsel for the Petitioner, granted special leave to appeal on the questions of law set out in paragraph 25 (1),(2),(3),(4),(5),(6), and (7) of the prayer to the Petition.

(I) Whether their Lordships of the Court of Appel has failed to consider, that the accused-Respondent-Appellant-Petitioner cannot be convicted under common intention, when in fact the Magistrate has not framed a charge sheet against the Accused-Respondent-Appellant-Petitioner whereas the trial was commenced on the plaint filed by the police.

(II) Whether their Lordships of the Court of Appeal has failed to consider, that the Petitioner-Respondent-Respondent has failed to comply with the Supreme Court Rules, when he filed the Revision Application at the High Court of Avissawella?

(III) Whether their Lordships of the Court of Appeal has failed to consider that the learned High Court Judge has misdirected himself on law by holding that a substantial error of law has being considered as an exceptional circumstance and erroneous decision reached by the trial Judge could be considered as exceptional circumstances.

(IV) Whether their Lordships of the Court of Appeal has failed to consider that the learned High Court Judge has misdirected himself on law by holding that the Magistrate had not considered the existence of common intention from the conduct of the assailants and participation in the commission of the offence by the Accused.

(V) Whether their Lordships of the Court of Appeal has failed to consider that the learned High Court Judge has misdirected himself on law by holding that the learned Magistrate should have considered the crucial test as to the applicability of constructive liability under Section 32 of the Penal Code, i.e the phrase "in furtherance of the common intention of all".

(VI) Whether their Lordships of the Court of Appeal has failed to consider that the learned High Court Judge has misdirected himself on law by holding that the failure of the Magistrate to consider the effect of the charges based on common intention amounts to miscarriage of justice.

(VII) Whether their Lordships of the Court of Appeal has failed to consider that Jayaweera's statement had not been marked by the prosecution and as such ordering a re-trial for an offence allegedly committed in 1991 violates the Petitioner's right to a fair trial.

The leave to appeal application was supported in this Court on 12.12.2011 and the Court granted special leave to appeal on the

questions of law set out in Paragraph 15 (1) to (7) in the prayer to the petition. When this matter came up for argument on 05.06.2012 the Counsel for the Respondent-Respondent raised the following preliminary objections as to the maintainability of this application.

(a)Has the jurisdiction of this Court been invoked contrary to the provisions of Section 360(1) of the Criminal Procedure Code Act, in so far as the Attorney-General is not made a party.

(b)In any event, in so far as the impugned order has been made in

Proceedings where the Attorney-General was a party, has the Petition of Appeal filed before the Supreme Court been filed in compliance with the Rules of this Court.

After granting leave the Court had stated that the said preliminary objections would be considered at the stage of hearing. I would now deal first with the preliminary objections taken by the Petitioner-Respondent-Respondent in this case.

The contention of the learned Counsel for the Respondents was that the Appellant had failed to name the Attorney-General, as a party respondent in the appeal to the Supreme Court. It was contended that the appellant had not complied with Rule 4, 28(1) and 28(5) of the Supreme Court Rules of 1990. Accordingly learned Counsel for the Respondent-Respondent moved that this appeal be dismissed *in limine*.

Chapter XIV of the Code of Criminal Procedure Act deals with the commencement of proceedings before the Magistrate's Courts and Section 136(1) a refers to the fact that proceedings in a Magistrate's Court shall be instituted on a complaint being made orally or in writing to a Magistrate of such Court that an offence has been committed which such Court has jurisdiction either to inquire into or try such complaint.

In Attorney-General V. Herath Singho (1948) 49 N.L.R 108, it was held that in Section 199 of the Criminal Procedure Code the word "complainant" must mean the person who makes the "complaint" to the Magistrate. The aggrieved person or persons or the police, who have been induced by the aggrieved person or persons, could take up the grievance before Court. It was further held by Dias, J. that if the aggrieved person or persons desire to be the 'Complainant', section 148 (1) (a) gives him or them the right to make a "complaint" orally or in writing provided that such "complaint" , if in writing, shall be drawn and countersigned by a pleader and signed by the complainant. If the aggrieved person or persons desire to be the 'complainant' the Code of Criminal Procedure Act would give him the right to make a 'complaint' making himself the 'complainant'. 'Complainant' means the person, who makes the complaint before Court. Considering the applicability of the word 'complainant' defined in Section 2 of the Code of Criminal Procedure Act in relation to other relevant sections of the Code ,Dias ,J was of the opinion that the 'Aggrieved person or persons, could take up the grievance before Court. On the other hand the aggrieved person or persons may, without exercising their right to make a complaint in terms of the Code of Criminal Procedure Act, state their grievances to the police, who after inquiry decides to take up the case and institute proceedings on their own, the said police would file their 'complaint' and is clear that the police officers, who instituted the proceedings would become the complainant. The aggrieved person would cease to be the 'complainant' in such situations.

In Nonis v. Appuhamy 27 NLR 430, too it was held that "…..for the institution of proceedings by complaint or written report, the person making the complaint or written report is regarded as the party instituting the proceedings against the accused person".

As stated earlier in terms of section 136(1) of the Code of Criminal Procedure Act, the proceedings before the Magistrate's Court would commence after the institution of a complaint being made to the Magistrate. Therefore it is quite clear that a person who makes such a complaint to the Magistrate would be regarded as a 'complainant'.

In the instant case it is not in dispute that on a complaint made by the Petitioner-Respondent-Respondent Thotapitiya Arachchige Abeypala on 29.05.1991 against the Accused-Respondent-Appellant and some other unknown persons about an assault to the Ratnapura police station, the Officer-in charge of the Criminal Investigation Department of the Ratnapura police station has investigated into the said complaint made by the Petitioner-Respondent-Respondent and have instituted action against the Accused-Respondent-Appellant for causing grievous hurt to the Petitioner-Respondent-Respondent and simple hurt to one C.L.Dayananda Jayaweera . The said case number is 68396. Therefore it is evident that the person who made the complaint to the Magistrate Ratnapura is the Officer-in-charge of the Criminal Investigation Division of the Ratnapura police station.

Section 360(1) of the Criminal Procedure Code Act enacts that the Attorney-General shall appear for the state in every appeal to the Court of Appeal under this Code to which the state or a public officer is a party and all such documents, exhibits and other things connected with the proceedings as the Attorney-General may require for the purpose of his duties under this section shall be transmitted to him by the registrar of the court having custody of such documents, exhibits and things. Section 360(2) enacts that the Solicitor-General or a state Counsel…….shall be entitled to appear for the state in place of the Attorney-General in such appeal.

It was submitted by the Counsel for the Petitioner-Respondent-Respondent that the Attorney-General has not even been cited in the (PHC) Appeal filed by the Accused-Appellant in the Court of Appeal and as such there is stark non-compliance with the provisions in section 360 of the Criminal Procedure Code Act.

It was the position of the Counsel for the Accused-Appellant that even though the Attorney-General had not been made as a party, Mr.Rohantha Abeysuriya, S.S.C has appeared for the Attorney-General and as such no whatsoever prejudice was caused to the Respondent.

It is not in dispute that the Attorney-General had not been made a party to this appeal. Therefore it is very clearly seen that the Accused-Appellant in this case has failed to make the 'complainant' to the Magistrate Ratnapura i.e O.I.C.Criminal Investigation Division Ratnapura police station or the Attorney General who represented the said "Complainant" in the High Court Avissawella as a party to this application. It is therefore evident that the Attorney-General has to be regarded as a necessary party to this case, and it is common ground that the Attorney-general has not been made a party to the application before the Supreme Court.

Rule 4 of the Supreme Court Rules 1990, which deals with the applications for Special Leave to Appeal refers to the necessity in naming as the respondents the necessary and relevant parties. The said Rule reads as follows:-

"In every such application, there shall be named as respondent, the party or parties (whether complainant or accused, in a criminal cause or matter, or whether plaintiff, petitioner, defendant, respondent, intervenient or otherwise, in a civil cause or matter), in whose favour the judgment or order complained against was delivered, or adversely to whom such application is preferred, or whose interest may be adversely

affected by the success of the appeal, and the names and present addresses of all such respondents shall be set out in full".

The rule indicates the necessity for all parties, who may be adversely affected by the success or failure of the appeal to be made parties to the application.

In Ibrahim v. Nadarajah (1991) 1 Sri.L.R 131, where the Supreme court had to consider whether there was a violation of rules 4 and 28 of the Supreme Court Rules, considering the applicability of the Supreme Court Rules and taking the view that a failure to comply with the requirements of **Rules 4** and **28** is necessarily fatal, Dr. Amerasinghe, J further held that:-

"It has always, therefore, been the law 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."

Section 28 deals with other appeals, which come before the Supreme Court and the said Rule reads as follows:-

28(1) Save as otherwise specifically provided by or under any laws 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."

28(5) In every such petition of appeal and notice of appeal, 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."

As stated earlier it is common ground that the Attorney-General who was the 3rd Respondent and who represented the "complainant" the Head Quarter's Inspector, Ratnapura was not made a party to this appeal. It is evident that the Attorney-General, has to be regarded as the representative of the 'complainant' in such an application and therefore is a necessary party to this appeal. 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.

It is thus apparent that the appellant had not complied with Rules 4 and 28 of the Supreme Court Rules of 1990.

In the instant case the learned Magistrate after trial has proceeded to acquit the Accused-Appellant from the charges against him. Thereafter the Petitioner-Respondent-Respondent has sought permission to appeal against the said decision of the Magistrate from the Attorney General. No sanction to appeal had been granted by the Attorney-General. The Petitioner–Respondent-Respondent had therefore moved in revision against the said judgment of the learned Magistrate making the Attorney-General a party before the High Court of Avissawella. Accordingly it is clearly seen that the Petitioner-Respondent-Respondent has clearly taken steps to make the Attorney-General who represented the 'Complainant' a party to the said Revision Application made to the High Court of Avissawella.

The Accused-Appellant who proceeded to challenge the decision of the learned High Court Judge has clearly failed to make the Attorney-General a party to the said appeal before the Court of Appeal. It is submitted on behalf of the Accused-Appellant that although the Accused-Appellant has failed to name the Attorney-General and make him a party to the said appeal before the Court of Appeal, Mr. Rohantha Abeysuriya , S.S.C.

has appeared for the Attorney-general and as such no whatsoever prejudice was caused to the Respondent. It was submitted that even though Mr.Rohantha Abeysuriya appeared for the Attorney-General he has not made submissions on behalf of the Attorney-General. The very fact that R.Abeysuriya, S.S.C. has appeared for the Attorney General in the said appeal before the Court of Appeal, although the Attorney General was not made a party to the said appeal, clearly demonstrate the fact that the Attorney General was concerned or was interested of the outcome of the said appeal before the Court of Appeal. Anyhow there is nothing before this court to substantiate the fact that R.Abeysuriya S.S.C. in fact appeared before the Court of Appeal.

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.

As stated earlier, the "Complainant" in this case the Head Quarter's Inspector, police station, Ratnapura or the Attorney-General who represented the "complainant" in the High Court, Avissawella has not been made a party to this appeal. In the said Revision application before the High Court Avissawella the Attorney-General was a party to the said revision Application and a State Counsel represented the 2nd Complainant-Respondent.

In short the Accused-Appellant in his appeal to the Appeal Court and as well as the Special Leave to Appeal Application before the Supreme Court has clearly failed to make the 'complainant' in this case namely the Head Quarter's Inspector, police station Ratnapura and the Attorney General parties to the said appeals filed by him. The Accused-appellant has clearly failed to comply with the Supreme Court Rules 4 and 28 in presenting this Special Leave to Appeal Application before the Supreme Court.

In Kesara Senanayake V. Attorney General and Another [2010] 1 SRI.L.R 149, Dr. Shirani Bandaranayake, J., held that " The totality of Rules 4, 28(1) and 28(5) of the Supreme Court Rules 1990 indicates 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. It was further held 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".

Accordingly in terms of the Supreme Court Rules, for the purpose of proper constitution of this appeal, it is vital that the Attorney-General should have been made a party to this appeal. The Accused-Appellant has very clearly failed to comply with the Rules 4 and 28 of the Supreme Court Rules of 1990.

For the reasons aforesaid, I uphold the preliminary objections raised by the learned Counsel for the Petitioner-Respondent-Respondent and dismiss this appeal for non-compliance with Supreme Court Rules.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PCJ.

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
a judgment of the High Court of
Civil Appeal of Kandy.

Seyadu Mohamadu Mohamed Munas,
No. 1/96, Dehigama, Muruthalawa.
Plaintiff

Vs

SC APPEAL 195/2012
SC HC (CALA) 341/12
CP/HC/CA 197/08
D.C.Kandy Case No. L/19019

Sitti Patu Umma, No. 19, Dehianga,
Muruthalawa.
Defendant

AND BETWEEN

Sitti Patu Umma, No. 19, Dehianga,
Muruthalawa.

Defendant Appellant

Vs

Seyadu Mohamadu Mohamed Munas,
No. 1/96, Dehigama, Muruthalawa.

Plaintiff Respondent

AND NOW BETWEEN

Seyadu Mohamadu Mohamed Munas,
No. 1/96, Dehigama, Muruthalawa.
(Now deceased)
Mohamed Muhuseen Inul Zulfika,
No. 1/96, Dehianga, Muruthalawa.

Substituted Plaintiff Respondent
Appellant

Vs

Sitti Patu Umma, No. 19, Dehianga,
Muruthalawa.

Defendant Appellant Respondent

BEFORE : PRIYASATH DEP PCJ.
S. EVA WANASUNDERA PCJ. &
PRASANNA JAYAWARDENA PCJ.

COUNSEL : S.K.K. Sangakkara with W.D. Weeraratne and Ms. Aloka de Silva for the Substituted Plaintiff Respondent Appellant.
Hemasiri Withanachchi for Defendant Appellant Respondent.

ARGUED ON : 01.02.2017.
DECIDED ON : 06.04. 2017.

S. EVA WANASUNDERA PCJ.

In this matter leave to appeal was granted on two questions of law raised by the Appellant and another question of law was raised by the Respondent at the same

time, all of which have to be considered and answered by this Court. The said questions are as follows:-

1. Did the High Court of Civil Appeal fail to consider the implication of Section 83 and 98 of the Trust Ordinance in arriving at its decision?
2. Did the High Court of Civil Appeal err by failing to consider the injustice caused to the Appellant if the Respondent gets the property without payment of any consideration?
3. Can the Petitioner have a declaration of title when the property is subject to a constructive trust?

The background facts of this case are pertinent to throw some light before treading on the matters which have to be decided. Sitti Patu Umma was a female who was running the boutique which covered about 2.7 Perches, bearing assessment number 7 in the town of Muruthalawa on a land of 2.8 Perches. Muruthalawa is about 8 kilometers away from Kandy. She had bought the said property from the Plaintiff, Munas in 1991. Since then she had been running the boutique and is in possession up to date. In April, 1997, Sitti Patu Umma had borrowed Rs. 60,000/- from Lilian Ranaweera on the promise that she will pay back the loan within one year and had **transferred her property to Lilian as security for the loan**. She had paid interest monthly on the loan as agreed for about 1 ½ years but failed to pay the loan. Lilian had sent a letter through her lawyer Karalliyedde to Sitti Patu Umma **demanding from the said loan of Rs. 60000/**- and further said that if it is not paid back to Lilian, *action will be **filed to recover the said loan***. At that time Sitti Patu Umma had gone to Lilian and begged her to allow her two more years to pay in full the money borrowed from her and **it was so agreed between Lilian and Sitti Patu Umma.**

Later on, Lilian had executed a transfer deed to the Plaintiff, Munas for Rs. 150000/-. **Sitti Patu Umma did not know about it**. She was still running the boutique and carried on her business. Munas had then filed action in the District Court praying for a declaration of title to the said property and for ejection of Sitti Patu Umma from the said boutique. The District Judge held in favour of Munas. Then Sitti Patu Umma appealed to the Civil Appellate High Court and the High Court held in her favour. Now Munas is before this Court in appeal from the judgment of the Civil Appellate High Court.

This Court has to consider both Sections 83 and 98 of the Trusts Ordinance. They come under the title, "Constructive Trusts" in Chapter IX of the Trusts Ordinance.

Src. 83 of the Trusts Ordinance reads as follows:
Where the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the **attendant circumstances** that he intended to dispose of the **beneficial interest therein**, the **transferee** or legatee must hold such property **for the benefit of the owner** or his legal representative.

Sec. 98 reads as follows:
Nothing contained in this Chapter shall impair the rights of **transferees in good faith for valuable consideration**, or create an obligation in evasion of any law for the time being in force.

In this matter, the Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) had filed action in the District Court of Kandy praying for a declaration of title to the property in question and for eviction of the Defendant Appellant Respondent (hereinafter referred to as the Defendant) from the said property. The Plaintiff based his title on Deed No. 1483 dated 22.09.1998 by which he had bought the property for Rs.150000/- from Lilian Ranaweera. The said Lilian Ranaweera had claimed title on the transfer **Deed No. 22090 dated 07.04.1997** which she claims to have received from the previous owner Sitti Patu Umma who is the Defendant in this case. The consideration thereof is mentioned as Rs. 60000/-.

The Defendant in her answer stated that the said Deed No. 22090 is **not in fact a deed of transfer but was security given for a loan of Rs. 60000/- obtained by the Defendant from Lilian Ranaweera.** The Defendant had prayed that Lilian Ranaweera be made a party to the action and be summoned to Court but the District Judge had not allowed that application.

The case proceeded to trial on three admissions and 17 issues. The Plaintiff gave evidence and marked documents P1 to P4. The Defendant gave evidence and Attorney at Law who sent the letter of demand to the Defendant as instructed by Lilian Ranaweera also gave evidence on behalf of the Defendant.The Defendant closed her defense case marking documents D1 to D3. The Defendant had been in

possession even prior to herself buying the property in 1991 and at the time of the trial as well, according to the evidence of the Defendant and the Plaintiff.

The Notary Public who attested the said Deed was Attorney at Law L.B. Karalliyadde. On 29.05.1998, Romesh Karalliyadde , Attorney at Law had written a letter to the Defendant, Sitti Patu Umma on behalf of his client Lilian Ranaweera demanding the return of the sum **of money which was borrowed by the Defendant Sitti Patu Umma on 07.04.1997 , ' upon the Deed No. 22090 attested by L.B.Karalliyadde Notary Public ' in order to discharge the deed**. Romesh Karallyadde was the son of L.B. Karallyadde who had attested the Deed No. 22090. Attorney at Law Romesh Karallyadde had given evidence on behalf of the Defendant.

On 15.02.1991, George Kulasekera had sold this property to the Plaintiff, S.M.M.Munas for Rs.50,000/- by Deed No. 13315. Munas had transferred the said property to Sitti Patu Umma, the Defendant by Deed No. 14093. Sitti Patu Umma had executed the Deed of Transfer No. 22090 to the transferee Lilian Ranaweera. Lilian Ranaweera had transferred the **same back to Munas**, the Plaintiff by Deed No. 1483. Lilian Ranaweera was not a party to this action. She was not a witness for the Plaintiff either.

The Plaintiff Appellant argued that he was the rightful owner of the property as he had paper title. He admitted that he never got possession of the boutique even though Lilian Ranaweera promised to get the same from the Defendant and hand over possession later. Lilian Ranaweera did not give evidence.

The Defendant Respondent gave evidence and stated that she executed the deed **in the firm belief that when the loan was paid up, Lilian Ranaweera would re transfer the property to her.** Even though interest was paid for about one and a half years she could not pay up the loan amount of Rs. 60000/-. She stated in evidence further that on such deeds executed as transfers for loans taken by others, Lilian instructs the Notary Public **to place only the loan amount as the consideration** for the transfer even though the **actual value** of the property **is much more** than the amount written in the deed. She had asked for more time to pay and Lilian had verbally agreed. Thereafter without giving any notice to the Defendant, the property had been transferred to the Plaintiff by Lilian Ranaweera for Rs.150000/- . Further in evidence she stated that in 1998 the property was

worth about Rs.10 lakhs and at the time she gave evidence in 2006, it was worth about Rs. 20 lakhs. She did not know that Lilian had transferred it to the Plaintiff. Lilian had been well known in that area, for giving loans on interest, keeping deeds of transfer as security for loans. The Attorney at Law who gave evidence for the Defense stated that he sent the letter of demand to the Defendant **on instructions from his client Lilian who specifically stated that it was a loan.**

The pivotal question is whether the transaction reflected in the Deed No. 22090 has given rise to a constructive trust in terms of Sec. 83 of the Trusts Ordinance due to the reason that the grantor in the said deed did not intend to pass her beneficial interest in the property to the grantee, Lilian. If the said transaction is on constructive trust, is the Transfer Deed No. 1483 which was executed by Lilian to the Plaintiff null and void?

In the Case ***of Perera Vs Fernando and Others, 2011 BLR 263*** , it was held that "When the owner of a property transfers it without intention to dispose of the beneficial interest therein, then a constructive trust is created and the transferee must hold such property in trust for the benefit of the transferor in line with the principle laid down in Sec. 83 of the Trusts Ordinance." In the present case in hand it is obvious from the evidence before court that the Defendant, Sitti Patu Umma never intended to dispose of the beneficial interest of the property to Lilian Ranaweera when Deed 22090 was signed by her.

In the case ***of Dayawathie Vs Gunasekera and Another , 1991, 1 SLR 115***, it was held that if the relevant attendant circumstances were sufficient to demonstrate that the transferor hardly intended to dispose of his beneficial interest , then it would be logical to elucidate that the beneficial interest of the property was not parted with by the transferor. In the case in hand the attendant circumstances clearly show that the Defendant did not intend to dispose of her beneficial interest of the property to Lilian Ranaweera. It is Lilian's lawyer who had written to the Defendant that the loan has to be repaid to Lilian if the Defendant wanted the deed discharged.

In the case of ***Thisa Nona and Three Others Vs Premadasa, 1997 1 SLR 167***, Justice Wigneswaran had considered along with other reasons that the reason of continuation of possession of the premises in suit, just the way the transferor had done prior to execution of the transfer deed, contribute to show that the

transaction was a loan transaction and not an outright transfer. He further said that when the attendant circumstances show that the transferor did not intend to dispose the beneficial interest of the property to the transferee, then the law declares that the transferee would hold such property for the benefit of the transferor.

In the case of ***Piyasena Vs Don Vansue 1977, 2 SLR 311***, it was held by the Court of Appeal that a trust is inferred from attendant circumstances. The trust is an obligation imposed by law on those who try to camouflage the actual nature of a transaction. When the attendant circumstances point to a loan transaction and not a genuine sale transaction the provisions of Sec. 83 of the Trusts Ordinance apply.

In an older case of ***Muttamma Vs Thiagaraja 1961, 62 NLR 559*** Basnayake CJ held referring to Sec. 83 of the Trusts Ordinance that " The Section is designed to prevent transfers of property which on the face of the instrument appear to be genuine transfers, but where an intention to dispose of the beneficial interest cannot reasonably be inferred consistently with the attendant circumstances. Neither the declaration of the transferor at the time of execution of the instrument nor his secret intentions are attendant circumstances. Attendant circumstances are to my mind, circumstances which precede or follow the transfer but not too far removed in point of time to be regarded as attendant which expression in this context may be understood as 'accompanying' or 'connected with'. Whether a circumstance is attendant or not would depend on the facts of each case."

In the present case, the intention of the Defendant when she executed Deed 22090 was never to transfer the title to the transferee Lilian Ranaweera and never to transfer the beneficial interest of the property to Lilian Ranaweera. The only intention was to get a loan on interest on the promise that when the loan was paid in full with interest having been paid monthly, the property would be transferred back to the Defendant. The Deed 22090 was the security for the loan. The lawyer's letter of demand to pay the loan and the lawyer's evidence before court regarding instructions of Lilian Ranaweera to send the letter of demand to the Defendant add to the attendant circumstances pointing the finger to the fact that the said Lilian Ranaweera held the property in trust for the Defendant.

The Plaintiff had failed to prove that he was a bona fide purchaser for valuable consideration. The evidence indicates that the property was much more valuable than the consideration paid by the Plaintiff to Lilian Ranaweera which was only Rs. 150000/- when he got paper title from Lilian Ranaweera. In fact, the Plaintiff had sold the property to the Defendant in 1991, the Defendant had obtained a loan from Lilian Ranaweera and executed a transfer deed to Lilian Ranaweera in 1997 for Rs.60,000/- mentioned as consideration and thereafter Lilian Ranaweera had transferred it back to the Plaintiff mentioning in the deed as consideration only Rs. 150000/-. Somehow by the year 1998, the Plaintiff had managed to get back paper title to the property sold by him in 1991. The Plaintiff had valued the land and the boutique for the law suit as Rs.500,000/- in the year 1999. If in fact the Plaintiff bought the property for good consideration, he should have sent a demand for the Defendant to hand over possession to the Plaintiff but he had never demanded so. The Plaintiff does not seem to be a bona fide purchaser for value since there is a disparity on the purchase price and the market price of land at that time. On the other hand the Plaintiff had not placed any evidence before court to prove that he was a bona fide purchaser. He had failed to bring the transferor in title from whom he bought the property, namely Lilian Ranaweera. It is seen that the Plaintiff had got together with Lilian Ranaweera and got the property of the Defendant transferred behind her back and then filed action to evict her from the property.

According to the evidence before Court, it can be understood that Lilian Ranaweera had held the said property in trust for the Defendant. Even though Deed No. 22090 was a transfer, the attendant circumstances point to the direction that the beneficial interest was not passed on to Lilian Ranaweera. Therefore I hold that Lilian Ranaweera had held the property in trust for the transferee Sitti Patu Umma the Defendant in this case.

At the time Lilian Ranaweera executed the Deed of Transfer No. 1483, passing the property to the Plaintiff, she was holding the property in trust for the Defendant. Therefore the Deed No. 1483 is not a valid transfer. The Plaintiff does not get any right of ownership from Lilian Ranaweera. The Defendant still remains as the owner of the property. The Deed No. 1483 is null and void.

The Defendant is entitled to get the property re transferred in her name through the Registrar of the District Court when the loan of Rs. 60000/- is deposited in court with legal interest. The Substituted Plaintiff Respondent Appellant is entitled to withdraw the money which will be deposited with the Registrar of the District Court. The Plaint is hereby dismissed. The Defendant is entitled to reliefs prayed for in prayer (a), (e) and (h) of the Answer dated 22.09.2000. The District Court should enter judgment accordingly.

This Appeal is dismissed. However I order no costs.

Judge of the Supreme Court.

Priyasath Dep PC.
I agree.

Chief Justice of the Supreme Court

Prasanna Jayawardena PC.
I agree.

Judge of the Supreme Court.

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

S.C. Appeal 195/2015
SC/HCCA/LA No. 485/2014
SC/HCCA/LA No. 489/2014
H.C Appeal No. WP/HCCA/COL/365/2004F
D.C Colombo Case No. 16900/MR

Sea Consortium Lanka (Pvt) Limited
174, George R de Silva Mawatha,
Colombo 10.

PLAINTIFF

Vs.

1. The Associated Newspapers of Ceylon Limited
Lake House
No. 35, D.R. Wijewardena Mawatha,
Combo 10.

2. E. Weerapperuma
No. 21/22, Maradana Road,
Hendala.
Wattala.

DEFENDANTS

AND BETWEEN

In the matter of an Appeal under Section 754(1) of the Civil Procedure Code, read together with Section 5A of the High Court of the Provinces (Special Provisions Amendment) Act No. 54 of 2006

1 The Associated Newspapers of Ceylon Limited
Lake House
No. 35, D.R. Wijewardena Mawatha,
Combo 10.

2. E. Weerapperuma
No. 21/22, Maradana Road,
Hendala.
Wattala.

DEFENDANT-APPELLANTS

Vs.

Sea Consortium Lanka (Pvt) Limited
174, George R de Silva Mawatha,
Colombo 10.

PLAINTIFF-RESPONDENTS

AND NOW

In the matter of an Application Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006

1. The Associated Newspapers of Ceylon Limited
Lake House
No. 35, D.R. Wijewardena Mawatha,
Combo 10.

2. E. Weerapperuma
No. 21/22, Maradana Road,
Hendala.
Wattala.

DEFENDANT-APPELLANT-PETITIONERS

Vs.

Sea Consortium Lanka (Pvt) Limited
174, George R de Silva Mawatha,
Colombo 10.

And presently of

256, Sri Ramanathan Mawatha,
Colombo 15.

PLAINTIFF-RESPONDENT-RESPONDENT

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

COUNSEL: Palitha Kumarasinghe P.C., with Nuwan Rupasinghe
for the Appellant

Ananda Kasthuriarachchi for the Respondent

ARGUED ON: 15.02.2017

DECIDED ON: 23.05.2017

GOONERATNE J.

This was an action filed in the District Court of Colombo on or about 05.09.1995 claiming damages in a sum of Rs. 50 million by the Plaintiff Company against the 1st and 2nd Defendants for a publication of an Article in the Sunday Observer of 25.6.1995, alleging that the Article published is defamatory perse and by innuendo. The Article in question is pleaded in paragraph 10 of the plaint

and its heading reads as “Ports Authority Ultimatum to Shippers”. The said Article was written by the 2nd Defendant. In paragraph 15 of the plaint the Plaintiff Company pleads the items (a to g) of innuendo to prove its case.

Two Leave to Appeal Applications were filed in the Supreme Court by the Plaintiff and Defendant respectively against the Judgment of the High Court (485/14 and 489/14). This court granted leave on both Applications. Both matters were consolidated. The question of law on which leave was granted are as follows:

<u>By the Defendant-Appellant-Petitioners</u>

1. Are the Defendant-Appellant-Petitioners entitled to defence of justification qualified privileged against the action of the Plaintiff-Respondent-Respondent, in view of the evidence adduced at the trial?
2. Did the learned High Court Judges err in holding that the Article published by the Defendant-Appellant-Petitioners is defamatory of the Plaintiff-Respondent-Respondent in view of the evidence adduced at the trial in particularly in absence of any independent evidence of the alleged defamation and innuendo?
3. Did the learned High Court Judges err in law disregarding evidence of the 2nd Defendant-Appellant-Petitioner who was present when Hon. Minister of Ports made inspection at Sri Lanka Ports Authority premises when particularly no other witness gave evidence to contradict the evidence of the 2nd Defendant?

4. Did the learned High Court Judges err in law in holding that

   (i) The pith and substance of the Article was that the Respondent had used some undue influence and/or had bribed certain officials of Sri Lanka Ports Authority in order them not to present the cheques that were given by the Respondent in that, *ex facie,* the pith and substance of the said Article is to disclose inefficiency and remiss of 2duties by employees of a State Instituted as discovered by Hon. Minister in charge of the Institute at an inspection held in presence of Media and no allegation of bribery whatsoever ever mentioned in the said Article and no independent witness had given any such evidence;

   (ii) The allegation in the Article triggered a shockwave in the business community, banks and overseas as the Plaintiff is considered the biggest leading shipping Company when no such admissible evidence has been adduced at the Trial?

5. Did the learned High Court Judges err in awarding damages without proper analysing or evidence or quantification particularly since, the business activities increased after the publication of the alleged defamatory Article by the Defendant-Appellant–Petitioners, the Net profit of the Plaintiff-Respondent-Respondent was only Rs. 2 million per annum and the Respondent incorporated in September 1994 whereas the publication made in June 1995?

By the Plaintiff-Respondent-Respondent

1. Is the Judgment of the learned High Court Judges dated 21.08.2014 contrary to law and evidence before the Court?
2. Did the Honourable Judges of the High Court err in holding that the quantum of damages should be reduced to Rs. 30 million without fresh evidence or facts?
3. Did the Honourable Judges of the High Court exercising Appellate powers err in substituting its judgment on quantum of damages where damages are awarded for defamation?

What really happened was that the then Hon. Minister of Ports, to the Sri Lanka Ports Authority along with the 2nd Defendant a journalist attached to the "Sunday Observer" visited the Ports Authority and personally witnessed what had taken place, in an inspection tour and the newspaper reported same in a news item. It would be convenient to reproduce that part of the Newspaper Article as follows which according to the Plaintiff is defamatory of the Plaintiff by innuendo.

"But when the Minister went through a register checking with cheques at hand at the time of sudden inspection, he found that some of the cheques entered into the register were not of that day but several months old. He also found that the document together with the cheques did not have the date stamp. He also found that most of the cheques that had not been entered

into the register were in respect of a single shipping firm – Sea Consortium Lanka (Pvt.) Ltd."

The above version is the gist of the main Article which could give rise to a cause of action to the Plaintiff. However if that was something the Minister and the 2nd Defendant observed, then the question is whether the defences pleaded such as on privileged occasion and published in good faith on a matter of public interest was justifiable, and a fair comment without any malice or ill will towards the Plaintiff. It is to be noted that the 2nd Defendant who gave evidence states there was no ill will or malice towards the Plaintiff but reported what was observed and detected by the Minister. On the other hand Plaintiff's position was that the above news item is false, as payments are made to the Ports Authority within 2/3 days and a document could be produced to indicate such payments. Position of the Defendant on this aspect was that no such document was produced at the trial. In fact it was not produced.

One Mr. Abeywickrema on behalf of the Plaintiff Company gave evidence, and several pages of evidence had been recorded. This witness testify that the news item was a false news item. Cheques were promptly presented to the Port Authority when invoices were sent to the company. Cheques given to the Ports Authority by the Company were deposited in the Bank within 2/3 days. Plaintiff Company makes a profit of Rs. 2 million per year. The Plaintiff Company

was not privy to the Ministers visit on 19.06.1995. He also stated in evidence that several of his customers inquired from him after the publication of the news item as to any fraud was committed ඇයි එසේ වරායට ගෙවීම සම්බන්ධයෙන් වංචා සිදු කරන්නේ කියා. Several letters were also received (Pg. 146) subsequent to the news item, company had more business.

The 2nd Defendant a journalist as stated above gave evidence for the Defendants. He accompanied the Minister on an inspection tour. It was the 2nd Defendant who wrote the Article in question. He saw several cheques that were spread over a table at the Accounts Division and most of the cheques <u>were not registered</u> in the relevant books, and not credited to the Bank Account. There was a failure of the Ports Authority Officials to perform their duties properly and bank the cheques properly. All these facts were revealed at the visit to the Finance Division and the 2nd Defendant directly participated in this visit. The Minister found that most of the cheques that were spread on the table were cheques of the Plaintiff Company.

It was the position of the 2nd Defendant that he should bring the fact of inefficiency to the notice and knowledge of the general public. This Article was published to demonstrate the inefficiency, negligence and the remiss in duties on the part of the officials of the Ports Authority. There is also no evidence led to show that the Plaintiff Company failed to make payments, on the invoices

submitted by the Ports Authority. As such the Plaintiff is not a defaulter. 2nd Defendant testified that he has no animosity towards the Plaintiff Company and had not defamed the Plaintiff.

The case consists of several pages of evidence and submissions. The issue is whether the Article is defamatory of the Plaintiff Company and the question whether Plaintiff had discharged his burden of proof. In this background I note the following matters, highlighted by the Defendant party.

(a) There was no other independent evidence led of a witness other than the Plaintiff, to demonstrate that the reading public understood the Article to be defamatory of the Plaintiff.

(b) No documentary proof placed before court to establish that the cheques were promptly banked by the Plaintiff Company, though the only witnesses for the Plaintiff in his evidence undertook to produce documentary proof.

(c) Plaintiff failed to call the Ports Authority to prove that the cheques given by the plaintiffs were promptly presented for payments, and that such cheques were not kept in the Ports Authority, as reported by the Defendant.

(d) In the oral testimony of the Plaintiff it was submitted that several of Plaintiff's customers inquired from the Plaintiffs witness about a fraud, on

reading the Article in question. However none of those customers were called to support such a view. This is in a way hearsay evidence.

(e) Evidence was placed by the Plaintiff that after the publication of the Newspaper Article, the Plaintiff Company made profits and the business was improving for the Plaintiff Company, irrespective of the alleged defamatory Article. This is indicative of the position that the allegation had no impact on the Plaintiff Company and its business. In other words the Plaintiff has not suffered as a result of the alleged defamatory Article. Plaintiff's position was that it continued to make a net profit of Rs. 2 million per annum. Plaintiff has not been able to prove that there was an injury to trading reputation whereas no damages whatsoever had been proved.

In the above circumstances I cannot accept the views of the learned High Court Judges and the High Court has erred in holding that the Article refers to the Plaintiff and the pith and substance of the said Article was that the Plaintiff used influence or bribed officials at the Ports Authority not to present the cheques for payment.

I also note that documents P1 to P4 were produced and marked in evidence. A point had been made that these documents are inadmissible in law and cannot be acted upon as evidence. More emphasis is on P4, and at the closure of Plaintiff's case the documents were not read in evidence. It is the cursus curiae of the District Court that documents produced and marked

through a witness should be read in evidence at the close of the case. This is a practice adopted from time immemorial and which has developed and recognised by our courts. Vide *Sri Lanka Ports Authority and Another Vs. Jugolina 1981 (1) SLR 18* This practice had been accepted in several decided cases. *Jamaldeen Abdul Lateef Vs. Abdul Majeed Mohomed Mansoor and Anoher 2010(2) SLR 333 SC at 371, 372 and 373*. It is observed that P4 was marked subject to proof. As such the proof of document P4 is in doubt.

The Article was published, no doubt for the benefit of the public and educate the reader of the state of affairs of an Institution like the Ports Authority. Public no doubt should be aware of what happened at the Ports Authority perusal of the Article does not bring about any complication. Nor can a normal reader pin point any fraud on the part of the Plaintiff Company, but the Ports Authority has to take the blame. No independent witness supported Plaintiff's case. There is no 'Animus Injuriandi' on the part of the Defendants. The existence of Animus Injuriandi is an essential basis of the cause of action. *De Costa Vs. Times of Ceylon (1963) 65 NLR 217 at 224*.

The other matter is whether the allegations triggered a shockwave in the business community. There was no proper evidence placed before court to prove above. Documents P2, P2A and P3 relied by Plaintiff refer to total volume handled by x-press container line, performance in the year 1998 and

awards received. It is not possible to conclude by these documents of any calculations to establish damages. Defendants describe it to be self serving documents. The newspaper Article is certainly not calculated to injure the business reputations of the Plaintiff Company.

The 1st and 2nd Defendants merely reported facts which arose as a result of an inspection tour of the relevant Minister of the Ports Authority. It is justifiable to do so. A case of this nature would require independent evidence. It is the view of a normal reader of the newspaper that could throw some light to the Article and call it defamatory. If it is defamatory perse and by innuendo it need to be proved, independent evidence. It would be necessary. In the case in hand as stated above no such evidence was placed before court. In all the above circumstances the questions of law (1) to (5) are answered as 'Yes' in favour of the Defendant-Appellant-Petitioners. In view of the above answers the questions of law (1) to (3) raised by the Plaintiff-Respondent-Respondent does not arise. I hold that the Judgment of the High Court is contrary to law and evidence led. Therefore the 1st and 2nd Defendant-Appellant-Petitioners' appeal is allowed and are entitled to relief as per sub paragraphs (b) and (c) of the

prayer to the petition. Plaintiff-Respondent-Respondent appeal is dismissed with costs.

Defendant-Appellant-Petitioners' appeal is allowed.

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 application for Leave to Appeal under and in terms of Article 128 of the Constitution.

SC Appeal No. 196/2015

Case No.SC/HCCA/LA:03/2015

Civil Appeal Case No:-

CP/HCCA/KANDY/97/2011(FA)

DC Kandy Case No:-L/21801/05

Suppaiah Wijeratnam

No.47**,** Kandy Road**,** Kengalle

Plaintiff

V.

Sarath Perera,

No.90, Kandy Road, Kengalle.

Defendant

THEN BETWEEN

Sarath Perera,

No.90, Kandy Road, Kengalle.

Defendant-Appellant

V.

Suppaiah Wijeratnam,

No.47, Kandy Road, Kengalle.

Plaintiff-Respondent

NOW BETWEEN

Suppaiah Wijeratnam,

No. 90, Kandy Road, Kengalle.

Plaintiff-Respondent-Petitioner

V.

Sarath Perera,

No.90, Kandy Road, Kengalle.

Defendant-Appellant-Respondent

BEFORE:- S.E. WANASUNDERA, PCJ.

ANIL GOONERATNE, J.

H.N.J. PERERA, J.

COUNSEl:- Saman Galappaththi for the Plaintiff-Respondent-Petitioner.

Esara Wellala for the Defendant-Appellant-Respondent

ARGUED:-20.07.2016

DECIDED ON:-19.09.2016

H.N.J.PERERA, J.

The plaintiff-Respondent-Petitioner (hereinafter referred to as the Petitioner) instituted a rei-vindicatio action on 10th November, 2005 against the Defendant-Appellant-Respondent (hereinafter referred to as the Respondent) seeking inter-alia;

(a)A declaration that the plaintiff is the owner of the land more fully

described in the schedule to the plaint,

(b)An order for ejectment of the defendant and his agents and servants From the subject matter,

(c)Damages in a sum of Rs.4000/- per month until the possession is Handed over to the plaintiff.

The respondent filed his answer on 11.07.2008 and prayed inter-alia:-

(a)Dismiss the plaint,

(b)Judgment deciding that this matter cannot be proceeded under Section 35(1) of the Civil Procedure Code,

(c)An order stating that the respondent has the prescriptive title over the property against all the rights of the plaintiff and others

The respondent contended that he is in possession of a larger land including the land described in the schedule to the plaint since 22.12.1978 and thereby acquired prescriptive title to the land. It was also contended that the respondent filed an application in the Rent Board under the case No. f.l=u/ ukq / 831/2004 as the plaintiff continuously harassed him stating that the plaintiff is the owner.

The parties admitted the jurisdiction and the fact that an application was filed in the Rent Board under case No. f.l=u / ukq /831/2004 against the petitioner and that the said application had been dismissed.

It was the position of the petitioner that he has become the owner of the land described in the schedule to the plaint by virtue of deed No.68 marked P1 at the trial. His predecessors in title had become entitled to the land by virtue of deed No.1188 dated 02.07.2003 and deed N0. 4317 dated 10.01.1960 respectively marked as P3 and P4. After he purchased

the said land he has sent notice to the respondent informing him that he has purchased the said land and that he is the owner of the said land and has requested the respondent to accept him as the owner of the said land and to pay him the rent accordingly. The said letter sent by the petitioner to the respondent has been marked as P 6. It was the position of the petitioner that the respondent has refused to accept the petitioner as the new owner. The respondent has clearly admitted the fact that after he received the said notice marked P6 from the petitioner he filed an application before the Rent Board to ascertain as to who the real owner was. The respondent in his evidence had also very clearly admitted that he refused to accept the petitioner as the new owner. It is also an admitted fact that the said application filed by the respondent before the Rent Board was dismissed.

The petitioner himself and an officer from Rent Board gave evidence on behalf of the petitioner and closed his case marking P1 to P23 in evidence. It is also to be noted that although the Counsel for the respondent has objected to some documents at the time they were marked and tendered to court at the trial but has not objected to them when the plaintiff's Counsel closed the case for the petitioner marking in evidence documents P1 to P23 at the end of the petitioner's case. The *cursus curiae* of the original Civil Court followed for more than three decades in this country is that the failure to object to documents, when read at the closure of the case of a particular party would render them as evidence for all purposes of the law. The respondent too gave evidence and closed his case marking in evidence documents V1 to V 10.

The Learned District Judge after trial by his judgment dated 11.03.2011 held in favour of the petitioner and the cross claim of the respondent based on prescription was dismissed. Being aggrieved with the said judgment the respondent preferred an appeal to the Civil Appellate High Court of the Central Province Holden in Kandy. The Learned High Court

Judges of the Civil Appellate High Court of Kandy by their judgment dated 2.11.2014 set aside the judgment of the Learned District Judge and allowed the petition of appeal of the respondent.

Being aggrieved by the said judgment dated 25.11.2014 of the Civil Appellate High Court of Kandy the petitioner filed the application for leave to appeal and this court granted the said application of the petitioner on the following questions of law;

(a)Have the Learned High Court Judges erred in law when they came to a conclusion that the respondent has become a tenant of the petitioner by operation of law on the receipt of Notice of attornment despite the refusal to accept the petitioner as the Landlord?

(b)Have the Learned High Court Judges failed to give an appropriate consideration to the basic principle that a tenant who refuses to attorn the new owner as his landlord looses the protection under the Rent Act and thereby becomes a trespasser in the premises?

(c)Have the Learned High Court Judges erred in law when they held that the petitioner's action of rei-vindicatio is misconceived in law and that the petitioner would have filed an action under the Rent Act against a person who has repudiated the contract of Tenancy?

(d)Have the Learned High Court Judges failed to give an appropriate consideration to the fact that the respondent has taken up the position that he has prescribed to the subject matter which per se establishes that the respondent is possessing the land against the will of the petitioner and that no contract of tenancy subsists in such a situation?

It is to be noted that the Learned Judges of the Civil Appellate High Court interfered with the judgment of the District Judge on the basis that upon the receipt of the letter of attornment the respondent becomes the tenant of the petitioner and gets the protection of the Rent Act, by

operation of law and therefore the tenant can be ejected for breach of the tenancy contract and the proper action would have been to seek remedy under the Rent Act and not the type of action filed by the petitioner.

The substance of the aforesaid findings of the Learned High Court Judges is that irrespective of the fact that the tenant has repudiated the contract of tenancy by refusing to accept the new owner (petitioner) as the landlord yet the petitioner is bound to file action under the Rent Act but not an action of rei vindicatio on the basis of repudiation of tenancy under him.

It was contended on behalf of the Petitioner that in the present case the Defendant-Respondent has refused to accept the Plaintiff-Petitioner as the Landlord thereby has repudiated the contract of tenancy. In such event the Defendant-Respondent is not entitled to seek refuge under the provisions of the Rent Act.

The High Court Judges of the Civil Appellate Court has set aside the judgment of the Learned District Judge and allowed the Petition of Appeal of the Defendant-Respondent on the grounds that the Plaintiff-Petitioner's action is misconceived in law because the proper action for the Plaintiff-Petitioner would have been to seek remedy under the Rent Act.

In Zakariya V. Benedict 53 N.L.R 311 Swan J observed that Ordinarily a purchaser of property "steps into the shoes of the landlord and receives all his rights and become subject to all his obligations , so that he is bound to the tenant and the tenant is bound to him in the relation of landlord and tenant" Wille on Landlord and Tenant , 1910 Ediion, p.221.In Wijesinghe V.Charles (1915) 18 N.L.R 168, de Sampayo J. accepted the right of the tenant to exercise the option:–whether he was bound to remain as the tenant of the new landlord or exercise the option of

claiming a cancellation of the lease. In Zakeriya V. Benedict (supra) Swan J also stated as that it is also conceivable that the plaintiffs might bring an action for the recovery of possession on the strength of their title.

In Gunasekera V. Jinadasa [1996] 2 Sri.L.R. 115 Fernando, J held that:-

"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 one hand or Defendants or tenants on the other.

While it is initially legitimate to infer attornment from continued occupation, thus establishing privity between the parties, another principle of law of contract comes in to play is such circumstances to which the presumption of attornment must sometimes yield. When the occupier persists in conduct which is fundamentally inconsistent with a contract of tenancy, and amounts to a repudiation of that presumed contract the transferee has the option either to treat the tenancy as subsisting and to sue for arrears of rent and ejectment or to accept the occupiers repudiation of the tenancy and to proceed against him as a trespasser."

And in the instant case as the defendant-Respondent persisted in repudiating the contract of tenancy and also challenged the title of the Plaintiff-Petitioner and claimed prescriptive title to the said property, the Plaintiff-Petitioner has opted to exercise his right as the owner and to file a case of rei vindication against the Defendant-Respondent.

The trial Judge has held that the Plaintiff-Petitioner has called upon the Defendant-Respondent to attorn to the Plaintiff-Petitioner and that the Defendant-Respondent having failed to attorn to the plaintiff-Petitioner,

was a trespasser. The Learned trial Judge has held with the Plaintiff-Petitioner. The Learned Judges of the Civil Appellate High Court has clearly erred when they came to a conclusion that the Defendant-Respondent has become a tenant of the Plaintiff-Petitioner by operation of law on the receipt of Notice of attornment despite the refusal to accept the Plaintiff-Petitioner as the landlord.

In this case there is evidence to show that the Defendant-Respondent not only refused to accept the Petitioner as his new landlord, he also made an application to the Rent Board to find out whether in fact the Plaintiff-Petitioner was his landlord. The said application has been dismissed by the Rent Board. Furthermore, he claimed prescriptive title to the land in dispute.

When the defendant-Respondent, having failed expressly to accept the Plaintiff-Petitioner as landlord, he repudiated the fundamental obligation of a tenancy- he denied the Plaintiff-Petitioner's status as landlord. And further when he claimed prescriptive tile to the land in question he has clearly disputed the title of the Plaintiff-Petitioner.

In Gunasekera V Jinadasa (supra) it was further held that the court must not apply the presumption of attornment as a trap for the transferee: allowing the occupier who fails to fulfil the obligations of a tenant, if sued on the tenancy, to disclaim tenancy and assert that he can only be sued for ejectment and damages in a vindicatory action; but if faced with an action based on title, to claim that notwithstanding his conduct he is tenant and can only be sued in a tenancy action. Since it is the occupier's conduct which gives rise to such uncertainty, equitable considerations confirm the option which the law of contract gives the transferee.

The evidence led in this case clearly disclose that the Defendant refused to accept the Plaintiff-Petitioner as his new landlord and failed to continue to pay rent as a tenant of the Plaintiff-Petitioner. It is an

admitted fact that the Plaintiff-Petitioner did inform the Defendant-Respondent in writing that he has become the new owner of the said premises and has requested the Defendant-Respondent to treat him as his new landlord and pay him rent accordingly.

But the Defendant in the instant case has very clearly refused to accept the Plaintiff-Petitioner as his new Landlord. He has challenged the title of the Plaintiff-Petitioner and also claimed prescriptive title to the land.

The Civil Appellate Court has held that since there has been a tenancy between the former owner and the Defendant-Respondent, the action against the Defendant-Respondent should have been constituted as one against an over-holding lessee. It has been held that the action instead, taking the form rei vindcatio and being therefore misconceived, the Defendant-Respondent is not liable to be ejected. Learned Counsel for the Plaintiff-Petitioner on the other hand contended that the acts complained of against the Defendant-respondent which the evidence had clearly established, were in derogation of the Plaintiff-Petitioner's rights as owner of the land. He contended that it was competent for the Plaintiff-Petitioner in the circumstances of this case, to maintain the action in this form and to get the relief he asked for.

The principle issue at the trial was whether the Defendant-Respondent was in unlawful possession of the premises by reason of his refusal to accept the plaintiff's title.

In the instant case the trial Judge held that the Plaintiff-Petitioner has called upon the Defendant-Respondent to attorn to the Plaintiff-Petitioner and that the Defendant-Respondent having failed to attorn to the Plaintiff-Petitioner was a trespasser, and gave judgment for the plaintiff.

In Thamayanthi V. Selvadorai 1986 (1) C.A.L.R.311 the Plaintiff filed action for ejectment and damages. The District Judge 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. In appeal Seneviratne, J , held that the judgment of the District Judge on the basis of the reasons given is valid and should therefore be upheld.

The facts in this case clearly indicate and establishes that the defendant-Respondent did not merely continue to possess the said property after receiving the notice of the fact that the Plaintiff-Petitioner is the new owner of the said premises, he refused to accept the Plaintiff-Petitioner as his new landlord and also proceeded to file an application in the Rent Board . He also disputed the title of the plaintiff-Petitioner and claimed prescriptive title to the land in dispute.

The plaintiff-Petitioner's title having been proved, the burden clearly is on the Defendant-respondent to show by what right he continued to occupy the premises. The Defendant-respondent has taken up the position that he has acquired prescriptive title to the land in question.

This principle was referred to by Sharvananda, C.J. in Theivandran V. Ramanathan Chettiar [1986] 2 Sri.L.R.219,222,

"An owner of a land has the right to possession of it and hence is entitled to sue for the ejectment of a trespasser…….Basing his claim on his ownership, which entitles to possession, he may sue for ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession."

Maarsdorf (volume 2,p 27) sys that the rights of an owner are comprised under three heads:-

(a)the right of possession and the right to recover possession

(b)the right to use and enjoyment; and

(c)the right of disposition.

And he goes on to say that these three factors are all essential to the idea of ownership.

The jus vindicandi or the right to recover possession is thus considered an important attribute of ownership in the Roman Dutch Law.

Wille in his book "Principles of South African Law" (3rd edition) at page 190 discussing the right to possession, states:-

"The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession he may retain it. If he is illegally deprived of his possession, he may by means of vindication or reclaim recover the possession from any person in whose possession the thing is found. In a vindicatory action the claimant need merely prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the defendant."

The Learned Judges of the Civil Appellate High Court have failed to give an appropriate consideration to the fact that the Respondent has taken up the position that he has prescribed to the subject matter which per se establishes that the Defendant-Respondent is possessing the land against the will of the Plaintiff-Petitioner and that no contract of tenancy subsists in such a situation. The moment title to the corpus in dispute is proved, like in this case, the right to possess is presumed. The burden is thus cast on the respondent to prove that by virtue of an adverse

possession he had obtained a title adverse to and independent of the paper title of the plaintiff.

The burden was cast on the defendant-respondent to prove that by virtue of an adverse possession he had obtained title adverse to and independent of the paper title of the plaintiff. According to section 3 of the Prescription Ordinance such a possession must be undisturbed, uninterrupted, adverse to or independent of that of the former possessor and should have lasted for at least ten years before he could transform such possession into prescriptive title. There must be proof that the defendant-respondent's occupation of the premises was such character as is incompatible with the title of the plaintiff.

The Learned trial Judge after considering the evidence placed by both parties has held that the Defendant-respondent has failed to prove prescriptive title to the said land. In my view in the present case there is significant absence of clear and specific evidence on such acts of possession as would entitle the Defendant-Respondent to a decree in favour in terms of Section 3 of the Prescription Ordinance.

The Defendant–Respondent has in this instant very clearly established by his conduct that he did not wish to be a tenant of the Plaintiff-Petitioner. In this case the conduct of the Defendant-Respondent has been fundamentally inconsistent with a contract of tenancy, and amounts to a repudiation of that presumed contract, therefore the Plaintiff-Petitioner has the right to accept the Defendant's repudiation of the tenancy and to proceed against him as a trespasser. The Learned Judges of the Civil Appellate Court has erred in law when they held that the Plaintiff-Petitioner's action of rei vindication is misconceived in law and that the Plaintiff-Petitioner would have filed an action under the rent Act against the Defendant-respondent who has repudiated the contract of tenancy.

Therefore I answer all the questions of law raised in this case in favour of the Plaintiff-Petitioner. I allow the appeal, set aside the judgment of the Civil Appellate High Court dated 25.11.2014, and affirm the decree of the District Court for the reasons set out. The Plaintiff-Petitioner will be entitled to costs in this court and in the Civil Appellate High Court.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PCJ.

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 leave to appeal obtained from this Court.

SEYLAN BANK PLC
No. 69, Janadhipathi Mawatha,
Colombo 03 and now of
Ceylinco-Seylan Towers,
No.90, Galle Road,Colombo 03.
(New Company NO. P.Q.9)

PLAINTIFF

SC Appeal No. 198/2014
SC HC LA No. 27/2014
HC/Civil/MR Case No. 473/2010

VS.

1. **NEW LANKA MERCHANTS MARKETING (PVT) LIMITED**
   No. 31/5, Horton Place,
   Colombo 07 and also of
   No.25, Abdul Jabbar Mawatha,
   Colombo 12.
2. **KOSHY THOMES**
3. **PUWANESHWARY THOMES**
4. **NELSON THOMES**
5. **SALLY THOMES**
   All of No.25, Abdul Jabbar Mawatha,
   Colombo 12.

DEFENDANTS

AND NOW BETWEEN

1. **NEW LANKA MERCHANTS MARKETING (PVT) LIMITED**
   No. 31/5, Horton Place,
   Colombo 07 and also of
   No.25, Abdul Jabbar Mawatha,
   Colombo 12.
2. **KOSHY THOMES**
3. **PUWANESHWARY THOMES**
4. **NELSON THOMES**
5. **SALLY THOMES**
   All of No.25, Abdul Jabbar Mawatha,
   Colombo 12.

DEFENDANTS-PETITIONERS/APPELLANTS

VS.

1. **SEYLAN BANK PLC**
   No. 69, Janadhipathi Mawatha,
   Colombo 03 and now of
   Ceylinco-Seylan Towers,
   No.90, Galle Road,Colombo 03.
   (New Company NO. P.Q.9)
   PLAINTIFF-RESPONDENT

AND

2. **THE GOLDEN KEY CREDIT CARD COMPANY LIMITED**
   No. 2. R.A.De Mel Mawatha,
   Colombo 03.
3. **DR. LALITH KOTELAWALA**
   No. 2. R.A.De Mel Mawatha,
   Colombo 03.
   PARTIES TO BE ADDED-RESPONDENTS

BEFORE:	Sisira J.De Abrew J. Upaly Abeyrathne J. Prasanna Jayawardena, PC. J.
COUNSEL:	Geoffrey Alagaratnam, PC with L.Ganeshanathan for the Defendants-Petitioners-Appellants. Nigel Hatch, PC with Shanaka De Livera and Ms.S Ellangage for the Plaintiff-Respondents-Respondents.
WRITTEN SUBMISSIONS FILED:	On 19th June 2015 by the Plaintiffs-Respondents-Respondents. Not filed by the Defendants-Petitioners/Appellants.
ARGUED ON:	07th July 2016.
DECIDED ON:	19th May 2017.

Prasanna Jayawardena, PC, J.

On 30th July 2010, the Plaintiff- Respondent Bank ["the plaintiff"] instituted this Action against the 1st Defendant-Petitioner/Appellant Company ["the 1st defendant"] in the High Court of the Western Province exercising Civil (Commercial) Jurisdiction. The

plaintiff prayed for the recovery of a sum of money which was said to have been lent and advanced to the 1st defendant upon an overdraft facility. The plaintiff pleaded that the 2nd to 5th Defendants-Petitioners/Appellants ["the 2nd to 5th defendants"] were also, jointly and severally, liable to repay these monies under and in terms of a written guarantee executed by them undertaking personal liability to pay monies due from the 1st defendant to the plaintiff.

On 02nd June 2011, all the defendants filed a joint answer denying liability to pay any monies. No claim in reconvention was made. Immediately after filing answer, the defendants made an application, by way of a petition dated 03rd June 2011 and supporting affidavit, seeking to add the duly incorporated Company named Golden Key Credit Card Company Limited ["Golden Key"] and the individual named Lalith Kotelawela, ["Kotelawala"] as defendants in the case. These two persons were named as the "Parties to be Added" in the Defendants' petition dated 03rd June 2011. The provision of law which governs the defendants' application to add these two persons, is Section 18 (1) of the Civil Procedure Code, which sets out the circumstances in which a person may be added as a party to a pending case.

As set out in the defendants' aforesaid petition, the application to add Golden Key and Kotelawela has been made on the basis of the defendants' claims that: Kotelawela was the Chairman of Golden Key and also the Founder Chairman/Managing Director of the plaintiff company; Kotelawala was the *"alter ego"* of both Golden Key and the plaintiff; these two companies and Kotelawela *"were inextricably linked"*; the plaintiff and the defendants had entered into the agreement set out in the letter dated 31st October 2008, filed with the answer marked **"D3"** on the strength of oral representations made by Golden Key and the plaintiff that the plaintiff will give banking facilities to the 1st defendant against the *"collateral security"* given by Golden Key; in terms thereof, Golden Key gave the plaintiff a letter of undertaking agreeing to pay a sum of Rs.16 million to the plaintiff in the event of the 1st defendant defaulting to repay the monies due upon an overdraft facility granted by the plaintiff to the 1st defendant; at the time this letter of undertaking was issued, the 4th and 5th defendants had a *"security deposit"* of Rs.40 million with Golden Key and they were utilising the deposit interest paid thereon, to repay the monies due upon the banking facilities granted by the plaintiff to the 1st defendant; following the financial crisis which beset Golden Key in 2009, the 4th and 5th defendants sought to withdraw this aforesaid *"security deposit"* to repay the plaintiff but were not paid any monies by Golden Key; the 4th defendant then asked the plaintiff and Golden Key to set off the monies due upon the overdraft facility from the security deposit of Rs. 40 million placed with Golden Key and refund the balance sum of Rs.28 million to the 4th defendant; the plaintiff had not acted in terms of the aforesaid request and instead, instituted the present action against the defendants to recover the monies due upon the overdraft facility; the plaintiff and Golden Key *"are guilty of fraud and collusion"* and have *"deliberately induced"* the defendants to enter into a contract with the plaintiff; the plaintiff *"having at the time of the agreement accepted the collateral security given by"* Golden Key, has failed to set off the sums due to it from 1st defendant from the security deposit given by the 4th and 5th defendants to Golden Key; and, in the aforesaid circumstances, the presence of Golden Key and Kotelawala as parties to the action *"may be necessary in order to enable Your Honours Court to effectually and completely adjudicate upon and settle all the questions involved in the present action"*.

The plaintiff filed a statement of objections praying for the dismissal of the defendants' application to add Golden Key and Kotelawala and pleading, *inter alia,* that: the overdraft facility granted to the 1st defendant was secured by the personal guarantee executed by the 2nd to 5th defendants; Golden Key's letter of undertaking referred to by the defendants was a *"further security"* and this letter of undertaking dated 25th August 2008 was filed with the statement of objections marked **"Q1"**; the defendants alleged *"security deposit"* had been deposited by them *"in a company which is a separate legal entity"*; and the plaintiff had not recovered any money from Golden Key.

The case record indicates that, neither Golden Key Company nor Kotelawala entered an appearance in response to the notices which were issued and which were eventually served on them, after considerable effort over a period of approximately two years.

In these circumstances, the defendants' application for addition of parties was taken up for inquiry on 13th December 2013. Only the plaintiff and the defendants participated at the Inquiry. At their request, the Inquiry was decided upon written submissions.

By his Order dated 25th April 2014, the learned High Court Judge refused the defendants' application for addition of parties, holding that, Golden Key and Kotelawala were not *"necessary parties"* as contemplated by Section 18 (1) and that, therefore, the defendants' application should be dismissed. In reaching this conclusion, the learned High Court Judge held that, any claim the defendants may have against Golden Key has to be determined between the defendants and Golden Key and is independent of the plaintiff's cause of action in the present case against the defendants. The learned High Court Judge also observed that, the 2nd to 5th defendants' personal guarantee and the letter of undertaking marked **"Q1"** issued by Golden Key were independent of each other and the plaintiff has the option of deciding to proceed against the 2nd to 5th defendants upon their personal guarantee without proceeding against Golden Key upon the letter of undertaking marked **"Q1"**.

The defendants made an application to this Court seeking Leave to Appeal from the aforesaid Order and obtained Leave to Appeal on the following two questions of law, which are reproduced *verbatim*:

(a) Did the learned High Court Judge err in law in interpreting and applying the provisions of Section 18 (1) of the Civil Procedure Code ?

(b) Did the learned High Court Judge err in law in failing to consider the purported effect of Section 34 (3) of the Civil Procedure Code ?

The aforesaid first question of law to be determined in this appeal asks whether the learned High Court Judge misinterpreted and misapplied Section 18 (1). Therefore, the determination of this appeal requires an identification of the true nature, scope and effect of Section 18 (1) and its application to the facts of the present case.

However, before proceeding to determine this appeal, it has to be noted that, the defendants' application to add parties is based on their contention, both in the High

Court and in this Court, that, the Court must apply what they term the *"wider construction"* of Section 18 (1) espoused by Lord Esher M.R in BYRNE vs. BROWN AND DIPLOCK[1889 22 QBD 657] and in MONTGOMERY vs. FOY, MORGAN AND CO [1895 2 QB 321] . The defendants submit that this *"wider construction"* was adopted by this Court in COOMARASWAMY vs. ANDIRIS APPUHAMY [1985 2 SLR 219] and followed in the later cases of DASSANAYAKE vs. PEOPLE'S BANK [1995 2 SLR 320], PERERA vs. LOKUGE [2000 3 SLR 200] and FERNANDO vs. TENNAKOON [2010 2 SLR 22]. The defendants submit that, therefore, Golden Key and Kotelawela must be added as parties upon an application of this *"wider construction"* of Section 18 (1). This contention was rejected by the learned High Court Judge. However, the application made by the defendants to add Golden Key and Kotelawela has resulted in a procedural delay of nearly three years in the High Court (largely due to delay in serving notice on Golden Key and Kotelawela) and further delay consequent to the defendants seeking leave to appeal from the Order of the High Court. It is also relevant to state here that, applications to add parties invoking the so-called *"wider construction"* of Section 18 (1), are frequently made to the original Courts even where it is plainly clear that, the proposed addition is not permissible under and in terms of Section 18 (1). Each such application causes delay and adds to the work load of Courts. Needless to say, delay in litigation is usually prejudicial and efforts should be made to reduce the causes of delay.

In these circumstances, it will be useful to examine the decisions of the Courts which have considered the circumstances in which a person should be added as a party, under and in terms of Section 18 (1) of the Civil Procedure Code, and seek to ascertain the true nature, scope and effect of the *"wider construction"*, which the defendants claim they rely on.

There have been many decisions of our Courts which have examined the type of person who will fall within the description set out in Section 18 (1) and who, therefore, should be added as a party to a pending action. In these examinations, our Courts often looked to the English Law since Section 18 (1) of our Civil Procedure Code, which was introduced in 1889, is modelled on and is very similar to Order 16, rule 11 of the Rules of the Supreme Court of England ,1883 which, *inter alia*, stated that, the Court may order:

> *"….. the names of any parties, whether plaintiffs or defendants, who ought to have been joined, 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 the cause or matter be added"*.

Thus, in the early Case of MEIDEEN vs. BANDA [1 NLR 51], Withers J held (at p. 54) tha*t "Now the language of the 18th section of our Civil Procedure Code corresponds with the language of Rule 11, Order XVI., of the Supreme Court of England, and this being so, I take it that on principle we are bound to follow the decisions of the High Court of Appeal on questions arising out of the rules of the Supreme Court in England …"*. The fact that, the English Law can provide useful guidance with regard to the criteria which determine questions relating to the addition of parties, has been recognized by the Supreme Court in the later cases of PONNUTHURAI vs. JUHAR [66 NLR 375 at p.376], THE CHARTERED BANK vs.

DE SILVA [67 NLR 135 at p.142] and COOMARASWAMY vs. ANDIRIS APPUHAMY [1985 2 SLR 219 at p.221-222].

Therefore, an examination of the decisions of the Courts of England which applied Order 16, rule 11 of the Rules of the Supreme Court of England,1883 will help understand the nature, scope and effect of Section 18 (1) of our Code.

In the early case of NORRIS vs. BEAZLEY [1877 2 C.P.D. 80], Lord Coleridge C.J. considered the circumstances in which a party may be added to a pending action and held that, the Court should decide such an issue by ascertaining whether the plaintiff had a cause of action against the person sought to be added which ought to be determined in the pending action itself. The learned Chief Justice held (at p.83-84), *"It seems to me to be correctly argued that those words plainly imply that the defendant to be added* ***must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action****, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any."* [emphasis added].

This somewhat restricted approach which limited the addition of parties to persons against whom the plaintiff had a cause of action which ought to be determined in the pending action itself, was later described as the *"narrower construction"* of the circumstances which would justify the addition of a party to a pending action. This approach has been favoured in cases such as McCHEAN vs. GILES [1902 1 Ch. 911], HOOD BARRS vs. FRAMPTON, KNIGHT AND CLAYTON [1924 W.N. 287] and ATID NAVIGATION CO. LTD vs. FAIRPLAY TOWAGE & SHIPPING CO [1955 1 AER 698].

However, a less restricted line of authority in the English Law sprang from the judgments of Lord Esher M.R. in the Court of Appeal in the aforesaid cases of BYRNE vs. BROWN AND DIPLOCK and in MONTGOMERY vs. FOY, MORGAN AND CO. In these two decisions, the learned Master of the Rolls advocated what has been later termed a *"wider construction"* of the circumstances which would justify the addition of a party to a pending action.

Thus, in BYRNE's case (at p.666), Lord Esher M.R. observed, *"One of the chief objects of the Judicature Act was to secure that, whenever a Court* ***can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding****. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same, and the Court then has the power to bring in the new parties; and to adjudicate in one proceeding upon the rights of all the parties before it. Another great object was to diminish the cost of litigation. That being so, the Court ought to give the largest construction to those Acts in order to carry out as far as possible the two objects I have mentioned"*. In MONTGOMERY's Case (at p.324), Lord Esher M.R. stated, *"I can find no case which decides that we cannot construe the rule as enabling the Court under such circumstances to effectuate what was one of the great*

objects of the Judicature Acts, namely that, ***where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court****,* ***and all those disputes may be determined at the same time without the delay and expense of several actions and trials****."* [emphasis added].

However, it is important to note that, in BYRNE's case, Lord Esher M.R. himself (at p. 666) recognized that his aforesaid statements were *"general observations"*.

The approach adopted by Lord Esher M.R. was followed in the later case of BENTLEY MOTORS (1931) LTD. vs. LAGONDA LTD. [1945 2 AER 211].

Thereafter, in the often cited decision of AMON vs. RAPAHEL TUCK AND SONS LTD [1956 1 AER 273], Devlin J carefully reviewed the two different lines of authorities and devised an approach and set of tests for determining whether a person should be added as a party, which may be described as standing between the *"narrower construction"* preferred by Lord Coleridge C.J. and the *"wider construction"* espoused by Lord Esher M.R.

In AMON's Case, Devlin J was not inclined to follow the approach taken by Lord Coleridge CJ in NORRIS vs. BEAZLEY that, the addition of a party should be confined *only* to instances where the plaintiff has a cause of action against the person sought to be added which ought to be determined in the pending action itself and observed (at p. 277), *"Nevertheless, the later authorities, which are binding on me, show conclusively that a party can be joined as defendant even though the plaintiff does not think that he has any cause of action against him."*.

But, at the same time, Devlin J did not share Lord Esher's aforesaid view expressed in BYRNE's case and MONTGOMERY's case that, the objective of preventing the multiplicity of litigation should be given pre-eminence when deciding whether a person should be added. In this connection, Devlin J stated (at p.285) *"I do not, with deference to those who have thought otherwise, agree that the main object of the rule is to prevent multiplicity of actions, though it may incidentally have that effect"*. In this regard, Devlin J pointed out, with regard to the object of Order 16, r.11, that, *"It is not to marry a future action to an existing one, but to ensure that all the necessary parties to the existing one (using 'necessary' in the broad sense of being necessary to effectual and complete adjudication in the existing action) are before the court. It does incidentally keep down multiplicity of actions, because if the necessary parties cannot get before the court in an existing action, they will naturally try to do so in another one, but that appears to me to be a desirable consequence of the rule rather than its main objective"*.

Devlin J observed (at p. 280) that, Order 16, rule 11 had **two limbs** [as does our Section 18 (1)] and posed the pertinent question *"If all the parties who* ***'ought to have been joined'*** *under the first limb are joined, who are the* ***'necessary parties'*** *contemplated by the second limb ?"* [emphasis added].

Devlin J emphasised that, the addition of a person to a pending action under and in terms of the **`second limb'** of Order 16, rule 11 on the ground that he is a *`necessary party'*, is governed by and **can only be done in terms of Order 16, rule 11**. Thus, Devlin J pointed out (at p. 279) that, the Court's decision whether or not to

add a person on the basis that he is a *"necessary party" "….. **really turns on the true construction of the rule, and, in particular, the meaning of the words***

> ***'….. 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 the cause or matter'***.

***The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose** and has **no** jurisdiction under the rule to join a person whose presence is not necessary for that purpose*.

*It is not, I think, disputed that 'the cause or matter' **is the action as it stands between the existing parties**. If it were otherwise, then anybody who showed a cause of action against either a plaintiff or defendant could, of course, say that the question involved in his cause of action could not be settled unless he was made a party."* [emphasis added].

Devlin J went on to examine who could be described as a *`necessary party'* as contemplated by the aforesaid **second limb** and observed (at p. 286-287) *"**It is the words of the rule that now govern the matter**, whatever the object for which it was made, and it is true that the words 'all the questions involved in the cause or matter' are very wide. They are so wide that no one suggests they can be read without some limitation. The limitation is not something to be left to be settled by the court in its discretion. It is there in the earlier words of the rule. **The person to be joined must be someone whose presence is necessary as a party**."*. [emphasis added].

Devlin J then formulated (at p.286-287) the following test which may be applied when determining whether a person should be added as a party under the aforesaid second limb: *"What makes a person a necessary party ? It is not, of course, merely that he has relevant evidence to give on some of the questions involved.; that would only make him a relevant witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ……..**The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be so settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party**."* [emphasis added].

Devlin J went on to identify another test which may be applied when determining whether a person is a *'necessary party"* who should be added, and stated (at p. 290) *"I think the test is: May the order for which the plaintiff is asking **directly affect the intervener in the enjoyment of his legal rights** ?"*. [emphasis added].

By way of two further tests, Devlin J stated that, a plaintiff or a defendant would be entitled to add a person whose presence before the Court as a party to the pending action is required to enable one of them to either: (i) effectually and completely establish their case; or (ii) to effectually and completely obtain the reliefs they seek in the action; even if that person is not bound by the determination of a pending action

and his legal rights are not affected by the Orders sought in that action. Devlin J explained that this was so since, in such circumstances, the presence of that person before the Court as a party to the action, was necessary to effectually and completely adjudicate upon and settle that action - *vide:* p. 290.

However, Devlin J went on to stress that, the aforesaid tests he formulated were neither universal nor exhaustive and stated (at p.290), *"It must not be supposed that the test which I have employed can be applied to every sort of application under the rule, and I am not attempting to lay down, or holding that the authorities lay down, a test of universal efficacy.".* and *"….. the test that is appropriate to determine whether a party is necessary or not may vary according to the circumstances."*.

The decision of Devlin J in AMON's case was followed by John Stephenson J in FIRE, AUTO AND MARINE INSURANCE CO. LTD vs. GREENE [1964 2 AER 761] and by Willmer J in MIGUEL SANCHEZ &CO. vs. THE RESULT [1958 2 WLR 725]

It should also be mentioned here that, in AMON's case, Devlin J (at p.281-282 and p.287), drew a distinction between `legal rights' and `commercial interests' and expressed the view that, a person's `commercial interests' being affected, would not justify his addition as a party. However, Lord Denning M.R took a different view in the subsequent Case of GURTNER vs. CIRCUIT [1968 1 AER 328] on this question of whether a person whose `pecuniary interests' or `commercial interests' may be affected, could be added as a party in appropriate circumstances.

In GURTNER vs. CIRCUIT, Lord Denning M.R held that even a person whose `pecuniary interests' or `commercial interests' may be affected, could be added as a party, in appropriate circumstances. In that case, the plaintiff instituted an action claiming damages from the defendant for injuries sustained in a motor collision. Summons could not be served on the defendant. The Motor Insurance Bureau, which would become liable in law to pay the amount of any *ex parte* decree which may be entered in the plaintiff's favour, made an application to be added as a party, since the Bureau wished to defend the action.

In the Court of Appeal, Lord Denning M.R. permitted the addition holding that, the Motor Insurance Bureau was entitled to be added as *"they are the people who have to foot the bill"*. The learned Master of the Rolls stated (at p.332) that, *"It seems to me that, when two parties are in a dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or his pocket, in that he will be bound to foot the bill, then the court in its discretion, may allow him to be added as a party on such terms as it thinks fit. By doing so, the court achieves the object of the rule. It enables all matters in dispute `to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome"*.

Thus, in GURTNER vs. CIRCUIT, Lord Denning M.R. has held that, in some circumstances, a person would be entitled to be added if the determination of the case will affect his `pecuniary interests' or `commercial interests' though his strictly 'legal rights' may not be affected.
In the course of his judgment (at p. 332), Lord Denning M.R. refers to Devlin J's judgment in AMON's case and makes the remark that, Devlin J thought Order 16,

rule 11 should be given a narrow construction but that, Lord Denning M.R. prefers to give a wider interpretation to the rule, as Lord Esher did in BYRNE's case. However, a perusal of Lord Denning M.R.'s judgment shows that, the learned Master of the Rolls did not refer to or disagree with the aforesaid tests which Devlin J formulated in AMON's case other than for specifically disapproving of Devlin J's view that, a person whose `commercial interests' were affected was not entitled to be added as a party to a pending action if his `legal rights' were not affected. In fact, it appears to me that, while Lord Denning M.R was of the view that, a Court should give a wide interpretation to Order 16, rule 11 when determining questions regarding the addition of parties, His Lordship applied a process of reasoning which seems to mirror, to an extent, the approach formulated by Devlin J in AMON's Case. Thus, the view expressed by Lord Denning M.R. that a person may be added as a party, at the discretion of the Court, if *"… the determination of the dispute will directly affect a third person in his legal rights or his pocket …."* quoted above is, on similar lines to the tests formulated by Devlin J but for the extension of the type of person who may be added to include persons whose `pecuniary interests' or `commercial interests' may be affected instead of only persons whose `legal rights' may be affected.

Before parting with the English decisions, it should be mentioned that, Order 16, rule 11 of the Rules of the Supreme Court of England, 1883, which was examined in the English decisions referred to above [other than GURTNER vs. CIRCUIT which was decided in 1967] were determined under the aforesaid Order 16, rule 11 of the Rules of the Supreme Court of England, 1883. However, in 1965, Order 16, rule 11 of the 1883 Rules was replaced by Order 15, rule 6 (2) (b) (i) and (ii) of the Rules of the Supreme Court of England, 1965. Order 15 rule, 6 (2) (b) (**i**) of the 1965 Rules is modelled on the previous Order 16, rule 11 of the 1883 Rules and GURTNER vs. CIRCUIT was decided thereunder. However, Order 15 rule, 6 (2) (b) (**ii**) introduced in 1965 permitted the addition of *"any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter"*.

Thus, the criteria for the addition of parties under Rules of the Supreme Court of England, 1965 are significantly wider than the wording of Section 18 (1) of our Civil Procedure Code. These criteria were further expanded when Rule 19 of the Civil Procedure Rules, 1998 of England came into effect.

Consequently, the decisions of the Courts of England *after* 1965 on the issue of the addition of parties, may not be of direct assistance to us when determining the tests or criteria to be used to decide issues relating to the addition of parties under our law, in terms of Section 18 (1) of the Civil Procedure Code.

To now turn to our law, the statutory provision which enables the addition of a party to a pending action is Section 18 (1) of the Civil Procedure Code, which states:

> *" ….. the court may at any time, …..order 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".

Section 18 (1) makes it clear that, the Court may make such an order either upon an application made to it or *ex mero motu* and subject to such terms as the Court thinks just.

Section 19 stipulates that, *" No person shall be allowed to intervene in a pending action otherwise than in pursuance of, and in conformity with, the provisions of the last preceding section…. ".*

Accordingly, it is evident from Section 18 (1) read with Section 19 that, questions relating to the addition of parties under our law must be decided **within the confines of Section 18 (1) of the Civil Procedure Code.**

Thus, in TEMPLER vs. SENEVIRATNE [1892 2 Cey. Law Reports 70 at p.71], Withers J observed with regard to the addition of parties in a civil action that, *"According to clause 19 of Ordinance 2 of 1889 which governed the procedure herein, no person can intervene in any action otherwise than as provided by clause 18 of Ordinance 2 of 1889"* [*ie: "Ordinance 2 of 1889"* referred to Withers J is the then recently promulgated Civil Procedure Code].

It is evident that, in the same way as in Order 16, rule 11, the use of the word *"or"* in the words of Section 18 (1) cited above, shows that, Section 18 (1) has ***two* limbs** which contemplate the addition of two different types of persons:

(i) Firstly, persons who *"ought to be have been joined, whether as plaintiff or defendant"*;

(ii) Secondly, persons 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"*.

The fact that, Section 18 (1) has two separate limbs under which a party may be added was highlighted by Basnayake C.J. in WEERAPERUMA vs. DE SILVA [61 NLR 481 at p.484] where the learned Chief Justice stated *"….. the grounds on which a person may be added as a party to an action are either (i) that he ought to have been joined as a plaintiff or defendant or (ii) that his presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action"*. In the same manner, in THE CHARTERED BANK vs. DE SILVA [67 NLR 135 at p. 137], Sri Skanda Rajah J observed *"Section 18 (1) of our Code, like Order I Rule 10 (2) of the Indian Code, makes a distinction between the two classes of persons, viz. persons who ought to have joined, i.e., necessary parties, and persons whose presence is necessary to enable the Court to completely and effectually to adjudicate upon and settle all the questions involved in the suit, i.e., proper parties".*

Accordingly, it is now necessary to examine the type of person who should be added on the basis that such person falls within the ***first* limb** of Section 18 (1) as being someone *"who ought to have been joined, whether as plaintiff or defendant"*.

Basnayake CJ in WEERAPERUMA vs. DE SILVA (at p.137) and Sri Skanda Rajah J in THE CHARTERED BANK vs. DE SILVA (at p.484) considered this question and determined that, when ascertaining whether a party who is sought to be added is a person *"who ought to have been joined, whether as plaintiff or defendant"* in terms of the first limb, Section 18 (1) should be read with Section 11 and Section 14 (as appropriate) of the Civil Procedure Code. Thus, Sri Skanda Rajah J stated (at p. 137) *"In our view sections 14 and 18 (1) should be read together"*.

It is clear from these two decisions that: in the case of an application to add a party under the first limb of Section 18 (1) on the basis that he *"ought to have been joined … as plaintiff"*, that person will be a third party who claims a right to relief upon the cause of action which is the subject matter of the case and who ought to have been joined as a plaintiff, as required by Section 11 of the Civil Procedure Code; and in the case of an application to add a party under the first limb of Section 18 (1) on the basis that he *"ought to have been joined … as defendant"*, that person will be a third party who is alleged to be liable upon the cause of action which is the subject matter of the case and who ought to have been joined as a defendant, as required by Section 14 of the Civil Procedure Code. In other words, the type of persons contemplated in the first limb of S:18 (1) are persons who must be added as parties since they are entitled to relief upon *or* are liable upon, the same cause of action which is the subject matter of the case.

By way of an example of a party being added since he was a person *"who ought to have been joined, whether as plaintiff or as defendant"* as contemplated by the first limb of Section 18 (1), in SINNATHAMBY vs. KANDIAH [56 NLR 535], only two of three trustees were plaintiffs in an action instituted by these two plaintiffs in their capacity as trustees, despite Section 473 of the Civil Procedure Code requiring that, where there are several trustees, they shall *all* be made parties in an action filed by one or more of them. The Supreme Court ordered that, the trustee who was not a plaintiff be added as a party and observed (at p.536) that, Section 18 (1) *"…..empowers the Court inter alia to add as a party the name of any person who ought to have been joined (in the first instance) whether as plaintiff or Defendant."*.

Next, it is necessary to examine the type of person who should be added on the basis that such person falls within the ***second* limb** of Section 18 (1) as being someone *"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"*.

In this regard, the use of the word *"or"* in Section 18 (1) suggests that, this second type of persons will be persons who may not be entitled to relief upon or be liable upon the cause of action which is the subject matter of the case (who will be encompassed by the first limb as set out earlier) but, nevertheless, are persons whose presence before the Court is necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in that action. This type of persons who should be added under and in terms of the second limb of Section 18 (1), are usually referred to as *"necessary parties"*. As mentioned above, in THE CHARTERED BANK vs. DE SILVA, Sri Skanda Rajah J referred to such parties as *"proper parties".* Although that term used by Sri Skanda Rajah J seems to be apt, a perusal of the later judgments shows that, the term *"necessary parties"* has

been frequently used when referring to parties who should be added under and in terms of the second limb of Section 18 (1). Accordingly, so as to maintain conformity, the term *"necessary parties"* will be used in this judgment when referring to parties who should be added under and in terms of the *second* limb of Section 18 (1).

In the early Case of APPUHAMY vs. LOKUHAMY [1892 2 Cey. Law Reports 57 at p.58], Lawrie J took the aforesaid words in the second limb of Section 18 (1) to mean that, *"Before a third person can be added as a party he must show that* ***he has an interest in the litigation and that he would be prejudiced by a judgment being entered either for the plaintiff or defendant****"*. [emphasis added].

In PERERA vs. LOWE [2 Cey. Law Recorder 191] where A sued B upon a Promissory Note. C, who had no connection to the transaction between A and B, sought to intervene because he feared this was a collusive action designed to seize B's land upon which C has a claim. C's application to be added was refused since Shaw ACJ held that, C had no direct interest in the action between A and B and could not be regarded as a *"necessary party"* merely because he feared he might suffer some loss. A similar conclusion was reached by Soertz J in THANGAMMA vs. NAGALINGAM [39 NLR 143] on facts which were broadly similar with the difference being that, the action was one upon a mortgage bond and not a promissory note.

In KUMARIHAMY vs. DISSANAYAKE [37 NLR 493], the defendant in a hypothecary action pleaded as his defence that he had paid the monies due to the plaintiff to the plaintiff's agent and obtained an Order from the District Court adding the plaintiff's agent as a defendant. In appeal from this Order of the District Court, the Supreme Court held that, the plaintiff's agent was wrongly added since he was no more than an important witness and his presence as a party was unnecessary to effectually and completely adjudicate upon and settle the questions involved in the action. In reaching this conclusion, Dalton S.P.J. referred to the fact that, neither the plaintiff nor the defendant claimed any right to relief against the party who had been added.

Then, in ARUMOGAM vs. VAITHIALINGAM [43 NLR 293] the plaintiff instituted a hypothecary action against the defendant to recover monies which he had lent to the defendant upon a contract between these two parties. The heirs of the plaintiff's daughter sought to be added on the basis that, the plaintiff had utilised monies belonging to his daughter when he made the loan to the defendant. However, the plaintiff claimed that, he had repaid his daughter and that, the monies he had lent to the defendant were his own. Having considered some of the previous decisions of this Courts and also the decisions in BYRNE vs. BROWN AND DIPLOCK and MONTGOMERY vs. FOY, MORGAN AND CO, De Kretser J refused to add the heirs on the basis that any claim they may have against the plaintiff must be the basis of a separate action and could not be made a part of the present action which was limited to the contract between the plaintiff and defendant. In reaching this conclusion, De Kretser J observed (at p.496) that, *"Now, there is no doubt that section 18 should be liberally interpreted but that must be done on some principle"* and went on to state with regard to the decisions where addition of a party had been allowed *" ….. The questions arose from the contract itself ….."*.

An instance where a party was added to a pending action was the Case of BANDA vs. DHARMARATNE [24 NLR 210] where it was held that, the plaintiff in a

hypothecary action was entitled, under Section 18 (1), to add as a defendant, a person to whom the mortgaged property had been transferred before the judgment was delivered and who was, therefore, a *"necessary party"* as contemplated by Section 18 (1) since the presence of the transferee, who was in possession and would be affected or be bound by the Orders which may be made, was necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the action.

A Bench of five Judges in IBRAHIM SAIBO vs. MANSOOR [54 NLR 217], in a decision which examined the liability of a sub-tenant to be ejected upon a writ obtained against the tenant, commented that, a sub-tenant would usually be entitled to be added to the action between the landlord and tenant. The Supreme Court went on to observe, *obiter* (at p.221), with regard to the purpose of Section 18 (1) that, *"Section 18 provides for the joinder of persons 'whose presence may be necessary in order to enable the court effectively and completely to adjudicate and settle all the questions involved in the action'. In our view the Code after making provision restricting the joinder of parties and causes of action by a plaintiff as of right enables the court under section 18 on the consideration of the merits of an individual application to relax the rigours imposed by other sections. It is proper that the court should have this power because, as in the circumstances under consideration, delay and inconvenience would be caused if power is not vested in some authority to relax the rules laid down to prevent in the generality of cases the indiscriminate joinder of parties and causes of action."*.

It is apparent from the above cases decided by the Supreme Court in the first half of the 20th century that, a person would be considered a *"necessary party"* under and in terms of the *second* limb of Section 18 (1) of the Civil Procedure Code if he had rights in the subject matter of the litigation and may be prejudiced by the Order that would be made in the case or if it was necessary that he be bound by the Order and, therefore, his presence as a party in the action was necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the action.

Devlin J's judgment in AMON vs. RAPAHEL TUCK AND SONS LTD was delivered in 1955 and the decisions of our Courts since then show that the Supreme Court approved of and applied the approach formulated by Devlin J in that case.

Thus, in THE UNITED FIRE AND GENERAL INSURANCE CO., LTD vs. WEINMAN [59 NLR 495], PONNUTHURAI vs. JUHAR and THE CHARTERED BANK vs. DE SILVA, the Supreme Court referred to and applied some of the aforesaid tests formulated by Devlin J in AMON's case. A perusal of these judgments establishes that, the Supreme Court considered Devlin J's approach in AMON's case as having correctly identified how to determine whether a person should be added as a *"necessary party"* under the second limb of Section 18 (1) of the Civil Procedure Code. Thus, in THE UNITED FIRE AND GENERAL INSURANCE CO., LTD vs. WEINMAN, Weerasooriya J decided that case by applying one of the tests formulated by Devlin J in AMON's case. In PONNUTHURAI vs. JUHAR, Sansoni J (at p. 377-378), stated, *"The English rule has been closely analysed in a learned judgment by Devlin J. in Amon v. Raphael Tuck and Sons Ltd. ….. "* and that Devlin J *"….. laid down the test to determine whether an intervention should be*

allowed when the plaintiff objects to it as being : " May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights ? ". His Lordship, Justice Sansoni then applied the aforesaid test formulated by Devlin J in deciding the appeal. In THE CHARTERED BANK vs. DE SILVA, Alles J stated (at p.142), *" I therefore agree that the principle laid down in Amon's case and followed in the later decisions should be preferred to the broad generalisation of Lord Esher in Montgomery's case. Otherwise as Devlin J. remarked in Amon's case `anybody who showed a cause of action against either a plaintiff or defendant could, of course, say that the question involved in his cause of action could not be settled unless he was a party'. Applying therefore the principles laid down by Devlin J. and followed in the later English cases to the facts of the present case what are the legal rights of the Bank which can be affected by the result of the action between the plaintiff and the defendants ?"***.**

Then, in GOVERNMENT AGENT, KALUTARA vs. GUNARATNE [71 NLR 58] the Supreme Court held that, one of the grounds on which the addition of a person as a party to a pending action should be permitted under Section 18 (1) is the fact that, the Order prayed for in the action would affect that person in the enjoyment of his legal rights.

Another decision of the Supreme Court which should be mentioned here is the aforesaid case of WEERAPERUMA vs. DE SILVA which was decided soon after AMON vs. RAPAHEL TUCK AND SONS LTD. In WEERAPERUMA vs. DE SILVA, Basnayake CJ did not refer to any previous decisions in Ceylon [as it then was] or in England with regard to the addition of parties and interpreted the second limb of Section 18 (1) to restrict the type of person who may be added as a *"necessary party"* to only persons whose presence is necessary to enable the Court to effectually and completely adjudicate upon and settle the questions involved in the action which arise from the pleadings of the parties who are already before Court. In this connection, His Lordship stated (at p. 484) that, *"Any question arising on the case set up by an intervenient in his petition and not arising on the case set up in the pleadings of the parties is not a question involved in the action"*.

This approach taken by Basnayake CJ in WEERAPERUMA vs. DE SILVA to confine situations where addition is to be permitted only to instances where the presence of the intervenient as a party is required to determine questions which arise out of the *pleadings* of the parties who are already before the Court, is considerably more stringent that the tests devised by Devlin J even though Devlin J's approach had been followed in THE UNITED FIRE AND GENERAL INSURANCE CO., LTD vs. WEINMAN, PONNUTHURAI vs. JUHAR and THE CHARTERED BANK vs. DE SILVA.

However, it is to be noted that, Basnayake CJ later agreed with the judgment of Sansoni J in PONNUTHURAI vs. JUHAR which was decided 17 months *after* the His Lordship, the Chief Justice had earlier voiced the more stringent requirements mentioned by him in WEERAPERUMA vs. DE SILVA. As I stated earlier, in PONNUTHURAI vs. JUHAR, the Supreme Court considered that, the aforesaid tests formulated by Devlin J correctly identified a party who should be added as being a *"necessary party"* under the second limb of Section 18 (1) of the Civil Procedure Code.

Thus, the cases cited above show that, the Supreme Court consistently approved of the approach taken by Devlin J in AMON's case or adopted an approach which was in consonance with Devlin J's reasoning. Naturally, the decision in each case depended on the particular facts of the case. But, it would be correct to state that, in general, the approach taken and tests adopted by the Supreme Court were on the lines of those formulated by Devlin J and that a *cursus curiae* to that effect, had been established.

However, about two decades later, in COOMARASWAMY vs. ANDIRIS APPUHAMY, Ranasinghe J, as he then was, expressed (at p.229) His Lordship's view that, *"….. the 'wider construction' placed upon it by Lord Esher, which has been set out above, commends itself to me."*.

As mentioned earlier, the defendants rely on Ranasinghe J's aforesaid observation made in COOMARASWAMY vs. ANDIRIS APPUHAMY that the *"wider construction"* espoused by Lord Esher M.R. is to be commended. Therefore, it is necessary to carefully examine Ranasinghe J's judgment in that case and seek to ascertain what exactly the Supreme Court held in that case.

The facts of this case are somewhat complicated but it suffices to say for the purposes of this judgment that, Coomaraswamy, who was the appellant seeking to be added, was the original lessee of the land which was the subject matter of this action. Coomaraswamy had leased the land from the 1st defendant upon a lease agreement and obtained a loan from the 2nd defendant against the security of the leased land. When Coomaraswamy had difficulty repaying the monies due to the defendants, he entered into an agreement with the plaintiff to sell the land to the plaintiff in return for the plaintiff paying the monies due to the defendants. The plaintiff paid these monies and Coomaraswamy requested the defendants to transfer the land to the plaintiff. Thereupon, the defendants had entered into an agreement with the plaintiff to transfer the land to the plaintiff. However, subsequently, Coomaraswamy claimed that his previous agreement with the plaintiff was vitiated by duress and, in view of this claim, the defendants issued a notice to the plaintiff cancelling the intended transfer to the plaintiff. The plaintiff then instituted the action against the defendants seeking a declaration that the notice of cancellation was null and void. Coomaraswamy sought to be added as a party to the pending action on the basis that he was the person who was entitled to the land under his original lease agreement with the 1st defendant. The plaintiff opposed the addition. The District Court refused to allow the addition and the Court of Appeal affirmed the Order of the District Court. Coomaraswamy appealed to the Supreme Court. In appeal, Ranasinghe J set aside the Orders of the lower Courts and directed that Coomaraswamy be added as a defendant.

In his judgment, with which with Sharvananda CJ and Atukorale J agreed, Ranasinghe J first examined the development of the Law in England and referred to both the *"narrower construction"* applied by Lord Coleridge CJ in NORRIS vs. BEAZLEY and the *"wider construction"* preferred by Lord Esher MR in BYRNE vs. BROWN and MONTGOMERY vs. FOY, MORGAN AND CO. In doing so, Ranasinghe J cited the passages from the judgments of Lord Coleridge CJ in NORRIS vs. BEAZLEY and of Lord Esher MR in BYRNE's case and MONTGOMERY's case, which I have cited above.

Ranasinghe J then referred to the judgment of Devlin J in AMON's case and commented (at p.223) *"After an exhaustive consideration of all earlier English authorities Delvin J., (sic) himself came down on the side of the `narrower construction' formulating the test to be adopted in this way at page 290: `May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights ?' "* However, with the greatest respect, it is necessary to mention here that, as observed earlier, Devlin J had held in AMON's case that he was not inclined to follow the *"narrower construction"* formulated by Lord Coleridge CJ in NORRIS vs. BEAZLEY and had specifically observed that, *"Nevertheless, the later authorities, which are binding on me, show conclusively that a party can be joined as defendant even though the plaintiff does not think that he has any cause of action against him."*.

In any event, in addition to referring to the aforesaid test formulated by Devlin J, Ranasinghe J went on (at p.224) to refer to another of the tests formulated by Devlin J and cited the aforementioned passage from the judgment of Devlin J in AMON's case where Devlin J stated *"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be so settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."* Further, Ranasinghe J referred (at p.223-224) to the other tests formulated by Devlin J where it is recognised that, a person should be added if his presence before the Court was necessary to effectually and completely adjudicate upon and settle the action or to give effect to the determination of the Court or to enable a party to effectually and completely get the reliefs he seeks in the pending action or to effectively establish his case.

Further, Ranasinghe J observed (at p.225-226) that, in cases such as PONNUTHURAI vs. JUHAR and THE CHARTERED BANK vs. DE SILVA, the Supreme Court had approved of the approach formulated by Devlin J in AMON's case and that, the decisions in GOVERNMENT AGENT, KALUTARA vs. GUNARATNE and WEERAPERUMA vs. DE SILVA also *"preferred the narrower construction"*. In this regard, Ranasinghe J stated (at p.226), *"A careful study of the judgments delivered in The Chartered Bank case (supra) reveals that the decision of the two judges was largely, if not wholly influenced by their view that the English Courts have moved away from the `broad generalization' of Lord Esher in 1895 and have, in recent times, favoured the `more restricted interpretation' adopted by Devlin J in Amon's case (supra) and that the views expressed by Lord Esher cannot then be regarded as expressing the correct interpretation of the said rule."*.

Thereafter, Ranasinghe J referred to the judgment of Lord Denning M.R. in aforementioned case of GURTNER vs. CIRCUIT and commented (at p.228), *"Denning M.R. was not disposed to accept the `narrower construction' adopted by Devlin J in Amon's case (supra) and followed by Stephenson J in Fire, Auto Marine Insurance Co. case (supra) but preferred to place the `wider construction' which had found favour with Lord Esher in Byrne v. Browne (supra) – and also later in Montgomery's case (supra)."*.

However, with the greatest respect, it seems to me that, as stated earlier, in GURTNER vs. CIRCUIT, Lord Denning M.R. did not disapprove of or reject the tests

formulated by Devlin J in AMON's case other than for expanding the types of persons who may be added to include persons whose 'pecuniary interests' or `commercial interests' would be affected. In this connection, Ranasinghe J himself (at p.228) cited the relevant passage from Lord Denning M.R's judgment in GURTNER vs. CIRCUIT [which has been cited above], where it was held that, persons who may be added will include persons whose 'pecuniary interests' or `commercial interests' would be affected. It may also be added that, a perusal of Lord Denning M.R's judgment in GURTNER vs. CIRCUIT shows that the comment therein that, Order 16, rule 11 should be given a wider interpretation as Lord Esher M.R did in BYRNE's case, was by way of a general observation that a Court should not adopt an over-rigorous approach to questions regarding the addition of parties. In any event, as observed earlier, the approach taken by Lord Denning M.R. in GURTNER vs. CIRCUIT was not dissimilar to that formulated by Devlin J in AMON's case.

Thereafter, Ranasinghe J went on to state [at p.229], *"On a consideration of the respective views, referred to earlier, which have been expressed by the English Courts in regard to the nature and the extent of the construction to be placed upon the rule regulating the addition of a person as a party to a proceeding which is already pending in court between two parties, the 'wider construction' placed upon it by Lord Esher, which has been set out above, commends itself to me. The grounds which moved Lord Esher to take a broad view, viz: to avoid a multiplicity of actions and to diminish the cost of litigation, seem to me, with respect, to be eminently reasonable and extremely substantial. Lord Esher's view, though given expression to almost a century ago, is, even today, as constructive and as acceptable"*.

However, apart from citing the above passages from the judgments of Lord Esher MR in BYRNE's case and MONTGOMERY's case and holding that the *"wider construction"* espoused by Lord Esher M.R. is commendable, Ranasinghe J did not stipulate or describe the tests to be used by our Courts when determining whether a person should be added as a *"necessary party"* under the *second* limb of Section 18 (1) of the Civil Procedure Code.

Further, it is to be noted that, having referred to the tests formulated by Devlin J in AMON's case, Ranasinghe J did not, other than for commending the *'wider construction'* espoused by Lord Esher M.R, disagree with the validity of these tests formulated by Devlin J or disapprove of them. Ranasinghe J also does not appear to have specifically referred to the effect of the aforesaid *cursus curiae* of decisions of the Supreme Court in which the approach formulated by Devlin J had been approved and applied.

Next, it is significant to note that, when *deciding* the appeal upon the facts of the case, Ranasinghe J held (at p. 231-232) that, Coomaraswamy should be added as a party on the basis that, the declaration prayed for by the plaintiff *"….. will not be a final solution unless and until the appellant himself can be held to be bound by such decision"* [the appellant was Coomaraswamy] and that, the pending action *"cannot be effectually decided in the absence of ….."* Coomaraswamy. Ranasinghe J observed that, *"Affording the appellant merely the role of a witness will not be adequate for a full and fair determination of the issue ….."* and that *"Any decision of these issues in a proceeding, to which the appellant is not a party and by the*

decision of which he will not be bound, will not effectively and finally settle the issue of who is the person now entitled, in law, to the said land and premises".

Thus, the actual criteria upon which Ranasinghe J based his decision in COOMARASWAMY vs. ANDIRIS APPUHAMY apply the tests formulated by Devlin J in AMON's case such as the fact that, the determination of the case will not be effective unless the person who seeks to be added [Coomaraswamy] is made a party and is bound by the determination of the case and the pending action cannot be effectively determined without Coomaraswamy being added as a party.

Accordingly, it seems to me that, the *ratio decidendi* in COOMARASWAMY vs. ANDIRIS APPUHAMY was largely in line with the approach formulated by Devlin J in AMON's case which has been approved and adopted by this Court in the *cursus curiae* cited above.

It also seems to me that, the commendation which Ranasinghe J accorded to the *"wider construction"* advocated by Lord Esher M.R. is to be understood in the context of *obiter dicta* setting out His Lordship's view that, when deciding questions regarding the addition of parties, a Court should keep in mind the desirability of seeking to add a party in order to prevent the multiplicity of litigation, *provided*, of course, the addition is permissible under and terms of Section 18 (1) of the Civil Procedure Code. In fact, this would be in line with Lord Esher M.R's statement in BYRNE's case that, *" ….. the Court ought to give the largest construction to…. "* Order 16, rule 11 to carry out the twin objects of reducing the multiplicity of litigation and the costs of litigation. Lord Esher's use of this phrase establishes that, the learned Master of the Rolls certainly did not suggest that, the addition of parties should be permitted *outside* the terms of or in violation of the scope and ambit of Order 16, rule 11. It appears to me that, what Lord Esher M.R did suggest is that, Order 16, rule 11 should be interpreted widely, keeping in mind the desirability of reducing the multiplicity of litigation, *provided* the addition of that party can be done within the terms and ambit of Order 16, rule 11. It is also relevant to reiterate here that, Lord Esher M.R. himself described his statements which were cited by Ranasinghe J, as being *"general observations"*.

In this connection, I would, with respect, echo Devlin J's pertinent observation in AMON's case and state here that, the question of addition of parties must be decided strictly within the confines of the applicable provision of law, which in our case is Section 18 (1) of the Civil Procedure Code. Therefore, the object of preventing the multiplicity of litigation cannot justify the addition of a person who is not a *"necessary party"* as defined in the second limb of Section 18 (1). Preventing the multiplicity of litigation can only be a happy result of the addition of a party under and in terms of and in compliance with the provisions of Section 18 (1). It cannot be a justification for acting outside the provisions of Section 18 (1). In fact, in seems to me that, His Lordship, Justice Ranasinghe recognised that restriction when, having mentioned that, a Court should endeavour to reduce the multiplicity of litigation when applying Section 18 (1), His Lordship proceeded to *decide* COOMARASWAMY vs. ANDIRIS APPUHAMY by applying criteria which are self evidently within the confines of Section 18 (1) and which were in consonance with the tests formulated by Devlin J.

In the subsequent Case of COLOMBO SHIPPING CO. LTD vs. CHIRAYU CLOTHING (PVT) LTD [1995 2 SLR 97], the Court of Appeal seemed to revert to something close to the *"narrower construction"* favoured by Lord Coleridge C.J and stated (at p.100) *" The words 'all questions involved in that action' in the Section [18 (1)] circumscribe the power of Court to add or strike out a party to an action. The provisions of the Section were never intended to apply to a person against whom the plaintiff did not disclose a cause of action"*. However, it appears that, the decision of the Supreme Court in COOMARASWAMY vs. ANDIRIS APPUHAMY was not brought to the attention of the Court of Appeal.

Two months later, in DASSANAYAKE vs. PEOPLE'S BANK [1995 2 SLR 320], the same Bench of the Court of Appeal applied the decision in COOMARASWAMY vs. ANDIRIS APPUHAMY which had been relied on by the petitioner. Ranaraja J, with Silva J as he then was, agreeing, referred to COOMARASWAMY vs. ANDIRIS APPUHAMY and stated (at p.322) *"That judgment lays down the guidelines applicable to the addition of parties thus, `if a plaintiff can show that he cannot get effectual or complete relief unless the new party is joined or a defendant can show that he cannot effectually set up a defence which he desires to set up unless the new party is joined, the addition should be allowed.'*.". It is evident that, the aforesaid two tests identified by Ranaraja J as having been laid down in COOMARASWAMY vs. ANDIRIS APPUHAMY, are in line with two of the aforesaid tests formulated by Devlin J in AMON's case.

Subsequently, in PERERA vs. LOKUGE [2000 3 SLR 200 at p.204], Bandaranayake J, as she then was, observed that, there are *"….. two strands of English decisions, labelled by Devlin J in., in AMON vs RAPAHEL TUCK AND SONS LTD as the 'narrower construction' and the 'wider construction.'* ". Bandaranayake J went on to state that, the *"narrower construction"* is *"best reflected"* in the aforementioned words of Lord Coleridge C.J. in NORRIS vs. BEAZLEY and that, the *"wider construction"* is *"expounded"* in the aforementioned words of Lord Esher M.R. in BYRNE's case. Bandaranayake J then stated that, in COOMARASWAMY vs. ANDIRIS APPUHAMY, the Supreme Court had endorsed the *"wider construction"* favoured by Lord Esher M.R in BYRNE's case.

Subsequently, in FERNANDO vs. TENNAKOON [2010 2 SLR 22], Marsoof J also observed that, the *"narrower construction"* was stated by Lord Coleridge C.J. in NORRIS vs. BEAZLEY, the *"wider construction"* was set out by Lord Esher M.R. in BYRNE's case and that, in COOMARASWAMY vs. ANDIRIS APPUHAMY the Supreme Court had endorsed the *"wider construction"* favoured by Lord Esher M.R, which had been followed in PERERA vs. LOKUGE. Accordingly, His Lordship, Justice Marsoof (at p.34) applied the "*wider construction expounded by Lord Esher"*.

However, an examination of the facts in PERERA vs. LOKUGE and FERNANDO vs. TENNAKOON show that, in both these cases, the party who was sought to be added was a person whose rights were affected by the reliefs sought by the original parties to the case or who was required to be bound by the determination of the case. Therefore, that person's presence before the Court as a party was obviously necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in that action. Thus, it appears that, the circumstances in PERERA vs. LOKUGE and FERNANDO vs. TENNAKOON did not

require the learned Judges to extensively examine the nature, scope and effect of the decision in COOMARASWAMY vs. ANDIRIS APPUHAMY in the light of the aforesaid previous decisions of the Supreme Court which had established the *cursus curiae* referred to earlier. Similarly, the facts and circumstances in these two cases did not require the learned judges to examine the limitations placed on the so called *"wider construction"* by the words used in Section 18 (1) or to determine the actual extent of the so called *"wider construction".*

Thereafter, in the later case of SIYANERIS & CO.LTD vs. JAYASINGHE [2012 1 SLR 124], the Court of Appeal did not refer to COOMARASWAMY vs. ANDIRIS APPUHAMY. Instead, the Court of Appeal followed the decision in THE CHARTERED BANK vs. DE SILVA. Ekanayake J with Sisira De Abrew J agreeing, both learned Judges then in the Court of Appeal, held (at p.129-130), *"Perusal of the impugned order reveals that basis of learned Judge's conclusion is that the presence of party proposed to be added would become necessary to enable the Court to effectually and completely adjudicate the questions involved in the case. This appears to be the correct proposition of law and it is in construction with the provisions of Section 18 of the Civil Procedure Code and also the judicial pronouncements we have had in this regard. The decision in the case of the Chartered Bank v. De Silva would be of importance here….. Further per* ***Sri Skandarajah****, J at 137 :When an application is made under Section 18(1) to add a party what the Court ought to see is whether there is anything which cannot be determined owing to his absence or whether he will be prejudiced by his not being joined as a party.".*

In these circumstances, it appears to me that, upon a careful reading of the judgment of Ranasinghe J in the context of the decisions of this Court prior to COOMARASWAMY vs. ANDIRIS APPUHAMY and also the aforesaid later decisions of this Court and the Court of Appeal, the following principles may be extracted from COOMARASWAMY vs. ANDIRIS APPUHAMY and the later decisions:

(i) The Supreme Court endorsed Lord Esher M.R.'s view that, the *second* limb of Section 18 (1) of the Civil Procedure Code should be given the *"largest construction"* [to use the words of Lord Esher M.R.] and that, when deciding questions regarding the addition of parties, a Court should keep in mind the desirability of reducing the multiplicity of litigation by adding parties *provided*, of course, the addition is permissible under and terms of and within the ambit of Section 18 (1) of the Civil Procedure Code;

(ii) The Supreme Court disapproved of Lord Coleridge C.J.'s restrictive approach [which has been termed the *"narrower construction"*] that, the addition of parties should be allowed only where the plaintiff had a cause of action against the person sought to be added which had to be decided in the pending action itself;

(iii) The Supreme Court did not set out the tests to be applied when determining whether a person should be added as a party under Section 18 (1);

(iv) The Supreme Court held that, the tests referred to by Lord Esher M.R. in BYRNE's case and MONTGOMERY's case are relevant when determining whether a person should be added as a *"necessary party"* under the *second* limb of Section 18 (1) of the Civil Procedure Code;

(v) However, the tests formulated by Devlin J in AMON's case, which had been approved and applied by the Supreme Court in THE UNITED FIRE AND GENERAL INSURANCE CO., LTD vs. WEINMAN, PONNUTHURAI vs. JUHAR and THE CHARTERED BANK vs. DE SILVA, remain relevant and the Supreme Court did not disagree with or disapprove of these tests other than for approving of the manner in which Lord Denning M.R expanded these tests in GURTNER vs. CIRCUIT;

Since in COOMARASWAMY vs. ANDIRIS APPUHAMY, the Supreme Court endorsed Lord Esher M.R's approach in BYRNE's case and MONTGOMERY's case, it is necessary to examine the words used by Lord Esher M.R. and extract the actual tests which Lord Esher M.R. formulated in these two cases, so that such tests can be applied when determining whether a person should be added as a *"necessary party"* under the second limb of Section 18 (1) of the Civil Procedure Code. Further, in order to ascertain whether the decision in COOMARASWAMY vs. ANDIRIS APPUHAMY affects the continuing validity of the tests formulated by Devlin J in AMON'S case which were approved and applied in the several decisions of this Court set out above, it is also necessary to see whether the tests that can be extracted from BYRNE's case and MONTGOMERY's case are at odds with the tests formulated by Devlin J in AMON's case.

In this connection, it is patently clear that, the object of reducing the multiplicity of litigation advocated by Lord Esher M.R. can only be a salutary result which may be achieved by permitting the addition of parties to a pending action, but is not a test which can be applied to determine whether a person should be added as a *"necessary party"* under and in terms of the second limb of Section 18 (1).

A perusal of Lord Esher's judgments in BYRNE's case and MONTGOMERY's case show that, the actual tests formulated by the learned Master of the Rolls [at p. 666 of BYRNE's case and at p.324 of MONTGOMERY'S case] are that, the addition of a party should be permitted *"whenever a Court can see in the transaction brought before it that the* ***rights of one of the parties will or may be so affected*** *that under the forms of law other actions may be brought* ***in respect of that transaction****"* and that, *"where there is* ***one subject-matter out of which several disputes arise****, all parties may be brought before the Court, and all those disputes may be determined at the same time"*. [emphasis added].

Lord Esher M.R's aforesaid first statement is to the effect that, where the Orders sought in a pending action will affect the rights of one of the parties to that action in a manner that he will result in him having to institute a separate action against another person or where another person's rights will be affected by the Orders sought in the pending action in a manner that will result in that person having to institute a separate action against one of the parties to the action, such person should be added as a party to the pending action. It is apparent that, in either of these circumstances, the addition of that person as a party to the pending action, will be in

line with the aforesaid tests formulated by Devlin J in AMON's case since one of the parties to the pending action will be unable to get effectual and complete relief unless that person is added as a party or that person's rights will be affected by the Orders made in the pending action.

Next, Lord Esher M.R's aforesaid second statement that, the addition of a party should also be permitted where there is *"one subject-matter out of which several disputes arise"*, needs to be examined. It seems to me that, since any application of Section 18 (1) must remain within the express terms of that statutory provision, the use of the words *"all the questions involved in that action"* in Section 18 (1) will limit the addition of parties to only instances where the *"several disputes"* referred to by Lord Esher M.R, arise out of and are limited to the specific *"questions involved in that action"*, as stipulated by Section 18 (1). In fact, since Lord Esher M.R himself recognised that the addition of parties must be done within the terms of Order 16, rule 11, when His Lordship referred to the desirability that a Court should give *"the largest construction"* to Order 16, rule 11 when deciding questions regarding the addition of parties, it cannot be correctly said that, Lord Esher M.R words were meant to justify adding parties whose presence before the Court is not *"necessary"* in order to enable the Court to *"effectually and completely adjudicate upon and settle the questions* ***involved in that action****"*, as specified in Section 18 (1). Therefore, as a result of the confines imposed by Section 18 (1), the addition of a person who has a *"dispute"* [in the words of Lord Esher M.R.] is permissible only if that *"dispute"* is such that, the questions involved in the **pending action** cannot be determined unless the person who has such *"dispute"* is added as a party to the pending action or the determination of the **pending action** will not be effective unless he is added to the pending action. Accordingly, it appears to me that, the second test mentioned by Lord Esher M.R when applied in terms of Section 18 (1) of the Civil Procedure Code, is also in line with the aforesaid tests formulated by Devlin J in AMON's case.

Thus, it seems to be me that, the actual tests mentioned by Lord Esher M.R. are not dissimilar to or appreciably wider than the aforesaid tests formulated by Devlin J in AMON's case, which were approved and applied in the several decisions of this Court set out above, and which were expanded by the inclusion of the additional criterion [of a `pecuniary interest' or `commercial interest'] identified by Lord Denning M.R. in GURTNER vs. CIRCUIT. There is no apparent conflict between the tests referred to by Lord Esher M.R and those formulated by Devlin J in AMON's case, as expanded by Lord Denning M.R. in GURTNER vs. CIRCUIT.

As stated earlier, it is clear that, the aforesaid tests formulated by Devlin J in AMON's case, which have been approved and applied by the several decisions of this Court set out above, and which were expanded by Lord Denning M.R in the aforesaid manner in GURTNER vs. CIRCUIT, remain relevant and are unaffected by the decision in COOMARASWAMY vs. ANDIRIS APPUHAMY.
If, for purposes of convenience and ready reference, I am to venture to extract from the aforesaid previous decisions of our Courts, including the decision in COOMARASWAMY vs. ANDIRIS APPUHAMY, the approach and the tests which may be used when determining the question of whether a person should be added as a party under and in terms of the Section 18 (1) of the Civil Procedure Code:

(1) A Court should keep in mind the desirability of reducing the multiplicity of litigation and, therefore, interpret Section 18 (1) widely;

(2) However, the object of preventing the multiplicity of litigation does not justify the addition of a party if the addition is not permitted by the words used in Section 18 (1);

(3) In terms of the *first* limb of Section 18 (1), a person who must be added because he is a party *"who ought to have been joined, whether a plaintiff or defendant"*, will be a person who should have been named as a plaintiff in terms of Section 11 of the Civil Procedure Code or who should have been named as a defendant in terms of Section 14 of the Civil Procedure Code;

(4) In terms of the *second* limb of Section 18 (1), a person who should be added because he is a *"necessary party"*, is a person whose presence before the Court is necessary in order to enable the Court to, effectually and completely, adjudicate upon and settle all the questions involved in the pending action;

(5) Accordingly, a person will be a *"necessary party"* if he will be bound by the determination of the pending action;

(6) Similarly, a person will be a *"necessary party"* if the determination of the pending action will affect his legal rights;

(7) Further, a person will be a *"necessary party"*, in appropriate circumstances, if the determination of the pending action will affect his pecuniary interests or commercial interests;

(8) A person who is not bound by the determination of a pending action or whose legal rights, pecuniary interests or commercial interests are not affected by the Orders sought in that action may, nevertheless, be added as a *"necessary party"*, if his presence before the Court as a party to that action (and *not* merely as a witness) is required to, effectually and completely, adjudicate upon and settle all the questions involved in that action. For example, to enable one of the parties to effectually and completely establish their case or to effectually and completely obtain the reliefs they seek in the action;

(9) Unless one or more of the circumstances described above exist, a person should not be added to a pending action upon a claim that he is a *"necessary party"* merely because one of the parties to that pending action has a separate dispute with or claim against him or merely because he has a separate dispute with or claim against one of the parties to that action;

(10) A person is not a *"necessary party"* merely because he has relevant evidence to give or because he is interested in and wishes to involve himself in the correct solution of the case or because he wishes to be heard in the case or to assist a party to the case.

I have attempted to set out, what seems to me to be, the appropriate approach and tests to be used when determining whether a party should be added under and in terms of Section 18 (1) of the Civil Procedure Code. This not intended to be a complete list of guidelines and every case will turn on its own facts. It should also be mentioned here that, while a Court must keep in mind the desirability of forestalling the multiplicity of litigation and not hesitate to add persons where the Court is satisfied that, such persons are *"necessary parties"* as contemplated by Section 18 (1), it should also be remembered that, the plaintiff is usually *dominus litis* and should not be made to contend with additional parties who do not fall within the scope of Section 18 (1). Further, it is prudent to keep in mind that, the addition of parties who are not *"necessary parties"* as contemplated by Section 18 (1), is likely to cause needless delay, expense and inconvenience.

I must now examine the defendants' application to add Golden Key and Kotelawela and determine whether the defendants were entitled to add these parties in terms of Section 18 (1) and the tests which have been identified.

In this connection, the plaintiff's cause of action against the defendants is simply for the recovery of the monies lent to the 1st defendant, the repayment of which has been guaranteed by the 2nd to 5th defendants. The defendants have not made a claim in reconvention against the plaintiff. A perusal of the plaint and the answer establish that, the transaction which is held out to be the subject matter of the present action is between the plaintiff on the one part and the defendants on the other part.

The defendants do not suggest that, Golden Key is a party *"who ought to have been joined"* under the first limb of Section 18 (1) since it not claimed that Golden Key has any right of relief against either party and no relief is claimed by either party against Golden Key in the present action.

However, the defendants' claim is that they are entitled to add Golden Key as a *"necessary party"* under the second limb of Section 18 (1), on the basis of the defendants' allegations, which were set out earlier.

But, it is evident that, all these alleged grievances claimed by the defendants, constitute disputes the defendants may have with Golden Key. They are independent of the subject matter of the dispute between the plaintiff and the defendants in the present action. The plaintiff's claim against the defendants and the any claim the defendants may have against Golden Key are not intertwined or inextricably linked in a manner that they must all be determined in the present action. The plaintiff's claim against the defendants and any claim the defendants may have against Golden Key can be pursued and determined separately.
Next, the determination in the present action – which can either be that, the plaintiff is entitled to judgment and decree against the defendants or that, the plaintiff's action is dismissed - cannot bind Golden Key in any way. In this connection, it is relevant to

mention that, there is no prayer in either the plaint or answer which makes any reference to Golden Key. Further, the determination of the present action will only entail deciding the plaintiff's claim against the defendants and will not affect the rights of Golden Key. Also, it is clear that, all the reliefs prayed for by both the plaintiff and the defendants can be effectively and completely granted without Golden Key being added as a party

The only remaining consideration is whether the defendants (who wish to add Golden Key) will be unable to establish their defence unless Golden Key is added as a party. In that regard, it is evident from the averments in the defendants' answer and petition that, any alleged facts or circumstances which the defendants wish to urge with regard to transactions with Golden Key can be established by summoning witnesses who worked at Golden Key to give evidence and by producing documents through an appropriate witness who has custody of those documents. Thus, Golden Key (or its successors) will, at most, be required to provide one or more witnesses and the addition of Golden Key as a party to the present action, is not required.

For the aforesaid reasons, it is apparent, that the presence of Golden Key as a party to the present action is not *"necessary"* to enable the Court to, effectually and completely, adjudicate upon and determine the present action. Thus, it is evident that, Golden Key cannot be regarded as a party "*who ought to have been joined"* or as a *"necessary party*, under and in terms of Section 18 (1) of the Civil Procedure Code.

With regard to Kotelawela, he is sought to be added as the alleged *"alter ego"* of Golden Key. Even if that were so, the aforesaid determination that, Golden Key cannot be added as a party under and in terms of Section 18 (1) of the Civil Procedure Code, results in the same conclusion being reached with regard to the proposed addition of Kotelawela as a party, too.

Accordingly, I hold that, the learned High Court Judge correctly interpreted and applied Section 18 (1) of the Civil Procedure Code. The first question of law is answered in the negative.

The second question of law asks whether the learned High Court Judge erred by failing to consider the effect of Section 34 (3) of the Civil Procedure Code. However, the defendants did not make any averments based on Section 34 (3) in their petition in the High Court praying that Golden Key and Kotelawela be added as parties. They also did not make any submissions in that regard in the High Court. Their petition to this Court does not refer to Section 34 (3). The defendants have not explained the basis on which they urge that, the learned High Court Judge erred.

In any event, the cause of action claimed by the plaintiff against the defendants and any cause of action the plaintiff may have against Golden Key upon the letter of undertaking marked **"Q1"**, are separate and can be claimed in two separate actions. Section 34 does not prohibit that. As Lord Moulton observed in the Privy Council in PALANIAPPA vs. SAMINATHAN [17 NLR 56 at p.60], Section 34 *"….. is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions.* Similarly, in KANDIAH vs. KANDASAMY [73 NLR

105], T.S. Fernando J held that, Section 34 of the Civil Procedure Code does not debar the institution of two separate actions on two different causes of action, even though the causes of action arise from the same transaction. Further, it hardly needs to be stated here that Section 34 of the Civil Procedure Code is usually invoked as a basis for a defence of *res adjudicata*. It appears to have been inappropriately and belatedly invoked here in support of an application to add a party under Section 18 (1). That attempt cannot succeed. Accordingly, the second question of law is also answered in the negative.

The appeal is dismissed. As mentioned earlier, the defendants' application to add Golden Key and Kotelawela has caused long delay and the defendants shall pay the plaintiff, costs in a sum of Rs.100,000/-.

Judge of the Supreme Court

Sisira J. De Abrew J.

Judge of the Supreme Court

Upaly 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 for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provision) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC APPEAL No. 199/12

SC.HC.CALA No. 178/2012

WP/HCCA/MT/31/2011/LA

DC Nugegoda No. 284/2010/L

Mahawattage Dona Chanika
Diluni Abeyratne,
No. 227/2,
Stanley Thilakaratne Mawatha,
Nugegoda.

Plaintiff

Vs.

1. Janaka R. Goonewardene,
No.17, 1st Lane,
Kirillapone,
Colombo 05.

2. Jaykay Marketing
Services(Pvt)Ltd,
Registered office
No. 130, Glennie Street,
Colombo 02.

Place of business
Keels Super Supermarket,
No.225,
Stanley Thilakaratne Mawatha,
Nugegoda.
Defendants

AND BETWEEN

Jaykay Marketing Services (Pvt) Ltd,
No. 130, Glennie Street,
Colombo 02.
Carrying on business at:
Keels Supermarket,
No. 225, Stanley Thilakaratne Mawatha,
Nugegoda.
2nd Defendant-Petitioner

Vs.

1. M.D.C.D. Abeyratne,
No.227/2,
Stanley Thilakaratne Mawatha,
Nugegoda.
Plaintiff-Respondent

2. J.R. Goonewardene,

No.17, 1st Street,
Colombo 05.
1st Defendant- Respondent

AND NOW BETWEEN

Mahawattage Dona Chanika Diluni Abeyratne,
No. 227/2,
Stanley Thilakaratne Mawatha,
Nugegoda.
Plaintiff-Respondent-Petitioner

Vs.

Jaykay Marketing
Services (Pvt) Ltd,
No. 130, Glennie Street,
Colombo 02.
Carrying on business at:
Keels Supermarket,
No. 225, Stanley Thilakaratne Mawatha,
Nugegoda.
2nd Defendant-Petitioner-Respondent

J.R. Goonewardene,

No.17, 1st Street,

Colombo 05.

1st Defendant- Respondent-Respondent

Before : Sisira J De Abrew J
Anil Gooneratne J &
KT Chitrasiri J

Counsel : Manohara de Silva President's Counsel
for the Plaintiff-Respondent-Appellant
Neranjan de Silva for the 1st Defendant-Petitioner-Respondent
Suren Fernando 2nd for the 2nd Defendant-Petitioner-Respondent

Written submissions
Tendered on : 20.6.2013 by the Plaintiff-Respondent-Appellant
7.2.2013 by the 1st Defendant-Petitioner-Respondent
6.2.2013 by the 2nd Defendant-Petitioner-Respondent

Argued on : 11.11.2016

Decided on : 15.2.2017

Sisira J De Abrew J.

The Plaintiff-Respondent-Petitioner (hereinafter referred to as the Plaintiff-Petitioner) filed action bearing No.284/2010/L in the District Court of Nugegoda against the 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Defendant-Respondent) and the 2nd Defendant-Respondent-Respondent (hereinafter referred to as the 2nd Defendant-Respondent) to restrain them (the Defendants, their servants, agents, licensees and customers) from obstructing her access road (Lot No.G of plan No.218 dated 11.7.1993 prepared by Licensed Surveyor JMW Samaranayake) and to restrain the 2nd Defendant-Respondent from disposing of waste on to her access which is morefully described in the 2nd

schedule to the plaint. The learned District Judge by her order dated 21.7.2011 granted an interim injunction as prayed for by the Plaintiff-Petitioner. Being aggrieved by the said order, the 2nd Defendant-Respondent filed an appeal in the High Court of the Civil Appeal (hereinafter referred to as the High Court) and the High Court by its order dated 27.3.2012 vacated the said order of the learned District Judge.

Being aggrieved by the said order of the High Court, the Plaintiff-Petitioner has appealed to this court. This court by its order dated 14.11.2012, granted leave to appeal on the questions of law set out in paragraph 11(a) to 11(l) of the petition of appeal dated 8.5.2012 which are set out below.

a. Is the `said order contrary to law and against the weight of evidence?

b. Did the High Court err and come to a wrong conclusion that in order to grant relief by way of an injunctive relief that there must be an imminent threat of danger to life, where its stated " **…..** that the Plaintiff has failed to establish the fact that there is a threat or imminent danger to her life if such injunction is not issued"?

c. Did the High Court fail to consider the facts on a balance of convenience and equitable consideration which has to be considered in a matter of granting and/or vacating an order for an interim injunction?

d. Did the High Court fail to properly consider the Petitioner's case?

e. Did the High Court misdirect itself by holding that the Petitioner is guilty of laches?

f. Did the High Court misdirect itself by stating that the Petitioner has not disclosed a cause of action,

g. Did the High Court misdirect itself in appeal by setting aside the order of the District Court without identifying any error of fact or law in the order of the District Court?

h. Can the High Court set aside the order for an interim injunction on laches when there is no error of fact or law?

i. Was the High Court correct in disturbing the findings of the District Court without identifying any error of fact or law?

j. Did the High Court err by failing to consider Petitioner's case of obstruction to her sole roadway access?

k. Did the High Court misdirect itself in failing to consider the Petitioner's right of unfettered access to her residence?

l. Did the High Court fail to appreciate the irreparable loss and damage caused to the Petitioner's health by the unsanitary waste disposal methods of the 2nd Defendant that has created an unsanitary environment to the Petitioner by the actions of the Defendants?

The learned judges of the High Court in vacating the interim injunction made the following observation.

"In the above exposition it is abundantly clear that the Plaintiff has failed to establish the fact that there is threat or imminent danger to her life if such injunction is not issued. It is an essential requirement of the proof of such fact and a vital limb of a sequential test applicable to the issuance of an interim injunction."

When considering the correctness of the above observation made by the learned High court Judges, I would like to consider Section 54 of the Judicature Act which reads as follows.

(1) Where in any action instituted in a High Court, District Court or a Small Claims Court, it appears -

(a) from the plaint that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff; or

(b) that the defendant during the tendency of the action is doing or committing or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or committed, an act or nuisance in violation of the plaintiffs rights in respect of the subject-matter of the action and tending to render the judgment ineffectual, or

(c) that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff, the Court may, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, grant an injunction restraining any such defendant from-

(i) committing or continuing any such act or nuisance;

(ii) doing or committing any such act or nuisance;

(iii) removing or disposing of such property.

(2) For the purposes of this section, any defendant who shall have by his answer set up any claim in reconvention and shall thereupon demand an affirmative judgment against the plaintiff shall be deemed a plaintiff, and shall have the same right to an injunction as he would have in an action brought by him against the plaintiff for the cause of action stated in the claim in reconvention, and the plaintiff shall be deemed the defendant and the claim in reconvention the plaint.

(3) Such injunctions may be granted at any time after the commencement of the action and before final judgment after notice to the defendant, where the

object of granting an injunction will be defeated by delay, the court may enjoin the defendant until the hearing and decision of the application for an injunction but for periods not exceeding fourteen days at a time."

In Felix Dias Bandaranayake Vs The State Film Corporation [1981] 2SLR 287 Justice Soza considering the question whether or not an injunction should be granted held as follows:

"In deciding whether or not to grant an interim injunction the following sequential tests should be applied:

1. *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 serious question to be tried in relation to his legal rights and that the probabilities are that he will win.*
2. *In whose favour is the balance of convenience- the main factor being the uncompensatable disadvantage or irreparable damage to either party?*
3. *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. The material on which the Court should act as the affidavits supplied by plaintiff and defendant. Oral evidence can be led only of consent or upon acquiescence.*

In Subramaniam Vs Shabdeen [1984] 1 SLR 48 Justice Thambiah in considering the question whether or not an injunction should be granted held as follows:

1. *The person who seeks an interim injunction must show Court that there is a serious matter to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief. In other words, he must establish a prima facie case. He must first show the prima facie existence of a legal right and that there was an infringement or invasion of that legal right.*
2. *The plaintiff must show that irreparable injury will be caused to him if the injunction is not granted. Where damages are an adequate remedy, no*

injunction will lie. The test to be applied is, "is it just that the plaintiff should be confined to his remedy in damages?"

3. *The balance of convenience should favour the grant of the interim injunction and here the test is "how does the injury that the defendant will suffer if the injunction is granted and he ultimately comes out victorious weigh against the injury which the plaintiff will suffer if the injunction is refused and he wins?" Where any doubt exists as to the plaintiff's right or if his right is not disputed but its violation is denied the court will take into consideration the balance of convenience. If the plaintiff establishes his right and its infringement the balance of convenience need not be considered.*

The plaintiff had established a strong prima facie case to his entitlement to carry on the business and the violation of his rights. It would not be just to confine the plaintiff to his remedy in damages. An interim injunction must be granted to stop the wrong doer from obtaining the benefits arising from his own wrongful conduct. The application to dissolve the injunction therefore could not succeed."

When I consider the above legal literature I am unable to agree with the above observation made by the learned High Court Judges. Learned counsel appearing for the 2nd Defendant-Respondent however submitted that the word life should be replaced with the word 'right'.

Has the Plaintiff-Petitioner established a prima facie case? Has the Plaintiff-Petitioner, prima facie, shown an existence of a legal right and that there was an infringement or invasion of that legal right? If the Plaintiff-Petitioner has not established the above rights, she will not be entitled to an interim injunction. I now advert to the above questions. What is the Plaintiff-Petitioner' case? The Plaintiff-Petitioner states, in her affidavit filed in the District Court that the 2nd Defendant-Respondent is running a Super Market; that her access road is blocked by the vehicles of customers coming to the said Super Market, by the vehicles of suppliers bringing goods to the said Super Market, and by the vehicles of the 2nd Defendant-Respondent; that due to the said obstruction of her access road, she can't, on certain days, walk on the said road; that the 2nd Defendant-Respondent dumps animal waste from the said Super Market on the access road of the Plaintiff-

Petitioner and on the strip of land in front of her house; and that said animal waste emits an unbearable stench causing health hazard to her and the neighbourhood. The Plaintiff-Petitioner, by a letter dated 19.8.2009, has informed the Municipal Council, Kotte about the said health hazard and also complained to the police about the obstruction of the road. She has made complaints to the police on 3.12.20017, 13.5.2009 and 22.7.2009. She has annexed the copies of the said complaints and the letter written to the Municipal Council, Kotte. The Defendant-Respondents have denied the above allegations. However it is an undisputed fact that the 2nd Defendant-Respondent is running a Super Market by the side of the access road of the Plaintiff-Petitioner. The 2nd Defendant-Respondent, in his affidavit filed in the District Court, states that he, in a lawful manner, disposes of the waste of the Super Market with the help of private contractors. It is clear from the facts of this case and the plan No.218 referred to above that the road leading to the house of the Plaintiff-Petitioner is situated between the house of the Plaintiff-Petitioner and the Super Market of the 2nd Defendant-Respondent. The Plaintiff-Petitioner should have free access to her house through road leading to her house from the main road. This is her legal right. No one can cause obstruction to the said right.

When I consider the above facts, I hold that the Plaintiff-Petitioner has established a prima facie case and that he has, prima facie, shown an existence of a legal right and that there is an infringement and/or invasion of the said legal right.

In whose favour the balance of convenience – the main factor being the uncompensatable disadvantage or irreparable damage to the either party. Has the Plaintiff-Petitioner established the fact that an irreparable damage would be caused if the interim injunction is not granted? I now advert to this question. The Plaintiff-Petitioner states that the animal waste dumped on the strip of land in front of her house and on the access road by the 2nd Defendant-Respondent emits an unbearable

stench. Needless to say that this kind of stench would cause health problems. People of this country should have the right to inhale unpolluted air and no one is entitled to take away this right and as such no one is permitted to do acts which would emit unbearable stench and smoke (emitting smoke from the ground or closer to the ground) causing disturbance to inhalation of good air. The learned High Court Judges have failed to consider the above facts when they vacated the interim injunction. I must consider if the interim injunction is granted whether it would cause irreparable damage to the Defendant-Respondents. If it is granted the 2nd Defendant-Respondent will have to take steps to find another place to dump the animal waste and also provide parking space for his vehicles, customers' vehicle and suppliers' vehicles. This would not cause an irreparable damage to him. When I consider all the above matters, I hold that an irreparable damage would be caused to the Plaintiff-Petitioner and the people in her neighbourhood if an interim injunction is not issued.

As the interim injunction is granted in the discretion of court, I must consider whether the conduct of parties would justify the grant of the interim injunction prayed for by the Plaintiff-Petitioner. I now advert to this question. The Plaintiff-Petitioner states, in her affidavit, that her access road is obstructed by the vehicle of the 2nd Defendant-Respondent, his suppliers and his customers and that the animal waste dumped by the 2nd Defendant-Respondent emits an unbearable stench causing health hazard to the people. As I pointed out earlier the people should have the right to inhale unpolluted air and no one has the right to deny the said right. For the above reasons, I hold that the conduct of the 2nd Defendant-Respondent would justify the grant of the interim injunction. The learned Judges of the High Court have not considered the above matters and fallen into serious error when they vacated the interim injunction issued by the learned District Judge.

The learned High Court Judges, in the impugned order, have held that the Plaintiff-Petitioner is guilty of laches. Is this correct? I now advert to this question.

The Plaintiff-Petitioner has, on 19.8.2009, made a complaint to the Municipal Council Kotte complaining about the health hazard caused by the 2nd Defendant-Respondent. This letter has been produced with her Plaint. The Plaintiff-Petitioner has also made complaints to the police stating the problems that she was facing. These complaints have been made on 3.12.2007, 13.5.2009 and 22.7.2009. It appears from the above facts that she had made continuous attempts to get relief to her problems. Thus how can one say that she was guilty of laches? With due respect to the learned Judges of the High Court, I would like to state here that the Plaintiff-Petitioner was not guilty of laches.

Learned counsel for the 1st Defendant-Respondent contended that the 1st Defendant-Respondent was only the owner of the property in which the 2nd Defendant-Respondent was running a Super Market; that he did not do any of the acts complained of by the Plaintiff-Petitioner; and that therefore the injunction sought by the Plaintiff-Petitioner could not be issued against the 1st Defendant-Respondent. I now advert to this contention. If the court decides to grant the interim injunction against the 2nd Defendant-Respondent and at the same time decides not to grant the interim injunction against the 1st Defendant-Respondent what would happen? In such an event it is possible for the 2nd Defendant-Respondent to continue with the above acts on the basis that he is an agent of the 1st Defendant-Respondent against whom the interim injunction has been refused. If that happens issuing of an interim injunction against the 2nd Defendant-Respondent would be rendered nugatory and there will be no finality in litigation. It is an accepted principle in law that there must be finality in litigation.

Learned counsel for the 2nd Defendant-Respondent contended that the learned District Judge had considered documents marked X1 to X16, produced along with

written submission and that therefore the order of the learned District Judge is wrong. I now advert to this contention. It is true that the learned District Judge had used the above documents when granting the interim injunction. But when I consider the facts of this case, I am of the opinion that the learned District Judge could have arrived at the same conclusion even without considering the said documents. I therefore hold that there is no merit in the above contention.

For the aforementioned reasons, I hold that the learned District Judge was right when he issued the interim injunction against the 1st and the 2nd Defendant-Respondents and the learned Judges of the High Court were wrong when they vacated the said interim injunction. For the above reasons, I set aside the order of the learned Judges of the High Court dated 27.3.2012 and affirm the order of the learned District Judge dated 21.7.2011. In view of the conclusion reached above, I answer the questions of law in favour of the Plaintiff-Petitioner. The Plaintiff-Petitioner is entitled to costs of the action in this court and the costs of the action in courts below. I direct the learned District Judge expeditiously conclude the action filed in the District Court of Nugegoda.

Judge of the Supreme Court

Anil Gonneratne 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

SC Appeal No.199/2014
SC/HC/CALA No.528/2013
CP/HCCA/KAN/RA No.23/2012 (Rv)
D.C.Kandy Case No.18258/L

In the matter of an Appeal with Leave to Appeal obtained from this Court

K.R.SUMANAWATHIE,
Ampitiya Road, Nuwarawela,
Kandy.

PLAINTIFF

VS.

S.SEELAWATHIE,
No. 29/250B, Ampitiya Road,
Nuwarawela,
Kandy.

DEFENDANT

AND BETWEEN

S.SEELAWATHIE,
No. 29/250B, Ampitiya Road,
Nuwarawela,
Kandy.

DEFENDANT- PETITIONER

VS.

K.R.SUMANAWATHIE,
Ampitiya Road, Nuwarawela,
Kandy.

PLAINTIFF-RESPONDENT

KULATUNGA RAMANI GUNASEKERAM
No.29/250, Ampitiya Road,
Nuwarawela,
Kandy.

SUBSTITUTED PLAINTIFF-RESPONDENT

AND NOW BETWEEN

S.SEELAWATHIE,
No. 29/250B, Ampitiya Road,
Nuwarawela,
Kandy.

DEFENDANT- PETITIONER-PETITIONER/APPELLANT

VS.

K.R.SUMANAWATHIE,
Ampitiya Road, Nuwarawela,
Kandy. (Deceased)

PLAINTIFF-RESPONDENT

KULATUNGA RAMANI GUNASEKERAM
No.29/250, Ampitiya Road,
Nuwarawela,
Kandy.

SUBSTITUTED PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Sisira J. De Abrew, J.
Anil Gooneratne, J.
Prasanna Jayawardena, PC, J.

COUNSEL: Manohara de Silva, PC, with A. Wijesurendra for the Defendant-Petitioner- Petitioner/Appellant.
Samantha Ratwatte for the Substituted Plaintiff-Respondent-Respondent.

ARGUED ON: 26th September 2016

WRITTEN SUBMISSIONS FILED ON: By the Substituted Plaintiff-Respondent-Respondent on 06th March 2015 and after the argument on 26th September 2016.
By the Defendant-Petitioner-Petioner/Appellant on 11th December 2015.

DECIDED ON: 22nd June 2017

Prasanna Jayawardena PC, J

This appeal raises the question of whether this action, in which the plaintiff obtained a possessory decree entered in her favour by the District Court but subsequently died before that decree could be executed, can be continued by the legal representative of the deceased plaintiff and the decree be enforced, after the plaintiff's death.

I first will set out, as briefly as possible, the facts in this case, which has had a long history.

The Plaintiff-Respondent ["the plaintiff"] filed this action in the District Court of Kandy praying for the ejectment of the Defendant-Petitioner-Petitioner/Appellant ["the defendant"] from the allotment of land described as Lot No. 42 in Plan No. 1693, which is described in the schedule to the plaint ["the land"]. This land is situated in Ampitiya in the Kandy District. The plaintiff's case, as set out in that plaint, is that the plaintiff is entitled to the land. The plaintiff described herself as the "owner" ["අයිතිකාරිය"] of the land and also as the "allottee" ["කච්චිකාරිය"] of the land. However, the plaint does not state any further details with regard to the alleged ownership or allotment. The plaintiff pleads that the defendant has forcibly entered into wrongful and unlawful possession of a part of the land. On that basis, the plaintiff prayed for a decree ejecting the defendant from the land and placing the plaintiff to possession of the land. The plaintiff also prayed for the recovery of damages from the defendant.

The defendant filed answer denying the plaintiff's claim. The defendant pleaded that, the land is State land. The defendant stated that, Lot No. 42 which is referred to in the plaint, had been sub-divided into Lot No.s 62,64,65 and 67 by the Pradeshiya Sabhawa. The defendant further stated that she is in possession of and residing in a house she had built upon Lot No.62 while the plaintiff is in possession of and residing in Lot No.67. On that basis, the defendant prayed for the dismissal of the plaintiff's action and for an Order declaring that the defendant is entitled to possession of the entire land – *ie:* the entire land described in the schedule to the plaint and not only Lot No. 62.

A perusal of the journal entries shows that, the disputed land was surveyed upon a Commission issued by the Court. Thereafter, the Court directed that, this case be called in open Court on 22nd March 1999 to consider the plan which had been prepared. On that day, both the plaintiff and defendant were present in Court and were represented by their lawyers. It was recorded that the plaintiff and defendant were mother and daughter. The parties agreed to settle the case in the following manner: the parties agreed that the land which is the subject matter of this case is shown as the Lot No. 42 in Plan No. 1693 referred to in the plaint and described in the schedule to the plaint. The defendant agreed and undertook to hand over and deliver, to the plaintiff, within one month of 22nd March 1999, possession of the part of the land the defendant was occupying including the house the defendant was

residing in. The defendant further agreed that if she failed to do so within one month, the plaintiff was entitled to obtain a writ of ejectment against her. The plaintiff and the defendant have signed the case record to signify their assent to these terms of settlement. The Court has entered decree in terms of this settlement. The terms of settlement and the decree did not include any liability on the part of the defendant to pay damages to the plaintiff in the event the defendant failed to quit the land.

It is common ground that, the defendant did not hand over and deliver possession within the agreed period of one month. The defendant claims that, the plaintiff permitted her to remain in occupation of that part of the land and the house standing thereon, until she found alternative accommodation. However, instead of finding alternative accommodation and quitting the land, the defendant continued to reside in the house and occupy that part of the land. The defendant claims that she did so because she found out that the land was State land to which the plaintiff had not obtained any permit or license or title of any sort.

On 03rd August 2006, the plaintiff made an application to execute the decree and obtain a writ of ejectment against the defendant. Since more than one year had passed since the date of the decree and since the terms of settlement did not dispense with the need to give notice, the Court directed that notice of the application for execution of the decree be served on the defendant, in terms of section 347 of the Civil Procedure Code.

Upon receipt of notice, the defendant filed her Statement of Objections. Her position was that, the land was State land and, therefore, the decree entered on 22nd March 1999 in pursuance of the terms of settlement agreed to by the parties, could not be executed by the Court. It is significant to note that, the defendant did not dispute having agreed to the terms of settlement.

Although a final decree had been entered in pursuance of agreed terms of settlement, the District Court allowed the defendant to lead evidence to try and prove her claim that the land is State land to which neither the plaintiff nor the defendant has any entitlement by way of a permit or otherwise. The defendant then proceeded to lead the evidence of an officer of the Pradeshiya Sabhawa in her attempt to prove that the land was State land. However, his evidence was inconclusive since he failed to produce all the relevant documents.

Eventually, by an Order dated 29th October 2010, the learned District Judge held that there was no clear evidence before the Court as to whether the land was State land or not. More importantly, the learned District Judge held that, the plaintiff's action was limited to claiming the **possession** of the land and that *no* questions arose in the action with regard to title to the land or whether the land was State land. The Court held that, the terms of settlement agreed to by the parties were also limited in scope to **the plaintiff's right to possess the land** and that, the question of title to the land was *not* referred to in the terms of settlement and decree. Therefore, the

learned District Judge held that, the plaintiff was entitled to enforce the decree for **possession** and ordered that writ of execution issues against the defendant.

On 23rd December 2010, the defendant filed a petition of appeal in the High Court of Civil Appeal holden in Kandy praying that, the aforesaid Order dated 29th October 2010 of the District Court be set aside and that, the High Court declares that, the terms of settlement entered on 22nd March 1999, were unlawful and fraudulent. The plaintiff was the respondent to this appeal, which bore High Court of Civil Appeal No. CP/HCCA/KAN No. 54/2011 (FA).

While the appeal was pending in the High Court, the plaintiff died on 07th March 2011. Thereafter, the abovenamed Substituted Plaintiff-Respondent-Respondent ["the substituted plaintiff"], who is said to be another daughter of the plaintiff, filed a petition with a supporting affidavit, stating that the plaintiff had died and praying that she be substituted in place of the plaintiff, in the appeal. The plaintiff's death certificate, and the birth certificate of the substituted plaintiff [who at that stage had not been substituted], were annexed to the petition seeking substitution. These documents indicate that, the substituted plaintiff [who at that stage had not been substituted], is the daughter of the recently deceased plaintiff and that she had informed the registrar of the death of the plaintiff. Journal Entry No. 05 in the case record of the appeal in the High Court states that, notice of the application for substitution had been sent to the defendant by the attorney-at-law appearing for the substituted plaintiff [who at that stage had not been substituted]. The defendant has not filed a statement of objections opposing the proposed substitution.

Journal Entry No. 06 shows that, when the appeal was taken up before the High Court on 05th October 2011, counsel appeared for the "appellant" and the "respondent". The term "appellant" refers to the defendant. The term "respondent" has to mean the aforesaid substituted plaintiff [who at that stage had not been substituted] since the plaintiff had died seven months earlier. Further, the defendant had to know of the death of the plaintiff since she was the plaintiff's daughter and also the plaintiff's neighbor, prior to the plaintiff's death.

Counsel appearing for the substituted plaintiff [who at that stage had not been substituted] appears to have objected to the maintainability of the defendant's appeal based on a submission that the defendant did not have a right of appeal. Both counsel moved to file written submissions. Thereafter written submissions were filed by both parties. Since the defendant has not produced those written submissions, this Court is unaware of what each party submitted to the High Court.

However, Journal Entry No.08 clearly records that, the written submissions filed by both parties dealt with: (i) an objection to the application for substitution; and (ii) the aforesaid objection that the defendant had no right of appeal. Thus, it is evident that, the defendant had objected to the proposed substitution at that stage. Further, it appears that, counsel for both parties agreed that, the High Court should proceed to

make one Order deciding, upon these written submissions, *both* the application for substitution and the objection that the defendant had no right of appeal.

By Order dated 26th March 2012, the High Court first allowed the application for substitution and made Order substituting the abovenamed substituted plaintiff in place of the deceased plaintiff. In this regard, the High Court observed that, section 760A of the Civil Procedure Code permits the High Court to substitute a *"proper person"* in place of a deceased party to an appeal and went on to hold *"The petitioner who ought to be substituted in place of deceased mother appears to be proper person to be substituted. Therefore, we substitute the petitioner in place of the deceased Plaintiff for the continuation of the appeal"*. Thus, the High Court has substituted the substituted plaintiff in the place of the deceased plaintiff in the aforesaid High Court of Civil Appeal No. CP/HCCA/KAN No. 54/2011 (FA).

Next, in the same Order, the High Court held that, the defendant had no right of appeal and dismissed the defendant's appeal.

Six months later, the defendant made an application to the same High Court, by way of a petition dated 05th October 2012 and supporting affidavit, praying that, the High Court acts *in revision* and dismisses the plaintiff's action, declares that the District Court had no jurisdiction to make the aforesaid Order dated 29th October 2010 and sets aside the said Order dated 29th October 2010 of the District Court and the decree entered by the District Court in pursuance of the terms of settlement entered into on 22nd March 1999. This revision application bore High Court of Civil Appeal No. CP/HCCA/KAN/RA No.23/2012 (Rv), which is stated in the above caption.

A perusal of the defendant's aforesaid petition dated 05th October 2012 shows that, her revision application is essentially based on the same claim she made in the District Court that the land was State land and, therefore, the District Court had no jurisdiction to enter decree in pursuance of the terms of settlement reached on 22nd March 1999 or to issue writ of execution.

Further, a reading of the petition shows that, the defendant has named the substituted plaintiff as the "Substituted Plaintiff-Respondent" to the revision application and has admitted that, the High Court had made Order substituting the substituted plaintiff in place of the deceased plaintiff. However, the defendant has gone on to dispute the suitability of the substituted plaintiff to have been substituted in place of the deceased plaintiff. But, the defendant did not specifically challenge the substitution which had been made.

By Order dated 13th November 2013, the High Court dismissed the defendant's revision application holding that, the plaintiff had filed a possessory action only and that the title of the parties to the land, was not in issue. The High Court held, *"A decision in a possessory action does not have the effect of interfering with the title of the parties. Therefore, it cannot be said that the settlement entered into between the parties had any effect on the title of the state, if any."*.

The defendant made an application to this Court seeking leave to appeal from the aforesaid Order dated 13th November 2013 of the High Court in the revision application. This Court has granted leave to appeal on the following three questions of law, which are reproduced *verbatim*:

(i) The action of the deceased Plaintiff bearing No. D.C.Kandy 18259 L would come to an end upon her demise on 07.03.2011 as the said action is an *action in personam* ?

(ii) The action of the deceased Plaintiff bearing No. D.C.Kandy 18259 L is an *action in personam* and therefore no writ lies in favour of a deceased judgment creditor and/or other person ?

(iii) In any event no substitution has been effected in favour of the purported Substituted-Plaintiff-Respondent-Respondent ?

The third question of law will be considered now since the answer to it will have a bearing on the other two questions of law. This question asks whether the substituted plaintiff has been properly substituted in place of the deceased plaintiff. That has to be with regard to the appeal bearing No. CP/HCCA/KAN No. 54/2011 (FA) in which the High Court made the Order dated 26th March 2012 substituting the substituted plaintiff in place of the deceased plaintiff in that appeal.

As mentioned earlier, the plaintiff was the respondent to that appeal, which was filed by the defendant while the plaintiff was alive. When the plaintiff died during the pendency of the appeal, the substituted plaintiff, who is said to be her daughter, made an application to be substituted in place of the deceased plaintiff. Notice of that application appears to have been given to the defendant. In any event, the defendant was aware of it. The defendant has not filed a statement of objections opposing the proposed substitution. However, learned counsel appearing for the defendant has tendered written submissions, *inter alia*, opposing the proposed substitution. Parties have agreed that, the proposed substitution and the objections to the maintainability of the appeal, were to be decided by the High Court in one Order, upon written submissions which were to be tendered by the parties.

Thereafter, the High Court has made its Order dated 26th March 2012, substituting the substituted plaintiff in place of the deceased plaintiff in the pending appeal, under and in terms of section 760A of the Civil Procedure Code.

Section 760A provides that, where at any time during the pendency of an appeal, one of the parties to the appeal dies or undergoes a change of his legal status, the Court before which the appeal is pending may determine, in the manner provided in the Supreme Court Rules, *"….. 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."*. In terms

of Rule 38 of the Supreme Court Rules, that determination has to be made upon *"sufficient material"* submitted to the Court which establishes that the person who seeks to be substituted is the "*proper person"* to be substituted in the place of the deceased party to the appeal before that Court.

Thus, the High Court, before which the appeal was pending, had the discretion to substitute, in place of the deceased plaintiff, such person whom the High Court, after examining the material submitted to it, deemed *"is the proper person to be substituted"*. As His Lordship, Justice Wimalachandra commented in HEWAVITHARANE vs. URBAN DEVELOPMENT AUTHORITY [2005 2 SLR 107 at p.110], "*Section 760(A) gives the Court of Appeal a discretion to determine, whom in the opinion of the Court, is the proper person to be substituted in place of the deceased plaintiff. The Court may exercise its discretion to determine who is the proper person to be substituted in the manner as provided in the rules made by the Supreme Court under Article 136 of the Constitution. "*.

The High Court has, after hearing the parties and examining the material submitted to it, exercised that discretion vested in the High Court by section 760A of the Civil Procedure Code and made Order, dated 26th March 2012, substituting the substituted plaintiff in place of the deceased plaintiff in appeal bearing No. CP/HCCA/KAN No. 54/2011 (FA). The High Court had the jurisdiction to do so and that was a lawful Order. The defendant has not challenged that Order by seeking leave to appeal from this Court. Therefore, that Order is final.

The defendant could not, in the later revision application No. CP/HCCA/KAN/RA No.23/2012 (Rv) filed in the same High Court, challenge the validity of the aforesaid substitution made by that same Court in the earlier appeal No.CP/HCCA/KAN No. 54/2011(FA). In fact, as mentioned earlier, in the revision application, the defendant acknowledged the validity of the substitution made previously by the same Court in the appeal and did not purport to pray for any Order setting aside the substitution.

Consequently, the defendant cannot now, in this appeal from the Order made in the revision application, challenge, for the first time, in this Court, the validity of the aforesaid substitution made on 26th March 2012, in the earlier appeal. Any challenge to the validity of that substitution, was time barred when the defendant filed her petition, dated 18th December 2013, in the appeal which is now before us.

For the aforesaid reasons, the third question of law is answered as follows: the substituted plaintiff has been validly substituted in place of the deceased plaintiff in appeal bearing No. CP/HCCA/KAN No. 54/2011(FA). That substitution cannot now be challenged in the present appeal to this Court from the subsequent revision application.

It is to be noted that, in terms of section 760A of the Civil Procedure Code, the aforesaid substitution was only for the purposes of the appeal bearing No. CP/HCCA/KAN No 54/2011(FA). As Somawansa J observed in KUSUMAWATHIE vs. KANTHI [2004 1 SLR 350 at p.354], *"The intent and purpose of section 760 of*

the Civil Procedure code as well as Rule 38 of the Supreme Court Rules is substitution for the purpose of prosecuting the appeal.".

It is to be also noted that, up to now, there has been no substitution of any person in place of the deceased plaintiff in the case in the District Court. Therefore, if the action is to be continued in the District Court and the decree be executed, an application will first have to be made in the District Court, under the appropriate provision of the Civil Procedure Code, by a person who claims that he or she is entitled to continue with the action and execute the decree.

To now turn to the first question of law, it asks whether the plaintiff's action in the District Court was an action *in personam* and, if so, whether the plaintiff's action was extinguished upon her death on 07th March 2011. This question has two aspects: firstly, whether the plaintiff's action is an *action in personam;* and, secondly, whether, in the event of the plaintiff's action being an *action in personam*, the action was extinguished upon the plaintiff's death.

Before considering this question of law, it has to be noted that, the defendant did not claim, in the revision application, that, the plaintiff's rights under the decree were extinguished upon the plaintiff's death. The contentions which form the first question of law have been made, for the first time, before this Court.

Further, it appears to me that, the issues contained in this question of law could have been, more appropriately, decided by the District Court if and when an application is made by a person who claims that he or she is entitled to execute the decree after the plaintiff's death. The question of whether the rights of the deceased plaintiff survive her death and are capable of transmission to her legal representatives or to another person, will be a central question which has to be decided by the District Court if an application is made to the District Court to continue with the action and execute the decree after the plaintiff's death. However, since the aforesaid question of law is now before us, it has to be answered by this Court. Doing so will assist the District Court to conclude the proceedings in this case, which commenced over 21 years ago.

When considering the aforesaid question of law, this Court has to first decide whether the plaintiff's action is an *action in personam.* To do so, it is necessary to identify the nature of the plaintiff's cause of action set out in her plaint. As stated earlier, the plaintiff only claims the right to eject the defendant from the land and be placed in possession. In paragraph [2] of her petition filed in this Court, the defendant has described the plaintiff's action, as a *"possessory action".* In view of this position taken by the defendant herself, I will treat the plaintiff's action as a *"possessory action"* for the purpose of deciding this appeal, without examining whether the requisites of a possessory action had been averred in the plaint.

An *action in personam* is an action to claim or enforce a `personal right' which is termed a *jus personam* in the Roman Dutch Law. Wille [Principles of South African

Law 8th ed. at p.39] describes a `personal right' [*jus personam*] as *"a right entitling a person to claim from another some thing or act, or that the other should refrain from doing that act"*. An *action in rem* is an action instituted to claim or enforce a `real right' which is termed a *jus in rem* in the Roman Dutch Law. Wille (at p. 41) describes a `real right' [*jus in rem*] as *"an exclusive interest or benefit enjoyed by a person in a thing That is, the right in the thing is binding on all other persons, and it cannot legally be contested or nullified by any other person. It follows that the holder of a real right can legally prevent anybody else from interfering with his enjoyment; and, if anybody has actually interfered with his enjoyment, the holder of the real right has adequate remedies against the offender."*. For the purposes of this appeal, the aforesaid description of a `personal right' [*jus personam*] and a `real right' [*jus in rem*] and an *action in personam* and *action in rem* will suffice.

A perusal of the plaint shows that, the plaintiff's Cause of Action is the plaintiff's claim of her right to possess the land [as against the defendant] and the plaintiff's right to recover damages from the defendant. The plaint does not make a claim that the plaintiff is exclusively entitled to the possession of the land against all persons. The reliefs prayed for in the plaint, are to eject the defendant from the land and restore the plaintiff to possession and to recover damages from the defendant. Thus, the reliefs prayed for in the plaint are claimed by the plaintiff specifically against and limited to the defendant. On an application of the principles set out above, the rights claimed by the plaintiff in the action are personal rights [*jus personam*] against the defendant only. Accordingly, the defendant has correctly described this action, as an *action in personam*.

The other aspect of the first question of law, is the defendant's contention that, the plaintiff's cause of action ended with her death and did not survive and be capable of transmission or devolution to another person, to enable that person to continue the action.

It has to be first noted here that, since the decree had been entered before the plaintiff died, the continuation of the action in the District Court after the death of the plaintiff, is limited to the execution of the decree by a person whose name may be entered on the case record in place of the deceased plaintiff, under and in terms of section 341 (3) of the Civil Procedure Code. Section 341 (3) is in Chapter XXII of the Civil Procedure Code which sets out the provisions governing the execution of decrees. Section 341 (3) states, *"If the judgment-creditor dies before the decree has been fully executed, the legal representative may apply to the Court to have his name entered on the record in place of the deceased and the Court shall thereupon enter his name on the record."*. Thus, on the face of section 341 (1), the legal representative of the plaintiff will be entitled to have his name entered in the place of the plaintiff in the case record in the District Court and proceed to execute the decree against the defendant.

But, the ability of the legal representative of the deceased plaintiff to have his name entered in the place of the plaintiff in the case record in the District Court and

proceed to execute the decree against the defendant under and in terms of section 341 (3) will be dependent on the plaintiff's rights under the decree in this case surviving her death and being capable of transmission or devolution to her legal representative. In contrast, if the plaintiff's rights under the decree in this case ended upon her death, those rights will not be capable of being transmitted to or devolving upon her legal representative and would, therefore, be extinguished by the plaintiff's death. In such an event, the legal representative of the deceased plaintiff will not be entitled to have his name entered in the place of the plaintiff in the case record in the District Court and it will not be possible to execute the decree entered against the defendant.

In the light of the position set out above, the answer to the first question of law will obviously depend on whether the plaintiff's rights under the decree entered in this case to obtain possession of the land from the defendant, survived the plaintiff's death and are capable of transmission to her legal representatives to enable them to execute the decree against the defendant.

Since, with regard to this first question of law, the defendant appears to contend that, the plaintiff's action was extinguished upon her death on 07th March 2011 *because* this is action *in personam*, it will be useful to examine whether an action *in personam* does always end upon the death of the plaintiff.

A perusal of the decided cases establishes that, the usual principle that applies in the case of *actions in personam* is that, where the plaintiff in an *action in personam* dies, the action will end if the stage of *litis contestatio* has *not* been reached at the time of the plaintiff's death. However, where the plaintiff in an *action in personam* dies *after* the stage of *litis contestatio* has been reached, the action can, usually, be continued by the deceased plaintiff's legal representatives. It should be mentioned here that, in the case of *actions in personam*, the stage of *litis contestatio* is reached when the defendant files answer.

Thus, in VANGADASALAM vs. KARUPPIAH [79 (2) NLR 150], Samerawickrame J stated (at p.152), *"A personal action dies with the plaintiff unless the stage of litis contestatio has been reached. It would appear that litis contestatio takes place with the joinder of issue or the close of pleadings (see Voet 47.10.22). In Muheeth v. Nadarajapillai, 19 N.L.R. 461 at 462, Wood Renton, C.J. said -` An action became litigious, if it were in rem, as soon as the summons containing the cause of action was served on the defendants; if it was in personam on litis contestatio, which appears to synchronize with the joinder of issue or the close of the pleadings.'."*. It should be mentioned that, the exception to this general rule is the case of delictual actions for the recovery of patrimonial loss, where the heirs of a deceased plaintiff are entitled to continue with an action filed by the plaintiff irrespective of the stage of the action at which the plaintiff dies – *vide:* VANGADASALAM vs. KARUPPIAH (at p. 152) and FERNANDO vs. LIVERA [29 NLR 246 at p.248] where Drieberg J stated *"Where the wrongful loss has caused patrimonial loss and comes within the principles of Lex Acquilia the action does not lapse with the death of the plaintiff before litis contestatio, but enures to the benefit the heirs."*

The application of the aforesaid rule is demonstrated in the later cases of NAGARIA vs. GULAMHUSSEIN [78-79 (2) NLR 284] and JAYASURIYA vs. SAMARANAYAKE [1982 2 SLR 460]. In NAGARIA vs. GULAMHUSSEIN, the plaintiff filed action for the recovery of possession of an immovable property and damages from the defendant. This was an *action in personam*. The plaintiff died *after* the stage of *litis contestatio* and while the trial was pending. The Court of Appeal held that the widow of the deceased plaintiff was entitled to be substituted in place of the plaintiff. In contrast, in JAYASURIYA vs. SAMARANAYAKE, the plaintiff filed an action to revoke a deed of gift on the ground of gross ingratitude of the defendant, but died before the stage of *litis contestatio* was reached. The Court of Appeal held that, this was an *action in personam* and, therefore, the death of the plaintiff *before* the stage of *litis* contestatio, resulted in the action ending. Accordingly, the Court of Appeal refused to substitute the widow of the deceased plaintiff in place of the deceased plaintiff.

Then, in STELLA PERERA vs. MARGARET SILVA [2002 1 SLR 169], the plaintiff filed action against the defendant claiming a declaration of title to a property and the ejectment of the defendant from that property. The defendant filed a claim in reconvention praying that the deed of gift by which he had earlier gifted the property to the plaintiff be revoked on the ground of gross ingratitude. Thus, the defendant stood in the shoes of a plaintiff in respect of the claim in reconvention, which was an *action in personam*. The District Court entered judgment in reconvention in the defendant's favour. The plaintiff appealed. The defendant died while the appeal was pending. Amerasinghe J held (at p.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 actio personalis moritur cum persona had no application."* .

In the present case, the defendant had filed answer and the trial had been concluded long prior to the death of the plaintiff. Therefore, the stage of *litis contestatio* had been reached long before the plaintiff died. Accordingly, upon an application of the principle enunciated in the aforesaid decisions, the mere fact that this is an *action in personam*, does not cause this action to end upon the plaintiff's death.

It should be mentioned here that, despite the aforesaid general rule, there are some types of *actions in personam* where plaintiff's death will terminate the action even though the stage of *litis contestatio* has been passed. Those are cases where the character of the plaintiff's cause of action makes it incapable of transmission or devolution to his legal representatives. An example would be where a plaintiff's cause of action is a claim to a particular office, employment, title or benefit by virtue of his personal status, qualifications or ability, if those entitlements end upon his death and are incapable of transmission or devolution to his legal representative. Thus, in the Indian case of Sham Chand Giri vs. Bhayaram Panday [1894 22 Cal. 92] , which was cited by T.S.Fernando J in DEERANANDA THERO vs.

RATNASARA THERO [60 NLR 7 at p.9], the plaintiff filed action seeking a declaration that he was entitled to the office of *Mohant* of a shrine. That was an *action in personam*. The Calcutta High Court held that, the death of the plaintiff caused the action to end. Sale J stated (at p.9-10), "*the suit was of a personal character in as much as its object is to establish, a right to a personal office, and for that reason it appears to me that the right to sue does not survive. The result is that the action abates".* In the same vein, in DHAMMANANDA THERO vs. SADDANANDA THERO [79 1 NLR 289 at p.299], Pathirana J observed, *" ….. if the action is pure and simple a personal action like an action for seduction under the Roman Dutch Law, then the death of the plaintiff or the defendant will abate the action as the right to sue cannot survive. There are no interests in the action which can devolve on any other person. I agree that an action to be declared entitled to an office likewise is generally a personal action and cannot survive in the event of the death of the plaintiff or the defendant as with his death the holder of the office ceases to hold office.".*

However, it is clear that, the facts and circumstances of the present case do not fall within the aforesaid type of *actions in personam* where the death of the plaintiff results in the end of the action despite the stage *litis contestatio* having been reached. That is because, the plaintiff's cause of action, which is to recover possession of the land from the defendant and be placed in possession of the land, is undoubtedly capable of transmission or devolution to the plaintiff's legal representative and can be exercised by her legal representative after the plaintiff's death. Therefore, the present action can be continued after the plaintiff's death by her legal representative since the stage of *litis contestatio* has been passed.

The decision in the aforesaid case of NAGARIA vs. GULAMHUSSEIN supports this conclusion. The facts in that case are similar to the present case since, there too, the plaintiff instituted a possessory action claiming the recovery of possession of an immovable property and died after the stage of *litis contestatio* was reached. Rodrigo J with Ranasinghe J agreeing, both learned Judges then in the Court of Appeal, held (at p. 286), with regard to the character of the action filed by the plaintiff, ***" He is seeking restoration of possession of the premises*** *alleged to have been in his occupation or possession at the material time and* ***was seeking to establish his rights as against the defendants to the possession of the property****.* ***This kind of action survives the death of a plaintiff."***. [emphasis added].

Learned President's Counsel appearing for the defendant has cited the aforesaid case of DEERANANDA THERO vs. RATNASARA THERO in support of the defendant's contention that the plaintiff's cause of action does not survive the plaintiff's death. In that case, the plaintiff *thero* filed action against the defendant *thero* claiming that the defendant was unlawfully disputing the plaintiff's right to the chief incumbency of the temple and being disobedient to the plaintiff and prayed for a declaration that the plaintiff was the chief incumbent of a temple. The defendant died during the pendency of the action and the District Court substituted the defendant's successor in place of the deceased defendant. T.S.Fernando J held

that, the plaintiff's cause of action was the alleged wrongful acts of the defendant and that, therefore, the defendant's death resulted in the abatement of the action with the maxim *actio personalis moritur cum persona* applying. I do not think the rationale applied in DEERANANDA THERO vs. RATNASARA THERO with regard to the effect of the death of the *defendant* in that particular *action in personam* with the facts peculiar to that case, can be applied to the present case which deals with the effect of the death of the *plaintiff* during an *action in personam* where the cause of action clearly survives the death of the plaintiff. In fact, in the later case of DHAMMANANDA THERO vs. SADDANANDA THERO, Pathirana J stated (at p.307) with regard to decision in DEERANANDA THERO vs. RATNASARA THERO, *"The most that can be said of the three Bench decision in Deerananda Thero's case is that the principle laid down in that case must be confined to the facts of that case and cannot be applied as a general proposition of law.".* In DHAMMANANDA THERO vs. SADDANANADA THERO, this Court held (at p. 302) that, in an action for declaration of title to the office of Viharadipathi of a temple, on the death of the plaintiff or the defendant (if he too claims to be Viharadipathi) the action can be continued by or against the successor-in-title under section 404 of the Civil Procedure Code and that the maxim *actio personalis moritur cum persona* will not apply in such a case to abate the action. It was held that, the action, though, in form, an action for a status or an office, is, in substance, an action for the temple and the temporalities, which, by operation of law, belong to the Viharadipathi of the temple.

Further, in DEERANANDA THERO vs. RATNASARA THERO, T.S.Fernando J cited the Indian case of RAMSARUP DAS vs. RAMESHWAR DAS [1950 AIR Patna 184], where, Sinha J in the Patna High Court stated (at p.189), *"If a plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal."*. It is apparent that, Sinha J's aforesaid observation, which, in fact, was cited by T.S.Fernando J in DEERANANDA THERO's case (at p.10), lends support to the conclusion that, in the present case, the plaintiff's cause of action survives the death of the plaintiff.

Learned President's Counsel has also cited the decision in LEELAWATHIE vs. RATNAYAKE [1998 3 SLR 349]. That case concerned the issue of a writ of *Certiorari*. That decision turned on whether or not an application made by a tenant, under section 13 of the Ceiling on Housing Property Law No. 1 of 1973, to purchase the house let to her, could be continued by another person after the death of the tenant. G.P.S. De Silva CJ held that, under and in terms of section 13, that application could not be maintained after the death of the applicant. In these circumstances, I do not think a parallel can be drawn between LEELAWATHIE vs. RATNAYAKE and the case that is now before us. The other two cases cited on behalf of the defendant - PODISINGHO vs. JAYATU [30 NLR 169] and FERNANDO AND THE AG vs. SATARASINGHE [2002 2 SLR 113] – also do not assist the defendant. In the first case, Drieberg J observed (at p.171) that, *"Under the Roman-Dutch law, in the case of delicts of this sort which fell under the Lex Aquilia* ***the right***

of action - does not, as in the case of the action of injury, lapse on the death of the person injured before litis contestatio but enures to the benefit of his heirs, *and they can sue the wrongdoer to recover what is known as `patrimonial loss'…."* In the second case, Dissanayake J held (at p.118) *"Therefore, on the above principles it is clear that, in an action for defamation on the death of the defendant the cause of action does not survive.* ***In the case of the death of the plaintiff after litis contestatio, however, the action would continue in favour of the heirs of the plaintiff as part of the plaintiff's property.****"*. *[emphasis added].* Thus, both decisions recognise instances where an *action in personam* can be continued after the death of the plaintiff.

Since the maxim *actio personalis moritur cum persona* - a personal right of action dies with the person - has been referred to in some of the decisions cited earlier, it will be useful to set out here, the pertinent observation made by Tilakawardane J in MAHAWEWA vs. MAHAWEWA [2010 1 SLR 270 at p.276) that, *"However, the maxim 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.".* The validity and force of Her Ladyship's aforesaid observation, is illustrated by the decisions cited earlier. It is also relevant to mention here, Pathirana J's examination, in DHAMMANANDA THERO vs. SADDANANADA THERO, of the infirmities of the maxim *actio personalis moritur cum persona* and his Lordship's trenchant criticism of the indiscriminate manner in which it is often sought to apply the maxim. If I may add, it has to be kept in mind that, the incantation *"actio personalis moritur cum persona"* cannot be chanted as the death knell of all *actions in personam* where a party dies during the pendency of the action. The fate of the action will depend on the nature of the cause of action and the stage of case. Each case has to be decided on its own facts.

For the reasons set out earlier, the first question of law is answered in the following manner: the plaintiff's action was an action *in personam* in which the plaintiff's cause of action survives and continues after her death since the stage of *litis contestatio* had been reached.

The second question of law asks whether the decree entered in favour of the plaintiff can be executed after the death of the plaintiff. Since the answer to the first question of law is that, the plaintiff's cause of action survives the plaintiff's death and the action can be continued, the answer to the second question of law will also be: the decree can be executed after the death of the plaintiff.

As mentioned earlier, section 341 (3) of the Civil Procedure Code will apply with regard to the manner in which the decree may be executed after the plaintiff's death. The legal representative of the deceased plaintiff will be entitled to make an application to the District Court, under section 341 (3) of the Civil Procedure Code, to have his or her name entered on the record in place of the deceased plaintiff so that the legal representative can proceed with the execution of the decree.

In this connection, as stated earlier, the substitution of the substituted plaintiff in the High Court in appeal No. CP/HCCA/KAN No 54/2011(F) was only for the purposes of the maintenance of that appeal. It does not necessarily mean that, the substituted plaintiff is entitled to have her name entered or substituted in the record in the District Court in the place of the deceased plaintiff. Instead, the identity of the person who is the legal representative of the deceased plaintiff and who is, therefore, entitled to have his or her name entered in the record in the place of the deceased plaintiff for the purpose of executing the decree, will have to be decided by the District Court if and when an application is made under section 341(3) of the Civil Procedure Code.

The appeal is dismissed with costs in a sum of Rs.25,000/- payable by the defendant to the substituted plaintiff.

Judge of the Supreme Court

I agree
Sisira J. De Abrew, J.

Judge of the Supreme Court

I agree
Anil Gooneratne, J.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an Appeal from the Judgment of the Civil Appellate High Court of Colombo dated 03.11.2014.

1. Barbara Iranganie De Silva,
   No. 125/A, Weliamuna Road,
   Hekitta, Wattala.
2. Malagalage Dona Chanithrie
   Kanchana Perera,
   No. 125/A, Weliamuna Road,
   Hekitta , Wattala.

Plaintiffs

SC APPEAL No. 200/2015
SC/HC/CALA/192/2015
WP/HCCA/COL/83/2014
DC COLOMBO DLM/93/2013

Vs

Hewa Waduge Indralatha,
No. 22, Peiris Mawatha,
Colombo 15.

Defendant

AND THEN BETWEEN

Hewa Waduge Indralatha,
No. 22, Peiris Mawatha,
Colombo 15.

Defendant Petitioner

Vs

1.Barbara Iranganie De Silva,
No. 125/A, Weliamuna Road,
Hekitta, Wattala.
2.Malagalage Dona Chanithrie
Kanchana Perera,
No. 125/A, Weliamuna Road,
Hekitta , Wattala.

Plaintiffs Respondents

AND THEREAFTER BETWEEN

Hewa Waduge Indralatha,
No. 22, Peiris Mawatha,
Colombo 15.

DEFENDANT PETITIONER APPELLANT

Vs

1. Barbara Iranganie De Silva,
No. 125/A, Weliamuna Road, Hekitta, Wattala

2. Malagalage Dona Chanithrie
Kanchana Perera,
No. 125/A, Weliamuna Road, Hekitta, Wattala.

PLAINTIFFS RESPONDENTS RESPONDENTS

AND NOW BETWEEN

1.Barbara Iranganie De Silva,
No. 125/A, Weliamuna Road, Hekitta, Wattala

2. Malagalage Dona Chanithrie
Kanchana Perera,
No. 125/A, Weliamuna
Road, Hekitta, Wattala.

PLAINTIFFS RESPONDENTS
RESPONDENTS APPELLANTS

Vs

Hewa Waduge Indralatha,
No. 22, Peiris Mawatha,
Colombo 15.

DEFENDANT PETITIONER
APPELLANT RESPONDENT

BEFORE: PRIYASATH DEP PCJ.
S.EVA WANASUNDERA PCJ.
SISIRA J DE ABREW J.
PRIYANTHA JAYAWARDENA PCJ.
UPALY ABEYRATHNE J.
ANIL GOONERATNE J. &
K.T. CHITRASIRI J.

COUNSEL: Kamran Aziz with Ershan Ariaratnam and Maduka Perera
Instructed by A. Nepataarachchi for the Plaintiffs
Respondents Respondents Appellants.
S. Dheerasekera for the Defendant Petitioner Appellant
Respondent.

ARGUED ON : 06.10.2016

DECIDED ON : 03.08 .2017.

This matter was argued before this Court on the following questions of law:

1. Has the Civil Appellate High Court erred in law by failing to determine that the Order of the learned Additional District Judge dated 13th June, 2014 was an interlocutory Order which can only be challenged by way of an application for Leave to Appeal to the Civil Appellate High Court?

2. Has the Civil Appellate High Court erred in law by determining that the judgments pronounced in Sangarapillai Vs Kathiravelu and Wijenayake Vs. Wijenayake were applicable in the present context, having particular regard to the fact the ratio decedendi in the Divisional Bench Judgment of the Supreme Court in Chettiar Vs Chettiar (2011) Bar Association Law Reports Page 25 was the applicable and relevant binding authority in the present context?

3. Has the Civil Appellate High Court erred and/or misdirected itself in law, by failing to appreciate and/or determine, that although the Judgment in Chettiar Vs Chettiar did not specifically refer to Sections 87 and/or 88 of the Civil Procedure Code, it did however, specifically set out a clear and unambiguous test in determining whether an Order delivered by Court was a Final Order or an Interlocutory Order?

The cases referred to in the questions of law, namely **A.S.Sangarapillai Brothers Vs Kathiravelu is reported in Sri Skantha Law Reports Vol. II at page 99; Wijenayake Vs Wijenayake is reported in Sri Skantha Law Reports Vol V at page 28 and Chettiar Vs Chettiar is reported in 2011, 2 SLR 70 and also in 2011 BLR 25.**

Facts of the case in hand are as follows:

The house and property which is the subject matter of this case is of an extent of 3.75 Perches situated in Colombo 15 where the Defendant Petitioner Appellant Respondent (hereinafter referred to as the Defendant Respondent) is residing as indicated in the address in the caption of this case.

The Plaintiffs Respondents Respondents Appellants (hereinafter referred to as the Plaintiffs Appellants) instituted action against the Defendant Respondent by Plaint dated 27.05.2013. They sought a declaration of title to the land described in the Schedule to the Plaint, an order ejecting the Defendant Respondent , damages for wrongful occupation and interim relief in order to maintain the status quo of the property concerned. When the

matter was supported for interim relief Court granted an enjoining order as prayed for in paragraph 'h' of the Plaint on 31.05.2013. The Defendant Respondent filed " answer and statement of objections " on 08.07.2013 praying that the enjoining order be set aside and the Plaint be dismissed.

Later on, the District Court granted an interim injunction on 30.08.2013 preventing the Defendant Respondent from changing the status quo of the property meaning that she should not act in any way renting out, selling or mortgaging the property to any other party. Since the Defendant Respondent was absent on that day and there was no application by her before Court, the Judge had fixed the case for ex parte trial. The Additional District Judge pronounced the judgment granting the substantial relief as prayed for in the Plaint on 01.10.2013. Decree was entered and the Defendant Respondent was given notice of the same.

The Defendant Respondent made an application under Section 86(2) of the Civil Procedure Code seeking to purge the default. The Plaintiff Appellant objected and the matter was fixed for inquiry. At the end of the inquiry, the District Court delivered Order on 09.05.2014. dismissing the Application to purge the default made by the Defendant Respondent.

The Defendant Respondent thereafter filed a " notice of appeal " against the said Order of the District Court dated 09.05.2014. She filed a Petition of Appeal (Final Appeal) seeking to challenge the said Order.

The Plaintiff Appellant submitted to the Civil Appellate High Court, whilst the Appeal was pending to be listed for hearing, by way of a Motion dated 06.02.2015 , seeking that the purported Final Appeal of the Defendant Respondent is liable to be rejected and dismissed in limine, having regard to the matters submitted by way of the said motion.

The Plaintiff Appellant submitted to the Civil Appellate High Court, that the correct remedy in seeking to challenge an Order made pursuant to an Application made **under Section 86(2)** of the Civil Procedure Code was by way **of an application for Leave to Appeal according to the Judgment of a Divisional Bench in Chettiar Vs Chettiar 2011**, **BLR 25** and hence, no Final Appeal will lie. The Plaintiff Appellant argued that in these circumstances, that the purported Final Appeal of the Defendant Respondent is liable to be rejected and dismissed in limine.

The **Civil Appellate High Court delivered Order** in respect of the aforementioned issue on **27.04.2015**. The Court had arrived at the said determination on the basis that :

(a) In terms of Sec. 88(2) of the Civil Procedure Code, only a Final Appeal in terms of Section 754(1) of the Civil Procedure Code is available in seeking to challenge an Order made in terms of Sec. 86(2) of the Civil Procedure Code.

(b) This is confirmed by the Judgments pronounced in **Sangarapillai Vs Kathiravelu (supra) and Wijenayake Vs Wijenayake (supra).**

(c) There is no reference to Section 87 and 88 in the judgment of **Chettiar Vs Chettiar.**

The Plaintiff Appellants being aggrieved with the said impugned Order of the Civil Appellate High Court dated **27.04.2015 sought leave to appeal from this Court there from and was granted leave** on the questions of law mentioned at the very beginning of this Judgment.

Section 86 reads:

(1) Repealed by Sec 3 of Act No. 53 of 1980.
(2) Where , within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes an application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defense as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper.
(2A)At any time prior to the entering of judgment against a defendant for default, the court may, if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default of the defendant and permit him to proceed with his defense as from the stage of default upon such terms as to costs or otherwise as to the court shall appear fit.
(3) Every application under this section shall be made by Petition supported by Affidavit.

Section 87 reads :

(1) Where the Plaintiff or where both the Plaintiff and the Defendant make default in appearing on the day fixed for the trial the court shall dismiss the plaintiff's action.
(2) Where an action has been dismissed under this section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.
(3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the court is satisfied that there were reasonable grounds for the non appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made.

Section 88 reads :

(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.**
(3) The provisions of sections 761 and 763 shall, mutatis mutandis, apply to and in relation to the execution of a decree entered upon default, where an order refusing to set aside such decree has been made.

Section 754(1) reads:
" 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 ".

Section 754(2) reads:
" 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".

The Divisional Bench in **Chettiar Vs Chettiar** (supra) discussed the law at that time on the question **" what is an Interlocutory Order and what is a Final Order?".**

They did so to decide on **the nature of the order because the aggrieved party when he wanted a higher Court to look into the matter was bound by rules of procedure contained in the Civil Procedure Court** and decide whether he has to make a "**Leave to Appeal Application**" or whether he has to make a **"Final Appeal**".

Even though the Plaintiff Appellant in the case in hand, argued that the order referred to under Sec. 88(2) attracts the judgment in Chettiar Vs Chettiar which decides on whether an order is interlocutory or final, **I do not see any reason how it could be dragged into the purview of the case of Chettiar Vs Chettiar**.

Firstly to summarise the procedure followed in this case, I find that the Defendant Respondent had filed due papers to purge the default when the case had gone exparte against her in the District Court. Then the District Judge held an inquiry as provided for by Sec. 86(2) and made order in compliance with Sec. 88(2). The written law in Sec. 88(2) states that " **the order** setting aside or **refusing to set aside the judgment** entered upon default **shall be accompanied by a judgement 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."** Therefore the District Judge's order refusing to set aside the judgment against the Defendant was accompanied by a judgment adjudicating upon the facts pertinent to the default in appearance and the grounds upon which the order was made. It is from this decision of the District Judge that an Appeal to the Court of Appeal lies, according to Sec.88(2). The wording , "shall be liable to an appeal to the court of appeal " is quite clear.

There is no ambiguity whether the decision under **Sec.88(2**) is an interlocutory order or a final order because **the section states crystal clear that it is subject to an appeal.** It is not an arguable point as it is. Precisely it can be recognized as a final order.

A decision made by court after holding an inquiry into purging the default held under Sec. 86(2) does not in any way attract any necessity to decide whether it is an interlocutory order or a final order. Sections 86 and 88 do not refer to any general order to be made. It is a specific decision from which

parties can file an appeal because it is so mentioned in Sec.88 itself. The Civil Appellate High Court judges have analysed the provisions of the Civil Procedure Code very carefully and held against the Plaintiff Appellant in this instance. They have quoted the two cases **Sangarapillai Vs. Kathiravelu (supra) and Wijenayake Vs. Wijenayake (supra) to support their decision** as these sections were gone into in those judgments also.

In the case **of A.S. Sangarapillai and Brothers Vs Kathiravelu (supra**), the Court of Appeal Judge, Siva Selliah has written a long judgment analyzing the Sections 84, 88,753 and 754 and delivered the same on 06.04.1984 holding that " order made under Sec**. 88(2)** of the Civil Procedure Code **gives rise to a direct Appeal and not Leave to Appeal.** In 1987, the Court of Appeal held in **Wijenayake Vs Wijenayake (supra**) that " Sec.88(2) states that 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 Supreme Court". …… " The right of appeal is given by the words ' shall be liable to appeal '.** Thus one cannot conceive it to be an order to appeal from which leave from the Supreme Court should be first had and obtained as set out in Section 754(2). The remedy sought is therefore misconceived."

There is no merit in the arguments made by the counsel for the Plaintiff Appellants submitting that the Defendant Respondent should have filed a Leave to Appeal Application and not a notice of appeal indicating that a final appeal will be lodged within sixty days.

I answer the questions of law aforementioned in the negative against the Plaintiffs Respondents Respondents Appellants and in favour of the Defendant Petitioner Appellant Respondent. I hold that the Civil Appellate High Court had decided the case before them quite correctly on 27th April, 2015 by having rejected the objections taken by the Plaintiff against the maintainability of the Appeal filed before the Civil Appellate High Court and having directed the Registrar of that Court to list the Appeal for argument when the briefs are ready. I answer the questions of law in the negative against the Appellants.

I am of the view that this Appeal filed by the Plaintiffs Respondents Respondents Appellants could be disposed of without considering the case of

Chettiar Vs Chettiar (supra). The case in hand does not attract the ratio decedendi in the case of Chettiar Vs Chettiar(supra).

This Appeal stands dismissed with costs.

Judge of the Supreme Court

Priyasath Dep PC, Chief Justice.
I agree.

Judge of the Supreme Court

Sisira J De Abrew J.
I agree.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.
I agree.

Judge of the Supreme Court

Upaly Abeyrathne J.
I agree.

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 judgment written by Eva Wanasundera PCJ and I am inclined to agree with Her Ladyship's conclusions found therein. The issue in this appeal is to determine whether an appeal by a party who is in default in a civil suit, be treated as a leave to appeal application as referred to in Section 754(2) or should it be a final appeal under 754(1) read with Section 88(2) of the Civil Procedure Code.

The manner in which leave to appeal applications and final appeals are to be determined and distinguished had been extensively discussed in the cases of **Siriwardena Vs. Air Ceylon Ltd.** ***[1984 (1) SLR 286],*** **Ranjith Vs. Kusumawathie and others** ***[1998 (3) SLR232]*** and **S.Rajendran Chettiar Vs. S. Narayanan Chettiar and others.** ***[2011 Bar Association Law Reports page 25]*** In those decisions, different criteria had been formulated to decide the issue, having defined the words "judgment" and "order" referred to in Sections 754(1) and 754(2) of the Civil Procedure Code respectively. In the case of Siriwardena Vs. Air Ceylon Ltd (Supra) Sharvananda J. (as he then was) formulated a criteria that required the presence of five elements in the order, to ascertain what a judgment is. The aforesaid test of Sharvananda J. is known as the order approach test.

Justice Dheeraratne, in the case of *Ranjith Vs. Kusumawathie, (supra)* having cited many English authorities, introduced different criteria to determine the same. In that, he held that it is necessary to consider the manner in which the initial application that had been made, in order to decide whether it is a "judgment" or an "order"and that test is known as the application approach. Her Ladyship Dr. Shirani Bandaranayake J. (as she was then) in *Chettiar Vs. Chettiar (Supra)* which is a decision of a five Judge Bench preferred to adopt the aforesaid application approach in determining the issue.

The appeal now before this Court is an appeal filed under Section 88(2) of the Civil Procedure Code. It is a section that covers a particular situation specially identified in the Civil Procedure Code. Accordingly, it is abundantly clear that the said Section 754 (2) of the Civil Procedure Code where leave of the court is necessary to proceed further has no application what so ever to the

application in hand. The order approach and the application approach referred to above are relevant only when appeals are filed under Section 754 of the Civil Procedure Code though the learned Counsel for the defendant appellant has argued that this is an application made under Section 754(2) of the Civil Procedure Code.

Clearly, this is an appeal filed against a judgment made and delivered in terms of Section 85 of the Civil Procedure Code upon a defendant been in default. In such a situation, Section 88(2) of the Civil Procedure Code provides for a special procedure, for the party who is dissatisfied with an order made pursuant to an application filed under Section 86(2) of the Civil Procedure Code. Moreover, Section 88 (2) clearly sets out the right of appeal given to a party who is dissatisfied with an order made under Section 86(2) of the Civil Procedure Code. Such a provision clearly removes any misconception with regard to the appealability of an order under Section 88(2). It ensures that the order made under Section 88(2) shall accompany a judgment by which the rights of the parties had been decided in a conclusive way.

This issue has been clearly identified in the case of **Wijenayake Vs Wijenayake. [Srikantha Law Reports Vol. 5 at page 30]** In that decision, Palakidnar J. held as follows:

> *"If Section 88(2) did not contain the requirement that the order shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds on which it is made, one may deem it to be an order contemplated in Section 752(2), and that the instant application was correctly made. But Section 88(2) makes it very plain that the order shall be accompanied by a judgment and is an appealable order as distinct from anorder for which leave has to be had and obtained from the Supreme Court. On the mere reading of the two Sections 754(2) and Section 88(2) one has to reject without hesitation the argument that the former repeals the latter".*

In the circumstances, I am unable to agree with the contention of the learned Counsel for the plaintiff-appellant that the application of the defendant-respondent made to the High Court, against the decision made under Section 86(2) of the Civil Procedure Code should be considered as a leave to appeal application. Therefore, I am of the view that appeals filed in terms of Section 88(2) of the Civil Procedure Code cannot be considered as leave to appeal applications. Accordingly, as concluded by Eva Wanasundera PCJ, this appeal should stand dismissed with costs.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for leave to Appeal to the Supreme Court against the judgment dated 29th July 2015 in WP/HCCA/14/2009 (F) D.C.Matugama Case No.2057/L

SC Appeal 206/2016
SC/(HC)CALA 276/2015
WP/HCCA/KAL/14/2009(F)
DCMatugamaCaseNo.2057/L

IN THE DISTRICT COURT

1. ILLEKUTTIGE HELEN STELLA PHILOMINA FEENANDO
Menikkurunduwatta, Devalamulla, Govinna

2.THUDUWAGE DONA KARUNAWATHIE PERERA
Govinna Junction, Govinna

PLAINTIFFS

Vs.

GOVINI THANTHRIGE PREMASIRI
Wanawitiya, Devamulla, Govinna

DEFENDANT

IN THE HIGH COURT OF CIVIL APPEAL KALUTARA

ILLEKUTTIGE HELEN STELLA PHILOMINA FEENANDO
Menikkurunduwatta, Devalamulla, Govinna

FIRST PLAINTIFF -APPELLANT

Vs

GOVINI THANTHRIGE PREMASIRI
Wanawitiya, Devamulla, Govinna

DEFENDANT-RESPONDENT

THUDUWAGE DONA KARUNAWATHIE PERERA
Govinna Junction, Govinna

SECOND PLAINTIFF-RES

NOW IN THE SUPREME COURT

ILLEKUTTIGE HELEN STELLA
PHILOMINA FEENANDO
Menikkurunduwatta, Devalamulla, Govinna
First Plaintiff-Appellant-Ptitioner-Appellant

VS

GOVINI THANTHRIGE PREMASIRI of Wanawitiya, Devamulla, Govinna
Defendant-Respondent- Respondent- Respondent

THUDUWAGE DONA KARUNAWATHI PERERA
Govinna Junction Govinna

KARUNAWATHIE PERERA of Govinna Junction, Govinna
Second Plaintiff-Respondent-Respondent-Respondent

Before : Sisira J De Abrew J
Anil Gooneratne J
Nalin Perera J

Counsel : JAJ Udawatta with Anuradha N Ponnamperuma
for the 1st Plaintiff-Appellant-Petitioner-Appellant
Defendant-Respondent-Respondent-Respondent
is absent and unrepresented
Second Plaintiff-Respondent-Respondent- Respondent is
absent and unrepresented

Argued on : 16.10.2017
Decided on : 28.11.2017

Sisira J De Abrew J.

Notices have been sent to the2nd Plaintiff-Respondent-Respondent-Respondent and the Defendant-Respondent-Respondent-Respondent on 9.9.2015 and 19.11.2015. But they have not responded to the said notices. The 1st Plaintiff-

Appellant-Petitioner-Appellant (hereinafter referred to as the1st Plaintiff-Appellant) and the 2nd Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the 2nd Plaintiff) filed action bearing Number 2057/L in the District Court of Mathugama to get a declaration that the road described in the 2nd schedule to the Plaint is a private road and the to prevent the Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) from using the said road.

The learned District Judge by his judgment dated 6.1.2009 dismissed the Plaint. Being aggrieved by the said judgment, the 1st Plaintiff-Appellant appealed to the Civil Appellate High Court (hereinafter referred to as the High Court). The High Court by its judgment dated 29.7.2015 dismissed the appeal. Being aggrieved by the said judgment of the High Court, the 1st Plaintiff-Appellant appealed to this court. This court by its order dated 2.11.2016 granted leave to appeal on questions of law stated in 18(a) and 18(e) of the Petition of Appeal dated 30.8.2015 which are set out below.

1. Did the High Court err by holding that the disputed road way is to be considered as a public road as the said right of way is being used by the Public?

2. Did the High Court err in failing to consider that for a road to be a public road it should either be used as such from time immemorial or that there should be clear evidence of vesting such road way in a local authority.

The Defendant-Respondent in the District Court took up the position that the disputed road was a public road. Therefore, the most important question that must be decided in this case is whether the disputed road is a public road or a private road. The 1st Plaintiff-Appellant in her evidence took up the position that the

disputed road was shown as Lot No.6 and 7 in plan No.1254 of H.S Samarasekara Licensed Surveyor marked as P2(a) which had been produced in DC Mathugama Case No.404. The No. 6 and 7 were declared as a common road among allottees in Partition Case No.404 in DC Mathugama (marked as P9). If it is a public road, this road would have been excluded in the Partition case. But no such thing was done. In DC Kalutara L202, parties entered a settlement to the effect that the disputed road in this case was a private road. The above evidence was given by the 1st Plaintiff-Appellant. The Defendant-Respondent in his answer filed in this case (page 58) took up the position that the disputed road was a portion of a public road known as Devamulla-Kurunduwatta-Diyagantota Road which has been vested with the Village Council by Gazette No.12182 dated 12.8.1960 marked V2 (page 399). A perusal of the aforementioned gazette reveals that the Local Authority had resolved to repair and maintain the Devamulla-Kurunduwatta-Diyagantota Road. But this road has not been vested with the Local Authority. Senadheera Archchige Pathmasiri who is an officer attached to the Local Authority Bulathsinhala at page 295 and 296 sated in evidence that Devamulla-Kurunduwatta-Diyagantota Road had not been vested with the Local Authority. Therefore, it appears that the stand taken up by the Defendant-Respondent is not correct. The learned Judges of the High Court have observed that the disputed road was being used as a Public Road. But it is to be noted that no such vesting was done by the aforementioned gazette. The learned District Judge has observed that even without a vesting order with consent of parties a private road can be converted to a Public Road. Where is the consent of parties in this case? The1st Plaintiff-Appellant and the 2nd Plaintiff seek a declaration in this case to the effect that the disputed road is a public road. In this connection it is relevant to consider the judicial decision in Allishamy Vs Arnolishamy (1898) I Thambya Reports 26 which was quoted with approval in the case of Samarasinghe Vs Chairman VC Matara 34 NLR 39 wherein it was

observed thus: "No amount use by the public is sufficient to make a road a public road where road was made within the memory of man."

When I consider all the above matters, I hold that the1st Plaintiff-Appellant and the 2nd Plaintiff have proved their case on a balance of probability and that the Defendant-Respondent has not proved that the disputed road was a public road. I further hold that both courts below have reached wrong conclusions. For the aforementioned reasons, I answer the above questions of law in the affirmative and grant reliefs claimed by the the1st Plaintiff-Appellant and the 2nd Plaintiff in their Plaint. I set aside both judgments of the District Court and the High Court and allow the appeal with costs. I direct the learned District Judge to amend the decree in accordance with this judgment.

Appeal allowed.

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.

S.C.Appeal 211/14

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

In the matter of a Leave to Appeal Application made under Section 5(a) of the High Court of the Provinces (Special Provisions) Amendment Act No.19 of 1990 amended by Act No. 54 of 2006.

Magedera Gamage Jinapala Dasanayaka, No.12, Harmars Lane, Wellawatta**.**

S.C.Appeal No. 211/2014

S.C.(HCCA)Leave to Appeal Application No:-331/2014

WP/HCCA/MT/44/2011/LA

D.C.Mt.Lavinia case No:-1213/P

V.

Magedera Gamage Nimal Dasanayaka

(Deceased**)**

5(A) Hemasinghe Mudiyanselage
Swarnalatha (After marriage)
Dasanayaka. No.90,
Koswatta Road, Nawala.

AND

Hemainghe Mudiyanselage
Swarnalatha (After marriage)
Dasanayaka, No.90,
Koswatta Road, Nawala.

5A DEFENDANT-PETITIONER

V.

Nagan Sinnaiah
No.142 1/1, Galle Road,
Colombo 6.

RESPONDENT

AND

Hemasinghe Mudiyanselage
Swarnalatha (After marriage)
Dasanayaka, No.90,
Koswatta Road, Nawala.

5(A)DEFENDANT-PETITIONER-PETITIONER

V.

Nagan Sinnaiyah

No.142 1/1, Galle Road,

Colombo 6.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

Hemasinghe Mudiyanselage

Swarnalatha(After marriage)

Dasanayaka, No.90,

Koswatta Road, Nawala.

5(A) DEFENDANT-PETITIONER-PETITIONER-APPELLANT

V.

Nagan Sinnaiyah

No.142 1/1, Galle Road,

Colombo 6.

RESPONDENT-RESPONDENT-RESPONDENT

BEFORE:- SISIRA J.DE ABREW, J.

ANIL GOONERATNE, J

H.N.J.PERERA, J.

COUNSEL:-Ikram Mohamed PC with Thisath Wijayagunawardena PC

Nadeeka Galhena & Nirasha Nanayakkara for the 5A

Defendant-Petitioner-Petitioner-Appellant

Collin Amerasinghe with Ms.C.D.Wijayasekera for the

Respondent-Respondent-Respondent

ARGUED ON:-20.10.2017

DECIDED ON:-08.12.2017

H.N.J.PERERA,J.

By the final decree entered in the Partition case bearing No.1213/P the District Court of Mount Lavinia declared that the 5th Defendant (deceased) is entitled to Lot 3070 in Final Plan No.2053. The 5th Defendant was also declared entitled in common with the 6th Defendant and the Plaintiff in the said case to Lot 3069 in the Final Plan 2053.

After the Final Decree was entered, the said Court issued writ of Possession directing the Fiscal Officer of the said Court to handover the possession of the said Lot 3070 and 3069 to the substituted 5A Defendant (wife of the 5th deceased Defendant) the 5A Defendant-Petitioner-Petitioner-Appellant (hereinafter referred to as the 5A Defendant-Appellant). When the Fiscal Officer attempted to execute the writ the Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) objected to the execution of the said writ.

Thereafter the 5A Defendant-Appellant made an application under Section 52(2)(a) of the Partition Law to eject the Respondent from the said premises and for the possession of the said lots 3070 and 3069.

The Respondent filed objections and claimed that he is a tenant of the premises situated in the said allotment No.3070 bearing assessment No.12 1/1, Galle Road, Wellawatta and that he is entitled to occupy the said premises as the tenant under the 5A Defendant-Appellant and for

the dismissal of the 5A Defendant Appellant's application. After inquiry the Learned District Judge by his order dated 28.09.2011 held that the Respondent is a tenant under the 5A Defendant-Appellant and is a protected tenant and dismissed the Petitioner's application. Being aggrieved by the said order of the Learned District Judge the 5A Defendant-Appellant made a Leave to Appeal application to the Civil Appellate High Court of Mt.Lavinia. At the said inquiry before the Civil Appellate High Court the Respondent took up a preliminary objection on the basis that the impugned order is a final order and as such leave to Appeal Application cannot be maintained.

The Civil Appellate High Court delivered order dated 16.06.2014 holding the impugned order is not a final order but dismissed the said application of the 5A Defendant-Appellant on the ground that the Respondent is a lawful tenant under the 5A Defendant-Appellant. Being aggrieved by the said order of the Civil Appellate High Court of Mt.Lavinia the 5A Defendant-Appellant has sought Leave to Appeal from the said judgment and this Court granted leave to appeal on the questions of law set out in paragraph 17 (1) to (1V) of the Petition dated 21.07.2014.

i)Has the Respondent established that he is a lawful tenant of the premises in question within the meaning of Section 52(2)(b) of the Partition Law?

II) Even if the Respondent is a lawful tenant in view of the admission by the Respondent that premises in question is a business premises, is he not entitled to continue to occupy the premises in terms of Section 52(2) of the Partition Law read with Section 14(1) of the Rent Act?

(III) Is the right granted by Section 52(2)(b) to continue in occupation of a premises available only to a tenant of a house as opposed to a business premises?

(IV) Is the burden of proof in terms of Section 52(2)(b) to establish that an occupant is entitled to continue to occupy, on the occupant who claims to be the tenant entitle to continue to occupy under that Section?

Section 52(2) of the Partition Law read as follows:-

a) Where the applicant for delivery of possession seeks to evict any person in occupation of a **land or a house** standing on the land as tenant for a period not exceeding one month who is liable to be evicted by the applicant, such application shall be made by Petition to which such person in occupation shall be made Respondent, setting out the material facts entitling the applicant to such order.

b) After hearing the Respondent, if the Court shall determine that the Respondent having entered into occupation prior to the date of such final decree or Certificate of sale, is entitled to continue in occupation of the said **house as tenant** under the applicant as landlord, the Court shall dismiss the application; otherwise it shall grant the application and direct that an order for delivery of possession of the said house and land to the applicant to issue.

It was contended on behalf of the 5A Defendant- Appellant that an application made under section 52(2)(a) of the Partition Law shall be dismissed only where the Respondent satisfy Court that he is entitled to continue in occupation of the **house** in question. It was the position of the 5A Defendant-Appellant that the protection under section 52(2)(b) of the Partition Law extends only to tenants of houses and not to the tenants of Business Premises.

The title of the plaintiff in this case is not in dispute. The Respondent's contention is that he is the tenant of the premises in suit. It is an admitted fact that "Deluxe dry cleaners" is a business carried on by the Respondent and that he was carrying on the said business even when the

Partition action was pending. It is also accepted that "Deluxe dry cleaners" was also carried on in the premises by the Respondent that was allotted to the 5th Defendant in the Final decree.

In Munidasa & Others V. Nandasena (2001) 2 S.L.R 224, it was held that the Partition Law provides a specific remedy, and the Plaintiff-respondent is not entitled to resort to provisions of the Civil Procedure Code. It was further held that the provisions of the Partition Act are mandatory provisions and provides a simple and easy remedy of obtaining delivery of possession.

In the instant case the 5A Defendant-Appellant has made an application under section 52 (2)(a) of the Partition Act to obtain possession of the said premises which is allocated to him by the Final decree of the said Partition action.

The aforesaid section 52(2)(a) of the Partition Law which the application was made reads as follows:-

"Where the applicant for delivery of possession **seeks to evict** any person in occupation of a land or house standing on the land as tenant for a period not exceeding one month who is liable to be evicted by the applicant …"

The learned President's Counsel for the 5A Defendant-Appellant submitted that protection under section 52(2)(b) of the Partition Law extends only to tenants of houses and not to tenants of business premises. It was the contention of the Counsel for the Respondent that the aforesaid argument is not tenable as the application has been under section 52(2)(a) of the Partition Law which also fails to include tenants of business premises by the words. It was further contended that if the aforesaid argument for the 5A Defendant-Appellant is accepted then the said application is not in accordance with the provisions of the said

section 52(2)(a) and should fail to invoke the jurisdiction of the original Court in respect of the Respondent who was not a party to the Partition action.

In Virasinghe V. Virasinghe and Others [2002] 1 Sri.L.R 264 it was held that section 52(2)(a) appears to contemplate a situation where the applicant for an order of delivery of possession **recognizes the person in occupation as a tenant** but moves for eviction on the basis that he is not entitled to continue in occupation of the house as a tenant under the applicant as landlord.

This application has been made by the 5A Defendant-Appellant under section 52(2)(a) of the Partition law. This is not an application made under section 52(1). It is stated in paragraph 6 of the affidavit of the 5A Defendant-Appellant dated 06.10.2008 that she earlier made an application under section 52(1) of the Partition Law to evict the Respondent and as the Respondent had claimed that he is a tenant of the 5A Defendant-Appellant she was compelled to make the present application under section 52(2(a) of the Partition Law.

It is submitted on behalf of the Respondent, that the Final decree in the Partition action was entered in 11.11.1991 and the 5A Defendant-Appellant by her Attorney-at-Law by a letter under registered post, dated 22.10.1997 marked V1 invited the Respondent to attorn to the 5A Defendant-Appellant where the acceptance of the offer is depicted in the letter dated 27.07.1998 of the 5A Defendant-Appellant's Attorney-at-Law that refers to the remittance of Rs.12,500/- by cheque and by telegraph money orders of Rs.2500/- each by the Respondent. It is the position of the Respondent that the said offer was never withdrawn hence the offer and the acceptance caused a new contract.

The final decree in this case was entered on 11.11.1991. The undisputed facts in this case clearly establish that the Respondent was in possession

of the said business premises as a tenant of the 5th Defendant (deceased) since 1968.The Respondent was a tenant of the 5th Defendant (deceased) on the block of land allotted to the 5th Defendant (deceased) in the said final decree of the Partition action carrying on a business under the name of "Deluxe dry cleaners". The fact that the Respondent was a tenant carrying on a business in the said lot allotted to the 5th Defendant (deceased) is not in dispute in this case.

It was the contention of the 5A Defendant-Appellant that the premises in question is a business premises and hence it does not fall within section 52(2)(b) of the Partition Law, since the Respondent is only entitled to continue in occupation only "of a house", in terms of section 52(2)(b) of the Partition Law.

In the instant case the 5A Defendant-Appellant has not made an application to evict a person who is occupying a block of bare land or a person who is occupying a house or a residential premises in the said land allotted to the 5th Defendant (deceased) in the said Partition action. Section 52(2)(a) provides for the eviction of a person who is in occupation of a land or a house standing on the land as tenant for a period not exceeding one month. If the argument of the 5A Defendant-Appellant is accepted as submitted by the Learned Counsel for the Respondent there is no proper application made by the 5A Defendant-Appellant before the District Court invoking the said jurisdiction of the said Court under section 52(2)(a) of the partition Law.

On perusal of section 52(2)(a) of the Partition Law it is very clear that the intention of the Legislature was to protect tenants who have been in occupation of allotment of land one month prior to the date of such final decree or Certificate of sale. It could be a tenant of a bare land or a tenant of a house occupying the said allotment of land. What a tenant under section 52(2)(b) has to satisfy court is that the said tenant has been

a tenant of the of the said land or the house one month prior to the date of the final decree as a tenant and is entitled to continue as a tenant under the Applicant as Landlord.

Under section 52(2)(b) what the Court has to decide is whether the Respondent having entered into occupation prior to the date of such Final decree or Certificate of sale , is entitled to continue in occupation of the said land or house as tenant under the Applicant as Landlord. This protection is given to a tenant who continue to occupy a bare land as a tenant of the Applicant as well as to a tenant of a house or of a residential premises. In my opinion section 52(2((a) is not exhaustive. The said section is wide enough to protect the rights of a tenant who occupies a business premises in the said land as a tenant under the Applicant as Landlord. It is absurd to think that the Legislature intended only to protect a tenant who has been in occupation of a bare land or a house and did not intend to protect a tenant who occupied a business premises prior to the date of the final decree.

Section 52(2) of the Partition Law provides protection to each and every tenant who was in occupation of a land or a house prior to the date of such final decree or certificate of sale notwithstanding the fact whether such tenant's rights are protected by the Rent Act or not. The said protection is given to a tenant who has been in occupation of a bare land or a house prior to the date of final decree whether the said premises is governed by the provisions of the Rent Act or not.

Section 14 of the Rent Act provides a special protection to tenants who were in occupation of **residential premises** which is allocated to a co-owner under a decree for partition or purchased by any person under Partition Act.

Section 14 of the Rent Act states as follows:-

(1)Notwithstanding anything in any other law, the tenant of any residential premises which is purchased by any person under Partition Act or which is allocated to a co-owner under a decree for partition shall be deemed to be the tenant of such purchaser or such co-owner; as the case may be, and the provisions of this Act shall apply accordingly,……"

Section 14(1) of the Rent Act makes provision for the tenants of **residential premises** to continue as such, under any co-owner who has been allotted the relevant premises under the final decree or who has bought the said premises under a certificate of sale.

Thus it is very clear that the said provision is intended to protect the tenants who were in occupation of the said premises one month prior to the date of the final decree being evicted by a party who is allotted a lot in the final decree in the said Partition action or by a person who becomes entitled to the said premises under Certificate of sale. Although section 52(1) of the Partition Law provides a very simple procedure for a party who is entitled to a lot to get possession of the said lot through Fiscal of Court, section 52(2)(a) has clearly been introduced to safeguard the interests of persons who has been in occupation of such premises as tenants one month prior to the date of final decree.

In the instant case, the Respondent, has been in occupation of the said premises as a tenant of the 5th Defendant prior to the date of the partition decree and thereafter the 5th Defendant has been allotted a lot including the said business premises occupied by the Respondent and the Respondent has continued to occupy the said premises as the tenant of the 5th Defendant and thereafter, after the death of the 5th Defendant under the 5A Defendant-Appellant who is the wife of the deceased 5th Defendant.

The main issue in this case is whether the Respondent has established that he is a lawful tenant of the 5A Defendant-Appellant of the premises

in question within the meaning of section 52(2)(b) of the Partition Law? The Learned District Court Judge has accepted the version of the Respondent and has held that the Respondent is a lawful tenant of the 5A Defendant-Appellant and that the 5A Defendant-Appellant has no right to evict the Respondent by way of executing a writ of possession under section 52(2)(a) of the Partition Law. In his order the learned trial Judge has held that from the year 1968 the Respondent has been a tenant under the deceased 5th Defendant.

Further it was observed by the Learned trial Judge that the premises in suit is governed by the Rent Act, and that in the case filed by the Respondent against the 5A Defendant-Appellant in the Rent Board it has been decided by the said Board that the Respondent is in occupation of the said business premises as the lawful tenant under the 5A Defendant-Appellant.

In the instant case the Respondent has satisfied Court not only that he was a tenant who was in possession of the said business premises allotted to the 5th Defendant very much prior to the date of the final decree but also the fact that he is protected by the provisions of the Rent Act.

I am of the view that the Respondent has clearly led sufficient evidence to satisfy court that he has been a tenant a of the deceased 5th Defendant of the said premises prior to the date of the final decree and that he is entitled to continue occupation of the said premises under the present 5A Defendant-Appellant as his landlord.

Therefore I answer all the questions of law raised in this case in the following manner.

(i)Yes

(ii)Yes

(iii)No

(iv)Yes

Accordingly, I affirm the judgment of the Civil Appellate High Court dated 16.06.2014 and dismiss the appeal of the 5A Defendant-Appellant with costs.

JUDGE OF THE SUPREME COURT

SISIRA DE ABREW, J

I agree.

JUDGE OF THE SUPREME COURT

ANIL GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to appeal under Article 128 of the Constitution.

Sri Lanka Telecom Ltd.,

Head Office,

Lotus Road,

Colombo 01.

PETITIONER-PETITIONER-APPELLANT

SC. Appeal No. 215/12

SC (Spl) L.A. Application No. 47/2012

C.A. (Writ) Application No. 519/08

-Vs-

1. Human Rights Commission of Sri Lanka,

   No. 36, Kynsey Road,

   Colombo 08.

2. Justice S. Anandacoomaraswamy,

   Former Chairman,

2A. Dr. Deepika Udagama,

   Chairperson,

3. Justice D. Jaywickrama,

Former Member,

3A. Ghazali Hussain,
Member,

4. M.T. Bafiq,
Former Member,

4A. Saliya Peiris
Member,

5. N.D. Abeywardena,
Former Member,

5A. Ambika Sathkunanadan,
Member,

6. Mahanama Thilakaratne,
Former Member,

6A. Dr. Upananda Vidanapathirana,
Member,

7. Nimal G. Punchihewa,
Former Additional Secretary,

7A. S. Jayamanna,
The Secretary,

All of the Human Rights Commission of Sri Lanka,
No. 36, Kynsey Road,
Colombo 8.

8. M.M.M. Zaheed,
585/1/A, 2nd Division,
Maradana,
Colombo 10.

RESPONDENT-RESPONDENT-REAPONDENTS

Before : Sisira J.De Abrew, J
Upaly Abeyratne, J &
Nalin Perera, J

Counsel : Sanjeewa Jayawardena, PC with Pubuduni Wickramaratne for
the Petitioner-Petitioner-Appellant.
Parinda Ranasighe Senior DSG for 1st – 7th Respondent-Respondent-Respondent
W.Jayaratne , PC with R. Jayawardena for 8th Respondent-Respondent-
Respondent

Argued on : 25th November 2016

Written Submission

tendered on : 20.2.2013 By the Petitioner

6.11.2013 by the 8th Respondent

Decided on : 1.3.2017

Sisira J De Abrew

This is an appeal against the judgment of the Court of Appeal wherein the Court of Appeal refused to issue a writ of certiorari sought by the Petitioner-Petitioner-Appellant (hereinafter referred to as the Petitioner-Appellant) to quash the recommendation of the Human Rights Commission (hereinafter referred to as the HRC). This court by its order dated 6.12.2012, granted leave to appeal on questions of law set out in paragraphs 19(b) to (g), (i) and (j) of the Petition of Appeal dated 12.3.2012 which are set out below.

1. Did the Court of Appeal err in holding that the recommendation of the Human rights Commission cannot be quashed by a Writ of Certiorari, when in fact, it is a distinct step in a statutory process as known to administrative law and is in any event, a finding that generates an affectation of rights and interests and is therefore, clearly justiciable?
2. Did the Court of Appeal err in holding that the Petitioner's acts at the material time amounted to executive or administrative action and that the Human Rights Commission had the jurisdiction to inquire into the 8th respondent's complaint and grant him relief?
3. Did the Court of Appeal err in failing to consider the most significant fact that the Labour Tribunal had dismissed the 8th Respondent's claim of

termination and that the 8th Respondent had not appealed against the said Order?

4. In any event, without prejudice thereto, did the Court of Appeal fall into grave error by failing to consider that the Human Rights Commission, after having significantly ignored the Labour Tribunal order, thereafter proceeded to grant relief to the 8th Respondent, without first making a determination as to whether there was in fact an unlawful termination of the 8th Respondent's employment by the Petitioner?
5. Without prejudice thereto, did the Court of Appeal fail to consider that the relief of compensation granted to the 8th respondent, was devoid of any objective or lawful basis?
6. In any event, did the Court of Appeal err by failing to consider that the recommendation of the Human Rights Commission is totally flawed in that the relief recommended by the Commission is irreconcilable and mutually exclusive an as much as one relief proceeds on the premise of continuing employment and the other proceeds on the premise of a terminal situation?
7. Did the Court of Appeal misdirect itself in failing to consider that the 1st to 6th Respondents acted arbitrarily in adopting the previous recommendation which was also made without holding an inquiry into the substantive matter and especially in view of the supervening circumstances?
8. Did the Court of Appeal err by holding that the impugned recommendation does not attract the writ jurisdiction, when in fact the said recommendation is a step in a prescribed statutory process as known to administrative law and leads to the affectation of rights and in the interest and is clearly justiciable?

The Petitioner-Petitioner-Appellant (hereinafter referred to as the Petitioner-Appellant) in the petitions filed in this court and the Court of Appeal states that the 8th Respondent-Respondent-Respondent (hereinafter referred to as the 8th Respondent) who was an employee of the Department of Telecommunication became a clerk in Class 11A in Sri Lanka Telecom Ltd in 1996 with the conversion of the Department of Telecommunication into Sri Lanka Telecom Ltd. On 26.4.1999, he was transferred to the Marketing Division as Assistant Sales Manager. The Petitioner-Appellant further states in the said petitions that in August 1999 on a complaint received from one SHM Rishan to the effect that the 8th Respondent had solicited a bribe to provide telephone facilities, a preliminary investigation was conducted; that on the recommendation of the investigating officer, the 8th Respondent was transferred to the Commercial Section by letter dated 4.11.1999; that the 8th Respondent refused to report to the Commercial Section; that a formal inquiry into the complaint against the 8th Respondent was held but the 8th Respondent did not attend the inquiry and as such the inquiry was laid by; that the 8th Respondent filed an application in the Labour Tribunal on 5.1.2000 against the Petitioner-Appellant on the basis of constructive termination of his employment by the Petitioner-Appellant; that the 8th Respondent also filed an application in the HRC alleging violation of his fundamental rights guaranteed by Article 12(1) of the Constitution by the Petitioner-Appellant; and that HRC delivered its decision on 3.3.2008.

The HRC, in its letter marked 'G' stated as follows:

"Therefore it is recommended

1. *to grant the salary scale of A6 from 22.6.1999 and place at appointment with all allowances and other payment which are not less than of his colleague V Niles, Neteunam and PMW Kumara and*

2. *to pay reasonable compensation for the full loss of his carrier.*

Further as empowered by Section 15 of the Human Rights Commission Act No.21 of 1996, the Commission recommends the Respondent to send a report back to the Commission on or before 15.5.2008. This report should contain the steps that have been taken with regard to this recommendation."

The HRC delivered the above decision on 3.3.2008. At this stage it is interesting to find out as to what happened to the application filed by the 8th Respondent in the Labour Tribunal. The learned President of in the Labour Tribunal on 3.3.2005 dismissed the application filed by the 8th Respondent on the ground that there was no constructive termination of services of the 8th Respondent by the Petitioner-Appellant and that the 8th Respondent on his own conduct left the services.

The Petitioner-Appellant filed a writ application in the Court of Appeal seeking to quash the said decision of the HRC. The Court of Appeal by its judgment dated 30.1.2012, dismissed the application of the Petitioner-Appellant on the ground that what is found in the letter of the HRC dated 3.3.2008 was only a recommendation and that recommendation could not be quashed by a writ of certiorari. The most important question that must be decided in this case is whether what is found in the letter of HRC marked 'G' is only a recommendation. I now advert to this question.

Learned President's Counsel (PC) who appeared for the 8th Respondent contended that the decision in the letter marked 'G' was only a recommendation which could not be enforced and that there were no provisions in the Human Rights Commission Act (hereinafter referred to as the HRC Act) to implement it. If the above contention of learned PC is accepted as correct, then the authority or the person who is expected to give effect to the recommendation of the HRC can keep quiet and nothing could be done against such an authority or a person. Further if the above contention of learned PC is correct, then purpose of establishing the HRC would be rendered nugatory. In considering the above contention of learned PC, it is relevant to consider Section 15(7) of the HRC Act which reads as follows.

> *" The Commission shall require any authority or person or persons to whom a recommendation under the preceding provisions of this section is addressed to report to the Commission, within such period as may be specified in such recommendation, the action which such authority or person has taken, or proposes to take, to give effect to such recommendation and it shall be the duty of every such person to report to the Commission accordingly."*

When one considers the above section, it is clear that the authority or the person to whom the recommendation of the HRC is addressed cannot keep quiet and that he cannot ignore the recommendation of HRC. He or the authority has to report to the HRC as to what steps he or authority had taken or propose to take. In the present case the Petitioner-Appellant has to act according to Section 15(7) of the HRC Act. It is also pertinent to consider Section 15(8) of the HRC Act which reads as follows.

"*Where any authority or person or persons to whom a recommendation under the preceding provisions of this section is addressed, fails to report to the Commission within the period specified in such recommendation or where such person reports to the commission and the action taken, or proposed to be taken by him to give effect to the recommendations of the Commission, is in the view of the Commission, inadequate, the Commission shall make a full report of the facts to the President who shall, cause a copy of such report to be placed before Parliament*."

According to Section 15(8) of the HRC Act, the authority or the person to whom the recommendation is addressed fails to report to the HRC or has taken inadequate steps in the opinion of the commission has to face consequences discussed in this section. The Petitioner-Appellant would have to face the consequences discussed in Section 15(8) of the HRC Act if he fails to comply with the recommendation of HRC. When I consider all the aforementioned matters, it is clear that the decision of the HRC in document marked 'G' would affect the rights of the Petitioner-Appellant. For the above reasons, I am unable to agree with the above contention of learned PC for the 8th Respondent.

Learned PC for the Petitioner-Appellant submitted that the Petitioner-Appellant is a public listed company and a pioneer in telecommunication industry in Sri Lanka and that if the Petitioner-Appellant does not comply with the recommendation of the HRC, there would be criticism that this company is a violator of fundamental rights of the people and thereby the Petitioner-Appellant would face serious repercussion. He therefore contended that his rights had been affected by the decision of the HRC in the document marked 'G'. I now advert to

this contention. What would happen if the Petitioner-Appellant does not comply with the recommendation of the HRC? As I pointed out earlier, this company would have to face the situation discussed in Section 15(8) of the HRC Act. Further the Petitioner-Appellant has a right to maintain the reputation that he respects the Rule of Law and does not violate the laws of the country. If the recommendation of the HRC is not implemented, he would lose this reputation. For the aforementioned reasons, I am of the opinion that the decision contained in document marked 'G' would affect the rights of the Petitioner-Appellant. For the above reasons, I hold that the decision of the HRC found in the document marked 'G' is not only a recommendation but a decision that would affect the rights of the Petitioner-Appellant. The Court of Appeal has failed to consider the above matters.

If a decision of a Public Body affects the rights of an individual, can such a decision be quashed by issuing a writ of certiorari? In this connection, I would like to consider a passage of the judgment of Lord Justice Atkin in Rex Vs Electricity Commissioner (1924) 1 KB 171 at 205 which reads as follows:

> *"Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs."*

In B Sirisena Cooray Vs Tissa Dias Bandaranayake and Two others [1999] 1SLR 1 this court issuing a writ of certiorari quashed the determination of the Presidential Commission. His Lordship Justice Dheeraratne in the said judgment observed as follows:

"The determinations and recommendations of the Commission are flawed firstly as being unreasonable in that the Commissioners did not call their own attention to the relevant matters; secondly as they are not based on evidence of any probative value; and thirdly because those determinations and recommendations have been reached without giving the petitioner a right of hearing in breach of the principles of natural justice."

HWR Wade & Forsyth in the book titled 'Administrative Law' 10th Edition page 518 discussing the question of issue of writ of certiorari states as follows:

"They will lie where there is some preliminary decision as opposed to a mere recommendation which is a prescribed step in a statutory process which leads to a decision affecting rights even though the preliminary decision does not immediately affect rights itself."

In GPA DE Silva Vs Sadique [1978-79-80] page166 at page 171-172 this court observed thus:

"The circumstances in which a Writ of Certiorari will issue have been the subject of judicial pronouncements. Brett L.J. in R. v. Local Government Board [1982] Vol: 10 QBD 309,321 said.

"Wherever the Legislature entrusts to anybody of persons other than to the superior Courts the power of imposing an obligation upon individuals the Courts ought to exercise as widely as they can the power of controlling those bodies if they attempted to exceed their statutory powers."

That this principle applies not merely to statutory bodies is clear. In Wood v. Wood, [1874] LR Vol: 9 Ex 170 it was said -

"this rule is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

It appears to be clear that certiorari will also lie where there is some decision, as opposed to a recommendation, which is a prescribed step in a statutory process and leads to an ultimate decision affecting rights even though that decision itself does not immediately affect rights."

Considering the above legal literature, I hold that if a recommendation of a Public Body affects the right of an individual, Superior Courts, in the exercise of their writ jurisdiction, have the power to quash such a recommendation by issuing a writ of certiorari.

For the above reasons, I hold that the Court of Appeal was in grave error when it decided that the recommendation found in the document marked 'G' could not be quashed by a writ of certiorari. The Court of Appeal due to the above wrong conclusion failed to consider the merits of the case. I reproduce below the questions of law set out in paragraphs 19(b) and 19(h) the Petition of Appeal dated 12.3.2012.

> Did the Court of Appeal err in holding that the recommendation of the Human rights Commission cannot be quashed by a Writ of Certiorari, when in fact, it is a distinct step in a statutory process as known to administrative law and is in any event, a finding that generates an affectation of rights and interests and is therefore, clearly justiciable?

Did the Court of Appeal err by holding that the impugned recommendation does not attract the writ jurisdiction, when in fact the said recommendation is a step in a prescribed statutory process as known to administrative law and leads to the affectation of rights and in interest and is clearly justiciable?

For the above reasons, I answer the above question of law in the affirmative. The other questions of law do not arise for consideration

For the aforementioned reasons, I set aside the judgment of the Court of Appeal and direct the Court of Appeal to rehear the case on its merits.

Judgment of the Court of appeal set aside.

Re-hearing ordered.

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 application for Leave to Appeal against the judgment of the Civil Appellate High Court of Kandy.

SC. APPEAL. No: 218/2014

SC. HC. CA. LA. No.476/2014

Civil Appellate High Court Case No:

CP/HCCA/Kandy/ 78/2012 (F)

D.C.NuwaraEliya Case No:

1255/2007 Miscellaneous

WicramaPathiranage Mahesh Ruwan Pathirana

"Sampath", Udumulla,

Nugathalawa,

Welimada.

PLAINTIFF

Vs.

GinthotaSarukkaleVitharanage Hemalatha Piyathilake

Alis Hemalatha Piyathilake Ginthota

"Links View", Kandy Road,

NuwaraEliya.

DEFENDANT

AND BETWEEN

Wicrama Pathiranage Mahesh Ruwan Pathirana

"Sampath", Udumulla,

Nugathalawa,

Welimada.

PLAINTIFF-APPELLANT

Vs.

Ginthota Sarukkale Vitharanage Hemalatha Piyathilake

Alis Hemalatha Piyathilake Ginthota

"Links View", Kandy Road,

NuwaraEliya.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Ginthota Sarukkale Vitharanage Hemalatha Piyathilake

Alis Hemalatha Piyathilake Ginthota

"Links View", Kandy Road,

NuwaraEliya.

DEFENDANT-RESPONDENT

APPELLANT

Vs.

Wicrama Pathiranage Mahesh Ruwan Pathirana

"Sampath", Udumulla,

Nugathalawa,

Welimada.

PLAINTIFF-APPELLANT-RESPONDENT

BEFORE : **SISIRA J DE ABREW, J.**

PRIYANTHA JAYAWARDENA, PC, J. and

PRASANNA S. JAYAWARDENA, PC, J.

COUNSEL : Pradeep Fernando for the Defendant-Respondent-Appellant.

Samantha Ratwatte instructed by Ms. UpuliAmunugama for the Plaintiff-Appellant-Respondent.

WRITTEN SUBMISSIONS

TENDERED ON : 8.1.2015 by the Defendant-Respondent-Appellant

28.4. 2015 by the Plaintiff-Appellant-Respondent

ARGUED ON : 5.12.2016

DECIDED ON : 15.2.2017

SISIRA J. DE ABREW J.

This is an appeal by the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant-Appellant) against the judgment of the Civil Appellate High Court (hereinafter referred to as the High Court) dated 6.8.2014 wherein it set aside the judgment of the learned District Judge who dismissed the case of the Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent). This court by its order dated 17.11.2014, granted leave to appeal on the following questions of law.

1. Have the learned Judges of the Civil Appellate High Court of the Central Province given adequate weightage and/or evaluated the provisions contained in clause '5' of the Agreement to Sell bearing No. 188 dated 27/11/2006 marked as P1?

2. Is there a finding that the Petitioner has violated the Agreement to Sell bearing No. 188 marked as P1?

3. If so, can a violator of an agreement elect the option of forcing the non guilty party to accept the damages in lieu of specific performance when a contract specifically refers to the right of seeking specific

performance?

4. In any event, is a party who is willing to carry out his obligations in terms of an agreement entitled to demand for specific performance by the other party, when the agreement has provided for specific performance as well as damages?

The 1st question of law was raised by the Defendant-Appellant whilst the 2nd,3rd and 4th questions of law were raised by the Plaintiff-Respondent. Facts of this case may be briefly summarized as follows.

The Defendant-Appellant by document marked P2 dated 11.11.2006, leased out the property in suit (hereinafter referred to as the property) to the Plaintiff-Respondent for a period of 1 ½ years. As per the said agreement, renovation to the property was carried out by the Plaintiff-Respondent with the consent of the Defendant-Appellant.

Thereafter on 27.11.2006 the Defendant-Appellant has, by an Agreement to Sell marked P1, agreed to sell the property to the Plaintiff-Respondent for a total sum of Rs.9.0 Million within 1 ½ years from 27.11.2006. At the time of the execution of the Agreement to Sell marked P1, the Plaintiff-Respondent paid Rs.1.0Million to the Defendant-Appellant by way of a cheque to be encashed on or after 31.5.2007. The Defendant-Appellant did not encash the cheque. The reasons as to why she did not encash the cheque have not been revealed at any stage of the trial.

The Attorney-at-Law for the Plaintiff-Respondent by letter dated 17.7.2007 marked P14, informed the Defendant-Appellant that the Plaintiff-Respondent had

deposited with him the balance amount of money of the agreed price of the transaction to be paid to the Defendant-Appellant in fulfillment of the Agreement to Sell marked P1 and for the Defendant-Appellant to make arrangements to convey the property in the name of the Plaintiff-Respondent by way of a Deed of Transfer. The Defendant-Appellant did not reply this letter. However the Attorney-at-Law for the Defendant-Appellant, by letter dated 8.9.2007 marked P16, informed the Plaintiff-Respondent that he had misled the Defendant-Appellant to enter into the Agreement to Sell marked P1 and to take steps to cancel the said Agreement to Sell and collect the cheque given by the Plaintiff-Respondent. The letter marked P16 further stated that the value of the property is Rs.250 Million. But it has to be noted here that the Attorney-at-Law for the Defendant-Appellant, in the said letter, states that the value of the property is Rs.250 Lakhs. The Defendant-Appellant did not, at the trial, frame issues; did not give evidence; did not lead any evidence on her behalf; and did not object to the documents marked by the Plaintiff-Respondent at the close of the case for the Plaintiff-Respondent. The Defendant-Appellant did not, however, convey the property to the Plaintiff-Respondent as per Agreement to Sell marked P1. The Plaintiff-Respondent instituted this action against the Defendant-Appellant seeking specific performance of the Agreement to Sell marked P1.

It is clear from the above evidence that the Defendant-Appellant has violated the Agreement to Sell marked P1. The learned District Judge too decided that the Defendant-Appellant had violated the Agreement to Sell marked P1. However, the learned District Judge was of the opinion that since the Agreement to Sell marked P1 provided for damages in alternative to specific performance, no specific performance could be ordered. The learned Judges of the High Court who

did not agree with the said view set aside the judgment of the learned District Judge and directed her to enter judgment for the Plaintiff-Respondent as prayed for in the prayer to the plaint. This appeal is against the said judgment of the High Court. When the Agreement to Sell marked P1 is examined, it is clear that it provides for specific performance or damages for both parties in the event of either party refuses to fulfill his or her obligations as per the agreement (vide clause 5,6 and 7 of the agreement).

The learned District Judge has relied on the judicial decisions in Thamel Vs Fernando [2001] 2 SLR 44 and Paiva Vs Marikkar 39 NLR 255. In both cases there were no clauses in the agreement for specific performance but provided only for damages in the event of violation. But in the present case there is a clause for specific performance in the Agreement to Sell marked P1. Therefore, I am of the opinion that the judicial decisions in the said cases do not apply to the facts of this case. In order to arrive at the correct decision in this case, it is necessary to consider certain judicial decisions. In Noorul Asin Vs Podinona de Zoysa [1989] 1 SLR 63 the Court of Appeal observed that: "In terms of the agreement between them, the vendors as well as the purchaser were entitled to claim specific performance in case of default by either party. There was a fair balance of sanctions." The Court of Appeal held thus:

"The right to claim- specific performance of an agreement to sell immovable property is regulated by Roman-Dutch law ana[1] not English law. Under the Roman-Dutch law every party who is ready to carry out his terms of the bargain prima facie enjoys a legal right to demand performance by the other party and this right is subject only to the overriding-discretion of the Court to refuse the remedy

in the interests of justice in particular cases. But in English law the only common law remedy for breach of an executory contract is damages but the Chancery Court developed the rule whereby specific performance could be ordered in appropriate cases. In the absence of agreement to the contrary the Roman-Dutch law confers on a purchaser ready to fulfil his obligations under an executory contract the right to elect one of two alternative remedies namely, specific performance or damages. The party that has broken his contract does not get the option of purging his default by payment of money. It is against conscience that such a party should have the right of election whether he would perform his contract or only pay damages for breach of it. The election is rather with the injured party subject to the discretion of Court. This is the Roman-Dutch law:

The question always is what is the contract ?" The Court must be guided by the primary intention of the parties to be gathered from the instrument embodying the agreement.

The agreement PI in clear and unambiguous terms has given the option to the party who has performed his part-of the contract to demand and compel performance by the other party. The plaintiff has performed her part of the obligations under the contract. Therefore she is entitled to a decree for specific performance."

In Hubert Fernando Vs Kusumawathi de Silva [1991] 1SLR 187 this court held: *"On the terms of the agreement to sell no alternative was made available to the vendor as to the mode of performing the contract. The return of the deposit was no alternative in any true sense. Hence the vendor was obliged to make specific*

performance on the purchaser fulfilling his obligations. There was here no substituted obligation."

When taking a decision whether to grant relief or not in a case of breach of contract it is necessary to examine the intention of the parties at the time that they signed the agreement. In the present case what was the intention of the Defendant-Appellant when she signed the agreement? In finding an answer to this question it must be remembered that the Defendant-Appellant, at the time of signing the agreement, accepted a cheque for Rs.1.0 Million from the Plaintiff-Respondent and that she signed the agreement knowing that there is a clause for specific performance. Thus it is clear that the intention of the Defendant-Appellant had been, at the time of signing the agreement, to sell the property to the Plaintiff-Respondent. What was the intention of the Plaintiff-Respondent at the time of signing the agreement? It has to be noted here that he gave a cheque for Rs.1.0 Million to the Defendant-Appellant and signed the agreement knowing that there was a clause relating to specific performance. Thus his intention had been, at the time of signing the agreement, to purchase the property. Thus it is clear that the intention of both parties, at the time of signing of the agreement, was to implement Agreement to Sell marked P1. What was the purpose of including a clause for specific performance? The purpose, it appears, had been that both parties would be compelled to fulfill their obligations. When I consider all the above matters, I am of the opinion that it becomes the duty of court to make an order, if there is a clause for specific performance in the agreement, implementing the clause for specific performance. For these reasons, I am of the opinion that the learned District Judge has fallen into grave error when she decided in her judgment not to order specific performance of the Agreement to Sell marked P1. The learned High

Court Judges were correct when they in their judgment ordered specific performance of the Agreement to Sell marked P1.

It is an accepted principle in law that the wrongdoer is not permitted to take advantage of his own wrongful acts. The same principle is applicable to a case of breach of contract. In the present case, I have pointed out earlier that the violator of the agreement was the Defendant-Appellant. Thus she is not and cannot be permitted to take advantage of her wrongful acts. If specific performance is not ordered she would take advantage of her wrongful act. When I consider all the above matters, I am of the opinion that it becomes the duty of court to order specific performance in this case.

In my view in an Agreement to Sell the party who has not violated the agreement cannot be permitted to suffer the injuries caused by the violating party. Considering all the above matters, I hold that in an Agreement to Sell which provides for specific performance and/or damages, the party who is ready to fulfill his obligation in terms of the contract has the right to elect one of the remedies namely, specific performance or damages when the Agreement to Sell is breached and that the party who is in violation of the Agreement to Sell has no right to elect between the remedies. Having considered the above matters and the legal literature, I further hold that the party to an Agreement to Sell who is willing to fulfill his obligation in terms of the agreement is entitled to demand specific performance of the agreement by the violating party when the agreement provides for specific performance and/or damages and the violating party cannot elect the option of forcing the party who has not violated the agreement to accept damages in lieu of specific performance.

The Judges of the High Court in a well considered judgment have considered clauses 5,6 and 7 of the Agreement to Sell marked P1 and have arrived at the correct conclusion. In view of the above conclusion reached by me, I answer the 1st, 2nd and 4th questions of law in the affirmative and answer the 3rd questions of law in the negative.

For the aforementioned reasons, I hold that the learned District Judge was in error when she dismissed the case of the Plaintiff-Respondent. I affirm the judgment of the High Court and dismiss this appeal with costs fixed at Rs.200,000/-. In addition to the above costs the Plaintiff-Respondent is entitled to recover the costs of the case in both courts below.

Appeal dismissed.

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

In the matter of an appeal with leave to appeal obtained from this Court.

GALLAGE DON SUNIL SHANTHA
No. 12, Puttalam Road, Nikaweratiya.
PLAINTIFF

S.C. Appeal No.226/14
S.C. HCCA LA No:352/13
NWP/HCCA/KUR No.139/2007(F)
D.C. Maho Case No. 5999/L

VS.

DISSANAYAKE MUDIYANSELAGE KUSUMAN PATRICIA
No. 10, Puttalam Road, Nikaweratiya.
DEFENDANT

AND

DISSANAYAKE MUDIYANSELAGE KUSUMAN PATRICIA
No. 10, Puttalam Road, Nikaweratiya.
DEFENDANT- APPELLANT

VS.

GALLAGE DON SUNIL SHANTHA
No. 12, Puttalam Road, Nikaweratiya.
PLAINTIFF-RESPONDENT

AND NOW BETWEEN

GALLAGE DON SUNIL SHANTHA
No. 12, Puttalam Road, Nikaweratiya.
PLAINTIFF-RESPONDENT -PETITIONER/APPELLANT

VS.

DISSANAYAKE MUDIYANSELAGE KUSUMAN PATRICIA
No. 10, Puttalam Road, Nikaweratiya.
DEFENDANT-APPELLANT-RESPONDENT

BEFORE:	Sisira J. De Abrew J. Upaly Abeyrathne J. Prasanna Jayawardena PC, J.
COUNSEL:	Niranjan de Silva for the Plaintiff-Respondent-Petitioner/Appellant. W.Dayaratne, PC, with Ms. D.N.Dayaratne and Uditha Gunathilake for the Defendant-Appellant- Respondent.
WRITTEN SUBMISSIONS FILED:	By the Plaintiff-Respondent-Petitioner/Appellant on 07th January 2015. By the Defendant-Appellant-Respondent on 05th November 2015.
ARGUED ON:	03rd February 2017.
DECIDED ON:	22nd June 2017.

Prasanna Jayawardena, PC, J.

On 14th August 2002, the Plaintiff-Respondent-Petitioner/Appellant ["the plaintiff"] filed this action in the District Court of Maho praying for an Order that he is the owner and possessor of the land and premises described in the schedule to the plaint ["පහත උපලේඛනයේ සඳහන් ඉඩම් කොටසේ සහ එය පිහිටි ගොඩනැගිල්ලේ පැමිණිලිකරුගේ අයිතිය හා බුක්තිය තහවුරු කිරීමේ නියෝගයක් ලබා දෙන මෙන් ද"] and for an Order directing the Defendant-Appellant-Respondent ["the defendant"] to refrain from interfering with the plaintiff's possession of these land and premises.

The schedule to the amended plaint described the land and premises which are the subject matter of this action as an allotment of land with a shop premises thereon, situated adjacent to the main road [*ie:* Puttalam Road] in Nikaweratiya town and bearing Assessment No.12 (and No. 126/1). The evidence shows that, these shop premises are in a building which has two units. One unit of that building is the shop premises bearing Assessment No. 12 (and No.126/1), Puttalam Road, Nikaweratiya, which is the subject matter of this action. The other unit in that building, is, admittedly, occupied by the defendant. The unit occupied by the defendant is said to bear Assessment No. 10 (and No.126A) Puttalam Road, Nikaweratiya.

In the plaint itself, the plaintiff states that, the land described in the schedule is State land. However, the plaintiff claims that he has possessed the land and premises bearing Assessment No.12 for several years and that, the defendant has recently attempted to disturb the plaintiff's possession.

In her answer, the defendant denied that the land and premises had been correctly described in the schedule to the plaint and the defendant set out a description of the land in the two schedules to the answer. She denied that the land which the plaintiff refers to, is State land. She further pleaded that, her father had title to the land described in the schedules to the answer and that there is a building with two units standing on this land, which bear Assessment No.s 10 and 12 respectively. She claimed she now has title to the said land and premises, which she derived from her father. She pleaded that, prior to 1984, the plaintiff had entered the unit bearing Assessment No. 12 with the permission of her father and later on a monthly lease from her father. The defendant claimed that the plaintiff had subsequently left the premises but that, recently, the plaintiff had forcibly placed a person named Senanayake in possession of the premises. On this basis, the defendant prayed that the plaintiff's action be dismissed, that a Declaration be made that the defendant has title to the entire land and premises described in the schedules to the plaint, that the plaintiff be ejected from the said land and premises and for the recovery of damages from the plaintiff.

At the trial, the plaintiff raised seven issues. It is significant to note that, although the plaintiff had prayed in the plaint for an Order that he is the owner and possessor of the land, the plaintiff did *not* raise an issue as to whether he was the *owner* of the land. Instead, he raised issues as to whether the land was a State land and whether the land was in his possession and, if so, whether the plaintiff is entitled to the reliefs prayed for in the plaint. Thus, on the basis of the pleadings in the plaint and the issues raised by the plaintiff, this action has to be regarded as a possessory action filed by the plaintiff.

Issue No. [8] raised by the defendant is whether the plaintiff could maintain his action without any title or right to the land which is the subject matter of this action. The other nine issues raised by the defendant are based on whether the *defendant* has *title* to the land and premises which are the subject matter of this action and whether the defendant had been in possession of the said land and premises until the plaintiff had forcibly placed Senanayake in possession, and, if so, whether the defendant is entitled to the reliefs prayed for in the answer. Thus, on the basis of the pleadings in the answer and the issues raised by the defendant, the defendant's claim in reconvention has to be regarded as a *rei vindicatio* action.

The plaintiff gave evidence and stated that he had built the shop premises which he now claims, on State land, and that he has been in possession since 1985, but that the defendant had recently sought to interfere with his possession. The plaintiff led the evidence of another witness who stated that he had helped the plaintiff to build this shop premise. The plaintiff led the evidence of an officer from the Provincial Land Commissioner's Department who confirmed that, the land which is the subject matter of this case, is State land. This witness further stated that, the plaintiff is in possession of the unit bearing Assessment No.12 [which is the unit described in the schedule to the plaint]. This witness also stated that, the State has not issued any permits in respect of the entire land but that, the process of issuing permits to

claimants was underway. The plaintiff also led the evidence of the Colonization Officer who confirmed that the land which is the subject matter of this action is State land. The plaintiff produced the documents marked **"පැ1"** to **"පැ8"** in his efforts to prove that he was in possession.

The defendant gave evidence and stated that, her father built two shop premises on the land described in the schedule to the answer and that these two shop premises bore Assessment No.s 10 and 12 respectively. She said that her father transferred the title to the entire land and both shop premises to her, by Deed of Transfer No. 6504 dated 07th October 1997, which was marked **"වි 4"**. She said that her father had obtained title to the land under and in terms of the decree entered in the District Court of Maho Case No. 1074/L and produced a certified copy of the judgment in that case and the order in the related appeal marked **"වි 3"**. The defendant said that her father had permitted the plaintiff to occupy the unit bearing Assessment No.12 and that the plaintiff had later vacated the premises

When the defendant was cross examined, it transpired that, District Court of Maho Case No. 1074/L had been instituted by one Tennekoon against the defendant's father and that, in the answer filed by the defendant's father in that case, the defendant's father had specifically pleaded that, the land which is the subject matter of this case, is State land. Further, in the course of his evidence in that case, the defendant's father had stated that, the land is State land. A certified copy of the pleadings, proceedings and judgment in District Court of Maho Case No. 1074/L was produced by the plaintiff, marked **"පැ 10 ඊ"**.

In his judgment, the learned District Judge observed that, the Deed No. 6504 marked **"වි 4"** which the defendant relies on to prove her title, clearly states that, the defendant's father claims title to the land under and in terms of the decree entered in the District Court of Maho Case No. 1074/L. The learned District Judge observed that, however, the defendant's father had admitted that the land was State land in his answer filed in the District Court of Maho Case No. 1074/L. The learned District Judge further observed that, the judgment entered in that case had only dismissed Tennekoon's case against the defendant's father and that it had not been held that the defendant's father had title to the land. The learned District Judge observed that, the evidence of the officer from the Provincial Land Commissioner's Department and the Colonization Officer further established that the relevant land was State land and that permits have not been issued as yet. The learned District Judge held that, the defendant had failed to prove that the State had issued a permit to her, or conveyed the rights to the land to the defendant, in any other manner.

In these circumstances, the learned District Judge held that the land was State land.

Next, the learned District Judge held that, the oral evidence before the Court together with the documents produced by the plaintiff marked **"පැ1"** to **"පැ4"** and **"පැ6"** to **"පැ8"** prove that, the plaintiff has been in possession of the Unit bearing

Assessment No.12 from 1982 onwards. The learned District Judge also held that, the defendant was threatening to disturb the plaintiff's possession.

On the aforesaid basis, the learned District Judge answered the seven issues raised by the Plaintiff in the affirmative and the ten issues raised by the defendant in the negative and then entered judgment for the plaintiff, `as prayed for in the plaint'.

At this point itself, it should be stated that, the learned District Judge erred when he entered judgment `as prayed for in the plaint', since doing so resulted in the issue of an Order declaring that the plaintiff was the owner of the land. That Order should not have issued since the District Judge himself had held that, the land was State land.

However, when the learned District Judge entered judgment `as prayed for in the plaint', the District Court has also issued the *other* Orders prayed for in the plaint against the defendant - *ie:* an Order that, the plaintiff was entitled to the possession of the land and an Order directing the defendant to refrain from interfering with the plaintiff's possession of the land and premises. The fact that, the land is State land will not necessarily preclude the issue of these two Orders in favour of the plaintiff against the defendant since the two Orders could be validly issued against the defendant if the plaintiff had succeeded in proving the requisites of a possessory action. Therefore, the correctness of these two Orders remains to be considered.

The defendant appealed to the High Court of Civil Appeal holden at Kurunegala. The learned High Court Judges observed that, since the land was State land, the real question in issue was whether it had been proved that, the plaintiff had been in possession of the shop premises which are the subject matter of this action and was entitled to the Orders prayed for in the plaint relating to the possession of the said land and premises. In this regard, the learned High Court Judges held that the evidence established that, the defendant's father had been in *"long continued and uninterrupted possession"* of the land and, on that basis, allowed the appeal and set aside the judgment of the District Court.

The plaintiff sought leave to appeal to this Court. This Court granted the plaintiff leave to appeal on the following question of law:

(i) Did the Civil Appellate High Court of Kurunegala err in law in holding that the Respondent's father had been in possession of Assessment No. 12, Puttalam Road, Nikaweratiya ?

Learned President's Counsel appearing for the defendant framed the following further question of law:

(ii) Did the District Court err in granting relief prayed for by the Plaintiff by his amended plaint date 08.08.2003, by judgment dated 14.4.2007 ?

For purposes of convenience, the aforesaid second question of law can be considered first.

In this regard, the learned District Judge held that, the land which is the subject matter of this action is State land. The High Court did not disagree. The plaintiff admits that the land is State land. Two official witnesses confirm that fact. In his answer filed in D.C.Maho Case No. 1074/L, the defendant's father admitted that the land is State land and, in his evidence, he stated "**මේ ගොඩනැගිල්ල තිබෙන ඉඩම ආණ්ඩුවේ ඉඩමක්** ". Although the defendant denied that this was State land and claimed she had title, the defendant did not suggest that she had obtained any rights to the land by way of a grant or permit issued by the State. The Deed of Transfer No. 6504 marked **"වි 4"** under which the defendant claims title, was executed by her father, as the "Vendor". However, in that Deed, the defendant's father has only stated that he has *possession* [භුක්තිය] of the land. He has *not* claimed that he has title to the land. Therefore, **"වි4"** does not establish that the defendant has *title* to the land. Thus, it is clear that, the learned District Judge correctly held that the land which is the subject matter of this action, was State land.

Since the land is State land, the plaintiff was not entitled to the declaration of title he has prayed for in the plaint. Therefore, as observed earlier, the learned District Judge erred when he entered judgment `as prayed for by the plaintiff'.

In these circumstances, the second question of law raised by learned President's Counsel appearing for the defendant is answered as follows: the learned District Judge erred when he entered judgment `as prayed for by the plaintiff' and, thereby, issued an Order declaring that, the plaintiff has title to the land. That Order could not issue since this is State land. Accordingly, the learned High Court Judges correctly set aside the Judgment of the District Court in that respect only. However, the correctness of the Judgment of the High Court setting aside the aforesaid *other* two Orders issued by the District Court, still remains to be considered.

Next, the first question of law, which asks whether the learned High Court Judges erred when they held that, the defendant's father had been in possession of the land and premises which are the subject matter of this action, has to be considered.

The learned District Judge held that, the evidence established that, from 1982 onwards, the plaintiff had been in possession of the premises which are the subject matter of this action. In this regard, it is seen that: the Grama Sevaka's letter dated 03rd August 2002 marked **"පැ1"** certifies that the plaintiff resides at these premises on that date; the Electoral List dated 06th August 2002 marked **"පැ2"** shows that, the plaintiff resided at these premises on 28th May 2002; the Business Registration Certificate marked **"පැ3"** states that, the plaintiff carried on a bicycle repair shop at these premises on 20th August 1991; the Mediation Board Certificate marked **"පැ4"** shows that when the defendant made an application to the Mediation Board on 14th June 2002, she stated that the plaintiff resides at these premises at that time; the

Driving License marked **"පැ6"** states that, the plaintiff's residential address on 03rd July 1982 was No.12, Puttalam Road, Nikaweratiya – *ie:* the premises which are the subject matter of this action; the Sri Lanka Telecom Receipt dated 09th December 1996 marked **"පැ7"** shows that the plaintiff had a telephone registered in his name at the premises in December 1996; and the People's Bank Account Statement for February/March 2002 marked **"පැ8"** indicates that the plaintiff resided at the premises at that time.

In addition to the aforesaid documentary evidence which established that, the plaintiff was in possession of the premises which are the subject matter of this action, the officer from the Provincial Land Commissioner's Department clearly stated that, the plaintiff was in possession of these premises [වරිපනම් අංක 12 හි දැනට මෙම පැමිණිලිකරු පදිංචි වෙලා ඉන්නවා]**.**

On the other hand, apart from her claim made when she gave evidence that, she had possession of the premises which are the subject matter of this action, the defendant was unable to produce any documents to prove such possession. In fact, the Electricity Bill marked **"වි7"** only show that the defendant was the user of electricity supplied to the premises bearing Assessment No.10 and the Electoral Lists marked **"වි9"** and **"වි10"** only show that the defendant was residing at the premises bearing Assessment No. 126/A , which is the other Number used to refer to the premises bearing Assessment No. 10, Puttalam Road, Nikaweratiya. The Assessment Register marked **"වි5"** and Rate Payment Receipt marked **"වි8"** produced by the defendant do not help prove that the defendant was in possession. These documents only establish that the defendant has registered her name as the owner of the premises under and in terms of the aforesaid Deed marked **"වි4"**.

Further, in her Statement of Objections in reply to the plaintiff's prayer for an interim injunction restraining the defendant from interfering with the plaintiff's possession of the premises bearing Assessment No. 12, the defendant has admitted that, the plaintiff was residing and occupying the premises bearing Assessment No. 12. Thereafter, at the time of filing her Statement of Objections in open Court on 27th September 2002, the defendant has stated that she is in occupation of the premises bearing Assessment No. 10 and that she undertakes not to interfere with the plaintiff's possession of the adjoining premises which are described in the schedule to the plaint [*ie:* the premises bearing Assessment No. 12], until the determination of the action.

In the light of the aforesaid facts, the learned District Judge correctly held that, at the times relevant to this action, the plaintiff was in possession of the premises which are the subject matter of this action. In this connection, it is relevant to also note that, the plaintiff maintained that, he was in possession of the premises in his own right and that he does not recognise any right of the defendant in respect of the premises.

A perusal of the lengthy judgment of the learned High Court Judges reveals that, the learned Judges have relied on the evidence and judgment in D.C.Maho Case No. 1074/L to reach their conclusion that, in the early 1980s, the defendant's father had been in possession of the premises which are the subject matter of this action. However, that action was in respect of the premises bearing Assessment No. 10 which are now, undisputedly, occupied by and possessed by the defendant. The premises which are the subject matter of this action are the premises bearing Assessment No. 12. Therefore, the evidence and judgment in D.C.Maho Case No. 1074/L cannot be relied on to prove the defendant's possession of the premises which are the subject matter of this action. Further, the learned High Court Judges failed to consider whether the defendant had proved that she had taken possession of the premises bearing Assessment No. 12 at any stage or even claimed any right to possession against the plaintiff – either before or after her father's death in 1998 – until the defendant made the police complaint marked **"වී4"** and made an application to the Mediation Board two months before the plaintiff instituted this action.

In these circumstances, substantial doubt arises as to the correctness of the Judgment of the High Court with regard to the setting aside of that part of the Judgment of the District Court which decided to issue the Orders prayed for in the plaint with regard to the plaintiff's right to possession against the defendant. Therefore, if this appeal is to be decided on its merits, it will be necessary to more closely examine whether the plaintiff had proved the requisites of a possessory action and also whether the plaintiff was entitled to maintain a *quia timet* action.

However, there is no need to consider these issues any further since, when this appeal was heard, both learned Counsel for the Plaintiff-Respondent-Petitioner/ Appellant and learned President's Counsel for the Defendant-Appellant-Respondent agreed that, the plaintiff was in possession of the premises which are the subject matter of this action at the times relevant to this action and that the plaintiff has remained in possession since then. It was further agreed that, the parties will maintain this *status quo* without prejudice to their rights to seek to obtain a permit or grant of the land from the State and/or institute fresh actions if required.

In view of the aforesaid agreement of the parties and to give effect to that agreement, it is necessary, for purposes of clarity, to refer to the concluding part of the Judgment of the High Court which stated, *"The question what is material as far as this case is concerned is that whether the respondent has title to obtain the reliefs he claims. ….. It is clear that whoever the owner of the land in question the respondent has no right to obtain a judgment against the appellant. This is the point raised by the appellant in suggesting issue No.08, her first issue. That issue should have been answered in the appellant's favour. Therefore, it is clear that the learned district judge could not have given the reliefs prayed for by the appellant. In the circumstances, the appeal is allowed with costs and the judgment of the learned district judge is set aside. The action of the respondent is dismissed with costs"*.

It has to be noted that, Issue No.[8] which the learned High Court Judges referred to, was as to whether the plaintiff could maintain his action without any right or title to the land. It is clear that, even if that issue was decided against the plaintiff, it will not result in the defendant becoming entitled to the Declaration of title, Order for ejectment and Order for recovery of damages at the rate of Rs.3,000/- per month prayed for in the defendant's answer. Instead, if the defendant is to obtain these reliefs, she should have proved the requisites which would entitle her to the said reliefs. But, in their judgment as quoted above, the learned High Court Judges failed to state their determination regarding the reliefs prayed for in the defendant's petition of appeal to the High Court, which included prayers for the aforesaid reliefs prayed for in the answer, although the learned High Court Judges have stated that the defendant's appeal is allowed. The learned High Court Judges should have ensured that, their determination with regard to the reliefs prayed for by the defendant was clearly stated in their judgment so as to avoid any doubt and confusion which can give room for injustice to be caused to a party.

Therefore, to in order to remove doubt, I hold that, the defendant is not entitled to the Declaration of title prayed for in the answer, as this is State land. Next, since it has been agreed that, the plaintiff will remain in possession, the defendant is not entitled to the other two reliefs prayed for in the answer.

In the aforesaid circumstances, the Judgment of the High Court is set aside. The plaintiff's action and the defendant's claim in reconvention are both dismissed. Both parties are free to pursue their respective claims, if any, to the land and premises which are the subject matter of this action, by making appropriate applications to the State or Provincial authorities and, if required, to institute actions or applications in a Court, to establish any such rights. In the meantime, as agreed by the parties, the plaintiff is entitled to remain in possession of the said land and premises until an order determining the person who is entitled to the possession of the said land and premises, is made by the appropriate State or Provincial Authority or Court. In the circumstances of this appeal, each party will bear their own costs.

Judge of the Supreme Court

I agree
Sisira J. De Abrew J

Judge of the Supreme Court

I agree
Upaly Abeyrathne J

Judge of the Supreme Court

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

In the matter of an Appeal from the Civil Appellate High Court of the Sabaragamuwa Province holden in Kegalle.

Ceylon Bank Employees Union,
No. 20,Temple Road, Maradana,
Colombo 10.
(on behalf of S.M.Ranbanda)

SC APPEAL 227/2014
SC Spl LA No. 172/2011
SP/HCCA/KAG/12/2010 LT Appeal
LT Kegalle No. 42/14/2004

Applicant

Vs

Peoples' Bank,
Head Office, Sir Chittampalam A.
Gardiner Mawatha, Colombo 02.

Respondent

AND

Peoples' Bank,
Head Office, Sir Chittampalam A.
Gardiner Mawatha, Colombo 02.

Respondent Appellant

Vs

Ceylon Bank Employees Union,
No. 20,Temple Road, Maradana,
Colombo 10.
(on behalf of S.M.Ranbanda)

Applicant Respondent

AND NOW BETWEEN

Ceylon Bank Employees Union,
No. 20,Temple Road, Maradana,
Colombo 10.
(on behalf of S.M.Ranbanda)

Applicant Respondent Appellant.

Vs

Peoples' Bank,
Head Office, Sir Chittampalam A.
Gardiner Mawatha, Colombo 02.

Respondent Appellant Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
H. N. J. PERERA J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : G. Alagaratnam PC with Ms. Harindi Seneviratne for the Applicant Respondent Appellant.
Ms. Manoli Jinadasa with Ms. Amanda Wijesinghe for the Respondent Appellant Respondent.

ARGUED ON : 29.09.2017.
DECIDED ON : 22.11.2017.

S. EVA WANASUNDERA PCJ.

The Applicant Respondent Appellant (hereinafter referred to as the Applicant), Ranbanda was an employee in the rank of a Branch Manager in the Peoples' Bank which is the Respondent Appellant Respondent (hereinafter referred to as the Bank). Ranbanda, the Applicant had filed an Application dated 07.07.2003 in the Labour Tribunal of Kegalle against the Bank for unlawful termination of his services seeking inter alia reinstatement, compensation and statutory benefits.

Upon inquiry, the Labour Tribunal made order dated 09.07.2010 holding that the Bank had failed to prove on a balance of probabilities that the Applicant's termination was just and equitable and awarded retirement benefits to the Applicant. Being aggrieved by the said order, the employer Bank had appealed to the Provincial Civil Appellate High Court. The learned High Court Judges delivered judgment dated 01.08.2011 dismissing the Application of the Applicant. The instant Appeal was then filed seeking to get the said judgment of the High Court set aside.

This Court has granted leave to appeal on the following questions of law :-

1. Did the High Court Judges err in determining that the learned President of the Labour Tribunal had concluded that the charges against the Appellant were proved?
2. Did the High Court Judges err on the evidence in concluding that the Petitioner had not obtained the requisite approvals for facilities granted by him and/or that he had not sought and/or obtained the required approval?
3. Did the High Court err by failing to consider that the Respondent Bank produced only 7 current account ledger sheets out of the 39 accounts listed in the charge sheet and especially in determining that the loss incurred to the Bank was Rs. 8,554,826.94?
4. Did the High Court fail to consider that the Respondent Bank had failed to produce crucial documents when summoned by the Labour Tribunal especially upon a motion dated 23.11.2004 filed by the Applicant?

5. Did the High Court misdirect itself by concluding that the Appellant's main contention was that when he assumed duties at the Medirigiriya Branch, it was running at a loss, but at the time he left the Branch, it was a profit making institution?
6. Did the High Court err in deciding that pension rights had been granted by the Labour Tribunal without jurisdiction?

The Applicant, S.M.Ranbanda was employed by the Respondent Bank on 02.05.1970 as a Grade vi **clerk**. He had been working in the Bank with **promotions given regularly** and he was posted to the Medirigiriya Branch with effect from **08.01.1997** and he had **later** on, accepted his appointment as **Manager** of the said Branch on **21.01.1997**. On **27.10.1997** he was **transferred** to the Polonnaruwa Branch. On 15.06. 1998 he was again transferred to the Kandy Branch. **On 08.12.1998 he was interdicted** subject to a disciplinary inquiry to be held. He was granted **half salary from 21.07. 1999**. By letter dated **31.10.2000 he was called back to work pending the inquiry as he had agreed to go on with the inquiry** while at work as the employee of the Bank.

The charge sheet dated 17.07.2000 was issued to him before he was called back to work. The said charge sheet was marked R 37 at the inquiry. The charges in the charge sheet were based on the allegedly having not complied with Circular No. 491/96 clause 3:2 (meaning that he had gone beyond the powers to grant temporary over drafts) , Circular No. 388/84 Chapter 2 paragraphs 2,3 and 4 (meaning that he had not taken into account the aggregate balance maintained in the bank account , while granting temporary over drafts to customers) , Circular No. 388/84 Clause 4:3 (meaning that over draft facilities were granted without getting an enhancement on the amount of deposit) and Circular 388/84 paragraph 9 (meaning that when granting overdraft facilities he had not filled form 593 and obtained the permission of the area Manager prior to granting overdrafts to customers). It was also alleged that **by not having complied with the said Circulars, the Applicant S.M. Ranbanda had caused a loss of Rs. 8554826.94 to the employer Peoples Bank.** At the end of the inquiry Ranbanda had been dismissed from service by the employer Bank.

The Applicant had come before the Labour Tribunal praying that he be reinstated with back wages or he be granted compensation in lieu of reinstatement. The Bank had filed answer admitting employment of the Applicant and that after an

inquiry the employee's services were terminated due to alleged serious misconduct committed by the Applicant. The Bank had led the evidence of a few witnesses and the Applicant had given evidence and led the evidence of a retired friend who had at one time worked with him at the Bank, in support of his application at the Labour Tribunal. The President of the Labour Tribunal made order at the end of the inquiry before the Labour Tribunal, that the **Applicant be made to retire with effect from the day he completed 55 years of age with pension rights and all other benefits** accrued to him at the retirement since reinstatement could not be granted as the Applicant had passed the age of 61 years at the time of the order being made.

The employer Peoples' Bank appealed to the Civil Appellate High Court from the order of the Labour Tribunal. The High Court set aside the Order of the Labour Tribunal and allowed the Appeal with costs. The Applicant has now appealed to this Court from the judgment of the Civil Appellate High Court.

At the very commencement of the proceedings in this case before this Court, the Respondent Bank had raised a preliminary question regarding jurisdiction of this Court not having been invoked properly by the Applicant Respondent Appellant. Thereafter parties had awaited a decision on the same issue in SC Spl. LA 229/11. Order in the said Application had been delivered by the date, 08.08.2014 and Counsel for the Respondent Bank had informed this Court on that day that she would **not be pursuing** with the **said preliminary objection** , in view of the order in SC Spl LA 229/11. The matter had thereafter been fixed for support. On 26.11.2014, Special Leave to Appeal was granted by this Court on the questions of law in paragraph 8 (c), (d), (e), (f) and (h) of the Petition dated 12.09.2011. The said questions are as set out at the commencement of this judgment by me numbering them as questions numbers 1 to 6.

However, the learned Counsel for the Respondent Bank had presented arguments regarding jurisdiction in the written submissions filed by her dated 26.03.2012 in paragraphs 1 to 7.1 of the same. I will not be considering the same in view of ' her undertaking given to court not to be pursuing the preliminary objection' on 8.8.2014. Thereafter written submissions were once again filed on 11.02.2015 by the Respondent Bank and on 07.01.2015 by the Applicant Appellant.

The Applicant was serving the Bank from 02.05.1970 up to 07.07.2003 when he was dismissed from service. He had joined the service as a clerk and his first appointment as Manager of the Medirigiriya Branch of the Bank was on 21.01.1997. He was transferred to the Polonnaruwa Branch on 27.10.1997. The allegations of misconduct with regard to him is only during this period of time of **9 months**. He was transferred to Kandy from Polonnaruwa and interdicted on 12.12.1998. He was placed on half pay on 18.06.1999. Pending inquiry he was recalled for service on 31.10.2000. He had received his full salary of around Rs. 29000/- from November, 2000. He was promoted to a higher grade in Management on 17.01.2001 and his increment for the year 2003 was also granted. At the end of the inquiry, the Applicant was dismissed from service on 07.07.2003.

Until he became the Manager of Medirigiriya Branch the Applicant had been working with the Bank without any serious complaint against him for 27 years. The evidence before the Labour Tribunal disclose the fact that the said Branch had been running at a loss at that time. The main charges were that the Applicant had granted Temporary Overdraft Facilities to the customers without getting the approval from the Regional Manager and going against several circulars of the Bank.

The Bank alleged that such action of the Applicant had caused a loss of Rs. 8554826.94 to the Bank. The Applicant's position was that by the time he was charge sheeted an amount of Rs.3740812.60 had been recovered by the Bank from the 40 customers to whom over draft facilities were granted. The Applicant **contested t**hat without taking into account how much has been paid back to the Bank, by the **forty customers** to whom the overdraft facilities had been given by the Applicant at that time as manager, each of the facilities being around Rs. 100,000/- to 200,000/- each to 40 customers **, in good faith of promoting the Respondent Bank in the area** of Medirigiriya which was an agricultural area , **the loss to the Bank** as alleged to be Rs.8554826.94 **cannot be taken as correct.** The Bank had produced only seven current account ledger sheets out of the 39 accounts listed in the charge sheet. I find that there is a serious lapse on the part of the Bank for not having produced the correct and actual loss to the Bank allegedly caused by the Applicant employee at the inquiry and before the Labour Tribunal in this regard. The actual alleged loss calculated to be as over 8.5 million to the Bank without producing each and every current account ledger sheet which

would show the amount of the overdraft facility granted and how much had been recovered, does not seem to be just and fair. All the overdrafts given by the Applicant were Temporary Over Drafts which were to be recovered within a short period and I cannot understand why the Bank failed to produce the ledger sheets of all the accounts since the number of accounts were only forty and nothing more.

The grave misconduct alleged against the Applicant was non compliance with the circulars. But however in the Charge Sheet R 37, it was never alleged that due to his conduct, the Bank, the employer had lost confidence in the Applicant. It was not argued that he had personally gained any benefit by granting such TODs. In fact I do not find that the Bank has discharged the burden of proving the loss incurred by the Bank due to the alleged misconduct of the Applicant at the Medirigiriya Branch.

In the case **of Indrajith Rodrigo Vs Central Engineering Consultancy Bureau 2009 , 1 SLR 248 ,** it was held that " In Labour Tribunal proceedings where the termination of services of a workman is admitted by the Respondent, the onus is on the latter to justify termination by showing that there were just grounds for doing so and that the punishment imposed was not disproportionate to the misconduct of the workman. The burden of proof lies on him who affirms and not upon him who denies ……".

I also find within the evidence placed before the Labour Tribunal by the witness of the Bank, Newton, that many of the TODs at the Medirigiriya Branch had been granted by the second Officer of the said Branch at that time. The said Second Officer namely K.B.Sirisena also had been dismissed from service for having overdrawn the accounts irregularly. The finger is pointed at only this Applicant regarding the grant of TODs for the whole amount with regard to 40 customers whereas the Second Officer also had done so but the loss to the Bank has not been proven as regards the amount which was granted by the Applicant. The Bank has failed to prove the amount of loss as alleged.

It was argued on behalf of the Bank that failure to produce 593 forms to the Regional Manager according to Circular No. 388/84 when the Manager grants a TOD exceeding his authority without either prior or post approval from the Regional Manager amounts to misconduct on the part of the Manager. In the

case in hand it was alleged that the Applicant had failed to submit the 593 forms. The witness Newton on behalf of the Bank stated that the Applicant had not submitted the said forms. In cross examination Newton admitted that he had seen on many occasions 593 forms sent by the Applicant from the Medirigiriya Branch , at the Regional Office.
It is Newton who had held the domestic Inquiry against the Applicant. Newton's evidence further shows that it was the duty of the Regional Managers to visit the Managers at their Branches every month and put down their observations as entries in the log book at the Branch. When questioned whether he had seen such entries of Regional Managers who had visited the Medirigirya Branch in the log book, the answer had been in the negative. For several months, if 593 forms were not submitted, the Regional Office would have summoned the Manager and called for explanation. It had never happened so. **There were no warnings or reminders sent to the Applicant to submit 593 forms.** However the Bank alleges that 593 forms were not submitted but the Applicant submits that the 593 forms were submitted. The learned counsel for the Bank argued that the burden lies on the Applicant to prove that he submitted the said forms and that the Applicant had not discharged that burden before the Labour Tribunal.

The Applicant's counsel had filed a motion dated 23.11.2004 before the Labour Tribunal and moved for notice to be sent to the Bank to produce several documents such as TOD Approval Register for the period from 01.01.1997 to 31.12.1997, Log Book of the Medirigiriya Branch for the same period, Account Statements depicting the balance as at 31.10.2004 pertaining to the current accounts mentioned in Schedule 1 of the Charge Sheet and All cheques and credit slips pertaining to the current accounts mentioned in Schedule 4 of the Charge Sheet. Even though the Tribunal sent the notice to the Bank, the Bank failed and neglected to produce the said documents which if produced , would have thrown light on the facts in a more detailed manner. The Bank cannot at present submit that the Applicant had failed to prove that the 593 forms were submitted by him because the Bank had neglected to submit to the Tribunal what was asked for at the inquiry held by the Tribunal.

The learned President of the Labour Tribunal made order having summarized the evidence in a detailed manner and held that the Applicant be granted pension rights from the age of 55 years and be given all other benefits due to him as an employee of the Bank within two months from the date of the order.

The Civil Appellate High Court over turned the order of the Labour Tribunal and held that the dismissal of the services of the Applicant by the employer Bank was quite correct. The High Court Judge dismissed the Application made by the Applicant to the Labour Tribunal.

The High Court Judge had quoted the case of **People's Bank Vs Gilbert Weerasinghe 2008, BALJR Vol. XIV at page 333** and stated that the ratio decedendi of that case is that " in terms of Section 31(c) of the Industrial Disputes Act, the Labour Tribunal has jurisdiction to inquire into **only in respect of the matter stated in that application** and that the Labour Tribunal under the said Act has no jurisdiction to determine the matters that have not been pleaded or sought in the application". She held that " in view of the principle enunciated in the said judgment, granting pension rights to the applicant had been made **without jurisdiction** and therefore it cannot be allowed to stand". When the Applicant's services were terminated on 07.07.2003, he was eligible to work for only about one month until he reached the age of 55 years. At the time the Applicant filed his application before the LT, I believe that he would have had the hope of being reinstated and then he would have been eligible to apply for yearly extensions after the age of 55 years. It may well be that he had not specifically prayed for the pension rights in his application as he wanted to be reinstated.

Yet I find that at the end of the evidence of the Bank closing its case marking documents R1 to R 38 , when the learned LT President ordered that the evidence of the Applicant to be given to the Tribunal by way of an Affidavit within two weeks from 20.07.2007, **the Applicant had filed the said Affidavit of evidence dated 01.07.2007.** This Affidavit is at page 228 of the LT Brief and it runs up to page 236. At the end of that Affidavit written in Sinhalese language, the Applicant has prayed for pension rights in the last paragraph of the Affidavit submitting thus ;

"According to the facts I have set out above, I am entitled to be granted, as prayed for in my Application dated 17.07.2003, **the pension rights which are properly due to me with all other statutory benefits** since the termination of my services of over 33 years by letter dated 07.07.2003 is unjust and unreasonable."

It is my view that within the proceedings before the LT, the Applicant had begged fervently that he be granted his pension rights as it had long passed the time of six months within which the LT should ,in law, have concluded the inquiry.

The Industrial Disputes Act as amended has made provision for employees to make an application before the Labour Tribunal for reinstatement and compensation and to conclude the inquiry within six months. Practically even though it is next to impossible to conclude the inquiry within this stipulated time period, the message given is that the applications be concluded as soon as possible. The Industrial Disputes Act is a special legislation enacted for a specific purpose of dealing with industrial disputes. Section 31 C provides that it is the duty of the Labour Tribunal to make all such inquiries into an application and hear all such evidence as it considers necessary and make an order that appears to the tribunal to be just and equitable.

Section 33(1)(e) provides that "without prejudice to the generality of the matters that may be specified and any award under this Act or in any order of a labour tribunal, such award or such order may contain decisions as to the payment by any employer of a gratuity (except where a gratuity is payable under the payment of Gratuity Act, 1983) **or pension** or bonus to any workman, the amount of such gratuity or pension or bonus and the method of computing such amount, and the time within which such gratuity or pension or bonus shall be paid."

Accordingly it is obvious that the LT is allowed to make any order about pension rights if it thinks it fit and proper to do so.

Moreover, in the case of **Associated Newspapers of Ceylon Ltd. Vs National Employees' Union 71 NLR 69,** it was held that " The statements filed by the parties in applications before a Labour Tribunal are not pleadings in a civil action and it is the duty of the President to consider all the facts relative to the dispute placed in evidence before him at the inquiry even though those facts may not be expressly referred to in the statements." I hold that due to the wide powers given to the Labour Tribunal by the provisions contained in the Act itself, the President of any Labour Tribunal has wide powers to grant any relief that the Tribunal thinks fit and proper according to the evidence before the Tribunal. The prayer need not contain all what the Applicant wants from the employer. The

President of the Labour Tribunal is empowered to grant what is just and equitable.

In the case in hand the learned High Court Judge has analyzed the evidence before the LT wrongly by considering short portions separately and not as a whole. The evidence heard and seen by the President of the Labour Tribunal should not be taken as separate portions but as a whole and decide the matters before the Tribunal with the big picture portrayed by the whole of evidence before it.

I answer the questions of law enumerated above in favour of the Applicant Respondent Appellant and against the Respondent Appellant Respondent, Peoples' Bank. I set aside the judgment of the Civil Appellate High Court dated 01.08.2011. I affirm the order of the learned President of the Labour Tribunal dated 09.07.2010.

This Appeal is allowed. However I order no costs.

Judge of the Supreme Court

H.N.J. Perera J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda 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 application for Special Leave to Appeal to the Supreme Court under Article 128 of the Constitution of Sri Lanka.

SC. Appeal 232/14

SC.Spl. LA 163/2013

Court of Appeal No. 101/2011

Anuradhapura HC No. 345/2004

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant

Vs.

Dissanayake Appuhamilage Amarasiri Dissanayake.

Accused

AND BETWEEN

Dissanayake Appuhamilage Amarasiri Dissanayake.

Accused Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant Respondent

AND NOW BETWEEN

Dissanayake Appuhamilage
Amarasiri Dissanayake.

Accused Appellant-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant Respondent-Respondent

BEFORE	:	S. E. WANASUNDERA, PC, J. UPALY ABEYRATHNE, J. K. T. CHITRASIRI, J.
COUNSEL	:	Raja Dep with K.A. Upul Anuradha Wickremaratne for the Accused Appellant-Appellant H. I. Peiris DSG for the Complainant Respondent-Respondent
WRITTEN SUBMISSION ON:		29.05.2015 (the Accused Appellant Appellant)
ARGUED ON	:	10.11.2016
DECIDED ON	:	11.07.2017

UPALY ABEYRATHNE, J.

The Accused Appellant-Appellant (hereinafter referred to as the Accused) preferred an appeal to the Court of Appeal against the conviction and sentence imposed upon the Accused by the learned High Court Judge of

Anuradhapura dated 06.10.2011. The Court of Appeal, by judgement dated 28.05.2013, has dismissed the said appeal and affirmed the conviction and the death sentence. This appeal is from the said judgment of the Court of Appeal. Leave to Appeal was granted on the grounds set out in paragraph 9 (a), (b) and (c) of the amended petition of appeal dated 11.11.2013. But in the said amended petition of appeal, the Accused has not set out any question of law, as required by Supreme Court Rules, to be considered by this court.

In paragraph 9 of the petition of appeal the accused has stated that the learned High Court Judge has erred in law allowing to lead in evidence a confessionary statement which was alleged to have been made by the accused to the Police Officer on reserve duty at the Eppawala Police Station at about 1.30 a.m. on 17.10.2000. He has further stated that the Court of Appeal had erred in failing to consider the submission of the counsel for the accused that the prosecution had failed to establish the charges in the indictment beyond reasonable doubt and also the Court of Appeal had erred in coming to the conclusion that the prosecution has established a strong prima facie case against the accused.

The Accused in this case was indicted in the High Court of Anuradhapura for having committed murder of a man named Nishshanka Arachchige Senadeera. The Prosecution has led the evidence of several witnesses. It appears from the evidence that the case for the prosecution entirely depended on circumstantial evidence. It has transpired from the evidence that the deceased was last seen in the company of the accused on a motor cycle ridden by the accused. On 16.10.2000, at about 8.00 p.m. said motor cycle had been given to the accused by the owner on a request made to that effect by the deceased. About one hour to one and half hour later the accused had returned the motor cycle to the owner and the owner has found at that point that the bunch of key of the motor cycle are missing.

At the investigation, the said bunch of key was found at the crime scene near the dead body.

According to the evidence of Police Constable 25019, Sembukuttige Premasinghe on 17.10.2000, at about 1.30 a.m. the accused, armed with a sword, had surrendered to Eppawala Police Station. Thereafter the statement of the accused has been recorded by the Police. Upon the statement of the accused the Police has recovered the dead body of the deceased. The police have reached to the crime scene where the dead body was found, according to the directions given by the accused. At the trial before High Court the Police witness who recorded the statement of the accused had not been cross examined by the accused. Said evidence does not contain any confessional statement made by the accused. Even the accused has not highlighted any such evidence in his petition of appeal or in his written submissions to this court.

The prosecution has led very strong circumstantial evidence against the accused. The accused has not given evidence. He has made a very short dock statement. In his dock statement, he has stated that "I had no animosity with uncle. We were residing in same house. I do not know anything about this".

The police witness said that he proceeded to the crime scene and recovered the dead body on the direction of the Accused. There had been cut injuries on the dead body. Evidence further reveal that the accused was last seen in the company of the deceased. Both of them were seen on a motor cycle ridden by the accused. Said motor cycle was given to the accused on a request made by the deceased. Owner of the motor cycle inquired the accused about the loss of motor cycle key. Said motor cycle key was found at the crime scene. Said circumstances have clearly established the fact that the Accused had been in the crime scene. Since it appears that the knowledge of the said circumstance was exclusively

within the Appellant it should have been explained by him. But the Accused in his dock statement did not offer any explanation.

In the case of State of Tamil Nadu Vs. Rajendran (1999) Cr.L.J. 4552 the Indian Supreme Court observed that 'In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.'

The Appellant in his short dock statement had not offered any explanation with regard to the strong and incriminating evidence led against him. When a strong prima facie case has been made out by the prosecution the Appellant has, though he has not been bound by law to offer any explanation, failed and omitted to explain the strong circumstantial evidence led against him. In the case of Rex. Vs. Lord Cochrane and others [1814] Gurney's Report 479 the Lord Ellenborough held that "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

Abbot J. in Rex Vs. Burdett (1820) 4 B & Ald 161at 162 observed that "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature

of the case is such as to admit of explanation or contradiction, if the conclusion to which the prima facie case tends to be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

In the case of Rajapaksha Devaga Somarathna Rajapaksha And Others Vs. Attorney General (S.C. Appeal) 2/2002 TAB) Justice Bandaranayke observed that "With all this damning evidence against the Appellants with the charges including murder and rape the Appellants did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstance relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct there are permissible limitation in which it would be necessary for suspect to explain the circumstances of suspicion which are attached to him."

In the case of Rameshbhai Chandubhai Rathod Vs. State of Gujarat [2009] INSC 828 (27 April 2009) (SC of India) Dr. Arijit Pasayat, J. observed that "The incriminating circumstances enumerated above unmistakably and inevitably lead to the guilt of the appellant and nothing has been highlighted or brought on record to make the facts proved or the circumstances established to be in any manner in consonance with the innocence at any rate of the appellant. During the time of questioning under Section 313 Cr.P.C. the appellant instead of making at least an attempt to explain or clarity the incriminating circumstances inculpating him, and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court not only lost the opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody

else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defense plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed. (See: State of Maharashtra v. Suresh). That missing link to connect the accused appellant, we find in this case provided by the blunt and outright denial of every one and all that incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause of the death of Gracy and for robbing her of her jewellery worn by her."

I am mindful of the fact that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh Vs.State of Rajasthan AIR (1977 SC 1063), Eradu and Ors. Vs. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa Vs. State of Karnataka (AIR 1983 SC 446); State of U.P. Vs. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh Vs. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee Vs. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram Vs. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt. In the case of C. Chenga Reddy and Others Vs State of A.P.

(1996) 10 SCC 193, wherein it has been observed thus: "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".

Having regard to the nature of the circumstantial evidence led by the prosecution I am inclined to accept the submissions of the learned Deputy Solicitor General that the strong items of circumstantial evidence unexplained by the accused would in itself be adequate to establish the charges against the accused. Hence, I am of the view that the learned trial Judge has rightly convicted the Accused for the charge of murder levelled against him. In the said circumstances I see no reason to interfere with the Judgement of the Court of appeal dated 06.10.2011. Hence, I affirm the conviction and dismiss the Appeal of the Accused.

Appeal dismissed.

Judge of the Supreme Court

S. E. 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 for Leave to Appeal under section 4c of the High Court of the Provinces (Special Provisions) Act no. 19 of 1990 as amended, to be read with Sec. 754 (2) of the Civil Procedure Code.

SC Appeal.243/14
WP/HCCA/MT
CASE No.38/201 (F)
DC Mount Lavinia
Case No.3654/2012/M

Ranawaka Arachchige Brigette Alwis
No.31/2, Kuruniyawatta Road,
2nd Lane, Avissawella Road,
Wellampitiya.

Plaintiff

-Vs_

Allen Margret Wijethunga,
No.81/9, Allen Mawatha,
Dehiwala

Defendant (deceased)

Hettiarachchige Kusumalatha,
No.81/9, Allen Mawatha,
Dehiwala

Substituted Defendant

AND/BETWEEN

Hettiarachchige Kusumalatha,
No.81/9, Allen Mawatha,
Dehiwala

Substituted Defendant-Appellant

Ranawaka Arachchige Brigette Alwis
No.31/2, Kuruniyawatta Road,
2nd Lane, Avissawella Road,
Wellampitiya.

Plaintiff-Respondent

NOW AND/BETWEEN

Hettiarachchige Kusumalatha,
No.81/9, Allen Mawatha,
Dehiwala

Substituted Defendant-Appellant-Petitioner

-VS-

Ranawaka Arachchige Brigette Alwis
No.31/2, Kuruniyawatta Road,
2nd Lane, Avissawella Road,
Wellampitiya.

Plaintiff-Respondent-Respondent

BEFORE: Buwaneka Aluwihare, PC, J,
Anil Gooneratne, J &
Nalin Perera, J.

COUNSEL: Harindra Rajapaksa, instructed by Roshan Gamage for the substituted Defendant Appellant-Petitioner

J. Kroon for Plaintiff-Respondent-Respondent.

ARGUED ON: 19.06.2017

DECIDED ON: 13.12.2017

ALUWIHARE, P.C., J:

Leave to appeal was granted in this matter on 10.12.2014 on the questions of law referred to in sub-paragraphs 19 (b), 19 (d), 19 (e) and 19 (f) of paragraph 19 of the Petition of the Petitioner dated 24.06.2014.

The questions of law are reproduced verbatim below:

(b) Did the learned judges of the Civil Appellate High Court, Holden in Mount Lavinia err in law in deciding the said appeal, disregarding the vital evidence given by the Plaintiff-Respondent herself and the other witnesses of the Plaintiff-Respondent, to the effect that the 'Promissory Note' in dispute is in fact a security given in a land transaction?

(d) Did the learned judges of the Civil Appellate High Court err in law by failing to analyse the evidence at all given at the trial and by their failure to give adequate reasons for the judgment?

(e) Did the learned judges of the Civil Appellate High Court err in law, by failing to analyze the evidence lead in the original court in its proper perspective?

(f) Did the learned judges of the Civil Appellate High Court err in law, in deciding the appeal, disregarding the evidence to the effect that the Plaintiff-Respondent has in fact obtained the possession of the house in the year 1997 and remained in occupation up to now?

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) filed an action in the District Court of Mount Lavinia against the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant) to recover a sum of Rs.325, 000 and the accrued interest at the rate of 20%, based on a promissory note.

According to the evidence led at the trial of the original Defendant, (who was substituted by her daughter in the course of the proceedings due to her demise) the house, the defendant was in occupation had been acquired by the State for road widening and she had been offered a house from a housing scheme at Wellampitiya. The defendant was required to pay a sum of Rs.245, 000 to the Road Development Authority (RDA) towards the cost of the property. The Defendant, however, had decided to sell this property to the plaintiff.
According to the Plaintiff, she had given a sum of Rs.325, 000/- to the defendant with the intention of buying the house. The Plaintiff's position had been that she had been told by the defendant that once the money is paid to the Road Development Authority, the Road Development Authority would give the title deed in a month and once the Defendant gets the deed, she in turn would transfer the property in the favour of the Plaintiff.

In fact an admission had been recorded to the effect that the Plaintiff gave Rs.325, 000 to the Defendant and the evidence of the Plaintiff was that she gave this amount after executing a promissory note (P1).

It was the position of the Plaintiff that the amount was advanced as a loan, until such time the deed of transfer is executed. Under cross

examination the Plaintiff had said the monies were advanced on interest till she got the deed. " ඔප්පුව ලැබෙන තෙක් මුදල් දුන්නේ පොළියට ".

The Plaintiff, however, admitted that she was handed over possession of a house which was not complete in many aspects.

In response to a question that the Plaintiff enjoyed possession for about eight years, she had said that the house is closed and was handed back. " ගේ වහලා තියෙන්නේ, බාරදිලා තියෙන්නේ ".

Simply the Plaintiff's position was that she no longer is interested in the house and she wants the money that she had advanced, with interest.

Due to extreme old age, the Defendant had not given evidence in this case, but her daughter, the present Appellant had testified on behalf of the Defendant. Her evidence was that the house in question allotted to her mother by the Road Development Authority was sold to the Plaintiff. Her evidence is not at variance with the evidence of the Plaintiff. Substituted Defendant also had admitted that although her mother paid Rs.245,000/-towards the purchase of the house to the Road Development Authority, they never received the title deed to the house as promised by the Road Development Authority. Her position was, the payment of Rs.325, 000/- was an advance of the agreed sale price of Rs.600, 000/-. She also admitted that the amount paid as an advance, as claimed by the witness, was in excess of the amount they were required to pay the Road Development Authority which was Rs.245, 000/-.

One of the main contentions of the Defendant in these proceedings was that the High Court of Civil Appeals erred, in disregarding vital evidence

by the Plaintiff and other witnesses to the effect that the Promissory Note is only security given in a land transaction.

No doubt, the Plaintiff had said in her evidence that she had the intention of buying the house in question, of which the title was not with the Defendant. It is quite evident from the evidence placed by both the Plaintiff and the Defendant that the sale was contingent upon the Road Development Authority transferring the title to the (original) Defendant. The Plaintiff had been quite alive to these uncertain factors and the impediments to proceed with the transaction to a conclusion. It is in that context that the Plaintiff had said that she advanced the money as a loan to the Defendant. The Promissory note (P1) clearly stipulates the percentage of interest that is payable, as well. The Promissory note had been signed before a lawyer who also had given evidence at the trial. If the intention of the parties were to reach an agreement on the sale, the attorney could have been instructed to draw an agreement to sell instead, which was not the case.

On the other hand, having considered the evidence placed at the trial, the learned District Judge had placed credence on the evidence of the Plaintiff and had come to a factual finding which an Appellate Court should not disturb, unless the finding is visibly erroneous.

There may have been arrangements between the parties, which are not documented, with regard to the sale of the house in question, but action before the District Court was instituted based on the Promissory note, the execution of which was not disputed by either party. I am of the view that, unless there is strong and cogent evidence to come to a finding that parties executed the promissory note purely for security, one cannot find

fault with the learned District Judge for holding that the Defendant had borrowed the sum referred to in the promissory note from the Plaintiff.

The learned Counsel for the Defendant also submitted that that the High Court of Civil Appeals failed to analyse the evidence placed before the District court and had not given adequate reasons for these findings by the learned judges of the High Court of Civil Appeals. It was the contention of the learned counsel that the judges of the High Court of Civil Appeals failed to appreciate the fact that the Defendant had obtained possession of the house in 1997 and continued occupation even at present.

The daughter of the original Defendant Kusumalatha in her evidence admitted that the defendant accepted Rs.325, 000 from the plaintiff on the Promissory note P1 and in terms of P1 nowhere it is stated that the money so accepted is an advance payment towards the purchase price of the house. It appears that even as late as 2009, there had been no title deed in favour of the Defendant.

When one evaluates the evidence placed before the learned District Judge, the plaintiff's position is that she gave the money as a loan on the Promissory note P1, payable on demand, but she also had the intention of buying the house that was to be allocated to the original Defendant after the execution of the title deed in favour of the Defendant, which never materialized.

On the other hand, the solitary witness for the Defendant stated that her mother took this money as an advance payment in relation to the house that was to be sold to the plaintiff and the promissory note was executed only as security.

The learned District judge had formed the view that the Plaintiff's version is more credible and had placed reliance on the evidence placed before the court on behalf of the Plaintiff. The learned District Judge had observed that the parties have not executed any document with regard to the purported agreement to sell the property. On that basis the learned District Judge, holding in favour of the plaintiff, had come to a finding that the plaintiff is entitled to the principal sum that was transacted between the parties and the legal interest thereof.

The learned judges of the High Court of civil Appeals having considered the matter had also come to the finding that the learned District judge had come to the correct finding as "it is crystal clear that the Plaintiff has proved that the cause of action has arisen to claim Rs.325, 000 as per the judgement delivered in this case, on a balance of probability".
Part of the function of an appellate court is to ascertain whether there may have been serious and material errors in the manner in which the learned District Judge reached his conclusion as to the facts.

In the case of McGraddie v. McGraddie 2013 UKSC 58 [2013] 1 WLR 2477, commenting on the approach of the Appeal Court to a finding of fact, the Supreme Court of United Kingdom held, "*It was long settled principle, stated and restated in domestic and wider common law jurisdictions that an appellate court should not interfere with the trial judge's conclusions on the primary facts unless satisfied that he was plainly wrong.*

In the case before us, as referred to earlier an admission had been recorded as to the execution of the promissory note P1 and the fact the Defendant was given a sum of Rs.325, 000 by the Plaintiff.

The only issue the learned District Judge was required to consider was whether it was a loan, as stated by the Plaintiff or was the Promissory note executed as security, the position taken up by the Defendant. The learned District Judge upon evaluation of evidence had held that the plaintiff's version is more credible and accordingly gave judgement in favour of the Plaintiff. This court, to my mind, cannot fault the District Judge, which was also the view of the High Court of Civil Appeals, in arriving at that conclusion. As such I answer the questions of law on which leave was granted in the negative.

Accordingly, the appeal is dismissed and under the circumstances of the case, I make no order as to costs.

JUDGE OF THE SUPREME COURT

Justice Anil Gooneratne
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 under the provisions of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Divisional Secretary
Kalutara

Petitioner

SC Appeal 246,247,249 & 250/14
SC Spl LA: 188/14,189/14,
SC Spl LA: 186/14, 189/14
C. A. (PHC) Application No.193/2011
Kalutara High Court No. Rev: 14/2011
Kalutara Magistrate's Court No: 78608, 78609,78610 &78613

Vs.

Kalupahana Mestrige Jayatissa
No.09/20, Mahajana Pola
Kalutara South

Respondent

AND

Kalupahana Mestrige Jayatissa
No.09/20, Mahajana Pola
Kalutara South

Respondent-Petitioner

Vs

1. Divisional Secretary
   Kalutara

2. The Attorney General
   Attorney General's Department
   Colombo.

Applicant-Respondents

AND

1. Divisional Secretary
   Kalutara

2. The Attorney General
   Attorney General's Department
   Colombo.

Applicant-Respondent-Petitioners

Vs

Kalupahana Mestrige Jayatissa
No.09/20, Mahajana Pola
Kalutara South

Respondent-Petitioner-Respondent

AND NOW BETWEEN

1. Divisional Secretary
   Kalutara

2. The Attorney General
   Attorney General's Department
   Colombo.

Applicant-Respondents-Petitioner-Petitioners

Vs

Kalupahana Mestrige Jayatissa
No.09/20, Mahajana Pola
Kalutara South

Respondent-Petitioner-Respondent-Respondent

BEFORE: B.P. ALUWIHARE P.C, J
UPALY ABEYRATHNE J
H.N.J PERERA J

COUNSEL: Sumathi Dharmawardane DSG with Chaya Sri Nammuni SSC for the Appellant.
Vijaya Niranjan Perera P.C, with Jeevani Perera for the Respondent-Petitioner-Respondent-Respondent.

ARGUED ON: 28-11-2016

DECIDED ON: 04-08-2017

UPALY ABEYRATHNE J

The Divisional Secretary of Kalutara, the 1st Applicant-Respondent-Petitioner-Appellant (hereinafter referred to as the Applicant) filed four separate actions in the Magistrate's Court of Kalutara against the Respondent-Petitioner-Respondent-Respondent (hereinafter referred to as Respondent) under the State Lands (Recovery of Possession) Act No. 7 of 1979 (hereafter referred to as the "Act") seeking orders for the eviction of the Respondent from the land referred to in the Schedule and a further order directing the Respondent to have the vacant possession handed over to the applicant (the Divisional Secretary).

In all four actions filed, the learned Magistrate made orders for eviction as prayed for by the Applicant. Aggrieved by the said orders the Respondent moved the Provincial High Court by way of Revision. The learned Judge of the High Court by his order dated 8th December, 2011, set aside the orders of the learned Magistrate.

The Applicant (Divisional Secretary) and the 2nd Applicant-Respondent-Petitioner-Appellant the Attorney-General, appealed against the order of the High

Court and the Court of Appeal by its judgment dated 1st September, 2014, affirmed the order of the High Court.

Aggrieved by the said judgment of the Court of Appeal the Applicant sought special leave from this Court and special leave was granted on the following questions of law:

a) Has the Court of Appeal erred in holding that the documents marked V4, V7, V8, V10-21-22, V27V49, V 50 which are mainly payments relating to the operation of the Respondent's business are valid permits or valid written authority issued by the state granting the Respondent permission to occupy state land?

b) Has the Court of Appeal erred in law that the Respondent is in lawful possession of the state land?

c) Has the Court of Appeal erred in law by holding that the Competent Authority is required to prove whether the state land was vested in the Government or acquired when Section 9(2) of the State Lands (Recover of Possession) Act specifically precludes the Magistrate from calling evidence from the Competent Authority to support the application for ejectment?

d) Has the Court of Appeal erred in holding that the title of the state is doubtful when this is beyond the scope of the Magisterial inquiry envisaged by the Act?

e) Has the Court of Appeal erred in law by holding the title of the State is required to be proved in the District Court?

f) Has the Court of Appeal erred in law in questioning the opinion formed by the Competent Authority?

g) Has the Court of Appeal erred in holding that the opinion of the Divisional Secretary who discharged the duties of the Competent Authority under the provisions of the Act is contrary to the land circulars?

h) Has the Court of Appeal erred in law in holding that the SC CaseNo.19/11 has any bearing and/or application in this instant case?

i) Has the Court of Appeal erred in law in holding that the case SC19/11 proves and/or concludes that the land that is the subject matter in this application is not a State Land?

j) Has the Court of Appeal erred in law in holding that the learned Magistrate has reached his determination being biased towards the State?

k) Has the Court of Appeal erred in law in holding that learned High Court Judge has come to a correct conclusion in the judgment dated 4.3.2011?

At the stage of the hearing of this appeal it was argued on behalf of the Applicant, that the order made by the High Court was made without jurisdiction and for that reason is bad in law. Relying on the decision of this court in the case of, *The Superintendent, Stafford Estate Vs. Solaimuthu Rasu in S.C Appeal 21/2013* – SC minutes 17th July 2013, it was contended on behalf of the Applicant that the Supreme Court had held, that there is no basis to invoke the writ jurisdiction of the Provincial High Court on the subject of State Lands, as the subject does not fall within the Provincial Council list.

I do not wish to consider this issue in the present judgment for two reasons. Firstly, in the case referred to, the Supreme Court dealt with the powers of the Provincial High Court under Article 154(P)(4) of the Constitution (writ jurisdiction), whereas in the instant case the Provincial High Court derives jurisdiction under Article 154(P)(3) (power to act in revision). Secondly, this was not an issue on which leave was granted by this court.

In its albeit short judgement, it appears that the only basis on which the Court of Appeal had affirmed the order of the learned High Court judge was, that the 1st Appellant (the state) had failed to produce any documents to prove that the land in question was either vested in the government or the impugned property had been acquired by the state.

For the purpose of clarity and in order to appreciate the basis on which the Court of Appeal arrived at its determination, the relevant passage of the judgement is reproduced verbatim.

> "After analysing the submissions made by both parties, I note appellant's **(the State)** had failed to produce any document to prove that the land in question was either vested in the government or whether it was acquired by the State. Respondent-Petitioner Respondent **(Respondent in the instant case)** had proved his lawful occupation in the said disputed land. I am of the view that the **right or title of the State of the disputed land** is doubtful. There is no material to substantiate that the disputed land has been acquired by the state. Therefore the documents submitted by the appellant do not support the **ownership of the State**, to the land in dispute. (emphasis added).

The learned High Court Judge, on the other hand, had set aside the order of the learned Magistrate, for reasons totally extraneous to that of the reasoning of the

Court of Appeal. The High Court had held that the compliance with sections 3 and 5 of the Act, by the Divisional Secretary was insufficient and that the order for eviction can only be made on an application duly perfected in conformity with section 5 of the Act.

In view of these contrasting decisions, this court cannot escape from the task of considering the legality of the conclusions of the courts below.

As referred to earlier the main question that needs to be considered is whether there is a requirement to establish the title of the State to the land, by the Competent Authority, in an application made to have an order for ejectment issued under the provisions of the Act.

When one considers the structure of the Act, all what is required is for the Competent Authority to **form the opinion** that the person is in unauthorised possession or occupation of any State land and the Competent authority can serve "notice to quit" under the Act.

In considering the provisions of the Act, his lordship Justice Abdul Cader stated that "where the competent authority had formed the opinion that any land is State land, even the Magistrate is not competent to question his opinion. *Farook v. Goonewardena Government Agent Amparai*1980 2 S.L.R 243.

In the said case his lordship went on to state that:

> *"the magistrate cannot call for any evidence from the Competent authority in support of the application under section 5, which means the Magistrate cannot call for any evidence from the competent authority to prove that the land described in the schedule to the application is State land. Therefore, the petitioner did not have an opportunity of raising the question whether the land is a state land or private land before the magistrates" (page 245).*

Thus, it appears the Court of Appeal had fallen into error when it held that the Appellant had failed to prove that the land in question was either vested in the State or acquired by the State. Needless to state that there can be State land which would not fall into any of the categories referred, to by the Court of Appeal.

In my view, the Court of Appeal fell into further error when it held that "the right or title of the State of the disputed land is doubtful"

The Court of Appeal had relied on the judgement of this court in the case of *Senanayake vs. Damunupola* 1982 2SLR 621. In the said case a "notice to quit" issued in terms of section 3 of the Act had been challenged by way of a writ and there had not been an order of the Magistrate under section 5 of the Act. In the said case it had been pointed out that part of the land covered by the "notice to quit" included part of the residential premises of the appellant and the matter however, had not reached the Magistrate's Court. What was in issue was the legality of the administrative action taken by the Government Agent.

A writ had been issued in the said case, quashing the quit notice on the facts and circumstances peculiar to the said case.

In the present case, it had reached the Magistrates Court and order for eviction had been issued and what is challenged is the legality of the order made by the Magistrate. The Act, however, provides a remedy to a legitimate owner to vindicate his rights by filing an action in the District Court in terms of Section 12 of the Act and in terms of Section 13, the State becomes liable to pay damages if it is established that the property in issue does not belong to the State.

As such, I am of the view, that the decision of *SenanayakeV. Damunupola* (supra) has no application to the present case and the Court of Appeal had misdirected itself in that regard.

The Court of Appeal also relied on the decision in the case of *Nirmal Paper Converters (Pvt) Ltd V. Sri Lanka Ports Authority* 1993 1 S.L.R 219.

The Court of Appeal, had referred to the above case and had stated that it had been decided in the said case, that, *"upon the construction of the statute as a whole, the forms of notice, application and affidavit had to be in strict compliance with those which the legislature has thought important enough to set out in the schedules before the jurisdiction of the magistrate to eject the person in possession or occupation could be exercised"*

It must be noted that no such determination had been made by the court in that case, however, the Court did hold that *"the only ground on which petitioner is entitled to remain on the land is upon a valid permit or other written authority of the State as laid down in section 9 (1) of the Act. He cannot contest any of the other matters."*

In the present case, although, the Respondent had produced documents marked V4, V7, V8, V10 to V22, V27 V49 and V50, they had failed to produce either a permit or a written authority. In this context, I hold that the Court of Appeal had misapplied the rationale of the case, *Nirmal Paper Converters* (supra). The documents referred to above, relate to payment of rates to the Local Government authority and a trade license by the Respondent, which in my view do not tantamount to a permit or written authority.

In the case of Muhandiram v. Chairman, Janatha Estate Development board, 1992 1*SLR - page 110,* it was held that:

"*In an inquiry under the State Lands (Recovery of Possession) Act, the onus is on the person summoned to establish his possession or occupation that it is possessed or occupied upon a valid permit or other written authority of the State granted according to any written law. If this burden is not discharged, the only option open to the Magistrate is to order ejectment*".

The learned High Court judge, on the other hand, had set aside the order of the Magistrate purely on a technicality; that the competent authority had not given 30 days notice to the Respondent, in terms of section 3 of the Act. The learned High Court judge had held, therefore, that the application made before the magistrate was defective. The High Court had further held, that as the Competent authority had not fulfilled the requirements of section 5 of the Act, the Magistrate had no jurisdiction to make a valid order under Section 5.

At the inquiry before the High Court (page 6 of the order) it had been argued on behalf of the Competent authority, that the Respondents had not raised any of these (technical) issues before the Magistrate and therefore the Magistrate cannot be faulted and that the High Court ought not to have considered such matters which were raised for the first time before the High Court. The learned judge, however, had disregarded this fact and had proceeded to set aside the order of eviction made by the learned Magistrate on the basis that the Competent authority had not strictly complied with the statutory requirement.

It must be noted that the Respondent had invoked Revisionary jurisdiction of the High Court, which is a discretionary remedy. Thus, if relief is to be granted, the party seeking the relief has to establish that, not only the impugned order is illegal, but also the nature of the illegality is such, that it shocks the conscience of the court. The High Court, it appears had not considered the criteria aforesaid

in setting aside the order of the magistrate. The learned magistrate, in my view, had correctly relied on the criteria set down in the decision of *Farook v. Government Agent Ampara* (supra) in making the impugned order.

I answer the questions of law raised as follows:-

a) The Court of Appeal had misdirected itself in holding that the documents marked V4, V7, V8, V10-21-22, V27V49, V 50 are valid permits or valid written authority issued by the state granting the Respondent permission to occupy State land.

b) The Court of Appeal had erred in law in holding that the Respondent is in lawful possession of the state land.

c) The Court of Appeal erred in law by holding that the Competent Authority is required to prove that the land was vested in the Government or acquired, in terms of Section 9 (2) of the State Lands (Recover of Possession) Act.

d) The Court of Appeal misdirected itself in holding that the title of the State is doubtful when the ownership is beyond the scope of a Magisterial inquiry under the provisions of the Act.

e) The Court of Appeal erred in law by holding that the title of the State is required to be proved.

f) Court of Appeal erred in law in questioning the opinion formed by the Competent Authority, which beyond the scope of the Act.

g) The Court of Appeal had misdirected itself in holding that the opinion of the Divisional Secretary who discharged the duties of the Competent Authority under the provisions of the Act is contrary to the land circulars.

h) The Court of Appeal had erred in law in holding that the decision in SC Case No.19/11 has a bearing to the instant case?

k) The Court of Appeal had erred in law in holding that learned High Court Judge had come to a correct conclusion.

I have not answered the questions of law raised as (i) and (j) in view of the findings on the questions of law referred to above.

For the reasons set out in this judgement, the judgement of the Court of Appeal dated 1-09-2014 and the order of the learned High Court Judge dated 4.03.2011 are hereby set aside. The order of the learned magistrate dated 4-03-2011 is hereby affirmed.

JUDGE OF THE SUPREME COURT

JUSTICE B.P. ALUWIHARE P.C

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

In the matter of an application under Articles 17 and 126 of the Constitution Of the Democratic Socialist Republic of Sri Lanka.

V.M.P Buddhika Karunadasa of
No 86/1, Keselwatte, Spring Valley, Badulla.

S.C.F.R. Application No. 337/2012

Petitioner

Vs.

1. D.K.M.K Dasanayake, Chairman
2. Rajaratnam Gnanasekaran, Member
3. Mohan Ratwatte, Member
4. A.A Salam, Member
5. D.C Dahanayake, Member
6. R.M.T.B Hathiyaldeniya, Secretary

   The 1st – 5th Respondents are the Chairman and the members and the 6th Respondent is the Secretary of the Uva Provincial Public Service Commission, 14/4, Peelipothagama Road, Pinarawa, Badulla.

7. The Governor, Uva Province,
   The Governor's Office, Rajaweediya, Badulla.
8. Hon. Attorney General,
   Attorney General's Department, Colombo 12.

Respondents

Before: Priyasath Dep PC, CJ

Priyantha Jayawardena PC, J

Upaly Abeyrathne, J

Counsel: J.C. Weliamuna, PC with Senura Abeyratne and Sulakshana Senanayake for the Petitioner

Rajiv Goonetilake SSC for the Attorney General

Argued on : 1st June, 2017

Decided on : 2nd August, 2017

Priyantha Jayawardena PC, J

The Petitioner was appointed as a Library Attendant on a temporary basis with effect from 15th July, 2000 by a letter of appointment dated 25th October, 2000 issued by the Secretary of the Ministry of Education, Health, Social Services, Cultural, Youth Affairs, Sports and Co-operative of Uva Provincial Council. The said letter of appointment stated that the appointment was on a temporary basis and that the Petitioner had no right to a permanent position in the Provincial Council or in the Central Government. Moreover, it stipulated that the Provincial Council could cancel the appointment when necessary. The Petitioner was attached to the Baddegama Maha Vidyalaya in Badulla.

The Petitioner was confirmed in the post of Library Attendant of Uva Province with effect from 1st July, 2005 by the letter dated 16th December, 2005 issued by the Secretary to the Ministry of Finance, Planning, Law & Order, Local Government, Divisional Administration, Education, Transport, Culture, Hindu Culture, Tourism and Estate Infrastructure Affairs of the Uva Provincial Council. The said letter stated that the Petitioner is on a three year Probationary period.

The Petitioner completed the Diploma in Library and Information Sciences of the University of Colombo and the Diploma was awarded in 2010.

By Circular dated 15th March 2011, the Uva Provincial Public Service Commission called for applications to fill vacancies for the post of Librarian Class III in the Uva Province. The Circular required applicants, *inter alia*, to have completed ten years of active service as a Library Assistant or Library Attendant and be confirmed in such posts.

The Petitioner forwarded his application dated 29th March, 2011 which was certified by the Zonal Director of Education of Badulla. A competitive examination was held for the recruitment for the post on 30th April, 2011 and the Petitioner passed the said examination obtaining the highest marks.

After an interview, the Petitioner was appointed to the post of Librarian Class III with effect from 2nd April, 2012 by the letter dated 29th March, 2012 issued by the Secretary of the Uva Provincial Public Service Commission. The Petitioner accepted the said appointment by his letter dated 2nd April 2012.

The Petitioner was attached to Soranathota Pradeshiya Sabha as its Librarian by the letter dated 23rd April, 2012 issued by the Commissioner of Uva Provincial Public Service. The Petitioner duly received his salary for three months.

The Secretary of the Uva Provincial Public Service Commission then sent a letter to the Petitioner, dated 6th June 2012, stating that the Petitioner's appointment as a Librarian Class III had been cancelled. However, the letter did not state reasons for cancelling the appointment.

Thereafter, the Petitioner informed the Governor of the Uva Province of his grievance by a letter dated 8th June, 2012 and sought the Governor's intervention to revoke the said cancellation. The Petitioner also made several attempts to discover the reason for the cancellation without avail.

The Petitioner further sought a release from the Department of Local Government to enable him to report to his previous work place by a letter dated 18th June, 2012. Accordingly, the said Secretary of the Uva Provincial Public Service Commission by his letter dated 21st June, 2012 to the Zonal Director of Education, Badulla directed him to reinstate the Petitioner in his previous work place. The Petitioner was thus reinstated by the letter of the Zonal Director of Education, Badulla dated 22nd June, 2012.

The Petitioner claimed that the decision to cancel his appointment was unfair, arbitrary, discriminatory, capricious and violated Article 12(1) of the Constitution.

Therefore, the Petitioner *inter alia* seeks:

a) a declaration that the Fundamental Right of the Petitioner guaranteed under Article 12(1) was violated by one or more of the Respondents;
b) a declaration that the decision taken by any one or more of the Respondents to cancel the appointment of the Petitioner to the post of Librarian Class III (document marked "P13") and all the consequential orders are null and void; and
c) a direction upon one or more of the Respondents to restore the Petitioner in the above position (document marked "P10") with the same privileges.

The Respondents stated that the Petitioner was appointed to a temporary position in 2000 by the letter marked as "P1" to the Petition. By the letter dated 16th December, 2015 he was appointed in the post of School Library Attendant.

The Uva Provincial Public Service Commission called for applications to fill vacancies in the Post of Librarian Class III in the Uva Province by the Circular dated 15th March, 2011. The Circular required applicants for the said post *inter alia* to have completed an active service of ten years as a Library Assistant or Library Attendant and be confirmed in such posts.

After passing the limited competitive examination for the recruitment for the said post and an interview, the Petitioner was appointed as a Librarian Class III by the letter dated 29th March, 2012 with effect from 2nd April, 2012. Accordingly, he was transferred to the Department of Local Government of the Uva Province and was attached to the Soranathota Pradeshiya Sabha as its Librarian.

In the meantime, the Secretary of the Public Service Commission of the Uva Province had informed all the relevant officers by his letter dated 28th June, 2012 of the decision not to recruit

officers for the post of Librarian Class III of the Uva Provincial Public Service based on the results of the limited competitive examination as the employees who had passed the said examination did not meet the required qualifications.

The Respondents further submitted that in his application, the Petitioner had erroneously or falsely identified his post as Library Attendant when he was in fact, as per "P3", the School Library Attendant. Further, the Petitioner had stated that he was appointed to the present post on 15th July 2000, when "P3" clearly states that his appointment was with effect from 1st July, 2005. Moreover, he had stated the date of confirmation in the present post as 1st July, 2005 which was the date of appointment to his present post that was subjected to a three year probationary period. Thus, the Petitioner had erroneously or falsely furnished wrong information in his application.

Since it transpired that the Petitioner did not have the required qualifications at the date of application, the appointment was cancelled by letter dated 31st May, 2012. Therefore, the appointment of the Petitioner was cancelled due to failure to meet the eligibility criteria for the post. As the Petitioner's appointment was cancelled, he was asked to report to his previous place of work.

Therefore, the Respondents have not in any manner violated the rights of the Petitioner and that in the circumstances the Petitioner is not entitled to the reliefs prayed for.

Did the Petitioner possess the required qualifications when he applied for the post of Librarian Class III?

The issue in this Application is whether the Petitioner had fulfilled the required eligibility criteria as at the date of applying for the post of Librarian Class III i.e. whether he had served in the post of Library Attendant or Library Assistant as a confirmed employee for a period of ten years.

The Petitioner had been appointed as a casual library employee on a temporary basis with effect from 15th July, 2000 by the letter of appointment dated 25th October, 2000. The said letter of appointment stated that the Petitioner has no right to a permanent position in the Provincial Council or in the Central Government by virtue of his temporary appointment.

The Log Entry made by the Principal of the Baddegama Maha Vidyalaya in Badulla, marked "P2", states that the Petitioner assumed duties on 22nd November, 2000 as a casual library employee.

Later, the Petitioner was appointed to the post of Library Attendant of Uva Province with effect from 1st July, 2005 by the letter dated 16th December, 2005. The said letter of appointment was subject to a three year Probationary period.

The title of the said letter states "Confirmation in the Post of Library Attendant". However, the body of the letter clearly states that the Petitioner was appointed to the post of permanent School Library Attendant of the Uva Provincial Public Service subject to a probationary period of three years.

Upon consideration of the clauses in the said letter of appointment, it is clear that the letter merely appoints the Petitioner to the post of Library Attendant and cannot be considered a letter of confirmation.

Clause 2.2 of the Establishment Code defines a casual officer as follows:

> "a person appointed as such, on a daily pay basis, for a short period, to a post approved as a casual post, or as a stop-gap measure to a temporary or permanent post pending the filling of the post on a temporary or a permanent basis."

A casual employee is one who is engaged to do a particular type of work for a short period. A casual employee does not have the rights of a permanent employee.

I am also of the view that an employee working on a casual basis cannot be confirmed in his post, as a casual employee does not have a permanent post.

The Petitioner was appointed to the Provincial Public Service in 2005 as a Library Attendant which was the post that he was holding at the time of applying to the limited competitive examination for recruitment to Librarian Class III.

By the Circular dated 15th March, 2011, the Uva Provincial Public Service Commission called for applications to fill vacancies for the posts of Librarian Class III in the Uva Province. The said Circular required applicants for the post *inter alia* to have completed ten years of active service as a Library Assistant or Library Attendant and be confirmed in the same post.

The Petitioner had submitted an application for the post of Librarian Class III taking into consideration the number of years he served since 2000; notwithstanding the fact that he was appointed as a casual employee on a temporary basis by a letter dated 25th October, 2000, marked "P1". Further, he stated in his application that he was appointed to the post of Library Attendant on 15th July, 2000 when in fact he was appointed to the said post on the 1st July, 2005 and that he was confirmed in the post of Library Attendant on 1st July, 2005 which is the date of appointment to the said post.

A casual employee cannot consider the period that he worked on a casual basis as active service. Therefore, as the Petitioner was in continuous active service of the Uva Provincial Public Service for only five years as at the date of applying for the said examination, he was not eligible as he did not meet the ten year active service requirement.

Moreover, Section 13 of the Gazette notification dated 31st December, 2010 clearly states that if it is revealed that any information furnished by a candidate is false, the candidate can be removed from the service at any time.

Further, in Section 7.0 of his application for the Librarian Class III, the Petitioner had certified that all the information furnished by him in the application was true and accurate and admitted his knowledge on the fact that if any information furnished by him was revealed to be false, he could be removed from the government service at any time.

In the circumstances, I am of the view that as the Petitioner did not possess the required number of years of service and the misrepresentation or false declaration of information furnished to obtain the appointment are sufficient grounds to cancel the appointment according to the terms of the letter of appointment.

At the time of the cancellation of the appointment given to the Petitioner by letter of appointment marked as "P10" he was working as a probationer. Thus, the employer is not bound to give reasons for the termination of the Petitioner's services.

Thus, there is no violation of the Fundamental Right of the Petitioner guaranteed under Article 12(1) of the Constitution by the Respondents.

I order no costs.

Judge of the Supreme Court

Priyasath Dep PC, CJ

I agree **Chief Justice 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 a Final Appeal in terms of Section 754 of the Civil Procedure Code read with Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

THE FINANCE COMPANY PLC
No.97, Hyde Park Corner, Colombo 02 (formerly, The Finance Company Ltd of No.69, Ceylinco Tower 3rd floor Janadhipathi Mawatha, Colombo 01.)

PLAINTIFF

S.C. C.H.C. Appeal No.05/2012
C.H.C. Case No. 702/2009/MR

VS.

1. **JAYAKODY ARACHCHIGE DON THUSHARA,**
   No.199/A, Palan Oruwa, Gonapola.

2. **HALLINNA LOKUGE JAYATH LAKSUMANA PERERA,**
   No.261/10, Waragoda Road, Kelaniya.

3. **ATULUWAGE NIROSH CHAMIKA JAYARATNE**
   Wagawathugoda, Maha Uduwa, Kuda Uduwa, Horana.

DEFENDANTS

AND NOW BETWEEN

THE FINANCE COMPANY PLC
No.97, Hyde Park Corner, Colombo 02 (formerly, The Finance Company Ltd of No.69,Ceylinco Tower 3rd floor, Janadhipathi Mawatha, Colombo 01.)

PLAINTIFF-APPELLANT

VS.

1. **JAYAKODY ARACHCHIGE DON THUSHARA,**
   No.199/A, Palan Oruwa,
   Gonapola.

2. **HALLINNA LOKUGE JAYATH LAKSUMANA PERERA,**
   No.261/10, Waragoda Road,
   Kelaniya.

3. **ATULUWAGE NIROSH CHAMIKA JAYARATNE**
   Wagawathugoda, Maha Uduwa,
   Kuda Uduwa, Horana.

DEFENDANTS-RESPONDENTS

BEFORE:	B.P. Aluwihare, PC, J. Sisira J. De Abrew J. Prasanna Jayawardena, PC, J.
COUNSEL:	R. Mahindaratne with Ms. H. Ratnayake for the Plaintiff-Appellant, instructed by T.B. Ekanayake
WRITTEN SUBMISSIONS:	Filed by the Plaintiff-Appellant on 09th October 2015.
ARGUED ON:	01st November 2016
DECIDED ON:	26th January 2017

Prasanna Jayawardena, PC, J.

The Plaintiff-Appellant Company [hereinafter referred to as "the Plaintiff] instituted this Action in the High Court of the Western Province exercising Civil [Commercial] Jurisdiction, praying to recover monies said to be due, jointly and severally, from the 1st, 2nd and 3rd Defendants-Respondents.

As set out in the Plaint, the Plaintiff's case is, in brief, that: the Plaintiff and the 1st, 2nd and 3rd Defendants-Respondents entered into the Agreement filed with the Plaint marked "**අ෭ව**" by which the Plaintiff leased a motor vehicle to the 1st Defendant-Respondent subject to the 1st Defendant-Respondent's agreement and liability to pay, to the Plaintiff, all the monthly rentals and interests specified in the said Agreement; by the same Agreement, the 2nd and 3rd Defendants-Respondents agreed and undertook liability to pay the said monies to the Plaintiff and renounced any rights they may have in law as sureties; the 1st Defendant-Respondent failed to duly pay these monies to the Plaintiff; therefore, the Plaintiff duly terminated the lease created by the Agreement; in these circumstances, the 1st, 2nd and 3rd Defendants-Respondents are, jointly and severally, liable and obliged to pay these monies to the Plaintiff but have failed to do so though payment was demanded from them.

The Defendants-Respondents failed to file Answer on the day fixed for the filing of Answer. In these circumstances, the High Court was required, as stipulated by Section 84 of the Civil Procedure Code, to proceed to hear the Case *ex parte*. Section 84 states that, *"If the defendant fails to file answer on or before the day fixed for the filing of answer, or on or before the day fixed for the subsequent filing of the answer ….. the court shall proceed to hear the case ex parte forthwith on, or on such other day as the court may fix."*

On 13th May 2011, following the aforesaid default to file Answer, the Court fixed the *ex parte* Trial against the Defendants-Respondents for 08th July 2011. The Court also directed the Plaintiff to tender the evidence of its witness by way of an affidavit. In pursuance of that Order, the Plaintiff tendered an affidavit dated 14th September 2011 affirmed to by an 'Assistant Manager – Recoveries' of the Plaintiff Company. Thereupon, the Court fixed this case for *ex parte* judgment to be delivered on 17th October 2011.

On 17th October 2011, the learned High Court Judge delivered his Judgment dismissing the Plaintiff's Case. The Plaintiff filed a Notice of Appeal and, thereafter, a Petition of Appeal to this Court.

On 01st November 2016, we heard learned Counsel for the Plaintiff in support of this Appeal. The Defendants-Respondents were absent and unrepresented.

Before considering the merits of this Appeal, there is a preliminary issue which needs to be considered since Section 88 (1) of the Civil Procedure Code states, *"No appeal shall lie against any judgment entered upon default"*. That issue arises because, although it would appear that, there has been no *"default"* on the part of the Plaintiff in this action, there has been a *"default"* on the part of the Defendants-Respondents (*ie:* their failure to file Answer) which led to the *ex parte* judgment which is now appealed from. Thus, the *ex parte* judgment from which the Plaintiff appeals in the present case, was entered following a *"default"* on the part of the Defendants-Respondents.

Therefore, the question that has to be considered is whether: despite the **Plaintiff** *not* having been in any *"default"*, Section 88 (1) of the Civil Procedure Code, nevertheless, operates to deprive the **Plaintiff** of the right of appeal (which it would usually have under and in terms of Section 754 (1) of the Civil Procedure Code which entitles any party to appeal from a judgment entered in any civil action).

If the answer to that question is in the affirmative, Section 88 (1) will preclude an appeal from the *ex parte* judgment entered in this case and the Plaintiff's remedy, if any, will be to canvass the judgment by way of revision.

There do not seem to be any reported decisions which have specifically considered this question of whether Section 88 (1) deprives a **Plaintiff** whose action has been dismissed at an *ex parte* trial, of his right of appeal which he would, otherwise, have under and in terms of Section 754 (1) of the Civil Procedure Code.

However, in **BRAMPY vs. PERIS** [3 NLR 34] where the District Judge dismissed the Plaintiff's action at an *ex parte* trial and the Plaintiff appealed, Lawrie A.C.J set aside the judgment of the District Court and directed a re-trial. Similarly, in **SINNATAMBY vs. AHAMADU** [1913 2 Balasingham's Notes of Case 13], where the District Court dismissed the action at an *ex parte* trial and the Plaintiff appealed, Lascelles C.J set aside the judgment of the District Court and directed that , the District Court grants a further hearing to the Plaintiff's case. These two cases can be considered as decisions which proceeded on the basis that, a Plaintiff, whose action has been dismissed at an *ex parte* trial, has a right to appeal from that *ex parte* judgment. However, this question was not specifically addressed in these two cases. Instead, it appears that, the Court had no doubt that, a Plaintiff, whose action has been dismissed at an *ex parte* trial has a right of appeal against the *ex parte* judgment.

It should be mentioned that, Section 88 (1) as it now stands was introduced only in 1977 by Section 23 of the Civil Procedure Code (Amendment) Law No.20 of 1977. At the time **BRAMPY vs. PERIS** and **SINNATAMBY vs. AHAMADU** were decided, the relevant provision was Section 87 (1) which stated *"No appeal shall lie against any decree nisi or absolute for default"*. By Section 23 of the Civil Procedure Code (Amendment) Law No.20 of 1977, this Section 87(1) was repealed and replaced with Section 88 (1) as it now stands. However, what is relevant for the purposes of this judgment is that, *both* the earlier Section 87(1) and the present Section 88 (1) have the effect of prohibiting an appeal from a decree or judgment entered upon default.

Therefore, even today, **BRAMPY vs. PERIS** and **SINNATAMBY vs. AHAMADU** continue to be relevant as decisions which recognized the right of a Plaintiff, whose action has been dismissed at an *ex parte* trial, to appeal from that *ex parte* judgment.

However, in **SIRIMAVO BANDARANAIKE vs. TIMES OF CEYLON LTD** [1995 1 SLR 22] where the Supreme Court held that, Section 88 (1) of the Civil Procedure Code prohibits an appeal by a **Defendant** from an *ex parte* judgment entered against

him, Fernando J commented [at page 31] : *"In regard to the converse situation where a trial judge dismissed a plaintiff's action, although on the evidence he was (or should have been) satisfied, Mr. De Silva had no hesitation in asserting that that would be a final judgment, against which the plaintiff would have a right of appeal, despite Section 88 (1). To reach this conclusion, he contended that Section 88 (1) barred only an appeal by the party in default, interpreting `against any judgment entered upon default' as if restricted to `any judgment entered* ***against a party*** *in default'. But this would mean that the consequences of judicial error under section 85 would vary not according to the nature of the error but the party prejudiced – the party in default would be denied a remedy but not his adversary. This would be an unfair and discriminatory result which the principles of interpretation of statutes would not permit unless compelled by plain words"*.

The aforesaid *dicta* suggest that, in **SIRIMAVO BANDARANAIKE vs. TIMES OF CEYLON LTD**, Fernando J took the view that, a Plaintiff whose action has been dismissed at an *ex parte* trial has no right of appeal from the *ex parte* judgment. Therefore, it is necessary to further examine that decision.

In that case, an *ex parte* trial was held and *ex parte* judgment was entered against the Defendant. The Defendant made an application by way of revision to the Court of Appeal, which set aside the *ex parte* judgment and dismissed the Plaintiff's action on the grounds that there had been a failure of justice. In appeal, the Supreme Court held that, the *ex parte* judgment was correctly set aside by the Court of Appeal since there was not a scrap of evidence which supported the entering of judgment against the Defendant. The Supreme Court also held that, although Section 88 (1) of the Civil Procedure debars an appeal by a Defendant from an *ex parte* judgment entered against him upon his default, the Defendant can canvass the correctness of an *ex parte* judgment, by way of revision.

Thus, **SIRIMAVO BANDARANAIKE vs. TIMES OF CEYLON LTD** was a case which held that, Section 88 (1) of the Civil Procedure Code prohibits an appeal by a **Defendant** from an *ex parte* judgment entered against him and that, a Defendant's remedy, if any, is by way of revision. It is ***not*** a decision with regard to the right of appeal of a **Plaintiff** whose action has been dismissed at an *ex parte* trial.

Accordingly, the aforesaid comments by Fernando J must be regarded as having been made *obiter*. Further, a perusal of the judgment makes it clear that, Fernando J only analysed and decided upon the right of a **Defendant** to maintain an revision application against an *ex parte* judgment and that, other than for the abovementioned brief comments referring to a submission made by learned President's Counsel appearing for the Plaintiff-Appellant-Respondent Defendant in that appeal, His Lordship did not examine and make a judicial determination with regard to question of whether a **Plaintiff** whose action has been dismissed at an *ex parte* trial, has a right of appeal. In this connection, Fernando J also did not consider the effect of the earlier decisions of **BRAMPY vs. PERIS** and **SINNATAMBY vs.**

AHAMADU where this Court has entertained and decided upon appeals made by a Plaintiff whose action was dismissed by an *ex parte* judgment.

However, the aforesaid differing views make it necessary to closely examine the issue of whether Section 88 (1) deprives a **Plaintiff** whose action has been dismissed at an *ex parte* trial, of the right of appeal which he would, otherwise, have under and in terms of Section 754 (1) of the Civil Procedure Code.

When considering this question, it should be first kept in mind that, Section 754 (1) of the Civil Procedure Code expressly grants any person who is dissatisfied with any judgment in a civil action, a right of appeal for any error of fact or law. The judgment which is the subject matter of this Case (and for that matter any judgment entered in an *ex parte* trial under the provisions of the Civil Procedure Code) would fall within the ambit of Section 754 (1) of the Civil Procedure Code.

Therefore, by operation of Section 754 (1), both the Plaintiff and the Defendant in an *ex parte* trial will have a right of appeal from the judgment entered in that *ex parte* Trial *unless* that right of appeal has been taken away by Section 88 (1) of the Civil Procedure Code.

Next, Section 88 (1) is in Chapter XII of the Civil Procedure Code which contains Section 84 to Section 90 and is titled *"OF THE CONSEQUENCES AND CURE (WHEN PERMISSIBLE) OF DEFAULT IN PLEADING OR APPEARING"*. Thus, the title to Chapter XII suggests that, the instances of *"default"* referred to in that Chapter will be instances of *"default"* in either: (i) tendering the mandatory Pleadings; *or* (ii) making an Appearance when required to do so by Law. This is confirmed when one peruses Section 84 to Section 90 within Chapter XII which make it clear that, the *only* two instances of *"default"* referred to are the circumstances set out in Section 84 and Section 87 (subject to the other conditions set out in those two Sections) which are: either a **Defendant's** failure to file answer or to appear on a day fixed for the hearing of the action or a **Plaintiff's** failure to appear on a day fixed for the hearing of the action. All the other Sections in Chapter XII deal with the consequences of the aforesaid two instances of *"default"* and the manner of curing the consequences of *"default".*

In these circumstances, it is evident that, the use of the word *"default"* in Section 88 (1) must be understood as meaning or referring to the *"default"* on the part of a Party to a Case to either:

(i) File the required Pleadings; *or*
(ii) To appear in Court on a day fixed for the hearing of the action.

This is in line with the usual meaning accorded to the word *"default"* in this context, which is stated in Stroud's Judicial Dictionary [6th ed.] to be *"failing", "negligence"* and *"not doing what is reasonable under the circumstances" a*nd as *"to fail to appear or answer"* and *"The omission or failure to perform a legal or contractual duty"* and *"To*

be neglectful" in Black's Law Dictionary [9th ed.] and as the *"failure to fulfill a legal requirement"* in the Shorter Oxford English Dictionary [5th ed.].

The question which then arises is whether the prohibition of an appeal set out in Section 88 (1) affects only the party who is guilty of the default (*ie:* the party who failed to appear *or* answer) which led to the *ex parte* judgment *or* whether even the party who is not in any default whatsoever, is also debarred from an appeal.

When answering that question, one must keep in mind that, the principle enshrined in Section 754 (1) of the Civil Procedure Code is that, any party to a civil action who is dissatisfied with the judgment in that civil action, has a right of appeal for any error of fact or law. Since Section 88 (1) is a provision which seeks to limit this right of appeal, Section 88 (1) should be interpreted restrictively.

With regard to a party who was in default, there is good reason why Section 88 (1) must be read as depriving that party who is in default, of any right of appeal against the *ex parte* judgment. This is because a party who is in default, must first purge his default before he can be allowed to canvass the merits of the *ex parte* judgment. Further, specific provision for applications for purging default has been made by Section 86 (2) and Section 87 (3) of the Civil Procedure Code and Section 88 (2) provides that the Orders made upon such applications, are appealable.

However, the position is entirely different with regard to the party who was not in default. In the case of the party who was not in default, there is no logical or good reason to read Section 88 (1) in a manner which would have the effect of depriving that party of the right of appeal which he is, otherwise, entitled to under and in terms of Section 754 (1).

Accordingly, I am of the view that, Section 88 (1) must be interpreted restrictively and that, when Section 88 (1) states *"No appeal shall lie against any judgment entered upon default"*, the words *"upon default"* must mean the default of the party who wishes to appeal against that judgment.

Thus, I am of the view that, Section 88 (1) only prohibits an appeal against an *ex parte* judgment by the party whose default resulted in that *ex parte* judgment. Section 88 (1) does not apply to the right of appeal of a party who was not in default since there was no default on the part of that party which resulted in the *ex parte* judgment which he wishes to appeal against. In other words, the right of the party who was not in default to appeal against the *ex parte* judgment, is unaffected by Section 88 (1) of the Civil Procedure Code.

The above approach accords with equity since there can be no possible justification for depriving a party who has been diligent and who is not in *"default"*, of the right of appeal granted to him by Section 754 (1) of the Civil Procedure Code and requiring him to, instead, surmount the additional difficulties which arise in an application for Revision.

Thus, in the case of a Defendant against whom an *ex parte* judgment is entered, that judgment has been entered as a result of or consequence of the failure of the Defendant to appear *or* answer and, therefore, Section 88 (1) prohibits an appeal by the Defendant against that *ex parte* judgment since the Defendant was in default. Similarly, in the case of a Plaintiff whose action has been dismissed under Section 87 (1) for the failure to appear on a day fixed for the hearing of the action, that judgment was also entered as a result of or consequence of the failure of the Plaintiff to appear and, therefore, Section 88 (1) prohibits an appeal by the Plaintiff against that *ex parte* judgment since the Plaintiff was in default.

However, as set out above, the position is entirely *different* in the case of a Plaintiff whose action has been dismissed at an *ex parte* trial, since the *ex parte* judgment has not been entered as a result of or consequence of the failure of the Plaintiff to appear or any other default of the Plaintiff. In those circumstances, Section 88 (1) does not apply and the Plaintiff continues to possess the right of appeal granted to him by Section 754 (1) of the Civil Procedure Code and can appeal against that *ex parte* judgment.

In the present case, as stated earlier, the Plaintiff was not in *"default"* within the meaning of Section 88 (1), since the Plaintiff did appear on the trial date. Therefore, for the reasons set out above, I hold that, in the present case, the Plaintiff has the right of appeal.

Now to turn to the merits of the appeal, there is no doubt that, as clearly stated in Section 85 (1) of the Civil Procedure Code, judgment could be entered for the Plaintiff in an *ex parte* trial only if the Court is satisfied that the evidence placed before Court establishes that the Plaintiff is entitled to that judgment. This rule has been emphasized in several decisions including **SIRIMAVO BANDARANAIKE vs. TIMES OF CEYLON LTD** and **SENEVIRATNE vs. DHARMARATNE** [1997 1 SLR 76] Therefore, the learned Trial Judge was fully entitled to dismiss the Plaintiff's action in the present case, if the evidence placed before the Court at the *ex parte* trial was, in fact, not sufficient to establish the Plaintiff's case.

When determining whether or not this burden of proof has been discharged in an *ex parte* trial, it has to be kept in mind that, a Plaintiff who adduces evidence at an *ex parte* trial is, usually, required to adduce only such evidence as is necessary to establish his case on a *prima facie* basis by establishing the constituent elements of his Cause of Action. This is subject to the Court seeing no reason to doubt the authenticity and *bona fides* of the evidence.

When these general principles are applied to the present case, it is evident that, the testimony set out in the affidavit of the Plaintiff's witness and the documents produced in evidence marked **"පැ1"** to **"පැ9"** amounted to *prima facie* evidence which established the constituent elements of the Plaintiff's Cause of Action.

A perusal of the very brief judgment shows that, the learned Trial Judge did not express any doubts with regard to the adequacy or genuineness of the testimony set out in the affidavit of the Plaintiff's witness and the documents produced in evidence marked **"පැ1"** to **"පැ9"**.

However, it appears from the judgment that, the learned Trial Judge dismissed the Plaintiff's action, primarily, on the ground that, although the Affidavit of the Plaintiff's witness stated that, the vehicle had been sold for Rs.1,275,000/- and that the sale proceeds had been applied in reduction of the amount due from the Defendants-Respondents, the Plaintiff has not adduced any further details regarding the alleged sale and has not produced any documents relating to the sale.

But, an examination of paragraphs [13] and [14] of the affidavit of the witness shows that, he has clearly stated that, the vehicle was sold for Rs.1,275,000/- and that, after the deduction of VAT in a sum of Rs.136,607/14, the balance sale proceeds in a sum of Rs.1,138,392/86 has been credited to the account of the Defendants-Respondents. The witness has further stated that, after giving credit for this payment and other amounts which are itemized, a balance sum of Rs.1,106,608/54 remains due from the Defendants-Respondents and is sought to be recovered. That evidence is corroborated by the letter marked **"පැ5"** by which the Plaintiff has informed the Defendants-Respondents that, the vehicle will be sold for the highest offer received, the published Notices marked **"පැ6"** and **"පැ7"** calling for bids for the vehicle, the letter marked **"පැ8"** by which the Plaintiff has informed the Defendants-Respondents of the highest offer received for the vehicle and the Statement of Account marked **"පැ9"** which, *inter alia*, clearly sets out that the vehicle was sold for Rs.1,275,000/- and that, after the deduction of VAT in a sum of Rs.136,607/14, the balance sale proceeds in a sum of Rs.1,138,392/86 was credited in reduction of the amount due from the Defendants-Respondents and that, a balance sum of Rs.1,106,608/54 remains due from the Defendants-Respondents.

The learned Trial Judge does not appear to have considered this evidence. Had he done so, he would have seen that, the Plaintiff adduced sufficient evidence to satisfy the Court that, the sale of the vehicle had realised a net sum of Rs. 1,138,392/86 which had been credited in reduction of the amount due from the Defendants-Respondents. He would have also seen that, this net sum of Rs. 1,138,392/86 was very close to the value of the vehicle which was stated to be Rs.1,150,000/- in the letter marked **"'පැ3'** and that, the amount of Rs.1,275,000/- for which the vehicle was sold was, in fact, higher than this estimated value.

Further, the learned Trial Judge failed to keep in mind the fact that, as clearly stipulated in the Lease Agreement marked **"පැ1"**, the Plaintiff was the owner of the vehicle and was entitled to sell the vehicle. Consequently, the sale of the vehicle was only relevant with regard to the net amount of the sale proceeds which were credited in reduction of the sum due from the Defendants-Respondents. Thus, the learned

Trial Judge erred when he took the view that, the Plaintiff was required to adduce details regarding the sale including the date of the sale and the name of the buyer.

For the aforesaid reasons, I am of the considered opinion that, the Plaintiff adduced sufficient evidence at the *ex parte* trial to enable the Court to enter *ex parte* judgment in favour of the Plaintiff. The learned Trial Judge erred when he disregarded this evidence and dismissed the Plaintiff's action.

Accordingly, I set aside the judgment of the learned Trial Judge and enter *ex parte* judgment for the Plaintiff against the 1st, 2nd and 3rd Defendants-Respondents, jointly and severally, in the aforesaid sum of Rs.1,106,608/54, which is the net sum which remains due from the 1st, 2nd and 3rd Defendants-Respondents together with costs of the action in the High Court.

The High Court is directed to enter *ex parte* decree accordingly and have copies of the *ex parte* decree served on the 1st, 2nd and 3rd Defendants-Respondents and to proceed with this action in terms of the relevant provisions of the law.

Before concluding, I should mention that, if the learned Trial Judge was of the view that there was a doubt with regard to the sale of the vehicle or any other matter, he should have given the Plaintiff an opportunity to clarify such doubt by adducing additional evidence, before proceeding to deliver the judgment. The learned Trial Judge should have kept in mind the well established and salutary practice and, in fact, recognized principle of law that, where the Plaintiff in an *ex parte* trial has adduced evidence in support of a substantial part of his case but the Trial Judge has a doubt with regard to a particular aspect of the case, the Plaintiff should be given an opportunity to adduce such evidence or make the requisite clarifications, by way of an affidavit or *viva voce* and within a specified period of time. The *ex parte* judgment should be delivered only after such additional material is considered, if adduced within the allotted time.

This rule was referred to in **BRAMPY vs. PERIS** [at p.36] where Lawrie A.C.J. stated *"….. whatever be the evidence it must be sufficient to satisfy the Judge, who is not bound to give a decree until he is satisfied. If he is dissatisfied, he should in an order point out in what, respect the evidence the evidence already recorded is defective and then adjourn to a day named or sine, die."* Browne A.J. stated [at p.37] *"But in my opinion plaintiff on the occurrence of any doubt in the mind of the Judge as to his right to judgment should have opportunity given to him to dispel that doubt ere his action were finally dismissed to the absolute extinction of his claim for ever, and I cannot see that he had that opportunity here given him"* In **SIRIMAVO BANDARANAIKE vs. TIMES OF CEYLON LTD** [at p.39], Fernando J, citing Browne A.J. stated *"…. whatever the evidence, it must be sufficient to* ***satisfy*** *the judge who is not bound to give a decree until he is* ***satisfied****, if he had a doubt, he was not bound to enter judgment, but should have given the plaintiff an opportunity to dispel it"*.

Had the learned Trial Judge done this instead of dismissing the action `lock, stock and barrel' because he had some doubts with regard to a limited aspect of the transaction, all this delay and the resultant prejudice caused to the Plaintiff would have been avoided.

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

S.C. (C.H.C) 07/2009

In the matter of an Appeal from the Judgment in H.C. (Civil) Colombo case No. 72/2003(1) in terms of Section 5(1) of Act No. 10 of 1996 read with Section 754(1) of the Civil Procedure Code.

Flexport (Private) Limited of
127, Jambugasmulla Mawatha,
Nugegoda.

PLAINTIFF

Vs.

Bank of Ceylon
Bank of Ceylon Headquarters
Colombo 1.

DEFENDANT

Flexport (Private) Limited of
127, Jambugasmulla Mawatha,
Nugegoda.

PLAINTIFF-APPELLANT

Bank of Ceylon
Bank of Ceylon Headquarters
Colombo 1.

DEFENDANT-RESPONDENT

BEFORE: Priyasath Dep P.C., J.
Anil Gooneratne J. and
Prasanna S. Jayawardena P.C., J.

COUNSEL: Hemasiri Withanachchi for the Plaintiff-Appellant

Nerin Pulle D.S.G. for the Defendant-Respondent

ARGUED ON: 08.11.2016 and parties agreed to conclude the case based on Written Submissions

DECIDED ON; 25.01.2017

GOONERATNE J.

This is a direct Appeal to the Supreme Court from the Judgment of the Commercial High Court, Western Province holden in Colombo, delivered on or about 18.01.2008. The case of the Plaintiff-Appellant is based on a tender claiming a sum of Rs. 3,500,000 as damages with interest, was dismissed by the Judgment of the High Court.

The Plaintiff Company was in the business of manufacturing furniture, name boards, Bill Boards, Mementos etc. Defendant Bank called for tenders to manufacture and supply 1600 mementos to the Defendant Bank, to be presented to their employees who had served the Bank for long years. Tenders were called (bearing No. R. OC/2002/09) by the Defendant Bank. It is stated that the Defendant Bank by its letter dated 12.08.2002 accepted the

Plaintiff-Appellant's bid and awarded the tender, subject to conditions. i.e to submit an acceptable bank guarantee to the Defendant Bank for the full value of the tender, and items to be supplied before 20.08.2002. However the Plaintiff Company was informed that the tender Evaluation Committee of the Bank rejected the tender of the Plaintiff Company. The position of the Plaintiff Company according to the material furnished to this court are as follows:

(a) Rejection and cancellation of the tender not due to any fault of the Plaintiff Company
(b) Tender Evaluation Committee of the Bank has not adduced any reasons for the rejection of the tender.
(c) Plaintiff Company had commenced the manufacture of Mementos (was in progress) even prior to awarding the tender.
(d) It has resulted in causing financial loss to the Plaintiff Company.

The position of the Defendant Bank was that Plaintiff Company has failed to fulfil the tender conditions. Further it was also brought to the notice of the Defendant Bank that the Plaintiff Company was in default of a loan granted to the company by the Nugegoda Branch of the bank. It is also stated that the Plaintiff Company failed to deliver the Mementos on time and in any event it was different to the specifications given by the bank. Parties proceeded to trial on 9 issues and 6 admissions, were recorded in the High Court.

I have perused the Judgment of the learned High Court Judge. It is the view of the learned High Court Judge that the letter awarding the tender

(P6) was a conditional award of the tender to Plaintiff-Appellant. Further trial Judge states document P7 is not a Bank guarantee, but an insurance guarantee. On the above basis which seems to be the main points inter alia considered by the learned High Court Judge to reject the case of the Plaintiff Company. The Appellant had not been in a position to fulfil the tender conditions, and P6 indicates it was a conditional award of tender. Therefore the trial Judge held that Plaintiff-Appellant was unable to fulfil the tender conditions stipulated in the invitation to tender. It is also in evidence and discussed by the trial Judge in his Judgment in this regard that Plaintiff-Appellant had not been able to tender a bank guarantee. Witness for the bank testified that document P7 is not a bank guarantee but only an insurance guarantee which was not acceptable to the bank. It is also in evidence that letter P12 was not acceptable to the bank, and bank could not proceed with the tender. P12 is a letter by the Janashakthi Insurance Company to Chief Manager, Properties and Procurement Department, Bank of Ceylon. All these relevant points had been considered by the learned trial Judge.

On a perusal of P12 it is evident that (and as testified by witness for the bank)

(a) P12 relates to an insurance guarantee which is not acceptable to the Defendant Bank.
(b) In any event it is conditional that Janashakthi Insurance Company could issue the same only upon Defendant-Respondent Bank releasing an

advance payment in favour of the Plaintiff-Appellant of 50% of the value of the Bond. (value of work they executed on tender sum)

On the above I wish to observe that the bank would not have been in a position to have complied with the requirements (as in P12). There is no requirement for a payment to be made by the bank as per tender documentation and tender conditions, which material are made available for perusal of this court and contained in the record of the case. In a way it is a conditional offer or an attempt of the offeree (Plaintiff Company) accepting subject to conditions. Counter offer is equivalent to a rejection of the original offer. Cheshire & Fi foot 6th ed. pg.32: Watermeyer Vs. Murray (1911) AD 61.

A tender is an offer of performance in accordance with the terms of contract. An acceptance of a tender has different legal results, depending on the wording of the form of tender which is accepted. An offer could be rejected if the offeree makes a counter-offer. If the offeree accepts subject to conditions it amounts to rejection of an offer. Only an absolute and unqualified assent to all the terms of the offer constitutes an effective acceptance. The tender of the Defendant Bank, has definite and serious terms, of performance. There is nothing vague in its terms, and to submit a Bank Guarantee would be part and parcel of the tender conditions. i.e terms of the contract.

In Pamkayu & Another Vs. Liyanarachchi, Secretary, Ministry of Transport & Highways 2001 (1) SLR 118, 125.

> "..... award of a tender must be based on the compliance 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 must be rejected in the same way as a late offer".

This court having considered all the material made available and on perusal the Judgment of the learned High Court Judge, does not wish to interfere with the Judgment of the High Court and the position of the Defendant-Respondent Bank. I see no legal basis to fault the Judgment of the High Court. Document P7 is not a Bank Guarantee, and it is a document not acceptable to the bank. Tender conditions do not contemplate such a document. Further Janashakthi Insurance requiring the Defendant Bank to fulfil their conditions, which would be contrary to the tender conditions. Therefore this court affirm the Judgment of the High Court. This appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep 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

S.C. CHC Appeal 06/2011
CHC 16/2005 (1)

In the matter of an Application for an Appeal under Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1966 and read with Article 154P of the Constitution of the Republic of Sri Lanka.

Commercial Leasing Company Ltd.,
No. 68, Bauddhaloka Mawatha,
Colombo 4.
And formerly of Commercial House
No. 21, Bristol Street,
Colombo 1.

PLAINTIFF

Vs.

1. Naurunna Badalge Princy Sujatha
   Prince Radio & Electricals
   No. 67, Akuressa Road,
   Weligama.

2. Indrajith Bandula Dickson Jayasinghe
   974/1, Sri Sumangala Mawatha,
   Ratmalana.

3. Liyana Gunawardhana Sunil
   Litiyamulla
   Pitidura,
   Weligama.

DEFENDANTS

AND NOW BETWEEN

1. Naurunna Badalge Princy Sujatha
   Prince Radio & Electricals
   No. 67, Akuressa Road,
   Weligama.

2. Indrajith Bandula Dickson Jayasinghe
   974/1, Sri Sumangala Mawatha,
   Ratmalana.

DEFENDANT-APPELLANTS

Vs.

Commercial Leasing Company Ltd.,
No. 68, Bauddhaloka Mawatha,
Colombo 4.

And formerly of Commercial House
No. 21, Bristol Street,
Colombo 1.

PLAINTIFF-RESPONDENT

2. Liyana Gunawardhana Sunil
   Litiyamulla
   Pitidura,
   Weligama.

DEFENDANT-RESPONDENT

BEFORE: S.E. Wanasundera P.C., Acting C.J.
B. P. Aluwihare P.C., J.
Anil Gooneratne J.

COUNSEL: W. Dayaratne P.C., with Achala Srima Perera
for Defendant-Appellants

Hiran M.C de Alwis with Heshan Thambimuttu
For Plaintiff-Respondent

ARGUED ON: 27.03.2017

DECIDED ON: 26.05.2017

GOONERATNE J.

This is a direct appeal to the Supreme Court. Action was filed on a Lease Agreement (Financial Lease) concerning vehicle bearing No. 251-0858 (P1) Plaintiff-Respondent's position was that the above agreement was breached by the 7th Defendant-Appellant and Plaintiff-Respondent, continues to be the owner of the vehicle. 1st Defendant failed and neglected to pay the lease rental, in terms of the Lease Agreement, and the agreement was accordingly terminated (P2). By an indenture of guarantee, and an indemnity of 10.02.2003 the Defendants are inter alia jointly and severally liable. By Letter of Demand dated 05.08.2004, Plaintiff demanded from the 1st Defendant a sum of Rs. 3,278,777/65 being the balance sum outstanding. The demand as aforesaid was not challenged by the Defendants-Respondents. A statement of account (P3) had been produced at the trial. A Judgment was sought for the balance amount due on the lease agreement but no claim made on the vehicle.

Defendant-Appellant's position was that the Plaintiff-Respondent's claim was unjust and unreasonable, as the Plaintiff-Respondent had re-possessed the bus bearing No. G2-9646 which was kept as security. Parties proceeded to trial on 23 issues. 5 admissions were recorded. It was recorded as admitted, paragraph 1-4 of the plaint and documents P1 to P2 and P5 filed along with the plaint. The signatures in P1, P2 & P5 were admitted. It was admitted that 2nd and 3rd Defendants were the guarantors in respect of the agreement P3. It is also admitted that the 1st Defendant-Appellant undertook to pay the sum of Rs. 6,1289/56 as monthly instalements as per the lease agreement.

In a nutshell Plaintiff's witness testified that Defendants failed and neglected to pay the lease rental as per the agreement. Therefore the lease had been duly terminated (P2). In terms of the agreement a sum of Rs. 3,278, 777/65 is due and owing being the balance outstanding. The Letter of Demand was not challenged by the Defendant. By a guarantee and an indemnity of 10.02..2003 the 2nd and 3rd Defendants agreed jointly and severally to the several conditions as pleaded in paragraph 18 of the plaint.

This is a very straight forward case although the learned President's Counsel for Defendant-Appellant took some time to conclude his submissions. This agreement is described as a financial lease. The lessee failed and neglected to pay the balance sum due as per the Lease Agreement. Plaintiff was the owner

of the vehicle in question. 1st Defendant-Appellant did not reply and respond to the Letter of Demand I see no legal basis to interfere with the Judgment of the learned High Court Judge. I affirm the Judgment and dismiss this appeal with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S.W. Wanasundera P.C. J.

I agree.

Acting Chief Justice

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 a judgment of the
Civil Appellate High Court
Of Colombo.

Peoples' Bank,
No. 75, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.
Plaintiff

SC CHC APPEAL 12/2011

Vs

HC (Civil) Case No. 18/2005(1)

Rola x Enterprises (Pvt.) Ltd.,
No. 97/8, Galle Road,
Dehiwala.
Defendant

NOW BETWEEN

Rolax Enterprises (Pvt.) Ltd.,
No. 97/8, Galle Road,
Dehiwala.
Defendant Appellant

Vs

Peoples' Bank,
No. 75, Sir Chittampalam A.
Gardiner Mawatha,
Colombo.
Plaintiff Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
SISIRA J DE ABREW J. &
ANIL GOONERATNE J.

COUNSEL : Chandana Prematilaka with Yuran Liyanage for the Defendant Appellant.
Kushan D' Alwis PC with Kaushalya Nawaratna for the Plaintiff Respondent.

ARGUED ON : 02.03.2017.

DECIDED ON : 31.03.2017.

S. EVA WANASUNDERA PCJ.

Rolaks Enterpises Private Limited was a company which imported and distributed MDF boards, plywood, hardboard and chip board. The said company was a customer of the Peoples' Bank and maintained an account at the International Branch which is the Branch No 1. The Peoples' Bank had functioned as a commercial bank at this instance when Rolaks Enterprises made an application to the said Bank for short term loan facilities for settling the bills in relation to the goods imported by the said company under letters of credit. On 19.02.2001, the two Directors of the company, Robert Perera and Jayanthi Perera requested the Bank to grant a short term loan equivalent to US$ 39,676/02 which is equal to Rs. 3,341974/- according to the exchange rates prevailing at that time, to settle the bill for MDF Board imported from Malaysia under a Letter of Credit. Incidentally, the Managing Director of Rolex Enterprises, Robert Perera was an ex-employee of the Peoples' Bank.

The company signed a promissory note and a guarantee bond, agreeing to pay the money back to the Bank within 90 days. The company failed to pay. The Bank filed action in the Commercial High Court to recover the money with interest.

The Rolax Enterprises accept non payment. The contest is only on the rate of interest claimed by the Peoples' Bank.

The Plaintiff, Peoples' Bank filed action against the Defendant, Rolax Enterprises (Pvt) Ltd. on 31.01.2005 to recover Rs. 5,565,790/27 and the annual interest at the rate of 31% on the amount of Rs. 3,368,010/54 from the date of 05.04.2003, upto the date of decree and thereafter legal interest on the decreed amount from the date of the decree till the said amount is paid in full and settled and for costs of suit.The Defendant filed answer on 01.08.2005 and denied the allegations against the company and submitted that the interest rate of 31% was not agreed and also that the promissory note was against the law.

The trial commenced and was concluded with the Plaintiff Bank marking documents **P1 to P29(a).**The Managing Director of the Defendant Company also gave evidence and stated that he had failed to repay the loan due to many unforeseen reasons and unfortunate incidents that had taken place within his company. He contested the interest rate of 31% as something which he had never agreed to. The learned Commercial High Court Judge gave judgment on 23.11.2010 granting the Plaintiff what was prayed for in the Plaint. The Defendant has appealed to this Court. The grounds of appeal in paragraph 4 of the Petition are 12 in number running from 4(a) to 4(l).The Defendant Appellant (hereinafter referred to as the Defendant) has pleaded to set aside the judgment of the learned High Court Judge dated 23.11.2010 and to dismiss the action filed by the Plaintiff in the Commercial High Court.

The trial proceeded with issues numbers 1 to 8 raised by the Plaintiff and issues numbers 9 to 13 raised by the Defendant. The Plaintiff produced P1 which was the request for a short term loan of Rs. 3431974/- . **P2 was the 'Application for Advance for Imports'.** In P2 paragraph 1, the company states that " As per the Letters of Credit No. 2001 IL 05122 dated 2001.01.27 opened by your Bank at the request made by us, we have imported MDF Boards from Malaysia to the value of US$ 39676/02 and the relative Bill of Exchange is lying with the Peoples' Bank, International Division awaiting retirement. " In **paragraph 4 of the same**, the company states that " The said loan shall be paid **before the expiry of 90 days** from the date of advance. If payment is made within the aforesaid period of 90 days we shall be liable to pay interest at the reduced rate of …….per annum. **Thereafter, the said sum shall be repayable to the Peoples' Bank , with the rate of interest agreed upon or additional rate of interest determined by the Bank".**

The Defendant failed to pay within 90 days. The Bank had been sending letters to the Defendant until 04.04.2003. The Defendant also had been replying that the company is undergoing bad times but kept on promising that the money and intest due will be paid. When the Defendant failed to pay even a part of the dues, the Plaintiff had sent a letter of demand. The letter of demand was sent on 04.08.2003 which demanded the amount claimed in the Plaint as well as mentioned that the short term loan interest amount at 31% also should also be added to the borrowed amount from 05.04.2003. It is observed that the percentage amount of interest is mentioned even in the letter of demand to which the Defendant had not sent any response to. The company and its directors were silent until action was filed in 2005. Silence by the Defendant in law does not stand in favor of the Defendant.

Document P3 is a promissory note which indicates that the Defendant Company is bound to pay the money granted by the bank on the short term loan on demand. The promissory note is signed by both the Directors of the Defendant Company. The Defendant's counsel contended that the promissory note does not contain the interest rate at all since there is a blank in the form where the interest rate should be included. Leave that aside, the Defendant Company having signed that, is **duty bound to pay on demand for certain.** P4 is a Guarantee signed by the Directors as security for the loans.

Then comes **P5** which is a letter issued by the Plaintiff to the Defendant after complying with the request made by the Defendant to grant a loan to ' retire the bill drawn under the Letter of Credit No. 2001ILO5122 for US$ 39676/02 '. By **P5** dated 20.02.2001 , **the Plaintiff informs formally** that the amount is granted which is equivalent to **Rs. 3,431,974/-** has been granted on the same date and the due date for repayment **is 20.05.2001** and the interest rate is 27% . It is well understood that the money has to be paid back **within 90 days** the last date of which is 20.05.2001. In page two of the said letter, on the 4th line it is mentioned that the interest rate is 27% and on the 7th line it is mentioned **that the penal rate is 31%.** This Letter P5 is full proof of the fact that the Defendant was informed of the rates of interest at different levels. The Defendant has not denied this letter even when its Managing Director Robert Perera was giving evidence.

All the documents when marked and produced at the end of the Plaintiff's case, were not objected to by the Defendant and stand as proven before the court

according to Chief Justice Samarakoon in the case of ***Sri Lanka Ports Authority and Another Vs Jugolinigja-Boal East reported in 1981, 1 SLR 18.*** It was held thus in the said case. " 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". I hold therefore that the Defendant cannot be heard to state that the Plaintiff has calculated the interest at 31% wrongfully and that the Defendant did not agree for such interest rate. He was fully aware of the said penal rate and as the Defendant did not comply with the time limit granted to repay, the loan goes into the 'non performing section' as a matter of course. In addition to all what is said, the Managing Director of the Defendant Company having been an ex employee of the Plaintiff Bank, he cannot make any excuses at all.

The other documents are to the effect that some more of the short term loans due were also not paid by the Defendant and time and again the Plaintiff had been writing to the Defendant and the Directors to at least come to the Bank and discuss a repayment programme. P18 is a letter from the Managing Director of the Defendant to the Plaintiff dated 28.05. 2002 requesting the Plaintiff Bank to grant time till 15th June, 2002 to enable him to submit a repayment programme to settle the dues. However Rs. 63,693.46 had been received by the account between 20.02.2001 to 11.03.2001. The statement of accounts as at 04.04.2003 was produced at the trial marked as P27. In that statement, the capital outstanding is mentioned as Rs. 3,368,010/54 and interest due from 12.03.2001 to 04.04.2003 at the rate of interest at 31% on the capital is mentioned as Rs. 2,197,779/73. That is how the claim had been calculated prior to the filing of action against the Defendant.

I have gone through the evidence led at the trial and find that the Defendant had admitted the grant of the short term loan and the default of payment as well. I am of the view that the Plaintiff has established the claim of the Plaintiff against the Defendant on the balance of probability. Any way as it was held in the case of ***Alwis Vs Piyasena Fernando 1993 , 1 SLR 119*** that **'the findings of primary facts by a Trial Judge who hears and sees the witnesses are not to be lightly disturbed in appeal',** I am of the view that this Court does not have to disturb the facts found by the trial judge but affirm the same.

I am also of the view that the Defendant Appellant by having preferred this Appeal has delayed the Plaintiff Respondent getting the benefit of the judgment delivered by the Judge of the Commercial High Court in favour of the Plaintiff.

The grounds of appeal stated in the Petition of Appeal do not stand to reason. The judgment cannot be disturbed on any of the grounds set out in the Defendant Appellant's Petition. I

The Appeal is dismissed with 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 an Appeal in terms of Sec. 754(1) Of the Civil Procedure Code read together with Sec. 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

SC (CHC) Appeal No. 18/09
H.C.(Civil) Case No. 140/2003(1)

People's Bank,
No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2.

Plaintiff

Vs

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

Defendant

AND NOW

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

Defendant Appellant

Vs

People's Bank,
No. 75, Sir Chittampalam A Gardiner Mawatha, Colombo 2.

Plaintiff Respondent

BEFORE **: S. EVA WANASUNDERA PCJ,**

UPALY ABEYRATHNE J, &

K. T. CHITRASIRI J.

COUNSEL **:** Nihal Fernando PC with Ms. Rhadeena De Alwis and K.U. Gunasekera for the Defendant Appellant.

Kushan D'Alwis PC with Rajiv Wijesinghe and Thilani Seneviratne for the Plaintiff Respondent.

ARGUED ON **: 08. 08.2016.**

DECIDED ON **: 17.03.2017.**

S. EVA WANASUNDERA PCJ.

In this matter, at the end of the hearing on 08.08.2016, Judgment was reserved by Hon. Justice K.T. Chithrasiri. Thereafter, I had the benefit of reading the draft judgment written by my brother Hon. Justice K. T. Chithrasiri with which I do not agree. As such I am writing this judgment in the following manner.

This Appeal arises **from two Guarantees** issued by the Defendant Appellant, the Sri Lanka Insurance Corporation Ltd., (hereinafter referred to as the Appellant SLIC), to the Plaintiff Respondent , the People's Bank (hereinafter referred to as the Respondent Peoples' Bank) on behalf of a company by the name of BAT International S.P.A. (hereinafter referred to as BAT International). **The Appellant SLIC is the Guarantor** and the Respondent Peoples' Bank is the receiver of the Guarantee.

The facts in brief are as follows. The Road Development Authority had awarded a contract to BAT International to perform road rehabilitation work on Galle – Matara, Matara – Akuressa and Matara – Hakmana sections of the road. BAT International was a customer of the Respondent Peoples' Bank and had maintained a current account at the Corporate Branch of the Respondent Peoples' Bank. BAT International had applied for over draft facilities on **two occasions**. The Respondent Bank had granted those facilities for **Rs. 15 million and Rs. 3 million** to the BAT International on the undertaking that all the payments that are to be made to BAT International by the Road Development Authority will be deposited into the current account maintained by BAT International in the Respondent Bank and **also on the condition that BAT International should provide a Guarantee from the Appellant, the Sri Lanka Insurance Corporation Limited,** for the repayment of the overdraft facilities as aforementioned amounting to **Rs. 18 million**. Accordingly two Guarantees were issued by the Appellant .

BAT International fell into arrears on payment. It made use of the overdraft facilities. The money due to them from the Road Development Authority kept on coming into the account but **at a particular time, BAT International had overdrawn the facilities over and above the limit of Rs. 18 million.** The Respondent Bank had to make the demand on the Guarantee within the guarantee period and so it did. The Appellant failed to honour the guarantee. Therefore the Respondent Bank filed action in the Commercial High Court against the Gaurantor, the Appellant. The Commercial High Court granted the reliefs as prayed for by the Plaintiff, the Respondent Peoples' Bank. Being aggrieved by the judgment of the High Court the Appellant SLIC has appealed to this court.

The contention of the Appellant SLIC is that the Respondent Bank should have filed action against the company BAT International first and then only the Bank gets the right to file action against the guarantor on the Guarantee. **The contention of the Respondent Peoples' Bank** is that the Guarantee is in place for the Guarantor to pay on demand and therefore the Appellant is duty bound to pay when the company whose payment was guaranteed by the Appellant, failed to perform its duty to make payments to the Respondent Bank.

The Respondent Bank filed action on 03.06.2003 praying for judgment in favour of the Bank and against the Appellant , the Sri Lanka Insurance Corporation in a sum of Rs. 18 million to be paid to the Bank on account of the two Guarantee Bonds. The Insurance Corporation filed answer on 29.09.2003. At the trial, the Guarantee Bonds were admitted. The statement of accounts pertinent to the current account of BAT International was produced in evidence marked as X2 in proof of the amount of Rs.18 million due and owing from BAT International since the overdrawn amount exceeded Rs.18 million thus paving way for the Bank to demand the same from the Insurance Corporation who guaranteed such payment by way of the Guarantee Bonds. **The cause of action was non payment on demand according to the Guarantee Bond.** The statement of accounts showed the fact that it was overdrawn by amounts over and above Rs. 18 million. The true factual amount due and owing from BAT International was much more than 18 million rupees but the Plaintiff could only demand from the Insurance Corporation only the amount it had guaranteed which is Rs. 18 million. The Bank closed its case reading in evidence documents marked P1 to P12. The Insurance Corporation did not lead any evidence

but submitted to court that as the Plaintiff Peoples' Bank had admitted that it had not filed action against BAT International, the Defendant Insurance Corporation would close its case without leading any evidence. **The position of the defense was that the Bank should go against the principal debtor before filing action against the guarantor.**

When the demands were made on the two guarantee bonds, the Insurance Corporation had sent certain letters in reply. They were marked as X5, X8 and X9. The letter X5 stated that the Insurance Corporation was waiting for the outcome of an expected settlement between the BAT International and the Road Development Authority. The letter X8 contained material to state that the dispute between BAT International and the RDA had been referred to arbitration and therefore the Insurance Corporation was unable to proceed to pay as guaranteed till the arbitration is over. The **final letter X9** dated 30.07.2002 stated that the **Insurance Corporation is in the process of attending to the claims,** which are the guaranteed amounts of Rs. 15 million and Rs. 3 million.

I fail to see any of these letters as a denial to pay the amounts demanded. Instead they seem to be letters conveying the message that the Insurance Corporation needs a little time to pay. None of these letters can be taken to be interpreted as directing the Bank to go against the company before demanding from the Insurance Corporation. None of the letters claim that the Insurance Corporation is not liable to pay. In fact letter X9 gives an assurance that it will pay the amount demanded according to the guarantee.

The demands were made within the stipulated time. The Appellant never denied liability.Reading through the Guarantee Bonds, the wording is clear in paragraph 6 which reads as follows:

" Now Know Ye And These Presents Witness that the said surety is now firmly bound to the said Bank to pay a sum of Rupees 15 million **when demanded** by the said Bank, in the event of the said Principal not repaying the said facility obtained from the said Bank either directly or through the said Road Development Authority."

The only time money can be demanded is when the Principal was not paying directly or through RDA. The statement of accounts was proof of that fact. The account of the Principal was overdrawn by amounts over and above Rs. 18 million which was the guaranteed amount.

There was no condition contained in the Guarantee Bond that the Peoples' Bank should first demand from the Principal before demanding from the guarantor. When any party grants an assurance to another party guaranteeing to pay on demand, **it is accepted that if the principal does not pay that the guarantor shall pay. It is only on that assurance that the Bank grants the facility which the principal requests from the Bank.** That is the norm and accepted practice in the business world. If any Bank takes it to mean that it has to first demand from the principal, then file action against the principal and then only the Bank can demand and file action against the guarantor, **there will be no bank who would want to grant any facility to any principal on such a guarantee.**

In this era when trade and commerce all over the world is proceeding in a balanced manner to serve the society in a just and fair manner, the Guarantee Bonds which have the clause 'to pay on demand' play a very big role. If not for the system of guarantee bonds by which one party assures the other party that if the principal is in arrears and or in default, the party giving the guarantee shall pay on demand, the trade and commerce prevailing in the society for the benefit of the people will surely crash down.

Law of Guarantees by Geraldine Andrews and Richard Millet 2nd Edition at page 192 reads as follows:

" The fact that the obligations of the guarantor arise only when the principal has defaulted in his obligations to the creditor **does not mean that the creditor has to demand payment from the principal or from the surety, or give notice to the surety, before the creditor can proceed against the surety**. "

At page 194 it reads as follows: " There is **no obligation on the part of the creditor to commence proceedings against the principal, whether criminal or civil**, unless there is an express term in the contract requiring him to do so……"

At page 195 it reads as follows: " Thus in the absence of any condition precedent in the contract, all that the creditor needs to establish to **complete his cause of action against the guarantor is that the principal has defaulted…"**

In the case of ***Hemas Marketing (Pvt.)Ltd. Vs Chandrasiri and Others (1994) 2 SLR 181*** Jutice S.N.Silva (P/CA) as he then was, stated thus:

" A guarantee is an **accessory contract** by which the promisor undertakes to be answerable to the promise for the debt, default or miscarriage of another person whose primary liability to the promise must exist or be contemplated. Bank Guarantees were established as a universally acceptable means of payment equivalent to cash in trade and commerce, on the basis that the promise of the issuing bank to pay was wholly dependent of the contract between the buyer and seller and **the issuing bank would honour its obligations to pay regardless of the merits or demerits of the dispute between the buyer and the seller.**

When a bank has given a guarantee, it is required to honour it according to its terms and is not concerned whether either party to the contract which underlay the contract was in default. **The whole purpose of such commercial instruments was to provide security which was to be readily, promptly and assuredly realizable when the prescribed event occurred."**

Accordingly, in the case in hand, the Respondent Peoples' Bank was assured by the Guarantee Bond provided by the Principal debtor who received overdraft facilities from the said Bank where the guarantor was the Appellant Insurance Corporation. The Sri Lanka Insurance Corporation provided security on behalf of BAT International 'to pay on demand' the amounts agreed by the guarantees when BAT International was in default. Such was the security readily and promptly realizable provided by the Appellant Insurance Corporation. **Therefore the Guarantor should pay on demand when the Principal failed to pay.**

In the case ***of Indica Traders (Pvt.) Ltd. Vs Seoul Lanka Constructions (Pvt.) Ltd. 1994, 3 SLR 387***, it was held that, " Business transactions between a bank and a

beneficiary, constituted in the nature of a performance bond, a performance guarantee, letter of guarantee or irrevocable letter of credit, whereby the bank is obliged to pay money to a beneficiary, **are not tripartite transactions** between the bank (surety) the beneficiary (creditor) and the party at whose instance the bond, guarantee or letter is issued (the principal debtor) but, **simply transactions between the bank and the beneficiary.** A bank thereby guarantees to the beneficiary payment of money and is **obliged to honor that guarantee according to its terms.** Any dispute that may arise between the beneficiary (creditor) and the party at whose instance the guarantee or letter is given (the principal debtor), on the underlying contract, **cannot be urged to restrain the bank from honoring the guarantee or letter according to its terms."**

In the case in hand, the Appellant, Sri Lanka Insurance Corporation cannot urge anything in the contract between the BAT International and the RDA and/or any contract between the BAT International and the Respondent Peoples' Bank and restrain from honouring the guarantee. According to the Guarantee Bond, the Appellant Insurance Corporation is duty bound to pay on demand because the only terms are that the BAT International has to be in arrears, which was proven by the statement of accounts, P3 and the demand has to be made within the guarantee period. Both conditions were fulfilled but the Appellant Sri Lanka Insurance Corporation Limited failed to pay on demand.

I hold that the Appellant is duty bound to pay on demand and it has failed to do so. The Respondent Peoples' Bank is therefore entitled to the reliefs prayed for in the Plaint.

This Appeal is hereby dismissed with costs.

Judge of the Supreme Court

Upaly Abeyrathne J.

I agree.

Judge of the Supreme Court.

CHITRASIRI, J.

Facts of this case are briefly as follows. Rural Development Authority (RDA) awarded a contract to a company named BAT International SPA to perform rehabilitation works in respect of Galle-Matara, Matara-Akuressa, and Matara-Hakmana roads under the Contract bearing number WB 3/3. Having succeeded in obtaining the said contract for road rehabilitation work, BAT International applied for two overdraft facilities from the Plaintiff-Respondent Bank (hereinafter referred to as the plaintiff) with the view of carrying out the aforesaid rehabilitation work. The plaintiff bank having granted the said facility, BAT International was permitted to overdraw funds by debiting the account bearing No.03206429 which was maintained by it in the plaintiff bank. The amount so authorized to overdraw was for Rs.18 million. (Rs.18,000,000/-) Accordingly, the plaintiff did release the money

to BAT International. Admittedly, Bat International, it being the principal debtor had failed to repay the plaintiff bank, the money so overdrawn.

Prior to the money being released, the Defendant-Appellant (hereinafter referred to as the defendant) namely, Sri Lanka Insurance Corporation Limited had agreed to secure the repayment of the money that was to overdraw by Bat International from the plaintiff bank. Securing the repayment of money had been assured by the defendant corporation by issuing two guarantee bonds. Those two guarantees were for a value of Rs.18 million and those were marked as P2 and P7 in evidence.

As mentioned before, granting of the said facility by the plaintiff bank to Bat International was subject to the condition that BAT International provides a guarantee from the defendant insurance corporation for the re-payment of the money released on the overdraft facility. Accordingly, the two guarantees marked P1 dated 31.07.1997 and P7 dated 24.11.1997 for the values of Rs.15 million and for Rs.3 million respectively had been issued by the defendant at the request of BAT International.

Accordingly, Road Development Authority had agreed to pay for the work done by BAT International, by depositing the money in the aforesaid Account bearing No.03206429 maintained by BAT International at the plaintiff bank. These two Bank Guarantees were executed to ensure the payments due to BAT International SPA from the Rural Development Authority.

Admittedly, neither the BAT International SPA nor the Rural Development Authority had paid the monies due to the plaintiff. As a result, the plaintiff Bank made claims on the two Guarantees, from the defendant namely, Sri Lanka Insurance Corporation Limited. The Bank had made several demands from the defendant to honour the guarantees issued by it. Defendant had failed to comply with those requests made by the plaintiff bank. Consequently, the plaintiff bank filed this action in the High Court Holden in Colombo exercising its civil jurisdiction, against the Sri Lanka Insurance Corporation Ltd to recover a sum of Rs.18 million under the aforesaid two guarantees. It is important to note that the plaintiff bank had not made the BAT International, as a party to this action though that company was the borrower of the money. No evidence is forthcoming to establish that the bank had even made a demand from Bat International to recover its dues either.

Upon filing the answer by the defendant, the case proceeded to trial. At the trial, evidence for the plaintiff was led and then the plaintiff closed its case reading in evidence the documents marked P1 to P12. No witnesses were called on behalf of the defendant. At the closure of the plaintiff's case, learned Counsel for the defendant submitted that the defendant is not calling any witnesses on its behalf. Such a decision was taken by the defendant due to the reason that the plaintiff has not filed any action against the BAT International which is the entity benefitted, having borrowed the money from the Plaintiff bank. Thereafter, learned High Court Judge, by the judgment dated 20.03.2009 decided the case granting the reliefs as prayed for by the plaintiff.

Circumstances show that the reason for not leading evidence at the trial by the defendant was due to a question of law depended upon by it. The said question

of law had been raised as an issue as well, [issues 24 and 33] at the trial held in the High Court and it reads thus:

> *Could the creditor (plaintiff bank) file and maintain action against the guarantor (defendant-Insurance Corporation) to recover dues under the two Guarantee Bonds, without first instituting action against the principal debtor (BAT International)?*

It seems that the learned High Court Judge has not addressed this issue of law when she decided the case in favour of the plaintiff. It is the only issue that was argued before this Court. Accordingly, the issue before this Court is to ascertain whether or not the plaintiff is entitled to institute action against the defendant on the Guaranteed Bonds marked P2 and P7 without taking steps to recover the dues from the principal debtor namely, BAT International SPA. Since, it is question of law; I will straight away refer to the authorities relevant thereto.

The law applicable in this connection is the Roman Dutch Law which is our residual Law that applies to Contracts of Surety-ship which are also termed as Contracts of Guarantee. English Law does not apply in this regard since it has not been introduced by statute or even by tacit introduction by a line of judicial decisions.

In the early Case of GURUSIN APPU vs. CARLINA HAMINE, [02 NLR 307] the Court applied the Roman Dutch Law (which was stated to apply in Scotland as well) when determining a question relating to the liability of a Surety.

Therefore, the issue before this Court will have to be decided applying the Roman Dutch Law principles and not under the English Law. In the Roman Dutch Law, a Surety has the right to require the Creditor to exhaust his legal remedies against the Principal Debtor before proceeding against the Surety – i e: to insist on the "excussion" of the Principal Debtor before the Creditor proceeds against the Surety. [Wille at Pg.619 and Maarsdorp at Pg. 357]

Wille's Principles of South African Law [8th Edition] at page 619, states thus:

> "The surety may claim that the principal debtor be first 'excused', i.e. that the creditor, before suing the surety, exhaust his legal remedies against the principal debtor for performance or payment, right up to execution against his property." [Grotius 3.3.27; Voet 46.1.14].

Maasdorp, The Institutes of Cape Law [Volume I, The Law of Obligation, at page357] states thus:

> "The benefit of excussion, as known to our law, is the right of exception to which a security is entitled, who is being sued before the principal debtor, to demand that the principal shall first be sued and excused; [Voet 46:1:14; G 3:3:27'Schorer, note 303] and, where there are more than one principal debtor, that all shall be excused. [Westhuizen v. Pope and Devenish, 2 Menzies,60] It further entitles the surety, where an obligation has been secured as well by the giving of sureties as by a mortgage on immovable property, to claim that the immovable property shall also be excused before he is himself proceeded against. [Serrurier Vs.Langeveld,1Menzies,316;Voet,46:1:15;20:4:3;G.3:3:32,V.D.K.,Th.507.508; Schorer,Note 303,par.1;V.L.,vol.2.p.42.]

In Gurusin Appu vs. Carlina Hamine, (supra) a Surety's right of excussion was recognized. This right of a Surety is known as the *beneficium excussionis sue ordinis.*

However, if the Surety has renounced this right either expressly, by agreeing to a specific renunciation of this right or impliedly, by accepting liability as a Principal Debtor and agreeing to be sued without the Debtor excussing the Principal Debtor, the Surety cannot claim this right or insist that, the Creditor must proceed against the Principal Debtor before proceeding against the Surety.
[Wille at p.619-620 and Maarsdorp at Pg.365]

The leading case of WIJEWARDENE vs. JAYEWARDENE [19 NLR 198 at pg.452-455.] contains a discussion on the rights of a Surety, the effect of renunciation of these rights and also the manner in which such renunciation should be done. In that decision Wood Renton J held thus:

> *"That the defendant was not debarred from relying on the beneficium ordinis. The ordinary privileges of suretyship must be specially renounced. In that case the renunciation by the defendant in deed no.5,279 of his rights as a surety would clearly be inoperative. But even if we adopt the view of Van der Keessel, the present appeal would still fail. For the efficacy of the general renunciation depends on whether the surety, not being peritus juris is proved affirmatively to have understood the nature of the right or rights renounced ……. I would hold that the surety's knowledge on that vital point must appear on the face of the deed of suretyship itself".*

This principle had been applied in WIJEWARDENE vs. JAYEWARDENE [24 NLR 336] and also in the Privy Council decision in WIJEWARDENE vs. JAYEWARDENE [26 NLR 193]

It has been discussed by Prof. C.G.Weeramantry in his book "The Law of Contracts" as well. [Volume I, at pg. 198] In that book he states as follows:

> *"Contracts of Guarantee must be distinguished from Contracts of Indemnity. In a guarantee, a promise is made by the guarantor to the creditor which is collateral to the contract already existing between the creditor and the debtor. The obligation of the guarantor is conditional on the failure of the principal debtor to pay. It will be seen that in cases of guarantee there are two contracts and three parties.*
>
> *In cases of Indemnity, on the other hand, there is only one contract the contract between the person indemnifying and the creditor. It is a promise to see that the promise does not suffer by entering into the transaction. To illustrate the difference – if two persons enter a shop and one buys goods and the other promises the seller "if he does not pay you I will", this is a contract of guarantee. If on the other hand he says "let him have the goods – I will pay you," this is a contract of indemnity. There is only one contract and it is not dependent on the existence of another."*

For completeness, I will briefly refer to the English Law principles as well particularly because both Counsel has referred only to the English Law principles in this instance.

In the book "Paget's Law of Banking" (12th Edition) Section 33.2 at pages 701-702, it states thus"

> *"A guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed; the guarantor undertakes that the principal debtor will perform his (the principal debtor's) obligation to the creditor and that he the (guarantor) will be liable to the creditor if the principal debtor does not perform. Therefore, the guarantor's liability for the non-performance of the principal debtor's obligation is co-extensive with that obligation. If the principal debtor's obligation turns out not to exist, or is void, diminished or discharged so is the guarantor's in respect of it".*

Geraldine Andrews and Richard Millett, Law of Guarantees, (Sixth Edition) at page 5 states as follows:

> *"The essential distinguishing feature of a contractor of guarantee is that the liability of the guarantor is always ancillary, or secondary, to that of the principal, who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligations…"*

At page 271, it states thus:

> *"A contractor of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligation. It*

has been described as a contract to indemnify the creditor upon the happening of a contingency, namely the default of the principal to perform the principal obligation (citing Sampson v Burton (1820) 4 Moo CP 515). The surety is therefore under a secondary obligation which is dependent on the default of the principal and which does not arise until that point ….”

Halsbury’s Laws of England, Secondary liability of the guarantor, Volume 20, (Fourth Edition) at page 180 states thus:

“There are two different kinds of guarantee. One is a promise by the guarantor which becomes effective if the principal debtor fails to perform his obligations. The other is a promise that the principal debtor will perform his obligations. In both cases, the guarantor’s liability is secondary. The guarantor is under no liability if the principal debtor’s obligation is discharged, by performance or otherwise, on or before the date of performance. In the one case, the conditional promise never becomes effective; in the other, there is no breach by the guarantor.

Consequently, a creditor may not, before any default has been committed, bring an action quia timet against a guarantor to force him to set apart money to provide for the possibility of a debt becoming due from the principal debtor and the principal debtor making default. Nor can the creditor obtain a Mareva injunction against the guarantor, because he has no accrued cause of action

to support it. On the other hand, a guarantor is no more justified in placing the whole of his property out of the reach of liability to pay the guaranteed debt than if he were the principal debtor."

English Law authorities referred to above too, show that the guarantors' liability would become effective only when the principal debtor fails to perform his duty towards the lender. However, as I have mentioned earlier in this judgment, it is the Roman Dutch Law that is applicable to the issue in hand.

Accordingly, the question on which this appeal should be decided is to ascertain whether the Surety has, in fact, renounced the aforesaid right of excussion and/or accepted liability as a Principal Debtor and/or agreed that the Creditor may sue the Surety for the recovery of the monies due without proceeding against the Principal Debtor, knowing the effect of the renunciation.

I do not see any material in this instance to show that the surety namely the defendant Insurance corporation has made such a renouncement of its right of excussion and/or accepted liability as a Principal Debtor and/or agreed that the Creditor may sue the Surety for the recovery of the monies due, without proceeding against the Principal Debtor, knowing the effect of the renunciation. Therefore, the Plaintiff Bank will have to first file action against the principal debtor namely BAT International Company, before proceeding against the Insurance corporation, it being the guarantor. In the circumstances, the question of law raised in this case is to be answered in favour of the defendant Insurance Corporation Ltd.

Moreover, I believe it also may leave room for the two main parties, namely the person who advanced the money and the borrower, to connive and to allow the borrower to avoid payment though the borrower is in fact, in a position to service the facility obtained. However, I must emphasize that the decision arrived at in this case shall not be a reason to escape liability under the guarantee bonds, after the proper cause of action is taken against the borrower, BAT International.

For the reasons set out hereinbefore, it is my opinion that it is incorrect to have filed action by the plaintiff bank against the defendant insurance corporation, it being the guarantor, without taking steps against the principal debtor namely Bat International to recover moneys due to it, on the overdraft facility extended to Bat International.

Accordingly, the judgment dated 20.03.2009, of the learned High Court Judge of the High Court (exercising its civil jurisdiction) Holden in Colombo is set aside. The plaint dated 04.06.2003, filed by the plaintiff bank is dismissed. Having considered all the circumstances, I make no order as to the costs of this appeal.

Appeal allowed.

JUDGE OF THE SUPREME COURT

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

S.C (CHC) Appeal No. 18/2008
HC (Civil) Case No. 26/2006(1)

Muruthawalage Chandrarathne
No. 74/10, Thalgassa Road,
Thibbotuwawa,
Akuressa.

PLAINTIFF

Vs.

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

DEFENDANT

AND NOW (BY AND BETWEEN)

Muruthawalage Chandrarathne
No. 74/10, Thalgassa Road,
Thibbotuwawa,
Akuressa.

PLAINTIFF-APPELLANT

Vs.

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

DEFENDANT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.
Anil Gooneratne J. &
Vijith K. Malalgoda P.C., J.

COUNSEL: M.U.M. Ali Sabrey P.C. with
Ruwantha Cooray for Plaintiff-Appellant

Chandana Liyanapatabendi P.C. with
Nirosha Wickremasinghe for the Defendant-Respondent

ARGUED ON: 21.06.2017

DECIDED ON: 14.09.2017

GOONERATNE J.

The Plaintiff-Appellant (the insured) obtained an Insurance Policy to cover his hardware stores, business. The policy bearing No. F/010//FBP/2002/35 inter alia covers loss and destruction due to fire. Policy had been issued for a period of one year from 10.04.2003. It is pleaded that on or about 17.04.2003, his business premises caught fire and completely destroyed his business premises. Loss and damage estimated at Rs. 7,500,000/- This is a direct appeal to the Supreme Court from the Commercial High Court.

The only issue to be decided as submitted to court and with the material pleaded before court, is the question of limitation of the time period, as per the Insurance Policy. It is pleaded that the Respondent Company

processed the Plaintiff-Appellants claim, based on the policy but the Respondent Company rejected the claim as pleaded in paragraph 7 of the Petition of Appeal. It reads thus:

(i) Appellant had instituted the present action by suppressing the material facts.
(ii) No fire had taken place in the premises insured.
(iii) No damages had been done to the Appellant due to the fire within the said premises.
(iv) Appellant had preferred a fraudulent claim to the Respondent.
(v) Appellant had failed to institute the present action within 3 months of the refusal and/or rejection of the Appellant's insurance claim and/or failed to institute the present action within 03 months of the arbitration award and,
(vi) The Appellant had failed to institute the present action within 12 months from the act of damage. Therefore Appellant's claim is prescribed in law.

I cannot find the letter of rejection though the claim was rejected on 24.06.2004. The brief unfortunately does not include such letter. The Plaintiff-Appellant relies on a Judgment pronounced by the Supreme Court bearing Case No. SC Appeal 23/2010: SC minutes of 16.05.2016. In this regard the Plaintiff-Appellant submits that prescription is a matter of evidence which need to be tried at a trial though the learned High Court Judge based her Judgment on three

preliminary issues and delivered Judgment dismissing Plaintiff-Appellant's case, on 05.02.2008.

When I consider the facts of this case I find that the matter had been referred to arbitration earlier and Plaintiff withdrew his claim. Thereafter arbitration proceedings were dismissed on 18.10.2005. Plaintiff urge that prescription is a mix question of fact and law. Further Arbitrator did not make any award, and prescription cannot be counted from the date of the incident. Learned High Court Judge, according to Plaintiff, failed to consider, the fact that instituting action within three months is not possible from the date of the purported refusal of Appellant's claim for the reason, it had been subjected to a matter of arbitration. Plaintiff also urge that learned High Court Judge has erred in interpreting Clause 20 of the Insurance Policy Agreement and the matter was referred to arbitration within three months as in Clause 13 of the Insurance Policy Agreement.

On the other hand the Defendant-Respondent Company had taken up the position that the purported dispute referred to arbitration by the claimant is not a difference that had arisen between parties as to the amount of loss or damage as may be referred to arbitration in terms of the Insurance Policy. Arbitration proceedings were withdrawn by the claimant. In the proceedings before the Arbitration Panel it is recorded that "matter comes up for hearing

today and, however in view of paragraph (1) of the statement of objections as stated in (a) to (e) above the Arbitral Tribunal has no jurisdiction to inquire into the dispute". Thereafter learned counsel for claimant withdrew his case, before the Arbitration Panel.

Parties proceeded to trial on 27 issues and issue Nos 20, 21 & 26 had been suggested by the Defendant-Respondent to be tried as preliminary issues as they involve questions of law. Issue Nos. 20, 21 & 26 read thus:

20. Has the Plaintiff failed to commence this action within 3 months of the rejection of the Plaintiff's claim?

21. Has the plaintiff failed to commence this action within 3 months of the award of the arbitration?

26 Is the Defendant not liable to make any payment to the Plaintiff for the reasons pleaded in paragraph 21 of the Answer?

Though the Plaintiff party takes up the position that the Plaintiff objected to trying the preliminary issues as it contains mix questions of law and fact, the record does not indicate so. Objection of Plaintiff has not been recorded in the journal entry of 24.07.2007. No proceedings of the day is also made available to court to examine whether Plaintiff objected to try the above issues as preliminary issues. However in the written submissions filed in the High Court, Plaintiff party discuss that position very extensively with reference to case law. The law on the point is settled that only pure questions of law should be tried as

preliminary issues in terms of Section 147 of the Civil Procedure Code. Vide *Pure Beverages Ltd. Vs. Sunil Fernando 1997 (3) SLR 202; 2001(3) SLR 56.*

I think this is a matter that need further discussions on the subject. Section 6 of the Prescription Ordinance states the period of prescription for contracts, agreements, etc. is 6 years. Insurance policy suggest a short period. There is nothing to say that the insurance policy itself is illegal, or against public policy. Therefore parties concerned are bound by terms of the insurance policy. It is not a contract 'in restrain' which is contrary to public policy.

Professor Weeramantry on Law of Contracts Vol II Pg. 797 reads thus "It is not contrary to public policy for parties to enter into agreements not to plead limitation, such an agreement is valid and enforceable in English Law if supported by consideration, whether it be made before or after the limitation period has expired. The same observation holds good for our law. Except that such an agreement need not be supported by consideration". In the case of *Hatton National Bank Ltd. Vs. Helenluc Garments Ltd. and others,* reported in 1999 (2) SLR 365 Wijetunge J. held that the Prescription Ordinance would not operate as a bar to the Plaintiff suing them for recovering of the money due under a guarantee.

The 2nd to the 6th defendants had in the guarantee made by them agreed to waive the plea of prescription. Such an agreement is valid and enforceable whether it is made before or after

the period of limitation. Hence, the plaintiff is entitled to pursue the action against those defendants.

I will at this point discuss whether the case relied upon by the Plaintiff party, S.C. Appeal 23/2010 has any bearing to the case in hand on a comparison of material points.

(1) The case in hand is a direct appeal to the Supreme Court. S.C. 23/2010 is not so, but a case where leave was granted by the Supreme Court from the judgment of the High Court, and to the High Court was an appeal from the District Court.

(2) Both cases deal with a Fire Insurance Policy. The several clauses are somewhat identical to each other notwithstanding the fact that the case in hand the Defendant is a government agency. In both cases it was alleged that the premises were destroyed by fire.

(3) In S.C 23/2010 there was an absence of a letter of rejection of the claim made by the. The case in hand, it was not so, though the letter of rejection was not available in the brief, the Plaintiff party itself refer to the letter of rejection dated 24.06.2004. This is a vital matter to distinguish the two cases. Plaintiff party relies on the letter of rejection to prosecute his case before the Arbitrators Panel and in the High Court. Such a notification is essential to prosecute one's case. On this alone the two cases could be distinguished.

(4) Connected to above, in S.C. 23/2010 it is stated in the said case that rejection of claim by insurer and notification are matters to be determined only after allowing parties to establish those facts and call witnesses to give evidence. It is also said that High Court Judge failed to allow parties to make submissions.

In the case in hand parties were not prevented in making submissions. If that be the case it is a breach of natural justice. Nor is it recorded in the brief that the Plaintiff applied to court to lead evidence. I have dealt with that position earlier in this Judgment.

In view of (1) to (5) above the case in hand is very easily distinguishable from the case S.C. 23/2010. To me it seems to be an afterthought of the learned counsel for Plaintiff-Appellant to have submitted to court the copy of above S.C 23/2010. I see no legal basis to arrive at a conclusion that both cases are similar factually. Nor can I hold that there was a breach of the rules of natural justice.

In all the above circumstances I hold that the learned High Court Judge has correctly dealt with the case. As such I affirm the Judgment of the High Court and dismiss this appeal with costs.

Appeal dismissed with costs.

JUDGE OF THE SUPREME COURT

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

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda 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 Commercial High Court of Colombo Against the Judgment dated 24.07.2003.

Somerville and Company Limited
No. 137, Vauxhall Street,
Colombo 02.
Plaintiff

SC CHC APPEAL 20/2003

HC CIVIL 56/1998 (1)

Vs

1.Employees Trust Fund,
1st Floor, Labour Secretariat,
Colombo 05.

2. Public Enterprises Reform
Commission, West Tower,
World Trade Centre,
Colombo 01.
Defendants

AND

Employees Trust Fund, 1st Floor,
Labour Secretariat, Colombo 05.

1st Defendant Appellant

Vs

Somerville and Company Limited,
No. 137, Vauxhall Street,
Colombo 02.

Plaintiff Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
SISIRA J DE ABREW J. &
H. N. J. PERERA J.

COUNSEL : Rajiv Goonethillake, SSC for the 1st Defendant Appellant.
Chandaka Jayasundera instructed by Abdeen Associates for the Plaintiff Respondent.

ARGUED ON : 22.02.2017.

DECIDED ON : 03.04 .2017.

S. EVA WANASUNDERA PCJ.

Somerville & Company Limited was a company renowned for its skills and expertise to manage plantations. The Employees Trust Fund Board , at a particular time and era in the past was intending to maximize its profit earning capacity by diversifying its investments in more profitable ventures other than investing in securities such as Treasury Bills as was the normal practice. As such, the said Board wanted to invest money in buying shares in Mathurata Plantations Limited when the Government of Sri Lanka decided to sell 51% of the shares of the said company.

Somerville Stock Brokers Limited was a subsidiary company of Somerville & Company Limited. Somerville Stock Brokers Limited offered their services to the Employees Trust Fund Board to prepare the documentation for the bidding process to purchase shares of Mathurata Plantations Limited.The bidding process had two stages. Only the qualifying bidders at the technical evaluation stage would qualify to take their bids to the financial bidding stage which was conducted at the Colombo Stock Exchange. The Somerville & Company Limited and the Somerville Stock Brokers Limited carried out work along with the Employees Trust Fund Board in preparation of the documents to evaluate the

technical and financial capabilities of ETFB as a bidder. When bidding was done , at the technical evaluation stage, the Technical Evaluation Committee had permitted the ETFB to bid at the second stage **only if their proposal contains an arrangement to have the plantations which came under the Mathurata Plantations Limited managed by a reputed management company with estate management experience.**

To fulfil this condition to bid at the second stage, **the ETFB entered into an Agreement with Somerville & Company Limited requiring them to manage the plantation** *through another subsidiary which was to be incorporated subsequently*.

The Public Enterprise Reform Commission (PERC) was functioning as the facilitator in this exercise. Since the **arrangement between ETFB and Somerville & Company Limited was acceptable to PERC** on the basis that ETFB was financially capable of providing the necessary funds for the required purchase of 51% of shares of Mathurata Plantations Limited and that the persons whose services were intended to be obtained had management capabilities of managing the plantations and there was a formal management structure in place, ETFB was qualified on the second attempt to bid at the Colombo Stock Exchange. ETFB had made the highest bid for shares and was able to secure the purchase of 51% of the shares of the Mathurata Plantations Limited. So, ETFB was successful at the end.

Then Somerville Stock Brokers submitted an invoice for the services rendered. ETFB did not pay the same since in its opinion the charges were high. ETFB paid a certain amount which Somerville Stock Brokers accepted later without prejudice to what it claimed was due.The dispute continued.

In the meantime, Mathurata Plantations Limited was not handed over to Somerville Company Limited. The problem was caused due to the security deposit not being determined. The managers of Mathurata Plantations Limited at the time of divestiture of the shares was a company called Crop Management Limited. That company continued to manage the plantation on revised remuneration terms with the concurrence of the Secretary to the Treasury.

When these problems were continuing, **the ETFB made a change of policy.** That was to withdraw all their equity investments in commercial enterprises. Therefore the **ETFB decided to sell its shareholding in the Mathurata Plantations Limited.**

It is at this juncture that Somerville & Company Limited instituted action in the Commercial High Court of Colombo against ETFB on the Agreement entered into between the parties. It was firstly for the purpose of stopping the sale of shares and secondly praying for declarations that ETFB was in breach of the conditions of the Agreement, for specific performance and for damages caused to the Plaintiff Company. Court did not grant interim relief. The sale of the shares held by ETFB went through, thus **ETFB earning a profit from the sale of the shares**. ETFB had purchased the shares of the Mathurata Plantations Ltd. for Rs. 616 million and thereafter sold the said shares for Rs. 881 million **making a profit of Rs. 265 million.**

At the trial, Somerville & Company stated that it was only concerned about the **damages** it claimed that the ETFB was liable to pay **for breach of contract and unjust enrichment.** ETFB was the 1st Defendant and the PERC was the 2nd Defendant. Later on PERC was released since no relief was prayed against PERC. The learned **High Court Judge** at the end of the trial **held** that the Plaintiff Somerville & Co. was **not entitled to compensation for unjust enrichment but was entitled to damages for breach of contract amounting to Rs. 21.9 million to be paid by ETFB**. The ETFB has appealed to this court from that judgment.

The grounds of appeal contained in the Petition of Appeal are contained in paragraph 6(a) to (k) of the Petition dated 18.09.2003. In summary the 1st Defendant Appellant, Employees Trust Fund (hereinafter referred to as the 1st Defendant) has submitted that the Plaintiff Respondent, Somerville & Company Ltd. (hereinafter referred to as the Plaintiff) has got judgment in its favor from the Commercial High Court because the learned High Court Judge had misdirected himself on the facts placed by evidence of the Plaintiff and the Defendant as well as the applicable legal position.

At the hearing of this Appeal, the counsel for the 1st Defendant pointed out to court that in paragraph 10 of the Answer of the Defendant dated 11.09.1998, the Defendant had pleaded that the High Court had no jurisdiction to hear and determine the action. The reason for that plea had been that in the Agreement

marked as A3 which is the base on which the Plaintiff's case was founded had an Arbitration Clause, as the last clause thereof to read as "If at any time, any question dispute or difference of opinion in relation to, or in connection or pertaining to with the Agreement or any part thereof shall be referred to Arbitration in accordance with the Rules of Arbitration under the UNCITRAL Rules of Arbitration." Yet, I find that no specific issue had been raised on this argument and neither party had pursued that either, at any time. The 1st Defendant argued that the issue number 22 which reads as " In any event is the action of the Plaintiff misconceived in law?", has been answered by the trial judge as "No" and on that account he has taken a wrong view with regard to jurisdiction. I am of the view that the said issue cannot be taken as a specific issue on jurisdiction. If the 1st Defendant wanted to pursue the matter he could have requested the trial judge to take it up as a preliminary issue but the 1st Defendant had failed in that regard.

Many dates had passed before the trial was taken up on the ground that parties were trying to get the matter settled. Finally as there was no adjustment, the trial had commenced.

The Court had recorded 10 admissions. Among other things, documents A2, A4, A5 and the receipt of letters A6 and A7 were admitted. It was admitted that in October,1996 the 2nd Defendant offered for sale, the shares of Mathurata Plantations. The 1st Defendant had commenced negotiations to purchase 51% of the share capital of Mathurata Plantations through Somerville Stock Brokers Private Limited. The 1st Defendant was permitted to purchase 51% of the share capital of Mathurata Plantations.

Thereafter the learned trial judge had allowed to record 10 issues of the Plaintiff and 34 issues of the 1st Defendant. Since the Plaintiff had prayed for reliefs only againt the 1st Defendant, the issues of the 2nd Defendant – PERC, was not allowed. Later on, the 2nd Defendant was discharged from the proceedings. The trial was taken up with Somerville and Company Limited as Plaintiff and Employees Trust Fund as the 1st Defendant. They were the only two contesting parties. The learned Commercial High Court Judge held with the Plaintiff at the end of the trial and being dissatisfied with the said judgment the 1st Defendant has appealed to this Court.

On behalf of the Plaintiff, the company secretary, Shalini Yasmini Dias gave evidence. She produced the document marked A3 annexed to the Plaint in evidence and marked the same as P4a. That was the agreement between the Plaintiff and the 1st Defendant which is the foundation of this action. This Agreement had been signed by the Directors of the Plaintiff company and the Directors of the EPF Board. By this agreement, **the 1st Defendant** agreed to appoint the **Plaintiff as the managing agent** of the Mathurata Plantations. The 2nd Defendant PERC upon being satisfied with this management agreement marked P4a and the management capabilities of the Plaintiff, permitted the 1st Defendant to bid at the Colombo Stock Exchange for the 51% shares in Mathurata Plantations. This was informed by the 2nd Defendant PERC to the 1st Defendant by letter P6.

It was **not disputed** that after securing 51% of the share capital of Mathurata Plantations, the **1st Defendant failed and neglected to hand over the management of Mathurata Plantations to the Plaintiff** even though the Plaintiff requested that it be done. Instead of handing over to the Plaintiff as agreed , the 1st Defendant handed over the management of Mathurata Plantations **to Crop Management Services Private Limited** which company was already managing the said Plantation before the Plaintiff bought 51% of the shares. This was in complete violation of the said Agreement P4a.

The Clause B of the Agreement P4a reads as follows:
" **Being convinced** that Somerville and Company will have necessary skills and the expertise and also the ability to procure them as and when needed for management of the assets and business of the Company **, the parties agreed that Employees Trust Fund Board will appoint Somerville and Company Limited** to manage the assets and business of the company subject to the terms and conditions herein set out **in the event of Employees Trust Fund Board purchasing 51% of stake. "**

After ETFB bought the shares consequent to this agreement having been sent to the Technical Evaluation Committee and the said committee having had accepted the Plaintiff as a company capable of managing estates, the 1st Defendant cannot be heard to say that " the Plaintiff had no experience in the management of estates" and therefore the Plantation was not handed over to the Plaintiff. Such a stance by the 1st Defendant is against the weight of the evidence before the trial

court not only by the witnesses who gave evidence on behalf of the 1st Defendant but also by the witnesses who gave evidence on behalf of the Plaintiff. The former Chairman of the 1st Defendant Denzil Gunaratne while giving evidence admitted that if not for the Agreement P4a, the 1st Defendant would not have succeeded in securing 51% of the shares of the Mathurata Plantations. He gave the reason for abrogating the management agreement unilaterally, as unpleasentness between parties which was created due to the disagreement on the brokerage fee which was demanded by Somerville Stock Brokers Limited. It is a separate legal entity even though it was a subsidiary company of the Plaintiff. He further said that the 1st Defendant made use of the Plaintiff purely for the purpose of obtaining permission of the 2nd Defendant and to prequalify to bid for the purchase of the 51% shareholding of the Mathurata Plantations.

I have gone through the evidence of the witnesses of both sides who gave evidence before the trial court. I am of the view that the 1st Defendant had failed to perform its contractual obligations towards the Plaintiff as agreed by the agreement P4a.

However, the 1st Defendant's counsel argued that P4a is a pre-incorporation contract because it was entered into prior to the 1st Defendant taking over the shares of Mathurata Plantations and therefore that agreement cannot be enforced in law. I observe that this pre incorporation contract was a condition to bid at the second stage of bidding which takes place at the stock exchange on the floor. Without a contract such as this, the 1st Defendant would never have been able to bid and receive the 51% shares of the Mathurata Plantations. After having used that contract or agreement to get at the goal, the same party who got the benefit of such an agreement cannot in law turn around and state that the said Agreement is not valid in law.

The next argument of the 1st Defendant was that the Agreement relied upon by the Plaintiff cannot be enforced since it is 'lex non cogit ad impossiblia' or in other words it is not possible to enforce it only by and between the parties who agreed upon the conditions thereof. It was pointed out to court that to appoint a Managing Agent to the Mathurata Plantations the 1st Defendant was required to get the consent of the Secretary to the Treasury who had the golden share. Having arrived at an Agreement to get 51% of the shares, and after having used the same to get the shares, now the 1st Defendant states that it is impossible to

appoint a Managing Agent without the consent of the golden share holder. I am of the view that such a condition exists **as part of procedure** in appointing a Managing Agent and if and when the 1st Defendant decides to appoint the Managing Agent in conformity with the Agreement, the golden share holder is duty bound to grant its consent. The procedural law is there in place not for the purpose of any breach of any contract between the parties but for smooth functioning of the events agreed upon. This cannot be taken as an excuse for not performing its obligations undertaken by the Agreement. I hold that the 1st Defendant had no justifiable grounds to refrain from appointing the Plaintiff as the managing agent of Mathurata Plantations Limited.

Next arises the question of how much was the loss which occurred to the Plaintiff due to the 1st Defendant's failure to honour the terms and conditions of the Management Agreement. It is an accepted fact that the 1st Defendant had earned a profit of Rs. 265 million after the sale of the 51% of the Mathurata Plantations shares in the share market subsequently. It was also accepted that the Plaintiff had advanced Rs. 1.4 million on behalf of the 1st Defendant to prevent the cancellation in terms of the relevant regulations and rules since non payment of the said sum within the stipulated time would have rendered void the bid made by the 1st Defendant.

Even though the plaintiff had claimed compensation on the basis of unjust enrichment, the Plaintiff had not pleaded in the Plaint that the 1st Defendant had got unjustly enriched at the expense of the Plaintiff. No issue either had been raised on unjust enrichment. There was no evidence regarding how the Plaintiff got impoverished as a result of the sale of 51% of shareholding of Mathurata Plantations to some other party by the 1st Defendant. The learned High Court Judge had put aside the claim of the Plaintiff against the 1st Defendant on unjust enrichment on the basis that the necessary ingredients , namely that the party claiming should prove how the other party got enriched as well as how the party claiming got impoverished at the same time , was not pursued in the proper way. I cannot find any error in that decision of the learned High Court Judge.

Yet, the learned High Court Judge had correctly come to a finding that damages for breach of the agreement was due from the 1st Defendant to the Plaintiff. It is trite law that damages for breach of contract are intended **to compensate the**

party who suffered as a result for the losses suffered including the profit that party would have made if the contract was not breached.

The evidence before court was that the Plaintiff had suffered loss by being denied the management fees and the earnings the Plaintiff would have been entitled to in terms of the agreement. In terms of Clause 6.1 of the Agreement P4a, the managing agent's fees was upto a profit of Rs. 100 million was 7.5% and from Rs. 100 million to Rs. 150 million was 5% and over that amount was 2.5%. The agreed period was for 2 years initially. The witness of the Plaintiff gave evidence as to how the management fees can be calculated in accordance with Clause 6.1. Shalini Dias witness of the Plaintiff, the company secretary, produced document P14 which was prepared by utilizing the figures published by the Plantation Management Monitoring Division of the JEDB. According to P14, the management fees for the

first year of management which was deprived to the Plaintiff, was calculated to be Rs. 10.95 million. For the second year a 10% increase of fees was claimed. For fees as trade practices P14 contained a claim of Rs. 6.3 million. I observe that the Agreement P4a does not have any mention of fees as trade practices or any increase of fees for the second year at 10% above the fees for the first year.

The learned High Court Judge has doubled the fee for the first year (which was proved and not objected to or cross examined to disprove the same by the 1st Defendant's counsel in the trial court) thus calculating for two years and concluded that the Plaintiff is entitled to Rs. 21.90 million as damages for breach of contract. I quite agree with the said quantity as damages for breach of contract since the judge has analyzed it very well going by the clauses in the main document which is the Agreement P4a. The learned Judge has answered each and every issue, namely issues 1 to 7 in favour of the Plaintiff, issue 8(a) to (c) , issues 9 to 19 , issues 20(a) and (b), issues 21(a) and (b), issues 22 to 24, issue 25(a) and (b), issues 26 to 28, issues 29(a) and (b), issues 30(a) and (b) and issue 31. He has considered issues 32 to 40 and concluded that those issues are not relevant to the instant action filed by the Plaintiff. He has answered issues 41, 42(a) to (c) and 43(a)to (c). Thereafter he states that issue No. 43(d) and (e) are answered in the negative against the 1st Defendant. Issue No. 44 is answered as 'does not arise'. The learned trial judge has taken the effort to analyze the evidence before court

and answered the issues with great care. I am of the view that the learned High Court Judge has not erred in his judgment dated 24.07.2003. It is a well considered judgment of 42 type written pages.

I hold that the learned High Court Judge has **not misdirected himself** on facts of the instant case and the law regarding the breach of a contract and the consequences arising thereafter. The compensation also has been calculated in the most suitable manner.

This Appeal is dismissed with costs in this court as well as costs in the Commercial High Court. I affirm the Judgment of the learned High Court Judge.

Judge of the Supreme Court

Sisira J De Abrew 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 appeal with leave to appeal obtained from this Court.

PAN ASIA BANKING CORPORATION
at No.450, Galle Road, Colombo 03
and a branch office and/or a place of
business called and known as the
"Panchikawatte Branch," at No 221/221A,
Sri Sangaraja Mawatha, Colombo 10.

PLAINTIFF

S.C.C.H.C. Appeal No: 26/2010
S.C.(HC) L.A. No:21/2010
HC Civil Case No:421/09/MR

VS.

RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA,
No. 400/60/9, Longdon Avenue,
Colombo 07.

DEFENDANT

AND

PAN ASIA BANKING CORPORATION
at No.450, Galle Road, Colombo 03
and a branch office and/or a place of
business called and known as the
"Panchikawatte Branch," at No 221/221A,
Sri Sangaraja Mawatha, Colombo 10.

PLAINTIFF-PETITIONER

VS.

RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA,
No. 400/60/9, Longdon Avenue,
Colombo 07.

DEFENDANT-RESPONDENT

AND

RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA,
No. 400/60/9, Longdon Avenue,
Colombo 07.

DEFENDANT-RESPONDENT-PETITIONER

VS.

PAN ASIA BANKING CORPORATION PLC,
at No.450, Galle Road, Colombo 03 and a branch office and/or a place of business called "Panchikawatte Branch" at No 221/221A, Sri Sangaraja Mawatha, Colombo 10.

PLAINTIFF-PETITIONER REPONDENT

AND NOW BETWEEN

PAN ASIA BANKING CORPORATION PLC,
at No.450, Galle Road, Colombo 03 and a branch office and/or a place of business called "Panchikawatte Branch" at No 221/221A, Sri Sangaraja Mawatha, Colombo 10.

PLAINTIFF-PETITIONER REPONDENT-PETITIONER/ APPELLANT

VS.

RANASINGHE ARACHCHIGE THILANGANI CHANDRASENA PERERA,
No. 400/60/9, Longdon Avenue,
Colombo 07.

DEFENDANT-RESPONDENT-PETITIONER-RESPONDENT

BEFORE: S.E. Wanasundera, PC. J.
Upaly Abeyrathne, J.
Prasanna Jayawardena PC. J.

COUNSEL: S.A. Parathalingam, PC with Varuna Senadhira for the Plaintiff-Petitioner-Respondent-Petitioner/Appellant.
Rasika Dissanayake for the Defendant-Respondent-Petitioner-Respondent

ARGUED ON: 05th October 2016.

WRITTEN SUBMISSIONS FILED: By the Plaintiff- Petitioner-Respondent-Appellant on 01st September 2010 and 01st November 2016.
By the Defendant- Respondent-Respondent on 08th November 2016.

DECIDED ON: 06th April 2017

Prasanna Jayawardena, PC, J.

The Plaintiff-Petitioner-Respondent-Petitioner/Appellant ["the plaintiff"] is a Licensed Commercial Bank and the Defendant-Respondent-Petitioner-Respondent ["defendant"] is a customer and account holder of the plaintiff bank. The plaintiff instituted this action against the defendant praying for the recovery of a sum of Rs. 16,350,246/13 together with interest thereon, which is said to be due upon an overdraft facility granted by the plaintiff to the defendant.

One month after the plaint was filed, the plaintiff made an application under section 653 of the Civil Procedure Code, praying for the issue of an Order sequestering the car bearing registration number WP GV 7007["the car"], before judgment. This application was made by way of a petition supported by an affidavit affirmed to by the Recoveries Manager of the plaintiff bank.

The plaintiff's application was supported *ex parte* on 07th October 2009. Having heard learned Counsel appearing for the plaintiff, the learned High Court Judge issued the sequestration order by way of a mandate (in Form 104 read with Form 38 of the First Schedule to the Civil Procedure Code) directing the Fiscal to seize and sequester the car and secure it until the further Orders of the Court. In terms of section 654 of the Civil Procedure, the learned High Court Judge also directed the plaintiff to furnish a bond in a sum of Rs.150,000/- to secure the payment of any damages or costs which the defendant may have to bear as a result of the sequestration and which may be awarded by the Court.

The learned High Court Judge directed that, the case be called on 05th November 2009. Since the petitioner has failed to annex the journal entries of the case in the High Court, this Court is unable to ascertain what occurred on that day. Further, in its application to this Court seeking leave to appeal, the plaintiff has stated that, the sequestration order could not be executed since the car was not located. As the journal entries are not before us, we are unable to gather any further information regarding the efforts to seize and sequester the car. Also, since the journal entries are not before us, we are not aware whether the defendant has filed answer.

In any event, on 03rd February 2010, the defendant made an application, by way of a petition and supporting affidavit, praying that, the Order for sequestration be vacated. The plaintiff filed its statement of objections to the defendant's application, with a supporting affidavit. The parties agreed that, the defendant's application to vacate the Order for sequestration, be decided upon written submissions. On 09th March 2010, both parties tendered their written submissions to the High Court. By his Order dated 22nd April 2010, the learned High Court Judge vacated the Order for sequestration which had been issued *ex parte*. Since the car had not been sequestered and seized, the learned Judge discharged the bond furnished by the plaintiff.

The plaintiff made an application to this Court seeking leave to appeal from the Order of the High Court. This Court has granted leave to appeal on the following three questions of law, which are set out *verbatim*:

(i) The learned Judge of the Commercial High Court in his said order having held that the Petitioner has complied with the requirements set out in the said section 653 of the Civil Procedure Code has misdirected himself on the case law applicable to the said section ?

(ii) In a situation where the Petitioner on the information given by the Respondent has stated in the Petition (marked **'P2'**) and the Affidavit (marked **'P3'**) that the Petitioner verily believes that the only valuable asset that the Respondent is possessed with is the said vehicle, the learned Judge of the Commercial High Court in his said order has gravely misdirected himself in holding that the Petitioner has failed to establish that the Respondent is not possessed with any other assets ?

(iii) The learned Judge of the Commercial High Court in his said order has not properly drawn his attention and/or misdirected himself with regard to the documents marked **'P2c'** and **'P5i'** already annexed to this Petition ?

At this point, it is pertinent to mention that, Section 653 of the Civil Procedure under and in terms of which the plaintiff has made the application to sequester the car and under and of which this appeal has to be decided, is contained in Part V of the Civil Procedure Code which provides for and governs the issue of the "Provisional Remedies" of `arrest before judgment', `sequestration before judgment', `injunctions', interim orders' and the `appointment of receivers'. Part V of the Civil Procedure Code consists of four Chapters. Chapter 47 makes provisions with regard to the "Provisional Remedies" of `arrest before judgment' and `sequestration before judgment'. Chapters 48, 49 and 50 make provisions regarding the other three "Provisional Remedies" of `interim injunctions', interim orders' and the `appointment of receivers'.

These "Provisional Remedies" provided by our Civil Procedure Code are referred to as "Interim Orders" and sometimes "Interlocutory Orders" in the India and England.

Such Orders may be issued by a Court *during the pendency of an action* where the Court is satisfied that the interests of justice require the issue of an Order granting one or more of these "Provisional Remedies" *before* the Court makes a final determination of the action.. As observed in Halsbury's Laws of England [4th ed. Vo. 37 para 326], *"Interlocutory applications are almost invariably necessary in order to deal with the rights of the parties in the interval between the commencement of the proceedings and their final determination. Their function is to enable the court to grant such interim relief or remedy as may be just or convenient. Such relief or remedy may be designed to achieve one or more of several objectives, for example to maintain the status quo ante, to prevent hardship or prejudice to one or other of the parties, to preclude one party from overreaching or outwitting the opposite party, to preserve a fair balance between the parties and to give them due protection while awaiting the final outcome of the proceedings, and to prevent any abuse of process during this period."*.

In the case of an Order for sequestration of property before judgment, which is the subject of the present case, section 653 of the Civil Procedure Code provides this "Provisional Remedy" to protect the interests of a plaintiff faced with the prospect of a defendant who is about to fraudulently dispose of his property, during the pendency of the action, in order to escape paying the monies which he will have to pay to the plaintiff, if a decree is entered against him. Thus, a sequestration order is issued to prevent a decree which may be entered in favour of the plaintiff being rendered nugatory, by the fraudulent disposal of property by the defendant.

In view of the circumstances in which a sequestration order is issued and its effect, a sequestration order may be described as an extraordinary remedy issued on a just and equitable basis.

A sequestration order can be issued at the commencement of the action or at any time before judgment. Due to the nature of the circumstances which give rise to a need to seek a sequestration order, such Orders are, usually, issued *ex parte*. That is because, a defendant who has ample notice of an application for an Order sequestering his property, is likely to then have equally ample opportunity to complete a fraudulent alienation of his property *before* the plaintiff can obtain a sequestration order and, thereby, render the sequestration order nugatory.

Section 653 states:

> *"If a plaintiff in any action, either at the commencement thereof or at any subsequent period before judgment, shall by way of motion on petition supported by his own affidavit and viva voce examination (if the Judge should consider such examination necessary) satisfy the Judge that he has a sufficient cause of action against the defendant, either in respect of a money claim of or exceeding one thousand five hundred rupees or because he has sustained damage to that amount, and that he has no adequate security to meet the same, and that he does verily believe that the defendant is*

fraudulently alienating his property to avoid payment of the said debt or damage; and if he shall at the same time further establish to the satisfaction of the Judge by affidavit or (if the Judge should so require) by viva voce testimony such facts that, the Judge infers from them that, the defendant is fraudulently alienating his property with intent to avoid payment of the said debt or damage, or that he has with such intent quitted Sri Lanka leaving therein property belonging to him, such Judge may order a mandate (Form No. 104, First Schedule) to issue to the Fiscal, directing him to seize and sequester the houses, lands, goods, money, securities for money and debts, wheresoever or in whose custody soever the same may be within his district, to such value as the Court shall think reasonable and adequate and shall specify in the mandate, and to detain or secure the same to abide the further orders of the Court.".

It is evident from a reading of section 653 that, a plaintiff who wishes to obtain an Order for the sequestration of a defendant's property before judgment, must satisfy the Court that he has established all the following five requisites:

(i) That, the plaintiff has a *"sufficient cause of action"* against the defendant;

(ii) That, the cause of action is for the recovery of money or compensation for damages, in a sum of Rs.1500/- or more;

(iii) That, the plaintiff does not hold adequate *"security"* for the satisfaction of his claim against the defendant in the event decree is entered in his favour against the defendant;

(iv) That, the plaintiff *"does verily believe"* that, *"the defendant is fraudulently alienating his property to avoid payment"* of the monies claimed by the plaintiff in the action;

(v) That, the plaintiff has established by affidavit [or by *viva voce* testimony if the Court requires] *"facts"* from which the Court can *"infer"* that the defendant is *"fraudulently alienating his property with intent to avoid payment"* of the monies claimed by the plaintiff in the action or that, the defendant has *"with such intent quitted Sri Lanka leaving therein property belonging to him"*.

It is also evident from section 653 that, when issuing a sequestration order, the Court is required to determine the *"reasonable and adequate"* value up to which property may be seized in order to secure the plaintiff's claim. That value has to be specified in the Order.

With regard to the considerations which should guide the issue of sequestration orders in Sri Lanka, I have been able to locate only two reported decisions of our

Courts which refer to such considerations. Those are the cases of DAVID & Co. vs. ALBERT SILVA [31 NLR 316] and BOSANQUET & CO. vs. RAHIMTULLA & CO. [33 NLR 324] . In the first case, Fisher CJ stated (at p.316) with regard to section 653 of the Civil Procedure Code, *"….. the provisions of that section must be strictly complied with inasmuch as the section deals with very special procedure invoked at the outset of the action before the merits of the action or the legal rights of the parties have been dealt with on the basis of fraudulent conduct on the part of a defendant, involving interference with the proprietary rights of a defendant. Special procedure, such as this, can only be invoked if the provisions of section 653 are complied with."*. In the second case, Garvin SPJ stated *obiter* [at p.331], *"A mandate of sequestration is a lawful method of process, and nothing in this judgment must be read as discouraging its use under the proper circumstances, and these are that the debtor actually is fraudulently disposing of his goods with a view to avoiding payment of debts due, or that there are facts within the knowledge of the person applying for the sequestration which would justify a man of ordinary experience and common sense in supposing that the debtor was so fraudulently alienating his goods, for in either of these circumstances the applicant will have reasonable or probable cause for his application.…."*.

The other reported decisions of our Courts which deal with appeals arising from sequestration orders made under section 653, have succinctly dealt with the specific issues which arose in these appeals, particularly with regard to what a plaintiff must aver in his affidavit and establish in order to obtain a sequestration order. These decisions do not appear to have examined, in general, the considerations which should guide the issue of sequestration orders in Sri Lanka. In that background, this may be an opportune time to do so.

To start with, it is evident from section 653 that, it enables a plaintiff who satisfies the Court that the requisites of section 653 have been established, to obtain an Order for the sequestration of the defendant's property and, thereby, secure rights which the plaintiff *may* obtain if decree is eventually entered in his favour at the conclusion of the pending action. Thus, a sequestration order has the effect of securing rights which the plaintiff claims, long *before* the Court actually decides, at the conclusion of the action, whether the plaintiff is entitled to succeed in his claim or whether the plaintiff's claim should be dismissed. Therefore, when a Court is called upon to decide whether to issue a sequestration order, it must keep in mind the fact that, it has not yet had an opportunity to make a final determination with regard to the rights and liabilities of the parties and that, a sequestration order is issued, on a just and equitable basis, to protect the potential rights of a plaintiff who has satisfied the Court that, he has established the requisites of section 653 of the Civil Procedure Code.

At the same time, a Court has to keep in mind that, the issue of the sequestration order will immediately interfere with the defendant's proprietary right, in law, to enter into *bona fide* transactions with his own property during the pendency of an action instituted against him. In addition, the issue of a sequestration order and the consequent seizure of property can damage the reputation of a defendant or, in some cases, block the efforts of a defendant who is trying to sell a part of his

property and raise funds to vigorously defend himself in the pending action. There may also be instances where a manipulative plaintiff uses an *ex parte* sequestration order to try and coerce a defendant to pay the plaintiff's claim. The issue of an *ex parte* sequestration order can result in a defendant having to bear these consequences before he is heard.

Therefore, when a Court is considering whether to issue a sequestration order, the Court must keep in mind *both* the interests of a plaintiff who wishes to secure rights under a decree which he may obtain at the conclusion of the pending action *and* the aforesaid consequences which the defendant may have to bear, if the sequestration order is issued.

Further, a Court has to be vigilant to ensure that the plaintiff is seeking the sequestration order because he, *bona fide* and for good reason, apprehends that the defendant is attempting to fraudulently dispose of his property and not because the plaintiff is attempting to coerce the defendant into settling the case or to humiliate or harass the defendant out of ill will.

For these reasons, Orders for sequestration before judgment should be issued only where the Court, after exercising due care and consideration, is satisfied that, the plaintiff has duly established all the requisites of section 653. The Court should be of the view that, unless the sequestration order is issued, there is a likelihood that the defendant will fraudulently alienate his property and, thereby, render nugatory any decree which the plaintiff may obtain and that, therefore, the interests of justice require the issue of the sequestration order. Where the Court is so satisfied, a Court should not hesitate to issue a sequestration order and, thereby, secure the plaintiff's claim. But, where the plaintiff fails to establish all the requisites of section 653 to the satisfaction of Court, the extraordinary remedy of a sequestration order should not issue.

Useful insights can be gained by a look at some of the decisions in India which have examined the principles which are relevant when determining whether a sequestration order should be issued. In this connection, it is to be noted that, although there are differences between Section 653 of our Code and the corresponding Order 38 Rule 5 of the Civil Procedure Code in India, there are sufficient similarities between these two provisions, to make reference to the Indian decisions helpful to us in Sri Lanka. It should be mentioned here that, Order 38 Rule 5 of the Indian Civil Procedure Code, uses the term *"attachment before judgment"* while our Code uses the term *"sequestration before judgment"*. Both terms refer to much the same act and Order.

The fact that, an Order for sequestration of property before judgment is an extraordinary remedy which should be issued with due care and consideration was emphasised by the Calcutta High Court in RATAN KUMAR vs. THE HOWRAH MOTOR CO (PVT) LTD [AIR 1975 Cal 180 at p.187], which stated, *"….. the remedy of an attachment before judgment is an extraordinary remedy and should be granted*

with utmost care and caution.". Similarly, SRINIVASAN vs. SRINIVASAN [AIR 1985 Mad. 269 at p.269], the Madras High Court stated, *" …. utmost caution and circumspection should guide the court. The court must advert to the provisions of the Code in this regard, advert to and investigate the allegations thrown against the defendant, satisfy itself that a case for attachment before judgment has been made out and then pass the requisite order."*.

With regard to the prejudice that may be caused to a defendant by the interference with his proprietary rights when a sequestration order is issued, the Calcutta High Court observed in JAI PRAKASH vs. BASANTA KUMARI [1911 15 IC Cal 604], *"An attachment practically takes away the power of alienation and such a restriction on the exercise of the undoubted rights of ownership ought not to be imposed upon an individual except upon clear and convincing proof that the order is needed for the protection of the plaintiff."*. Similarly, in NOWROJI PUDUMJEE vs. DECCAN BANK LTD [AIR 1921 Bom. 69 at p.69], the Bombay High Court stated, *"A man is not debarred from dealing with his property just because a suit has been filed against him. Otherwise, in every case in which a suit is brought against a man, if during the pendency of the proceedings he sells some of his property that would be at once a sufficient ground to satisfy the Court that he is disposing his property with intent to defraud the plaintiff. Clearly, there must be additional circumstances before the Court can be satisfied that such an intention exists."*.

With regard to the other adverse consequences which may be caused to a defendant when a sequestration order is issued: The Gujarat High Court observed in BHARAT TOBACCO CO. vs. MAULA SAHEB [AIR 1980 Guj. 202 at p.204], *"An order of attachment before judgment is a drastic order and ordinarily the Court would be slow in exercising the power conferred upon it under Order 38 Rule 5 of the Code for the simple reason that if the power is not exercised with utmost care and caution, it may ruin the reputation and business of the party against whom the power is exercised. The Court must act with utmost circumspection before issuing an order of attachment so that the power vested in the Court is not abused by an unscrupulous litigant as a weapon of oppression against the opposite party."*; In CHANDRIKA PRASAD SINGH vs. HIRA LAL [AIR 1924 Pat. 312 at p. 314], the Patna High Court emphasised that, *"The power given to the Court to attach a defendant's property before judgment was never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before his liability is established by a decree, may have the effect of seriously embarrassing him in the conduct of his defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit, which may eventually prove to have been entirely devoid of merit."*; and in SRINIVASAN vs. SRINIVASAN, the High Court pointed out (at p.269) *"This process is never meant as a lever for the plaintiff to coerce the defendant to come to terms."*.

Having set out the five requisites which have to be established by a plaintiff who wishes to obtain a sequestration order under section 653 of the Civil Procedure Code and also some of the considerations which should be kept in mind when a

Court is deciding whether to issue a sequestration order, it is necessary to also examine whether a defendant against whom an *ex parte* sequestration order has issued, is entitled to make an application to have that sequestration order vacated. This question should be addressed here since section 653 and the subsequent sections in Chapter 47 of the Civil Procedure Code make no specific provision for a defendant against whom a sequestration order has issued, to make an application to have that Order vacated.

This question was considered by the High Court in the present case where the plaintiff obtained the sequestration order *ex parte* on 07th October 2009 and, later, the defendant made her application dated 03rd February 2010, praying the sequestration order be vacated. The learned High Court Judge, very correctly, issued notice of the defendant's application to the plaintiff and then held, at an *inter partes* Inquiry, that the defendant was entitled to make an application to vacate the *ex parte* sequestration order.

In holding so, the learned High Court Judge relied on the decision of this Court in MUTTIAH vs. MUTUSWAMY [1 NLR 25] in which it was held that, a defendant against whom an *ex parte* sequestration order has been issued by a Court, is entitled to make an application to the same Court, with notice to the plaintiff, to have that sequestration order vacated. In this regard, Lawrie ACJ held [at p.28], *"On the ground suggested that a District Court, having once ex parte allowed a sequestration to issue, cannot recall it, on good grounds shown by the defendant, all I can say is that I do not assent to so novel and, I think, so dangerous and unjust a rule. There is as a rule no appeal against an ex parte order. The proper course is to apply to the Court which made the order to vacate it with notice to the party who holds the order, and on showing good grounds that the order had been made on insufficient materials, or was otherwise wrong."*. I would also mention that, a perusal of the decisions in SAMARAKOON vs. PONNIAH [32 NLR 257] HADJIAR vs. ADAM LEBBE [43 NLR 145] and SINGHAPUTRA FINANCE LTD vs. APPUHAMY [2005 1 SLR 5] shows that, in all these cases, a defendant against whom an *ex parte* sequestration order had been issued in the District Court, succeeded in an application made by him to the same Court to have that sequestration order vacated. In appeal, it was recognised in all three cases that, the defendants were entitled to make such applications to the District Court.

Thus, it is established law that, a defendant against whom an *ex parte* sequestration order has been issued by a Court, is entitled to make an application to the same Court, with notice to the plaintiff, to have that sequestration order vacated. I must add here that, learned Counsel appearing for the plaintiff in the High Court and learned President's Counsel appearing for the plaintiff before us, did not, very correctly, dispute the defendant's right to make that application to the High Court.

To now turn to the three questions of law that are to be decided in this appeal, the first of them asks whether the learned High Court Judge misdirected himself on the

case law applicable to section 653 of the Civil Procedure Code having previously held that, the plaintiff had complied with the requirements of section 653.

At the outset, it has to be observed that, this question of law appears to have been framed upon a mistaken assumption that, the learned High Court Judge had held that, the plaintiff had complied with requirements of section 653. In fact, a reading of the Order dated 22nd April 2010 of the High Court, which is being challenged by the plaintiff, makes it very clear that, the learned High Court Judge's determination was that the plaintiff has failed to comply with the requirements of section 653. That is why the learned Judge vacated the sequestration order which had been issued *ex parte*. In this connection, the plaintiff cannot be heard to contend that, the issue of the *ex parte* sequestration order amounts to a final determination by the High Court that the plaintiff has duly established all the requisites for the issue of a sequestration order. That *ex parte* sequestration order was issued without the defendant being heard. The High Court had every right, and indeed a duty, to vacate the *ex parte* sequestration order if, after considering the defendant's application, the learned Judge determined that, the plaintiff is not entitled to the sequestration order.

Thus, the remaining aspect of the first question of law is whether the learned High Court Judge misdirected himself on the case law applicable to section 653.

When considering that part of the first question of law, it will be helpful to look, sequentially, at each of the five requisites of section 653, which were identified and set out above, in the light of the applicable decisions of the superior courts, and then examine the determination of the learned High Court Judge with regard to each such requisite.

The first requisite which the plaintiff had to establish to the satisfaction of the court was that, the plaintiff has a *"sufficient cause of action"* against the defendant. It is self explanatory that, this places a duty upon the Court to satisfy itself that, the plaint makes out a *prima facie* maintainable cause of action. If the defendant has filed a statement of objections or answer, the Court should also look at such pleadings to see whether the defendant has made out any ground which would, as a matter of law, prevent the plaintiff from succeeding in the action. The Court is not required to engage in any further analysis of the merits of the plaintiff's case at this stage. There do not appear to be any previous decisions of this Court which have considered this requisite of section 653. Most likely, because this requisite is self-explanatory.

In the present case, the learned High Court Judge has approached this aspect of section 653 in the aforesaid manner and has held that, the plaintiff had made out a sufficient cause of action in the plaint and the documents annexed thereto. He further held that, the defendant's contention that, the statement of account of the overdraft facility indicated that interest had been in charged in excess of capital, was a question that had to be determined at the trial and not at this interlocutory stage. I am in entire agreement with the learned High Court Judge.

The second requisite which the plaintiff had to establish was that, the cause of action is for the recovery of money or compensation for damages, in a sum of Rs.1500/- or more.This places a duty upon the Court to satisfy itself that, the plaintiff's cause of action is for the recovery of a sum of money of Rs.1,500/- or more or for the recovery of compensation for damages in a sum of money of Rs.1,500/- or more. Thus, plaintiffs who file actions for declarations or possessory actions or other types of reliefs which are not `money recovery' actions or actions for the recovery of compensation for damages, cannot obtain sequestration orders.

In the present case, the plaintiff has filed a money recovery action praying for the recovery of a sum of Rs.16,350,246/13.Therefore, this requisite has been satisfied. This issue was not disputed by the parties in the High Court.

The third requisite which the plaintiff had to establish to the satisfaction of the court was that, the plaintiff does not hold adequate *"security"* for the satisfaction of his claim against the defendant in the event decree is entered in his favour against the defendant. In my view, this places a duty upon the Court to satisfy itself that, the plaintiff does not hold *"security"* – by way of a mortgage or hypothecation or pledge or lien or other sort of charge over property – which provides him with *"security"* which can be sold to realise his `money claim' against the defendant. In my view, the word *"security"* used in section 653 is to be understood in the sense of *"Property etc deposited or pledged as a guarantee of the fulfillment of an obligation (as an appearance in court or the payment of a debt) and liable to forfeit in the event of default."* as defined in the Shorter Oxford English Dictionary, *"money secured on property"* as defined in Stroud's Judicial Dictionary [6th ed. Vol. 3 p.2390] and *"Collateral given or pledged to guarantee the fulfillment of an obligation"* as defined in Black's Law Dictionary [9th ed.] That is so since, a plaintiff who holds such *"security"* can look to that *"security"* to secure his claim against the defendant and has no cause to seek the additional protection of the sequestration of the defendant's *other* property.

In the light of the specific requirement in section 653 that the plaintiff must not hold adequate *"security"* for the satisfaction of his claim against the defendant, the plaintiff should have specifically averred in its petition and supporting affidavit, that it did not hold *"security"* or, at the very least, make averments which make it clear that, the plaintiff does not hold *"security"*. However, a perusal of the plaintiff's petition and supporting affidavit reveals that, the plaintiff has not done that.

Instead of making the averment that the plaintiff had no *"security"* or words to that clear effect, which is what is required by the plain wording of section 653, the plaintiff has, in its application for the sequestration order and the supporting affidavit, averred that, the aforesaid car is the *"the only valuable asset"* of the defendant. It appears that, the plaintiff has confused *"security"* which may be held by the plaintiff with the *assets* held by the defendant. As mentioned earlier, section 653 requires that the plaintiff must not hold any *"security"* (*ie:* by way of a mortgage or hypothecation or pledge or lien or other sort of charge over property) to meet its claim against the

defendant. Whether or not the defendant owns *assets*, is not relevant to the specific requirement specified in section 653 that the plaintiff must not hold adequate *"security"* for the satisfaction of his claim against the defendant.

The plaintiff has sought to overcome the aforesaid omission by stating in its statement of objections to the defendant's application and supporting affidavit that, the plaintiff does not hold *"security"*. But, that averment is belated and cannot remedy the aforesaid omission in the application for the Order sequestering the defendant's property before judgment. Lyall Grant J held the same view in SAMARAKOON vs. PONNIAH when he stated (at p.258-259) *"It is impossible to give effect to the contention that the insufficiency of material on which the mandate was granted can be made good if it shown that the state of things in fact existing at the time the application was made, had it been brought to the notice of the Judge, would have justified him in acting as he did. In my opinion there is no proper material upon which the mandate could be issued and it must therefore be dissolved."*.

The learned High Court Judge held that, the plaintiff had failed to establish that it held no *"security"*, basing his determination primarily on the failure of the plaintiff to establish any reasons for making the aforesaid statement that the car is the *"the only valuable asset"* of the defendant. The learned High Court judge was correct when he observed that, the plaintiff had failed to adduce any reasons for making that claim. I would add, as a compelling reason for the determination that the plaintiff has failed to establish that it held no *"security",* the fact that, the plaintiff has failed to state so in its application for the sequestration order and supporting affidavit. The plaintiff has failed to expressly state that it held no *"security"* by using those specific words or even by using other words to that clear effect. As I mentioned earlier, stating that the car is the defendant's *"only valuable asset"* is not the same as stating that the plaintiff holds no *"security"*.

In this regard, I think it should be emphasized that, since an application for an *ex parte* sequestration order invokes an extraordinary remedy which can cause prejudice to the defendant, a plaintiff who wishes to obtain that extraordinary remedy on an *ex parte* basis, must be held to strict compliance with all the requirements of section 653 of the Civil Procedure Code. As Fisher CJ stated in DAVID & Co. vs. ALBERT SILVA (at p.316) with regard to section 653 of the Civil Procedure Code, *"….. the provisions of that section must be strictly complied with…."*.

The essential requisites of section 653 must be clearly averred on the face of the petition and supporting affidavit. A Court cannot be expected to scour these documents searching for clues to check whether the plaintiff has satisfied the requirements of section 653. It would not be inappropriate to stress here that, it is incumbent on the pleader to exercise care and due diligence in the drafting of an application, especially where *ex parte relief* is sought.

The fourth requisite which the plaintiff had to establish to the satisfaction of the court was that, the plaintiff *"does verily believe"* that, *"the defendant is fraudulently*

alienating his property to avoid payment" of the monies claimed by the plaintiff in the action.

A glance at section 653 shows that, the specific requirements are that, the plaintiff has to first satisfy the Court that, the plaintiff believes that, the defendant is acting or is about to act ***"fraudulently"*** and, thereafter, discharge the burden of adducing facts from which the Court can reasonably infer that *"the defendant is* ***fraudulently*** *alienating his property ….."*. Thus, the defendant's ***"fraudulent"*** acts or intent is an essential component of section 653. As Lawrie CJ observed in MUTTIAH vs. MUTUSWAMY, Lawrie CJ (at p.28), *"Alienation is not enough. It must be* ***fraudulent*** *alienation"*. [emphasis added]. Further, in HING APPU vs. DONCHAHAMY [1 Browne's Law Reports 376], this Court appears to have taken the view that, there must be specific averments that the defendant were acting or about to act *fraudulently*. There is also the well known rule that, where a plaintiff wishes to rely on alleged *"fraud"* on the part of the defendant, the alleged *"fraud"* must be pleaded.

Therefore, in the light of these specific requirements of section 653, the plaintiff should have specifically stated, in its petition and supporting affidavit, that, the plaintiff believes the defendant is **fraudulently** alienating his property to avoid payment of the monies claimed by the plaintiff in the action or, at the least, said so by using other words to that clear effect.

However, the plaintiff makes *no* claim in its petition and supporting affidavit that the plaintiff believes that the defendant is acting or is about to act *"fraudulently"*.

Once again, the plaintiff has sought to overcome the aforesaid omission by making averments in its statement of objections to the defendant's application and the supporting affidavit, to the effect that, the defendant is *"fraudulently"* alienating his property to avoid payment of the monies claimed by the plaintiff in the action, But, here too, that averment is belated and cannot remedy the aforesaid omission in the application for an Order sequestering the defendant's property before judgment. The observations by Lyall Grant J in SAMARAKOON vs. PONNIAH which were cited a little earlier and the insistence on strict compliance with the requirements of section 653, which I stated earlier, will apply here too.

The learned High Court Judge observed that, the plaintiff had failed to specifically aver that the defendant is acting or is about to act *"fraudulently"*. I hold that, the learned Judge correctly determined that, the plaintiff had failed establish the aforesaid fourth requisite of section 653 of the Civil Procedure Code.

The fifth requisite which the plaintiff had to establish to the satisfaction of the court was that, the plaintiff has adduced, by affidavit [or by *viva voce* testimony if the Court requires], *"facts"* from which the Court can *"infer"* that the defendant is *"fraudulently alienating his property with intent to avoid payment"* of the monies claimed by the plaintiff in the action. [A question whether defendant has *"with such intent quitted Sri Lanka leaving therein property belonging to him"* did not arise in the present action].

In DAVID & CO. vs. ALBERT SILVA, Fisher CJ held that, the plaintiff's affidavit must set out reasonable grounds to justify the plaintiff's claim that he believes the defendant is disposing of his property. The learned Chief Justice stated (at p. 316) *"The affidavit in this case merely says that the plaintiff `has good reason to believe certain things'. There is no statement of any facts in the affidavit as required by section 653 of the Civil Procedure Code; and moreover, being an affidavit based on belief, section 181 is also applicable and must be complied with,. That requires reasonable grounds for the belief to be set forth in the affidavit"*. In SAMARAKOON vs. PONNIAH [32 NLR 257], Lyall Grant cited the aforesaid passage with approval. Lyall Grant J went on (at p.259) to explain with regard to section 181 of the Civil Procedure Code, *"Section 181 contains an exception to the rule that affidavits shall be confined to statements of such facts as the declarant is able of his own knowledge and observations to testify to, except in interlocutory applications, in which statements of his belief may be admitted provided that reasonable grounds for such belief are set forth in the affidavit. The requirement of section 181 and section 653 are similar."*. For purposes of easy reference, it may be mentioned here, Section 181 of the Civil Procedure Code provides that, in the case of interlocutory applications [such as in the present case] a statement of belief may be included in an affidavit, provided reasonable grounds for such belief are set out in the affidavit.

In RAJADURAI vs. THANAPALASINGHAM [2 CLW 147], this Court held that, a sequestration order should not have issued on a mere assertion that the defendant was making arrangements to draw money and place it beyond the reach of the plaintiff. Drieberg J stated (at p.148]) *"The Court should have required Ramapillai to state what the arrangements were which he mentioned in his affidavit"*.

In the later case of KARUNADASA vs. YOOSOOF [51 NLR 326 at p.326], Windham J further explained, *"Now an examination of sections 653 and 181 of the Civil Procedure Code makes two points clear. First, section 653 requires the affidavit to set out allegations of fact from which the judge may infer that the defendant is fraudulently alienating his property with intent to avoid payment of the debt or damage; that is to say, a mere statement in the affidavit that the defendant is fraudulently alienating is not enough, – it is for the court to infer fraudulent alienation, or not, from the allegations of fact set out in the affidavit. Secondly, since petitions under section 653 are interlocutory, the allegations of fact so set out in the affidavit need only comply with the second part of section 181 of the Civil Procedure Code and not with the first part; that is to say they need not be such as the declarant is able to of his own knowledge and observation to testify to; but they may be merely statements of his belief, provided that reasonable grounds for such belief are set forth in the affidavit."*.

In the facts and circumstances of that particular case, Windham J held that, statements in the plaintiff's affidavit that, the defendant is making preparations to withdraw an amount that was payable to him and has been trying to avoid the plaintiff and that, the defendant is making preparations to transfer his deposits to third parties and to dispose of his only immovable property, were sufficient to

establish reasonable grounds for the plaintiff's belief that the defendant is attempting to fraudulently alienate his property. In this regard, Windham J (at p.327) expressed his view that, the word *"facts"* in section 653 should not be construed so narrowly as to require the plaintiff state the precise *"movements or acts"* which give rise to his belief that the defendant was attempting to fraudulently alienate his property. His Lordship stated, *"To allege that somebody is preparing to do something is to allege a fact, and that is all that the section requires"*.

In SINGHAPUTRA FINANCE LTD vs. APPUHAMY, Wimalachandra J held (at p.57-58) that, since an application for a sequestration order is an interlocutory application, section 181 of the Civil Procedure Code permits the Court to act on statements of belief *provided* reasonable grounds for that belief which *"enable the Court to come to a conclusion whether it would be safe to act on the petitioner's affidavit to grant the relief sought by the petitioner in its petition."*, are set out in the affidavit.

It is clear from the aforesaid decisions and upon a reading of section 653 with section 181 of the Civil Procedure Code, that the reference to *"facts"* in section 653 will include statements of the plaintiff's belief if the plaintiff states reasonable grounds for such belief. Thus, a sequestration order may be issued not only upon the plaintiff adducing *"facts"* but also upon the plaintiff making statements of belief only, provided the Court can reasonably infer from those facts or statements that, the defendant is about to fraudulently alienate his property.

I would mention, with respect, that the aforesaid statements by Windham J in KARUNADASA vs. YOUSOOF (at p.327 of that judgment) should not be taken as giving a plaintiff the license to simply make a few unsubstantiated allegations and then claim that he has set out *"reasonable grounds"* for a belief that the defendant is attempting to fraudulently alienate his property. Instead, where a plaintiff wishes to rely on a statement of belief, the plaintiff must state, in some detail, reasonable grounds which give cause for that belief with reference to past and anticipated acts of the defendant and other relevant circumstances. It is only by doing so that, a plaintiff may enable a Court to consider it reasonable to infer that, the defendant is attempting to fraudulently alienate his property. That appears to have been the case in KARUNADASA vs. YOOSOOF.

In its petition seeking the sequestration order and supporting affidavit, the plaintiff relied only on the defendant's letter dated 17th August 2009 marked **"X3"** to establish the plaintiff's claim that the defendant is attempting to alienate her assets and from which the plaintiff wishes the Court to infer that the *"defendant is fraudulently alienating his property"* in order to avoid paying the plaintiff's claim.

This letter marked **"X3"** is written by the defendant to the plaintiff. By this letter, the defendant has stated that, she had leased the aforesaid car from the plaintiff and duly paid all monies owing on the lease facility. She has stated that, therefore, she would like the plaintiff to hand over the certificate of registration of the car (which had

been held by the plaintiff in view of the lease agreement) and that she wished to sell the car to meet a financial commitment.

I cannot see how that letter can be regarded as establishing or even suggesting that the defendant was attempting to *"fraudulently"* alienate her assets. It is well known that, the established practice in the leasing industry is for the lessor to release the registration certificate to a lessee who pays all monies due upon the lease agreement. Therefore, the defendant could have, reasonably, expected the plaintiff to hand over the registration certificate since she had paid all monies due on the lease agreement. The defendant has written to the plaintiff asking for the registration certificate and has mentioned that she intends to sell the car to meet a financial commitment. She need not have mentioned that detail if she wished to hide her wish to sell the car. It seems to me that, the defendant's act is far from that of a fraudulent person. On the contrary, the defendant has acted honestly and frankly. Further, it has to be kept in mind that, at this preliminary stage of the action, the plaintiff has no priority over other creditors of the defendant and, therefore, the defendant's stated desire to pay off another creditor is not necessarily fraudulent *vis-a-vis* the plaintiff. In these circumstances, the letter marked **"X3"** is not sufficient to raise an inference that, the defendant is acting or is about to act fraudulently and alienate her assets to avoid paying the plaintiff's claim.

The plaintiff has adduced no other *"fact"* or *"reasonable ground"* in support of its application for the sequestration order.

In these circumstances, the learned High Court Judge referred to the cases of DAVID & CO. vs. ALBERT SILVA and SAMARAKOON vs. PONNIAH and MUTTIAH vs. MUTUSWAMY and concluded that, the plaintiff has failed to adduce any fact or reasonable ground from which the Court could infer that the defendant is fraudulently alienating her assets. Here too, I am in agreement with the learned Judge.

In the defendant's written submissions made in this Court, learned President's Counsel appearing for the defendant has urged that, the learned High Court Judge erred in failing to consider the decision in KARUNADASA vs. YOOSOOF and submitted that, in that case, Windham J had taken a contrary view to the views expressed in DAVID & CO. vs. ALBERT SILVA, SAMARAKOON vs. PONNIAH. I cannot agree with that submission since it appears to me that, all three decisions expounded much the same principle – namely, that the plaintiff must adduce *"facts"* or *"reasonable grounds"* in support of the plaintiff's belief that the defendant is attempting to fraudulently alienate her assets and from which the Court can infer that the *"defendant is fraudulently alienating his property"* in order to avoid paying the plaintiff's claim. In fact, in KARUNADASA vs. YOOSOOF, Windham J referred to the decisions in DAVID & CO. vs. ALBERT SILVA and SAMARAKOON vs. PONNIAH and stated (at p. 326), *"The position as I have set it forth with regard to both these points is recognized in David & Co. v. Albert Silva and in Samarakoon v. Ponniah.*"

For the aforesaid reason, the first question of law is answered in the negative.

The second question of law asks whether the learned High Court Judge has erred in holding that, the plaintiff had failed to establish that the defendant had no assets other than the aforesaid car.

Section 653 certainly does not entitle a plaintiff to obtain a sequestration order against a defendant simply because the defendant has only one asset and is attempting to sell it. Instead, as explained earlier, a plaintiff has to adduce *"facts"* or *"reasonable grounds"* in support of the plaintiff's belief that the defendant is attempting to *"fraudulently"* alienate assets and from which the Court can infer that the *"defendant is fraudulently alienating his property"* in order to avoid paying the plaintiff's claim. As held earlier, in the present case, the plaintiff has failed to do that. Therefore, the second question of law is also answered in the negative.

The third question of law asks whether the learned High Court Judge has failed to consider the defendant's letters marked **"P2c"** and **"P5i"**. The letter marked **"P2c"** is the letter marked **"X3"**. The learned High Court Judge has correctly decided the effect of **"X3"**. The letter marked **"P5i"** was not annexed to plaintiff's application for the sequestration order. Therefore, the learned High Court Judge was not required to consider it. In any event, the contents of **"P5i"** (which was produced by the defendant with her application to vacate the sequestration order) are similar to **"X3"** apart from the defendant voicing her indignation that the plaintiff is holding on to her certificate of registration long after she has paid all the monies due on the lease agreement. Therefore, even if the learned High Court Judge had considered **"P5i"**, it would have made no difference to his Order. Accordingly, the third question of law is also answered in the negative.

The Order dated 22nd April 2010 of the High Court is affirmed. This appeal is dismissed. In the circumstances of this appeal, no order is made with regard to costs.

Judge of the Supreme Court

S.E. Wanasundera PC, J.

Judge of the Supreme Court

Upaly Abeyratne J.

Judge of the Supreme Court

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

SC (CHC) Appeal No. 28/2008
HC (Civil) No. 261/2005(1)

In the matter of an Appeal from the Judgment of the High Court of Colombo (Exercising Civil Jurisdiction) dated 29.2.2008

Papeteries De Maudit
No. 07, Avenue Ingres,
76016, Paris,
France.

PLAINTIFF

Vs.

Tylos Tea (Private) Limited
Serendib Park,
Indolamulla
Dompe.

DEFENDANT

AND NOW

Tylos Tea (Private) Limited
Serendib Park,
Indolamulla
Dompe.

DEFENDANT-APPELLANT

Vs.

Papeteries De Maudit
No. 07, Avenue Ingres,
76016, Paris,
France.

PLAINTIFF-RESPONDENT

BEFORE: S. E. Wanasundera P.C., J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: Hiran de Alwis with Chanaka Jayamaha
and Heshan Thambimuttu for the Defendant-Appellant

Geoffray Alagaratnam P.C. with Senuri de Silva
For the Plaintiff-Respondent

WRITTEN SUBMISSIONS OF THE DEFENDANT-APPELLANT FILED ON:
12.08.2014

WRITTEN SUBMISSIONS OF THE PLAINTIFF-RESPONDENT FILED ON:
05.01.2015

ARGUED ON: 16.02.2017

DECIDED ON: 02.06.2017

GOONERATNE J.

This is a direct appeal to the Supreme Court. Plaintiff Company, a company in France filed action against the Defendant Company for monies due

to the Plaintiff Company for goods described 'as tea bag filter papers' being provided to the Defendant Company and for the reason money due on same have not been settled. The Plaintiff-Respondent Company having its business concern in France had by a power of Attorney holder, authorised to collect and file action on behalf of the Plaintiff Company. A Managing Director of a private firm called Russel Fredricks Weerappah was the power of Attorney holder of the Plaintiff Company (X2 dated 17.11.2005) and by resolution of the Plaintiff Company (X 2a). He gave evidence on behalf of the Plaintiff Company and claim the amount of money described in prayer (a) of the prayer to the plaint. Defendant by a claim in reconvention as pleaded prayed for same but the learned High Court Judge held that the Defendant did not prove the counter claim and dismissed the counter claim as no evidence was led to prove the counter claim.

The main points urged inter alia before the Supreme Court by the Defendant-Appellant was that the action was prescribed and that there was no written agreement. Learned counsel for the Defendant-Appellant demonstrated to court that this was a case of goods sold and delivered and that there was no account stated as submitted by Plaintiff and accepted by the High Court. As such the action was prescribed. Parties proceeded to trial on six (6) admissions and 29 issues. I will refer to some of the admissions only as it has a bearing to the

appeal before this court. It was admitted that documents annexed to the plaint X4, X9, X14 and X19 were sent by the Defendant to the Plaintiff Company. These are all orders placed by the Defendant Company requesting the Plaintiff to sell the goods but the High Court has in the Judgment considered same to be an admission. What was admitted was sending of the purchase orders. But whatever it may be exchange of correspondence between parties on X24, X25, X26 X27 and X30 were also admitted.

X24 is a request for payment by Plaintiff. X25 Managing Director of the Defendant Company apologize for the delay in payment and states that he will remit the sum as early as possible. X 26 dated 27.11.2002 Plaintiff states partial payment was received and request for balance. X 27 Defendant apologise for delay (letter dated 29.11.2002). By X30 dated 25.04.2003, Defendant accept that they have to pay for some invoices but states fair part of the filter papers are inferior quality and unfit for human consumption. Plaint filed on or about 28.11.2005.

Documents X25, X27, X30 are letters where the Defendant Company admit liability for the goods imported, and states amounts due would be settled. X3A is a statement of accounts for the transaction during 2001-2002. There is no doubt that the amount due need to be settled by the Defendant. The question is whether the action is prescribed? If the case falls within Section 6 of

the Prescription Ordinance based on written contract etc., the period would be 6 years and Plaintiff would be entitled for Judgment

If the case falls within Section 8 of the Prescription Ordinance for goods sold and delivered prescriptive period would be a period of one year to institute action. Learned High Court Judge gives his reasons and consider the transaction based on 4 Purchase Orders where the goods were delivered to the Defendant Company. It is stated that the invoices, packing lists and the bill of lading in respect of those 4 orders were marked in evidence and produced in court. It is also stated that the above documents are admissible in evidence though the Defendant takes the view that there is no proof of such documents and or the documents were not proved. I do not think it is correct since a witness from the Commercial Bank, one Somananda gave evidence on invoices, packing lists and the Bills of Lading as those documents were produced to the Bank and goods cleared from the warehouse as the goods imported on D/A terms. As such goods were delivered to the Defendant Company. I am inclined to accept the reasoning of the High Court on this aspect where provisions of Section 65 of the Evidence Ordinance has been considered, in circumstances where secondary evidence could be led.

I do agree that invoices, packing list and Bills of Lading are evidence before the trial court and secondary evidence of same could be led without any doubt (Section 65(1) and (7) of the Evidence Ordinance)

Defendant-Appellant argued that this is a series of transactions, between parties of goods sold and delivered and each item of purchase constitutes a separate transactions, and attempted to establish that it is a transaction of goods sold and delivered. The action is prescribed in one year.

Entirety of the facts and circumstances and conduct of parties, admission of liability are all matters to be considered, in order to decide the nature of the transaction. It is a written contract, and an action would be prescribed in 6 years. Even though the case in hand is based on 4 Purchase Orders, Plaintiff's claim is based on all orders. I have considered the lengthy written submissions of the Defendant. I am not inclined to accept the argument that this is only a case of goods sold and delivered.

Defendant Company made no payments and the goods had been shipped on four consignments subsequent to the said purchase orders which were accepted. Based on the orders, invoices, packing list and Bills of Lading are all written documents on which the transaction proceeded and which was between parties. I am more inclined to accept the argument of the Plaintiff Company that having taken the entirety of the facts of the case into

consideration and not in isolation, I do agree that the transaction emanated from a written contract and not on a running account. In order to constitute a written promise contract, bargain or an agreement, no specific form of writing is required. Vide *Ceylon Insurance Company Ltd. Vs. Diesel and Motor Engineers Co. Ltd. 79(1) SLR 5.*

I note that the claim of the Plaintiff as pleaded and in the correspondence is for the four transactions based on orders, invoices, packing lists and Bills of Lading. I am also fortified in my views having perused the authority cited from 'The Law of Contracts' - *Prof. Weeramantry Pg. 826*

Prof. Weeramantry in his book titled the 'Law of Contract' at page 826 stated that, Instances of writing which have been held to constitute written agreements are;

- "an acknowledgement of liability to pay a sum due for goods bought on credit followed by a statement",
- "we shall definitely pay this bill by the end of this month"
- a written contract to supply a specified quantity of goods at a specified price, and containing other conditions as to the payment of an advance and the recovery of damages and an offer in writing to a person to pay certain charges for the supply of a service or commodity on the faith of which the supplier makes the supply".

There was another point on the question of locus standi urged on behalf of the Defendant-Appellant. Chapter V of the Civil Procedure Code deals with recognised agents and Attorney-at-Law. An agent with a special authority to represent his principle in matters in connection with a particular trade or

business is a recognised agent within the meaning of Section 25(b) of the Civil Procedure Code. Section 25(b) was not intended to refer only to persons who hold general powers of Attorney authorising them to represent the principle in every conceivable kind of transactions and in connection with every kind of legal proceeding. *Lanka Estate Agency Vs. Corea 52 NLR 477*.

Section 25(b) and (c) of the Civil Procedure Code reads thus:

(b) persons holding general powers of Attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance or application is made or act done, authorising them to make such appearances and applications, and do such acts on behalf of such parties; which power, or a copy thereof certified by an Attorney-at-Law or notary, shall in each case be filed in the Court.

(c) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance or application is made or act done, in matters connected with such trade or business only, where no other agent is expressly authorised to make such appearances and applications and do such acts.

The documents relating to power of Attorney X2 and X2(a) were produced in evidence without an objection. As such in view of the above

provisions of law I have to conclude that the witness for the Plaintiff Weerappa holds a valid Power of Attorney to act on behalf of the Plaintiff Company.

The first purchase order is dated 21.09.2001. Plaint filed on 28.11.2005. This is well within time. There are three letters of the Defendant Company admitting liability. By X25 Defendant having admitted liability states we will be starting to make payment from next week. X27 Defendant states they will do their best to remit the sum as early as possible. X 30 as mentioned above, Defendant admit that they have to pay for some invoices but attempt to complain of the quality of goods. It was the position in the High Court that the Defendant did not lead any evidence to prove their counter claim, and it was dismissed by court. Further after a lapse of time by X30 dated 30.05.2003 quality problems were raised for the first time and Defendant had not substantiated such a quality issue. This is an after thought and the Defendant could not place any evidence before the High Court to establish any such quality issue. Further the claim of the Plaintiff was for the entire sum due. I note that issue Nos. 17 to 23 relating to quality issue raised by the Defendant, has been answered by the learned High Court Judge as 'not proved'.

The correspondence between parties indicate the true nature of the transaction. X25 and X27 concedes the total sums due on the transaction. X26 makes reference to two invoices 15, 922 and 16754 and the amount due is

indicated. Further X26 dated 22.11.2002 refer to the other two invoices already due for an urgent payment. X27 is a reply to X26, and X27 refer to the date in X26 vide 27.11.2002. By X27 the Defendant whilst acknowledging X26 apologise for the delay and promise to pay. At this stage there is no complaint of bad quality but an independent written promise to pay. An acknowledgment of a debt in terms of Section 12 of the Prescription Ordinance may also give rise to creation of a new contract, and take the case out of prescription.

This court having considered the material placed before court more particularly, correspondence between parties at the relevant time would indicate the true nature of the transaction.

As such 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

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 from a judgment of the Commercial High Court of Colombo.

Independent Television Network Limited, Wickremasinghepura, Battaramulla.

Plaintiff

S.C. CHC Appeal 29/11
Commercial High Court
Case No. HC (Civil) 203/2006(1)

Vs

1. Godakanda Herbals Private Ltd., 102, Kandy Road, Veveldiniya.
2. Lelwala G. Godakanda, 102, Kandy Road, Veveldeniya.

Carrying on sole proprietyship under the name and style of "V.L.C. Advertising".

Defendants

AND NOW BETWEEN

Independent Television Network Limited, Wickremasinghepura, Battaramulla.

Plaintiff Appellant

Vs

1. Godakanda Herbals Private Ltd., 102, Kandy Road, Veveldiniya.
2. Lelwala G. Godakanda, 102, Kandy Road, Veveldeniya.

Carrying on sole proprietyship under the name and style of "V.L.C. Advertising".

Defendant Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
ANIL GOONERATNE J. &
H.N.J. PERERA J.

COUNSEL : M.U.M. Ali Sabry PC with Nalin Alwis and Samhan

Munzir for the Plaintiff Appellant.
Anura Ranawaka with Oshada Maharachchi for The Defendant Respondents.

ARGUED ON : **07.02.2017.**

DECIDED ON : **14.03.2017.**

S. EVA WANASUNDERA PCJ.

Independent Television Network Limited is a company carrying on the work of television industry in Sri Lanka. It is a government owned business undertaking. Godakanda Herbals Private Limited is a company who wanted to get its products advertised in the said television channel and its advertising agent was ' V.L.C. Advertising '. The sole proprietor of the said advertising agent was Lelawala G. Godakanda.

The Independent Television Network Limited had a long standing relationship where the Godakanda Herbals Private Limited company through the advertising agent VLC Advertising continued to advertise in the said TV channel. They had entered into an agreement for the said services, as on previous years, for the year commencing on 01.01.2004 to 31.12.2004. The advertisements were broadcast continuously up to August, 2005 when the advertiser refused to pay for the services on a dispute over the increase of charges. Yet the advertiser was found to have paid part of the money which was due, for services rendered beyond the ending date in 2004 getting into 2005. The balance money due was over 4.1 million and the Independent Television Network Limited (hereinafter sometimes called as ITN) filed action against the advertiser and the advertising agent to recover that money in the Commercial High Court of Colombo. The Plaint was dismissed by the learned High Court Judge and the Plaintiff has appealed to this Court.

The Petition of Appeal dated 27.10.2011 was filed in this Court by the Independent Television Network Limited, the Plaintiff Appellant (hereinafter referred to as the Plaintiff) against the judgment of the High Court which was in favor of the Godakanda Herbals Private Limited and Lelwala G.Godakanda carrying on as the sole proprietor under the name and style of "VLC Advertising", who are the Defendants Respondents (hereinafter referred to as the Defendants).

In the said Petition before this Court, the grounds of appeal as set down therein can be summarized as follows:-

1. The learned High Court Judge has misdirected himself in holding that the Appellant has not proved its case by holding that the Appellant had failed to establish the existence **of continuation of the agreement** after 2004 whereas there exists ample evidence and documents to prove the same.
2. The learned High Court Judge has misdirected himself in holding that documents marked on behalf of the **Respondents** need not be proved while the said documents had been **marked subject to proof.**
3. The learned High Court Judge has failed to appreciate the fact that the Respondents had made payments to the Appellant for the programs telecast even after 31.12.2004 when the same fact had been admitted by the 2nd Respondent himself.

4. The learned High Court Judge had failed to give proper weight to the documents marked and the evidence led on behalf of the Appellant.
5. The learned High Court Judge had failed to evaluate the evidence which transpired during the trial in the correct perspective.

This trial had been heard by two High Court Judges. The first High Court Judge had heard the trial on 03.05.2007, 30.07.2007, 25.01.2008. 06.05.2008 and on 31.10.2008. After adopting the evidence, the second High Court Judge had heard the continued trial on 11.02.2009, 07.05.2009 ,27.11.2009 and on 28.06.2010. The second Judge had written the judgment. The trial had commenced after some admissions and court had taken up the trial on eight issues. The trial judge had analyzed the evidence and reached the conclusion that the Plaint had not been proved by the Plaintiff who is the Appellant before this court. The Plaint was dismissed.

It is interesting to note that the Defendants had admitted the jurisdiction of the Court to hear the case even though they had challenged the jurisdiction in their answer. The letters of demand were also admitted. The 1st Defendant had accepted his signature in the document marked A1 which was produced as P1. The Plaintiff had raised 5 issues and the Defendants had raised 3 issues. The learned High Court Judge states that the Plaintiff had marked documents P1 to P68 and P70. Document P69 had been removed from the list of documents to be marked. At the time of producing documents P2, P3 to P65 and P68 they had been objected to by the Defendants' counsel but the 1st Judge who had heard the case had overruled the objections and accepted the documents. Then even at the end of the case, those documents were not objected to by the Defendants. The learned High Court Judge who wrote the judgment states that, therefore**, he has considered as evidence before court, the documents marked as P1,P2 to P68 and P70.**

The counsel for the Defendants had managed to mark documents,V1, V1a, V1b, V2, V2a,and V3 through cross examination of the Plaintiff's three witnesses. The Plaintiff's counsel had stated that those documents can be marked as 'subject to proof'. I observe that V1 is an Advertising Contract Form seemingly used by the Independent Television Network. It is not signed by either party even though it is written therein that the name of the advertiser is the 1st Defendant. V1a an V1b are carbon copies of the same, which the Defendants had tried to bring to the

notice of the trial court to show that such a form was sent in triplicate to the 1st Defendant by the Plaintiff but the 1st Defendant had refused to sign. V2 and V2a are also the same kind of form of contract and its carbon copy for the program of Vendol Chat and Music which again were not signed by either party. V3 is a letter sent by the ITN to the 1st Defendant dated 22.06.2005. It is signed by the Chairman of ITN. It addresses two matters; one being on Vendol Chat and Music and the other being on Doramadalawa. It specifically states that the agreement regarding Doramadalawa was over only on the 30th of May, 2005. The other agreement not having been signed as yet, by the date that V3 letter was sent, ITN states that it is a lapse on their Sales Department and that ITN has directed the particular department to properly do the same forthwith. The learned High Court Judge had taken these documents as valid documents, the analysis of them shows the finger to one point, i. e. that no written agreement was done until 22.06.2005. I observe that , even after that letter was sent from ITN to the 1st Defendant, the 1st and the 2nd Defendants had **failed t**o address a letter in writing , **telling the Plaintiff that they are not willing to sign a further contract and that ITN should stop placing their advertisements in the said programs. There is no evidence before court that the Defendants had tried to stop them from broadcasting their advertisements.**

The learned **High Court Judge states** that even at the time of the **closing of** the Defendants' case, the Plaintiff's counsel had **objected to the said documents.** However, the learned High Court Judge had analyzed the said documents and stated that because the said documents were marked in cross examination through the Plaintiff's witnesses, there is no proof necessary to be done by the Defendants. The 2nd Defendant had given evidence but had not produced any documents. When he was shown that there is money paid by his company which is the 1st Defendant to the Plaintiff for advertisements broadcast in the year 2005 as part payment of payments due from his company, all what he had said is that " if it is an overpayment paid after the agreement had ended on 31.12.2004, then that money should be paid back to me." Yet I observe that there was **no cross claim** in the answer of the Defendants against the Plaintiff.

Let me leave aside all what I have analyzed above and consider the issues before court. The Plaintiff's issues are as follows:

1. According to paragraphs 6,7,8 and 9 of the Plaint, was there an agreement to broadcast the 1st Defendant company's advertisements by the Plaintiff?
2. According to the said agreement, did the Plaintiff broadcast the advertisements on behalf of the Defendants?
3. According to the statement of accounts marked A2 filed with the plaint, are the Defendants liable to pay to the Plaintiff, a sum of Rupees four million one hundred and eleven thousand two hundred and forty nine (Rs. 4,111,249.00) ?
4. Have the Defendants failed and neglected to pay the said sum or part thereof even though demanded by the Plaintiff?
5. Is the Plaintiff entitled in law to get the reliefs prayed for in the Plaint, if any one or more of the questions above are decided in the affirmative in favor of the Plaintiff?

The Defendants' issues are as follows:

6. (a) Have the causes of action in the plaint occurred with regard to the services granted by the Plaintiff?
   (b) If it is so, have the causes of action got prescribed?
7. In any case have the claims/ causes of action got prescribed?
8. If any one or more of these issues are decided in favor of the Defendants , should the Plaint be dismissed with costs?

It is settled law that " once issues are framed and accepted, pleadings recede to the background ". It was held to be so in the case of ***Dharmasiri Vs. Wickrematunga 2002 2 SLR 218.*** When pleadings recede to the background, the case enunciated by the parties will be crystallized on the issues.

The only defense of the Defendants, according to the issues is that the causes of action have got prescribed and that on that account the Plaint should be dismissed.

I find that the Defendants have not raised any issue with regard to the written agreement A2 for the year 2004 not getting prolonged into the year 2005. Neither have they raised an issue with regard to not agreeing to buy the services of the Plaintiff from 01.01.2005 to 31.08.2005. They have failed to claim that the

amounts in the accounts are wrong as they have not raised that as an issue. The only issue is with regard to prescription.

The Plaintiff's document P1 is the initial written agreement between the parties for the period 01.01.2004 to 31.12.2004. Document P2 is the summary of the statement of account pertaining to the transactions between the Plaintiff and the 1st Defendant. Documents P3 to P 67 are the time schedules of the services provided to the 1st Defendant together with the value of the services. Along with the said P3 to P67 documents the Plaintiff has marked P3a, P4a etc. up to P67a which were the tax invoices tendered to the Defendants. P68 is a document comprising of 256, A 4 type written pages, showing the running account of Godakanda Herbals Private Limited, the 1st Defendant , from the time the advertisements had commenced, i.e. from the year 2001. Document P70 is a summary titled " Godakanda Herbals – Client Statement " , again commencing from 2001, stating the month and the " Brought Forward Balance " and "Closing Balance" up to August 2005. These documents were not challenged with regard to the entries therein. They arise from the computerized entries of how much was due , on what services , the air time, date etc. The 2nd Defendant, Mr. Godakanda did not state in his evidence before court that the entries were wrong. He only tried to establish that he did not have an agreement which was valid for the year 2005 and that without a proper written agreement he is not willing to pay.

The Plaintiff has tried to establish that there was a written agreement valid upto the end of December, 2004 and even though there was no written agreement which had got into place in the year 2005, by the conduct of the Defendants, there existed an unwritten promise/contract/bargain/agreement between the parties for the services to continue during the time period and therefore the Plaintiff has a claim for the services rendered to the Defendants. It was a running account which was maintained by the Plaintiff on behalf of the Defendants who advertised a lot of their products and who were the main sponsors for very popular TV shows. Due to the fact that the Defendants never demanded that their advertisements be discontinued along during the year 2005 , it has to be understood that there was a continuation of cordial good relationship between the Plaintiff and the Defendants. Due to these reasons it can be concluded that there was an unwritten agreement between the parties.

It was pointed out that on 25.05.2005 as well as on 08.06.2005 air time was given for Navaliya Vendol Award Ceremony and a repeat telecast of the same with which the 1st Defendant fully agreed in his evidence. His position was that it was only a special request for one hour air time, made by him which was accommodated by the Plaintiff. However, I observe that the payment was credited to the running account maintained by the Plaintiff on behalf of the Defendants. The said amounts which is two times of Rs. 1,15000/- amounting to Rs. 2,30,000/- for the program Navaliya Vendol Award Ceremony telecast is pending unpaid up to date. It is reflected on page 7 of A2 annexed to the plaint and the same was produced at the trial as P2. This document P2 reflects under what program heading, the costs are incurred by the Plaintiff on behalf of the 1st Defendant company such as under the headings of Savanak Ras, Vendol Chat N Music – Live, Doramadalawa Live, Doramadalawa Repeat, and Nawaliya Vendol Award Ceremony. The Plaintiff has maintained the running account under the name of the company and this is only categorization under special headings for convenience but it contains the same figures under the costs and payments made by the Defendants by cheques at different times and on different dates as usually done according to the practice maintained by the Defendants. I observe that the last payment made by the Defendants under the heading of Doramadalawa Live , was done on 30.05.2005 by cheque No. 732046 amounting to Rs. 2,30,000/-. Then, under the heading Doramadalawa Repeat, the payment of Rs. 143500/- was done by cheque No. 732047. On 17.05.2005 by cheque No. 732028 again an amount of Rs. 8,62500/-was paid under the heading Chat N Music.

These acts of the 1st Defendant company demonstrates that the Defendants have **acquiesced in the process of accounting under the running account and kept on paying for whatever went on air on their behalf in the past before 30.05.2005** very cordially as business partners.

The Plaintiff had calculated that the Defendants had paid Rs. 10,297,500 /- during the period from 1.1.2004 to 31.12.2004, whereas the exact due amount from the Defendants was only amounting to Rs. 7,221,250/-. This fact once again is proof of a running account having been kept with regard to the business transactions between the parties and as accepted, the Defendants as a practice, had been continuously paying the Plaintiff as and when they got the monies. The 2nd Defendant very casually stated in cross examination, that if more money is found to have been paid over and above the amount due from 1.1.2004 to 31.12.2004,

the said monies should be repaid to him by the Plaintiff. I observe that there is no cross claim in the answer for any amount at all. Furthermore, it was obvious that the Defendants did not make an attempt to show any of their accounts to the trial court by way of any document. Having gone through the accepted documents by the trial judge as well as the evidence placed before the trial court, I hold that the Plaintiff had **proven its case on documentary evidence**. However the trial judge has continuously complained in his judgment that the Plaintiff had failed to call a witness from the marketing division of the Plaintiff company to prove the existence of an agreement and the accuracy of the statements of accounts.

The documents of a case stands proven if the opposing party fails to object to the documents at the closure of the case. The documents contain evidence for all purposes. It was so held in the case ***of Aluthmuhandiramlage Somawathie and others Vs Lucy Nona and others , reported in the BASL Law Journal of 2012 Vol. 2 at page 318.***

The Defendants have made payments after the lapse of the written agreement. They cannot deny the fact that irrespective of an existing written agreement there was an understanding and an ongoing continuous contract/agreement between the parties to telecast their advertisements. I hold that the learned High Court Judge has disregarded the evidence before him which proves the case of the Plaintiff.

I also wish to state that the letters of demand were admitted by the Defendants. They had failed to reply the demands or send some response to them. In the case of ***Abeysinghe Vs Commercial Bank of Ceylon 2008 1 SLR 369,*** it was held that "In business matters, in certain circumstances the failure to reply to the letter amounts to an admission of a claim therein. The silence on the letter amounts to an admission of the truth of the allegations contained in that letter."

Most importantly, the only defense taken up by the Defendants in the issues is on prescription of the claim. I wish to reproduce Sec. 7 of the Prescription Ordinance as amended as follows:

" No action shall be maintainable for the recovery of any movable property, rent, mesne profit or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money

received by the defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain or agreement, unless such action shall be **commenced within three years** from the time after the cause of action shall have arisen. “

I hold according to the evidence placed by documents before court that there was an unwritten promise/bargain between the parties with regard to payments for the advertisements and programs telecast after 2004 December. The cause of action to recover the dues had arisen in June, 2005 and action had been filed in September, 2006 which is within 3 years from the date of the cause of action. The claim made is not prescribed. I therefore hold that the Defense on prescription fails.

At the hearing before this Court , the counsel for the Defendants Respondents argued that the statements of accounts in P68 are transcripts of statements maintained in computers and that they are not admissible in evidence due to non compliance of the provisions of Sec. 6(1) of the Act No. 14 of 1995, namely the Evidence (Special Privisions) Act. It should be observed that the Electronic Transactions Act No. 19 of 2006 was enacted specifically to promote technological advancement to be reckoned by the legal regime.

Sec. 22 of the said Act No. 19 of 2006 makes special provisions with regard to any data message, electronic document, electronic record or other document. It is reproduced as follows:

“ Nothing contained in the Evidence (Special Provisions) Act No. 14 of 1995 shall apply to and in relation to any data message, electronic document, electronic record or other document to which the provisions of this Act applies.”

I hold that in view of the said provision that the argument of the counsel for the Defendants Respondents in that regard fails. The computer generated running account is before this court. The summary of the same under different headings is placed before court. The contents thereof was not challenged at any time. The said documents were accepted by court without any legal objection. Court is entitled to analyze the contents thereof without bias.

I hold that the learned High Court Judge was wrong in having concluded that the Plaint should be dismissed because the cause of action was not proven by the Plaintiff. He had not analyzed the evidence before court on the documents accepted by court without any objection. He had only found fault with the way the three witnesses for the Plaintiff had answered the questions in cross examination.

The Appeal is allowed. The Plaintiff Appellant is entitled to recover the claim made against the Defendants Respondents by the Plaint dated 12th September, 2006. However I order no costs.

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

In the matter of an Appeal from a judgment of the Commercial High Court.

Telecommunication Consultants India Limited. (A Government of India Enterprise), 43, Nehru Place, New Delhi – 110019, India.

Plaintiff

SC CHC 36/2006
HC (Civil) 42/2002

Vs

Pan Asia Bank Limited, 450, Galle Road, Colombo 03.

Defendant

AND

Pan Asia Bank Limited, 450, Galle Road, Colombo 03.

Defendant Appellant

Vs

Telecommunication Consultants India Limited. (A Government of India Enterprise), 43, Nehru Place, New Delhi – 110019, India.

Plaintiff Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.,**
K. T. CHITRASIRI J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : S.A. Parathalingam PC with Varuna Senadhira for the Defendant Appellant.
Anura B. Meddegoda PC with Ms. G. Jayasundera and A.Divya for the Plaintiff Respondent.

ARGUED ON : 25.09.2017.
DECIDED ON : 24.11.2017.

S. EVA WANASUNDERA PCJ.

This Appeal is preferred by the Defendant , Pan Asia Bank Ltd. against the judgment of the Commercial High Court in the case filed against the said Bank by the Plaintiff, an Indian Company which is an enterprise fully owned by the **Government of India**, incorporated under the name and style of Telecommunication Consultants India Limited. The said impugned judgment is dated 02.06.2006.

The Defendant Appellant Pan Asia Bank (hereinafter referred to as the **Defendant Bank)** had issued an **Advance Payment Guarantee** under reference number TCIL / AGR/NT/97 dated 24.07.1997 to the Plaintiff Respondent Company, **Telecommunication Consultants India Limited** (hereinafter referred to as the **TCIL**). A local company by the name of **Nipuna Teleconstructions (Pvt.) Limited**, (hereinafter referred to as **Nipuna)**, was the sub-contractor in the work undertaken by TCIL regarding some telecommunications civil work at the villages in Sri Lanka, namely Keselwatte, Wadduwa, Ambalangoda and Hikkaduwa. **TCIL would pay an advance of Rs. 8,964,428/24,** (being 30% of the full contract amount) to Nipuna to commence and perform the work under a contract entered into between TCIL and Nipuna. If Nipuna **fails** to comply with the terms and conditions of the contract, **on the said Guarantee**, money advanced to Nipuna

would be paid to TCIL by the Defendant Bank **on demand.** The Bank had issued the said guarantee as requested by Nipuna to receive the advance payment from TCIL.

The Guarantee was marked as P 1 in evidence and within the Guarantee Bond it reads as follows:

" In **consideration of your paying to the sub-contractor** the amount of Rupees Eight Million Nine Hundred and Sixty Four Thousand Four Hundred and Twenty Eight and cents Twenty Four only (Rs. 8,964,428/24), we **PAN ASIA BANK LIMITED irrevocably undertake to repay** up to the said sum to you **despite any objection by the sub-contractor**, upon receipt by us of **your first demand** either by your banker's authenticated telex or by your letter with the signatures thereon authenticated by your bankers, provided that, in either case, such demand incorporates your declaration stating that the amount claimed is due **by reason of the sub-contractor having failed to comply with the terms and conditions of Contract No. TCIL / AGR / NT / 97.** The aforesaid **demand and declaration** shall be accepted as **conclusive evidence** that the amount claimed is **due to you under this Guarantee**."

The trial before the Commercial High Court commenced with 9 admissions and 24 issues. On behalf of the Plaintiff TCIL, K.B.Batra had given evidence and marked documents **P1 to P15**. On behalf of the Defendant Bank, Lakshman Uduwara had given evidence and marked document **D1**. At the conclusion of the trial, the learned Judge of the High Court delivered judgement in favour of the TCIL. Being aggrieved by the judgement, the Bank has filed this Appeal.

TCIL is a company fully owned by the government of India, incorporated under the laws of India and engaged in telecommunication projects in India and other countries as well. TCIL was awarded a contract by Sri Lanka Telecommunications under international competitive bidding to set up an external plant network from the Central Telephone Exchange to the subscriber's end, including inter alia cabling, ducting, transferring of telephones from one exchange area to another and providing new telephone connections. This project was funded by the World Bank, according to the evidence given by K.B. Batra, the Executive Director of TCIL. In order to complete the tasks undertaken by the contract, TCIL had engaged several sub-contractors including Nipuna to whom TCIL assigned civil works such

as trenching, ducting and other civil construction work. In terms of the contract entered into between the two parties, i.e. Nipuna and TCIL, Nipuna was required to submit an **Advance Payment Guarantee for the value of 30% of the full contract value, which amounted to Rs. 8,964,428.24** which is equivalent to the advance payment made to Nipuna by TCIL, in order to commence work. **As such, pursuant to the request made by Nipuna, TCIL had advanced Rs. 8,964,428.24 to Nipuna against the Advance Payment Guarantee which was issued by the Bank on behalf of Nipuna.**

Thereafter, in view of the unsatisfactory nature of the performance by Nipuna and its failure to commence work in two areas as agreed by the contract , **TCIL terminated the contract and made a claim on the Advance Payment Guarantee Bond from the Bank.** TCIL demanded by letter marked P2 dated 29.01.1998 addressed to the Defendant Bank that immediate payment of the sum of Rs. 8,964,428.24 to TCIL should be made by crediting the said amount to Account No. 20447 which was maintained at the Indian Overseas Bank.

The Defendant Bank, namely the **Pan Asia Bank failed to honour** the Guarantee and after 8 days from the date of the demand, refused to encash the Pay Order issued by the Defendant Bank dated 11.02.1998 and returned the same to TCIL containing the endorsement " **payment enjoined by Order of Court in D.C.Colombo Case No. 5061 / Spl."**

The Defendant Appellant Bank indeed refrained from making any payment for **about 8 days** from the date of the demand and the position of the Plaintiff Respondent TCIL in that regard is that the Bank **deliberately failed to make payment** as demanded which the Bank was obliged to do as soon as the payment was demanded, according to the provisions made specifically to that effect, under the Advance Payment Guarantee Bond.

However, the said D.C.Colombo case 5061/Spl. had been filed by Nipuna against the Defendant Appellant Bank seeking an Enjoining Order preventing the Bank from making any payment to TCIL under the Advance Guarantee Bond and had obtained an enjoining order ex-parte restraining the Appellant Bank from paying the amount demanded. TCIL was not made a party to that case but on application made by TCIL to intervene, the District Court had allowed the same. Then TCIL was named as the 2nd Defendant and thereafter Nipuna filed amended answer

and the case proceeded with the enjoining order getting extended from time to time for about 2 ½ years and on **19.06.2001** the stay order was not extended any more. So the **enjoining order lapsed on that day**.

Soon afterwards, TCIL sent a letter of demand dated 27.06.2001 seeking immediate payment under the Advance Guarantee Bond with specific instructions to credit the ESCROW Account No. 20718 at the Indian Overseas Bank. The Appellant **Bank failed to pay once again**, even **after the enjoining order lapsed** in spite of the fact that TCIL sent more letters demanding the payment.

On 24.10.2001, Nipuna moved to withdraw the District Court case No. 5061/Spl. At that time, the 2nd Defendant in that case, TCIL reserved the right to claim the monies due from the Appellant Pan Asia Bank which was the 1st Defendant. While moving for withdrawal, it is evident from the proceedings of 24.01.2001 at page 53 of the Brief before this Court, that the Plaintiff Nipuna's Counsel had specifically mentioned that the reason for withdrawal given by the Plaintiff Nipuna was **the delay in the case from February, 1998 up to 24th October, 2001** which has caused damages already to the Plaintiff Nipuna and that it would be futile to proceed with the case. The District Court Judge had then made order dismissing the action on 24.10.2001.

The very next day, i.e. on **25.10.2001**, the TCIL **demanded payment** once again under the Advance Guarantee Bond from the Appellant Bank. On 06.11.2001, the Appellant Bank had responded through its lawyers that they are not liable to pay as demanded on the alleged basis that **the claim** of the TCIL was **a fraud done in connivance with Nipuna in order to defraud the Defendant Appellant Bank.**

The Plaintiff **TCIL had then filed action** in the Commercial High Court of Colombo on 15.03.2002 for the recovery of the money with interest. The Defendant, Pan Asia Bank filed answer. The position of the Bank was that at **2.30 p.m. on 11.02.1998** the Pan Asia Bank **delivered its Pay Order** as demanded under the Advance Guarantee Bond in a sum of Rs. 8,964,428.24 to the Plaintiff TCIL; that **at 3.45 pm on the same day** the Pan Asia Bank received a notice of Interim injunction and an **enjoining order stopping payment** on the demand made by the Plaintiff TCIL ; that on 12.02.1998 when the Defendant Pan Asia Bank received the Pay Order for payment, the Bank **did not make the payment on the said Pay**

Order and the said Pay Order was **returned unpaid** with the endorsement "**payment enjoined by Order of Court in D.C.Colombo Case No. 5061/Spl."**

I hold that it was quite unlawful, unjust and unreasonable for the Bank not to have paid on demand as and when the demand was made for payment on 29.01.1998 but to have delayed without payment until 11.02.1998, the day on which the Pay Order was issued and later not encashed due to the enjoining order in the case 5061/Spl.

In case No. 5061/Spl, Nipuna had complained that the claim of TCIL was fraudulent and that is the reason why he prayed for an enjoining order from court to stop payment and succeeded. That case got dragged on untill 13.06.2001. Nipuna and TCIL had got tired of prolonged litigation by that time because the case had not even reached the stage of leading evidence. Therefore the parties to that case as Plaintiff and Defendant, namely Nipuna and TCIL had decided to put an end to the contest. By that time the Plaintiff TCIL had stopped operations in this country and their workmen who would have had to give evidence in court with regard to the non commencement of work by Nipuna in two stations etc. had been posted by TCIL to work in other countries and the cost of bringing them down would be very high. As such due to all these practical problems the parties in case 5061/Spl had arrived at a settlement between themselves. The agreement between them had been to get the money due from the Pan Asia Bank to the TCIL on the Advance Guarantee Bond and the same to be shared between the parties. It was not a secret . It was so informed to court.

Any parties before any court in a civil matter have a right to sort out their problems in any way they feel and inform court and resolve the matter before court as an amicable settlement. As agreed between the contesting parties, namely Nipuna and TCIL , they had filed a **joint motion** praying that the case be dismissed without costs and that the Pan Asia Bank be required to credit Indian Overseas Bank Account No. 20718 with a sum of Rs. 8,964,428.24. In this case the Pan Asia Bank was an intervenient party and they had no contest on the substantial matters but the money due to TCIL on the Advance Guarantee Bond was retained with them. The District Court did not make any order with regard to the money due from the Bank to TCIL.

Even after the conclusion of that case, from where the enjoining order had arisen for the Bank not to pay the money, there seems to be no reason why the Bank should not honour the Advance Guarantee Bond. However the Bank failed to pay on the basis that there was fraud in the claim.

The trial Judge in the Commercial High Court has analysed the evidence before court and had reached the conclusion that there is no fraud in this matter and no fraud has been proved by the Defendant Bank who alleged that there was fraud. Having gone through the documentary as well as oral evidence placed before the Commercial High Court I also do not see any evidence which can be categorized under fraud. The Escrow account being opened and operated by Nipuna and TCIL to share what is received by TCIL from the Bank does not amount to any fraud since it is a private agreement to reach a settlement and put an end to litigation. The Bank should pay the guaranteed money to the TCIL on demand as agreed in law according to the conditions in the Advance Payment Guarantee Bond.

In the case of **Edward Owen Engineering Ltd. Vs Barclays Bank International Ltd. 1978 1 Lloyds Law Reports 166; 1 QB 159** , relied on by both parties, Lord Denning states thus:

" A Bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with relation between the supplier and the customer nor with the question whether the supplier had performed contractual obligation or not, nor with the question whether the supplier is in default or not. **The Bank must pay according to its guarantee on demand if so stipulated, without proof or conditions.** The only exception is when there is **a clear fraud** of which the Bank had notice. "

The only exception for non payment is the presence of a clear fraud. In the case in hand there is no clear fraud. The Bank had failed to demonstrate by any evidence that there is any **clear fraud**. In fact there is no evidence of fraud. It is only conjecture and no proof. In such an instance there is no way that the Bank can be without payment in a guarantee bond.

Any Bank does not issue an Advance Guarantee Bond to any person or company without some form of security. The Defendant Bank must be holding onto the security which was provided to the Defendant Bank by Nipuna. The Defendant

Bank does not loose anything which cannot be recovered when issuing a Bond of that nature to any of its customers. My observation is that with all that financial backing, having issued the Advance Payment Guarantee Bond, the Defendant Bank has acted quite wrongly, unfairly and unjustly in this instance. Legally, the Bank is strictly bound to pay on demand in accordance with the terms of the guarantee bond.

In the case of **R.D.Harbottle (Mercantitle) Ltd. Vs National Westminister Bank Ltd. 1978 QB 146, Kerr J,** observed as follows:

" It is only in exceptional cases that the Courts will interfere with the machinery of irrevocable obligations assumed by Banks. They are the **lifeblood of International Commerce**. Such obligations are regarded as collateral to the underlying rights and obligations between merchants at either end of the banking chain. Except possibly in **clear cases of fraud** of which the banks have notice, **the Courts will leave the merchants to settle their disputes** under the contracts by litigation or arbitration as available to them or stipulated in the contracts."

In the case in hand, accordingly, the settlement of their disputes between Nipuna and TCIL should be left alone, only to themselves and the Bank **cannot in anyway interpret such a settlement as a fraud.** There is no other obvious reason as to why the Pan Asia Bank calls it a fraud.

In the case of **Intertec Contracting A/S Vs Ceylinco Seylan Development Ltd. and another 2002, 2 SLR 246** Justice Udalagama had followed Lord Denning with approval.

In the case of **Hemas Marketing Pvt. Ltd. Vs Chandrasiri and Others 1994 2 SLR 181**, Justice Ranarajah in the judgment inter alia states that ,
" **A mere plea of fraud** put in for the purpose of bringing the case within the exception and which rests on the **uncorroborated statements of the applicant will not suffice….."**

I am of the opinion that the Pan Asia Bank has done exactly that. For the purpose of not wanting to honour the demand, the Bank has merely pleaded that there exists fraud and has stayed without paying the demand as legally obliged to pay to the TCIL **from 29.01.1998 up to date**. The Bank has failed to prove fraud at all

except making a statement in evidence given by the witness of the Bank. In my opinion, the settlement entered into between the TCIL and Nipuna is no fraud by itself. It is a settlement to end litigation by the contesting parties.

The learned Judge of the Commercial High Court has carefully analyzed documents led in evidence by the Plaintiff TCIL itself before the High Court. The settlement contained in P 13 and P 14 by which TCIL and Nipuna had entered into an agreement between themselves and opened the Escrow Account, at the time when the District Court case No. 5061 was alive, was not a secret. Those documents were documents of the Plaintiff and Defendant and **not of the Pan Asia Bank.** There existed no illegality of such a settlement. The Bank cannot be heard to say that those documents submitted to Court amounts to a fraud. The Commercial High Court Judge had correctly come to the finding that the allegation by the Bank regarding **fraud was not proven** at all.

As I see, by not having honoured the demand on the Advance Payment Guarantee Bond as agreed, the Telecommunications Consultants of India Limited which is the Government of India Enterprise has been let down by the Pan Asia Bank. The whole purpose of obtaining an Advance Payment Guarantee from a contractor before paying him an advance prior to the commencement of the work as agreed by way of Agreements, has failed in this case. The most important clause in the Advance Payment Guarantee is to **"pay on demand"** without a question being posed to the person to whom the guarantee is given by the Bank. The Defendant Bank should have firstly paid on demand and then litigated against the company Nipuna on whose behalf the Advance Guarantee Bond was issued.

In the instant case, the Pan Asia Bank had received the demand to pay the TCIL on 29.01. 1998. The Bank delayed the Pay Order for a total number of 11 working days leaving out the date of the demand i.e. 29.01.1998, until 2.30 p.m. of 11.02.1998. The Pay Order which was issued on 11.02.1998, when submitted to the Bank for payment on 12.02.1998, the Bank did not make the payment on the said Pay Order but was returned unpaid with the endorsement that the District Court had enjoined the Bank not to pay. To my mind a question arises of the meaning of "on demand" , which is the key word in the Advance Payment Guarantee Bond.

Does it mean that the Bank has to pay on the very day the demand is made or does it mean that the Bank has to pay on that very hour of the day of the demand? The word demand attracts urgency. It means that the payment should be done then and there or as soon as possible. It means that the payment should not be delayed on whatever account.

In this case it is necessary to see what the Bank witness had to say when the question was asked about the delay in the Bank deciding to pay it factually after 11 working days in the calendar. I assume that it is after the Bank receives the demand on any particular date, that it has to pay forthwith. When the witness of the Bank, Mr. L. Uduwara was questioned under cross examination as to when the **demand was received** by the Bank he had not given any answer. The reason which can be assumed by his silence is that the Bank **does not want to admit and accept** the date since the pay order was issued very much later than when it was demanded.

Anyway there is no way that the Bank can account for such a delay. I hold that the delay was willful, illegal and contrary to law. I would like to set it down that under any Advance Payment Guarantee Bond in the commercial world, **the Bank guaranteeing the Payment under the Bond should make payment forthwith or as early as possible.** The Defendant Bank has acted unlawfully and has evaded payment quite wrongly against the interest of the very person who had the trust in the Bank when the Advance Payment Guarantee Bond was issued. The Defendant Bank had not got any notice with regard to any fraud by the time payment was demanded. At the end of the case also the Defendant Bank has failed to prove any fraud on the part of the TCIL.

I do hereby affirm the judgment of the Commercial High Court. The Pan Asia Bank is directed to honour the Advance Payment Guarantee Bond and pay the amount demanded on the Bond, forthwith. The Plaintiff Respondent Telecommunication Consultants India Limited is entitled to the reliefs as prayed for in paragraphs (a) and (b) of the Plaint filed by the said company in the Commercial High Court dated 15.03.2002 as decided by the learned High Court Judge in his judgment dated 02.06.2006.

The Appeal is dismissed with costs.

Judge of the Supreme Court

K.T.Chitrasiri J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda 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.

S.C.Appeal No: SC CHC 39/06
CHC Case No: 107/2001(1)

SEYLAN BANK LIMITED
No. 69, Janadhipathi Mawatha,
Colombo 1. Presently at "Ceylinco-Seylan Towers", No. 90,Galle Road,
Colombo 03.

PLAINTIFF

VS.

1. **CLEMENT CHARLES EPASINGHE**
   No.301/B, Kanjukkuliya,
   Mugunuwatawana.

2. **WEERAKKODY ARATCHIGE NIMALA EPASINGHE**
   No.301/B, Kanjukkuliya,
   Mugunuwatawana.

3. **BRAHMANA MUDALIGE BASIL PETER**
   Suduwella Farm,Suduwella,
   Madampe.

4. **BODAWALA MARASINGHALAGE SARATH KARUNATHILAKE MARASINGHE**
   Rest House,Chilaw.

DEFENDANTS

AND NOW

SEYLAN BANK LIMITED
No. 69, Janadhipathi Mawatha,
Colombo 1. Presently at "Ceylinco-Seylan Towers", No.90,
Galle Road, Colombo 03.

PLAINTIFF-APPELLANT

VS.

1. **CLEMENT CHARLES EPASINGHE**
   No.301/B, Kanjukkuliya,
   Mugunuwatawana.

2. **WEERAKKODY ARATCHIGE NIMALA EPASINGHE**
   No.301/B, Kanjukkuliya,
   Mugunuwatawana.

1ST AND 2ND DEFENDANTS-RESPONDENTS

BEFORE: S.Eva Wanasundera, PC, J
Upaly Abeyrathne, J.
Prasanna Jayawardena, PC, J.

COUNSEL: S.R. De Livera instructed by De Livera Associates for the Plaintiff-Appellant.
K. Nawaratne with Ms. T.E. Senadheera instructed by N. Wickramasinghe for the 1st and 2nd Defendants-Respondents.

ARGUED ON: 17th November 2016.

WRITTEN SUBMISSIONS FILED: By the Plaintiff-Appellant on 05th July 2016.
By the 1st and 2nd Defendants-Respondents on 17th July 2014.

DECIDED ON: 01st August 2017.

Prasanna Jayawardena, PC, J.

The plaintiff-appellant bank ["the plaintiff"], *inter alia,* carries on the business of Finance Leasing. The 1st and 2nd defendants-respondents ["the 1st and 2nd defendants"] are husband and wife. They operate a poultry farm and also engage in agriculture, public transport and vehicle hire.

On 12th December 1997, the plaintiff and the 1st and 2nd defendants entered into a written Lease Agreement by which they agreed that, the plaintiff shall lease, to the 1st and 2nd defendants, the *"01 UNIT BRANDNEW COLOMBO RIDER 40 SEATER BUS CH/NO. 5000-97-004 EN NO. 00106"* sold and supplied by *"SATHOSA*

MOTORS, CEYMO AUTOMOBILE MANUFACTURERS, NO. 25, VAUXHALL STREET, COLOMBO 2" which is described in the schedule to the Lease Agreement ["the vehicle"] and that the said Lease will be subject to the *"terms, covenants and conditions"* set out in the Lease Agreement. The defendants agreed to pay, to the plaintiff, as rent for the lease of the vehicle, an aggregate sum of Rs. 2,865,540/- in 60 monthly rentals of Rs.47,759/- each. They also agreed to pay interest at 23.725% *per annum* on any delayed payments. It was agreed that, the plaintiff was entitled to terminate the Lease Agreement if the defendants failed to pay any monthly rental within seven days of it becoming due for payment. It was also agreed that, upon such termination, the defendants shall pay, to the plaintiff, the arrears of rentals together with any accrued interest and also the rentals that fall due from the date of termination onwards. Further, the defendants promised to return the vehicle to the plaintiff if the Lease Agreement was terminated and agreed that, the plaintiff was entitled to retake possession of the vehicle if the defendants did not return it.

The plaintiff states that, the defendants paid only the first monthly rental but made no further payments thereafter. The plaintiff states that, therefore, the plaintiff terminated the Lease Agreement and demanded that the defendants pay all the monies due under the Lease Agreement and return the vehicle. However, the defendants did not pay any monies to the plaintiff.

On 04th May 2001, the plaintiff instituted this action against the 1st and 2nd defendants in the Provincial High Court of Western Province holden in Colombo and exercising Commercial [Civil] Jurisdiction, praying for the recovery of the monies said to be due to the plaintiff from the 1st and 2nd defendants under and in terms of the Lease Agreement. The 3rd and 4th defendants abovenamed were also joined as defendants on the basis that they were liable to pay these monies as guarantors. However, at the trial, the plaintiff did not proceed against the 3rd and 4th defendants.

As set out in the plaint, the plaintiff's case against the 1st and 2nd defendants was, in brief, that: the plaintiff and the 1st and 2nd defendants entered into the aforesaid Lease Agreement; the defendants failed and neglected to pay the monthly rentals due to the plaintiff thereunder; therefore, the plaintiff terminated the Lease Agreement; the plaintiff demanded payment of the monies due under the Lease Agreement and the return of the vehicle; the 1st and 2nd defendants did not pay the monies that were demanded; therefore, a Cause of Action has accrued to the plaintiff to sue the defendants to recover the sum of Rs.4,218,798/50 said to be due and owing as at 17th August 2000 upon the Lease Agreement, together with interest at 24% *per annum* from 18th August 2000 onwards on a sum of Rs.2,770,022/-, as set out in the Statement of Account filed with the plaint marked **"B"**.

In their answer dated 30th September 2001, the 1st and 2nd defendants denied liability to pay these monies. When the case was taken up for trial on 03rd December 2003, the defendants moved to amend their answer. The plaintiff objected. By an Order dated 25th April 2005, the learned trial judge refused the defendants' application to

amend the answer. Thus, the case proceeded to trial upon the answer dated 30th September 2001 filed by the 1st and 2nd defendants.

It is relevant to mention here that, in this answer, the defendants did not claim that the Lease Agreement had been frustrated. As a matter of interest, the proposed amended answer tendered by the defendants also did not include an averment to that effect.

On the next trial date, the plaintiff framed seven issues which, in essence, were: (a) whether the 1st and 2nd defendants agreed to the terms and conditions set out in the Lease Agreement ?; (b) whether the defendants failed to pay the monthly rentals due thereunder ?; (c) whether the plaintiff terminated the Lease Agreement ?; (d) whether the sum prayed for in the plaint is due and owing from the defendants upon the Lease Agreement ?; whether the defendants failed to pay these monies to the plaintiff ?; (e) and whether, if the aforesaid issues are answered in the affirmative, the plaintiff is entitled to judgment as prayed for in the plaint ? The 1st and 2nd defendants framed four issues. These issues were, in essence: (a) whether the Lease Agreement cannot be admitted in evidence for the reason that it has not been duly stamped ?; (b) whether the Statement of Account filed with the plaint marked **"B"** was incorrect ? and (c) whether, if the aforesaid issues are answered in the defendants' favour, the plaintiff's action should be dismissed ? The defendants did *not* frame an issue on whether the Lease Agreement had been frustrated

On the same day, learned counsel for the 1st and 2nd defendants objected to the admission of the Lease Agreement in evidence at the trial, on the ground that it had not been duly stamped. Learned counsel for the plaintiff moved for time to verify whether the Lease Agreement had been duly stamped. On the next date of trial, counsel submitted that, the Lease Agreement had been duly stamped.

Thereafter, an officer of the plaintiff bank gave evidence on the lines of the plaint and produced the documents marked "පැ1" to "පැ11". During the cross examination of this witness, the 1st and 2nd defendants produced several letters exchanged between the plaintiff, the 1st and 2nd defendants and the Supplier, marked "වි1" to "වි5". The plaintiff closed its case after this witness completed his evidence.

The 1st defendant gave evidence and produced more letters exchanged between the plaintiff, the 1st and 2nd defendants and Sathosa Motors ["the Supplier"], marked "වි6" to "වි11". The defendants did not call any other witnesses and closed their case leading in evidence, the documents marked "වි1" to "වි11".

The parties tendered written submissions. The learned trial judge delivered judgment dismissing the plaintiff's action with costs. The plaintiff appealed to this Court.

In his judgment, the learned trial judge discussed the pleadings and the issues raised by the parties and then stated that, there was ample evidence which established that defects in the vehicle prevented the defendants from paying the

monthly rentals due under the Lease Agreement. The learned judge commented that, the plaintiff had not objected to the reception of this evidence despite there being no issues framed by the parties on whether defects in the vehicle prevented the defendants from paying the monies due under the Lease Agreement. The learned trial judge went on to state that, in these circumstances, the Court was entitled to frame the following two additional issues at the stage of judgment.

[12] Did the latent defects in the bus bearing no. 62-6841 which the 1st and 2nd defendants were given under and in terms of the agreement marked "පැ2" result in the frustration of the said agreement marked "පැ2" ?

[13] If the above issue no. 12 is answered in the affirmative, should the plaintiff's action be dismissed with costs ?

After raising these two additional issues in the judgment, the learned trial judge proceeded immediately to answer these two issues and cited the decision in HAMEED vs. CASSIM [1996 2 SLR 30], as authority for this course of action.

When considering the evidence relevant to the two additional issues, the learned trial judge stated that, the plaintiff's witness testified at p.19 of the proceedings of 08th February 2005 that, the chassis and the body of the vehicle had separated while the vehicle was being driven – *"පැමිණිල්ල වෙනුවෙන් සාක්ෂි දී ඇති `මොහොමඩ් රිස්වාන්' නැමැති සාක්ෂිකරු සාක්ෂි දෙමින්, මෙම නඩුවට අදාළව බද්දට ගෙන ඇති දේපළ වන බස් රථය ධාවනය වන අවස්ථාවෙහිදී බොඩිය සහ චැසිය දෙකට වෙන් වී ගිය බව ප්‍රකාශ කර ඇත (ඒ සඳහා බලන්න 2005 පෙබරවාරි 08 වන දින සාක්ෂි සටහන් වල 19 වන පිටුව)"*. The learned judge goes on to mention that, the 1st defendant said that the vehicle could not be used due to numerous defects in the vehicle and that the letters marked "වි2" and "වි3" produced by the 1st and 2nd defendants establish that, there were numerous defects in the vehicle. The learned judge also says that, the letter marked "වි4" establishes that the plaintiff was ready to take the vehicle back due to these defects. The learned trial judge then concludes that, there was clear evidence that, the vehicle separated into two, which indisputably established that the vehicle could not be used – *"බස් රථය බරපතල දෝෂ වලට ලක් වී ඇත. විශේෂයෙන්ම බස් රථය දෙකට වෙන් වීම සම්බන්ධයෙන් වන කරුණ පැහැදිලි සාක්ෂි මගින් හෙළිදරව් වන්නේ නම්, එම බස් රථය පාවිච්චියට නුසුදුසු බස් රථයක් බව නොකිවමනාය "*.

Having made the aforesaid observations with regard to the evidence, the learned trial judge states that, the condition of the vehicle was such that it could not be used and concludes that, therefore, the Lease Agreement marked "පැ2" had been frustrated.

After concluding that the Lease Agreement marked "පැ2" had been frustrated, the learned trial judge briefly considered the evidence with regard to the sum claimed by the plaintiff. The learned judge was of the view that the plaintiff had satisfactorily explained the amounts set out in the Statement of Account marked "පැ7" and that

there was no reason why the High Court should not accept the evidence of the plaintiff's witness in this regard. However, the learned trial judge mentions that, there was no need to closely examine these amounts since the Court had previously held that the Lease Agreement had been frustrated. With regard to the defendants' claim that the Lease Agreement had not been duly stamped, the learned trial judge observed that neither party had produced a Gazette which set out the Stamp Duty which was payable. Here too, the learned trial judge mentions that, there was no need to further examine this issue in view of the Court's determination that the Lease Agreement had been frustrated.

The learned trial judge then proceeded to answer, in the plaintiff's favour, the plaintiff's issues with regard to whether the 1st and 2nd defendants had agreed to the terms and conditions set out in the Lease Agreement but failed to pay the monthly rentals due from them and whether the Lease Agreement had been terminated. However, presumably in view of the determination that the Lease Agreement had been frustrated, the High Court answered, in the negative, the plaintiff's other issues with regard to whether the monies claimed in the plaint are due and owing from the defendants to the plaintiff upon the Lease Agreement and whether the plaintiff is entitled to judgment against the 1st and 2nd defendants. Thereafter, the learned trial judge has answered the defendants' issues with regard to the alleged inaccuracy of the Statement of Account and the alleged lack of due stamping of the Lease Agreement, against the defendants.

Since the learned trial judge had, earlier on in the judgment, taken the view that the Lease Agreement had been frustrated, he answered the two additional issue no.s [12] and [13] in the affirmative and dismissed the plaintiff's case, with costs.

It is immediately clear that, the central questions to be decided in this appeal are: *firstly*, whether the learned trial judge erred when he framed the two additional issues at the stage of judgment *and immediately proceeded to answer* these two issues; and *secondly*, whether in any event, the learned trial judge erred when he answered those two additional issues in the affirmative.

With regard to the first question, although section 149 of the Civil Procedure Code was not cited in the judgment of the High Court, it is apparent that, the learned trial judge was relying on section 149 as giving the Court authority to frame the two additional issue no.s [12] and [13]. Section 149 states, *"The court may, at any time before passing a decree, amend the issue or frame additional issues on such terms as it thinks fit"*. No doubt, this provision permits a trial judge to frame additional issues at any time before passing the decree if he is of the view that such additional issues are required to enable the Court to arrive at *"the right decision of the case"* in terms of section 146 of the Civil Procedure Code. However, unlike section 146 which gives clear pointers to the procedure to be followed when framing issues at the commencement of the trial, section 149 is silent on the procedure to be followed when a trial judge decides, in the course of a trial, that additional issues are necessary.

In this regard, in instances where a trial judge frames additional issues while the parties are in the process of presenting their evidence, the parties will have notice of these additional issues and will have the opportunity to lead evidence on the additional issues and make submissions regarding them. But, the position will be different where a trial judge decides to frame additional issues only at the stage of writing the judgment, which is after the parties have closed their cases. In such instances, the parties will be denied that opportunity, unless the Court temporarily suspends the preparation of the judgment and affords the parties an opportunity to lead evidence on the additional issues and make submissions thereon, before the trial judge resumes preparing his judgment.

In the present cases, the learned trial judge has framed the additional issue no.s [12] and [13] at the stage of writing the judgment and has decided these two issues *without* giving the parties an opportunity to lead evidence on the additional issues and make submissions regarding them. As mentioned earlier, the High Court appears to have relied on the decision of the Court of Appeal in HAMEED vs. CASSIM, as authority for doing so.

In HAMEED vs. CASSIM, the plaintiff was the landlord of a premises of which the defendant was the tenant. The provisions of the Rent Act No. 7 of 1972 applied to the premises. The plaintiff filed action for the ejectment of the defendant on the grounds of reasonable requirement. During the course of his judgment, the District Judge framed an additional issue on whether the plaintiff could have and maintain the action in view of the provisions of section 22 (7) of the Rent Act. The plaintiff appealed. In appeal, counsel for the plaintiff contended that, the District Court was not entitled to raise an additional issue at the stage of judgment. Ranaraja J rejected that contention and held that, section 149 of the Civil Procedure Code gives the Court the discretion to frame additional issues at any time before passing a decree and that, accordingly, the District Court had the power to frame an additional issue even at the stage of judgment.

However, Ranaraja J pointed out that, the discretion vested in the Court to frame additional issues at the stage of judgment should be exercised only where it is necessary to do so in the interests of justice, which is, primarily, to ensure that the correct decision was reached. Thus, Ranaraja J stated [at p.33] *"Bertram C.J. in Silva v Obeysekara commenting on the discretion of a judge to allow issues after the commencement of the trial observed, `No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings.' The provisions of section 149 considered along with the observation of Bertram C.J. certainly do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgment is read out in open court. It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case."*.

I would, with respect, entirely agree with this cautionary restriction which Ranaraja J placed on the exercise of a trial judge's discretion to frame additional issues *at the stage of judgment*. This restriction is necessary since the scope and ambit of the trial had been defined by the admissions and issues which were framed at the commencement of the trial, in terms of section 146 of the Civil Procedure Code. The parties are only aware of those issues and have presented their cases for adjudication, based on those issues. Those admissions and issues have identified and mapped what the parties believed was the battle field on which they are to contest the trial. In STATE OF GUJARAT vs. JAIPALSINGH JASWANTSING ENGINEERS AND CONTRACTORS [1994 1 Guj. LR 258 at 261], Vaidya J in the High Court of Gujarat used a different metaphor to make a similar observation and said *"….. issues are backbone of a suit. They are also the lamp-post which enlightens the parties to the proceedings*, *the trial court and even the appellate court – as to what is the controversy, what is evidence and where lies the way to truth and justice."*. Therefore, a trial judge who intends to frame additional issues *at the time of judgment*, must be conscious of the fact that the framing of these additional issues may result in the case being decided on issues the parties did not contemplate when they led evidence. To use the metaphors mentioned earlier, the additional issues could shift the battle to a new field which the parties had not been asked to march upon or push the contest to an alley which had not been lit by the issues the parties could see.

Thus, while a trial judge does have the discretion to frame additional issues *at the stage of judgment*, that is a discretion which would, usually, be exercised sparingly and only in circumstances where it is necessary to do so to ensure that justice is done and the correct decision is reached by the Court. Other than in such circumstances, additional issues would not be raised *at the stage of judgment*. Thus, in JASRAJ FAOJI vs. MT. SUGRABAI [AIR 30 1943 Sind 242], the Sind Chief Court recognised that a Court should, usually, refrain from framing new issues after the parties had closed their cases. Davis CJ stated [at p. 243-244] *"Now, the procedure adopted by the learned Judge in resettling issues after the evidence was led and the arguments in large part heard, was not, we think, the correct procedure."*. Similarly, in the case of NAGUBAI AMMAL vs. B.SHAMA RAO [1956 AIR SC 593 at p.598] decided by the Supreme Court of India, Venkatarama Ayyar J stated, *"The true scope of the rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence."*.

Further, since the framing of additional issues *at the stage of judgment* may result in the case being decided on issues regarding which the parties have not led evidence on or, perhaps, even contemplated, equity demands that, a trial judge who wishes to frame an additional issue *at the stage of judgment*, suspends the preparation of his judgment and give both parties notice of the additional issues which the Court has framed. If the additional issues are issues of law, the parties should be given an opportunity to make submissions. If the additional issues are issues of fact or issues of both fact and law, the parties should be given an opportunity to lead evidence on

that issue and make submissions thereon. The preparation of the judgment may be resumed only after these steps are concluded. Ranaraja J expressed similar views in HAMEED vs. CASSIM [at p.33] when His Lordship stated, *"….. the Judge must ensure that when it is considered necessary to hear parties to arrive at the right decision on the new issue, that they be permitted to lead fresh evidence or if it is purely a question of law, that they be afforded an opportunity to make submissions thereon."*

A Court has ample jurisdiction to follow this procedure. In fact, section 165 of the Civil Procedure Code permits a Court to recall any witness *"whenever in the course of the trial it thinks it necessary for the ends of justice to do so."* While considering the comparable provision in India, the Delhi High Court in SURESH KUMAR vs. BALDEV [AIR 1984 439] stated that, a Court has the discretion to recall a witness at any stage before the judgment is pronounced. In MADUBHAI AMTHALAL vs. AMTHALAL NANALAL [AIR 1947 156], the Bombay High Court held that, a Court which is considering its judgment may recall a witness to clear up an ambiguity or omission. In any event, quite apart from section 165 which permits a Court to call a witness at any stage, there is no provision in our Civil Procedure Code which expressly prohibits or militates against a trial judge hearing evidence and submissions on additional issues which are framed at the time he is preparing the judgment. Therefore, a Court will also have the inherent power to adopt this procedure to achieve the ends of justice, in terms of section 839 of the Code.

In this connection, it hardly needs to said that, a failure on the part of the trial judge to take these precautions will cause grave injustice. Further, a trial judge who fails to give the parties an opportunity to lead evidence on and be heard on additional issues raised in the judgment, will be ignoring the *audi alteram partem* rule.

Finally, for the sake of completeness, it should also be mentioned that, there may be some limited instances in which, *because* the record makes it manifestly clear that the facts and law underpinning additional issues which are raised at the time of judgment, were at the forefront of the minds of both parties at the trial and that both parties were fully aware of the need to lead evidence and address the law on matters relating to those additional issues, a Court has the discretion to proceed to answer those additional issues without suspending the preparation of the judgment and giving the parties a further opportunity to be heard on those additional issues. This limited exception was referred to by Venkatarama Ayyar J in NAGUBAI AMMAL vs. B.SHAMA RAO, when the learned Judge, having outlined the general rule cited above, went on to mention, [at p.598], *"But that rule has no application to a case where the parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce relating evidence thereto."*. SUNDERSINGH vs. RAJARAM [AIR 1991 MP 59] and AGRAWALLA vs. BHARAT COKING COAL LIT [AIR 1989 SC 1530] are other decisions where this exception was referred to. However, this limited exception will apply *only* where it is indisputably clear from the record that, *both* parties were fully aware that the questions raised in the additional issues framed in the judgment, were in issue at the

trial but the parties have omitted to proceed to frame specific issues thereon. It is fitting to reiterate and emphasise that, the general rule is that parties must be given an opportunity to be heard on additional issues framed at the time of judgment.

When the principles set out above are applied to the present case, it is clear that, the two additional issues framed in the judgment regarding whether the Lease Agreement had been frustrated, were issues of both fact and law. It is also clear from a perusal of the evidence that, a claim that the Lease Agreement had been frustrated had not been expressly put to the plaintiff's witness and had not been expressly made by the 1st defendant when he testified. Further, the proceedings establish that, a question whether the Lease Agreement had been frustrated was not specifically raised or considered during the course of the trial before the parties closed their cases and the case was reserved for judgment. Thus, the plaintiff cannot be said to have been aware that a question of whether the Lease Agreement was frustrated, was in issue. This is not a case falling within the limited exception described earlier and referred to by Venkatarama Ayyar J in NAGUBAI AMMAL vs. B.SHAMA RAO.

Despite these circumstances, the learned trial judge has answered the two additional issues on frustration of the Lease Agreement, which were framed by him at the time the judgment was written, *without* giving the parties an opportunity to lead evidence on these two additional issues or to make submissions thereon. That has caused injustice to the plaintiff who, as entitled to, had presented its case guided by the eleven issues framed by the parties at the commencement of the trial, which did not include an issue on whether the Lease Agreement had been frustrated. Further, since a claim that the Lease Agreement had been frustrated had not been raised or considered during the trial, the plaintiff had no cause to think that there would be any issue for determination with regard to whether the Lease Agreement had been frustrated or to lead evidence or make submissions on that question. The plaintiff was entitled to have believed that, the High Court would deliver its judgment in conformity with De Silva CJ's observation in HANAFFI vs. NALLAMA [1998 1 SLR 73 at p.77] that, *"….. once issues are framed, the case which the court has to hear and determine become crystallized in the issues."*.

In these circumstances, the failure of the High Court to give an opportunity to the parties to present evidence and be heard on the two additional issues framed at the stage of writing the judgment, has caused a miscarriage of justice. Therefore, these two additional issue no.s [12] and [13] must be struck out by this Court and, the answers to these two issues, must be set aside.

Although the two additional issues have been struck out by this Court, it is, nevertheless, incumbent on this Court to examine whether there was sufficient evidence to indicate that the Lease Agreement marked "පැ2" had been frustrated. This has to be done since, the existence of such evidence may require this case to be sent back to the High Court to determine an issue on frustration of the Lease Agreement, after the parties are given an opportunity to be heard on that issue.

In this regard, a perusal of the judgment makes it clear that, the learned trial judge relied heavily on the testimony of the plaintiff's witness at p.19 of the proceedings of 08th February 2005, when the High Court reached the conclusion that the chassis and the body of the vehicle had separated. However, a reading of the evidence of the plaintiff's witness shows that, the witness has not admitted that the chassis and the body of the vehicle had separated. Instead, what occurred was that, while this witness was being cross examined by the learned counsel for the defendants, he was shown the letter dated 13th January 1998 marked ''**වි2**'' written by the defendants and asked whether it states that the chassis and the body of the vehicle has separated while it was being driven. The witness has replied stating that such a claim is made in the letter marked ''**වි2**'' but, the witness has *not* admitted the truth of that claim - *vide:* the following evidence at p.19 of the proceedings of 08th February 2005 soon after the letter marked ''**වි2**'', which stated *"At 9.00 a.m. the said bus broke down at Avissawella with the body separating from the chassis with the passenger load luckily no casualties.",* was shown to the plaintiff's witness:

ප්‍ර: ඒ ලිපියේ කියා තිබෙනවා මේ කල්බදු පහසුකම් මත ලබා ගත්ත වාහනය ආපසු ගැනීම සම්බන්ධව ?

උ : ඔව්.

ප්‍ර: තව දුරටත් කියා තිබෙනවා මේ බස් රථය ධාවනය කරන අවස්ථාවේදී බස් රථයේ බොඩිය සහ වැසිය දෙකට වෙන් වුණා කියලා?

උ : ඔව්.

This evidence of the plaintiff's witness only establishes that the defendants claimed in ''**වි2**'' that the chassis and the body of the vehicle had separated while the vehicle was being driven. This evidence does *not* establish the truth of that claim or that the plaintiff admitted that the chassis and the body of the vehicle had separated. With regard to the 1st defendant's evidence, apart from making a claim in the aforesaid letter marked ''**වි2**'' that the chassis and the body of the vehicle had separated and a similar claim when the 1st defendant gave evidence, the defendants did not adduce any reliable material to prove that such an incident occurred. Further, in their subsequent letter marked ''**වි9**'', the defendants have modified the aforesaid claim made in their first letter marked ''**වි2**''and have stated *"At about 9.00 a.m. the bus broke down at Avissawella with the body* ***almost*** *separating from the chassis,"* [emphasis added by me]. There is a significant difference between the claim made in ''**වි2**'' and the claim made in ''**වි9**''. The inference is that the first claim was exaggerated. Further, in both letters, the defendants say that, *"The bus was brought down to Colombo…."* . This would suggest that the vehicle was capable of being driven back to Colombo or, at worst, being towed back to Colombo. It is highly unlikely that a vehicle which is *"almost separating"* as claimed in ''**වි9**'', can be driven or even towed on a highway. In these circumstances, it can be reasonably inferred that, the second claim in the letter marked ''**වි9**'' was also in the nature of an exaggeration. In any event, the defendants have admitted that, the alleged defect they referred to in ''**වි2**'' was repaired and that, thereafter, the defendants used the vehicle on the Colombo-Badulla route. Thus, in their letter dated 27th May 1998 marked ''**වි9**'', the defendants state, *"After the bus was repaired and handed to me,*

we operated it on the Colombo-Badulla route…..". Further, if the chassis and the body of the vehicle had, in fact, separated while the vehicle was being driven, the defendants would have had ample evidence such as police entries, the driver's evidence and repair estimates to prove the occurrence of an event of that nature. The inability of the defendants to produce any such evidence, casts substantial doubt on the claim made by them.

For these reasons I am not inclined to place much credence on the defendants' claim that the chassis and the body of the vehicle had separated.

Next, it is useful to examine the letters marked "**වි1**" to "**වි11**" produced by the defendants. These letters have been marked and produced out of their chronological order. The result of this stratagem is that these letters do not present a clear picture at first glance. Perhaps, that was inadvertent. On the other hand, it may smack of a deliberate ploy to create a measure of confusion. Either way, an examination of these letters marked "**වි1**" to "**වි11**" in the order in which they were written, reveals the history of this transaction.

When these letters are looked at in chronological order, it is seen that the defendants had paid the first monthly rental in December 1997. Thereafter, the vehicle broke down in Avissawella on 11th January 1998 and was returned to the manufacturer for repairs. The defendants then wrote their letter dated 13th January 1998 marked "**වි2**", asking the plaintiff to give them an extension of time to pay the second monthly rental. Thereafter, by their letter dated 16th February 1998 marked "**වි6**", defendants requested the plaintiff to reschedule the payment of the monthly rentals since the defendants claimed that the vehicle was not fit to ply the Colombo-Badulla route and had to be, instead, used on short distance routes. Next, by their letter dated 02nd March 1998 marked "**වි3**", the defendants have stated that the vehicle needs extensive repairs and have offered to return the vehicle to the plaintiff. The plaintiff has replied by its letter marked "**වි1**" [the date is not legible] and letter dated 06th March 1998 marked "**වි7**", inviting the defendants to a discussion with regard to the defendants' request. After that discussion, the defendants have written their letters dated 25th March 1998 and 27th May 1998 marked "**වි8**" and "**වි9**" stating that they had handed over the vehicle to the manufacturer on 23rd March 1998 and requested the plaintiff to make a new vehicle available to the defendants, but that a new vehicle has not been provided.

This evidence establishes that, prior to the defendants handing over the vehicle to the manufacturer on 23rd March 1998, the defendants were using the vehicle. Thus, the defendants' letter dated 02nd March 1998 marked "**වි3**" reveals that the defendants were plying the vehicle on the Chilaw-Kurunegala route while the defendants' letters dated 16th February 1998 and 25th March 1998 marked "**වි6**" and "**වි8**" state that the defendants had been plying the vehicle on *"short distance routes"*.

After the defendants handed the vehicle to the manufacturer on 23rd March 1998, the manufacturer completed the repairs to the vehicle and wrote its letter dated 01st

July 1998 marked ‘‘**වි10**’’ to the defendants, notifying that the vehicle had been repaired and is now *“in very good running condition”* and requesting the defendants to collect the vehicle. It is apparent from the evidence that, the defendants took delivery of the repaired vehicle. In this connection, the 1st defendant has stated ‘‘ඉන්පසුව බස් රථය ලැබුන අවස්ථාවේ 1998.07.27 වැනි දින අපේ බස් රථය බාර ගත්තේ.’’ The reasonable assumption is that the defendants commenced using the vehicle after that. The defendants have not led any evidence to the contrary.

However, the defendants have not paid a single monthly rental after they paid the first rental in December 1997. It was in these circumstances that, the plaintiff sent the Letter of Termination dated 17th August 1998 marked “පැ4” terminating the Lease Agreement and demanding payment of the monies due thereunder. The defendants replied by their letter dated 29th August 1998 marked ‘‘**වි11**’’ denying liability to pay any monies to the plaintiff. Later, there was a further discussion between the parties after which the plaintiff wrote its letter dated 13th October 1998 marked “**වි4**’’ stating that, the plaintiff will release the defendants from all liabilities under the Lease Agreement if the defendants returned the vehicle. The defendants then wrote their letter dated 15th October 1998 marked ‘‘**වි5**’’ addressed to the manufacturer and copied to the plaintiff, stating that the defendants would hand over the vehicle to the manufacturer.

But, the defendants did not return the vehicle. Thus, the defendants chose not to make use of the plaintiff’s offer, made in ‘‘**වි4**’’, to release the defendants from their liabilities under the Lease Agreement provided the defendants hand over the vehicle. Instead, the defendants chose to continue to use the vehicle after it was repaired and handed over to them on 27th July 1998.

It was in these circumstances and long after the plaintiff terminated the Lease Agreement on 17th August 1998 by the letter marked “පැ 4’’ that, the plaintiff repossessed the vehicle in March 1999 and instituted this action for the recovery of the balance monies due under the Lease Agreement.

Next, to consider the defects in the vehicle, the letters written by the defendants refer to the vehicle breaking down on 11th January 1998 after which is was repaired and returned to the defendants. The letters also refer to defects in the lights, the front and rear windscreens not being properly fixed, repairs to the front hub, oil leaks, and defects in the front shock absorbers. These are all defects which can be repaired. As mentioned earlier, the evidence is that, these defects were repaired and the vehicle was handed back to the defendants on 27th July 1998. The evidence indicates that the defendants continued to use the vehicle after that. In these circumstances, it is not possible to reasonably conclude that, the defects in the vehicle rendered the vehicle unusable.

Weeramantry [Law of Contract, para 791] commenting on instances where a contract may be frustrated by the destruction or damage to the subject matter of the contract, states, *“For this purpose, it is not necessary that there should be a total or*

complete destruction of subject matter of the contract. It is sufficient, if the subject matter is affected in such a way that the main purpose of the contract is defeated or cannot be performed. Thus even where there is an impairment or destruction not of the entirety but of some attribute or quality which is essential to the particular contract, the contract is discharged in the same way for the reason that performance is impossible.".

When this principle is applied to the present case, it has to be kept in mind that, the contract between the plaintiff and the defendants was nothing more than a contract by which the plaintiff leased the vehicle to the 1st and 2nd defendants subject to the *"terms, covenants and conditions"* set out in the Lease Agreement. The vehicle was the subject matter of the contract. The evidence establishes that, the defects in the vehicle were repaired and the vehicle [*ie:* the subject matter of the contract] was usable. In fact, the defendants themselves have said that they were using the vehicle on the Chilaw-Kurunegala route and *"short distance routes"*. The Lease Agreement did not contain any term or condition specifying a specific route that the vehicle was required to ply on or make it a condition of the Lease Agreement that the vehicle must be able to ply the Colombo-Badulla route. Thus, evidence establishes the subject matter of the contract [*ie:* the vehicle] was not affected in a manner which prevented the performance of the Lease Agreement. Accordingly, upon an application of the principle set out by Weeramantry, the Lease Agreement cannot be considered to have been frustrated.

The learned trial judge appears to have also taken the view that, the plaintiff's letter dated 13th October 1998 marked ''**වි4**'' establishes that, the plaintiff was willing to take the vehicle back because the plaintiff had recognized that defects in the vehicle made it unusable. However, with great respect to the learned judge, I am unable to agree that such a conclusion can be correctly drawn. This letter was written after the Lease Agreement was terminated and before the plaintiff repossessed the vehicle. By this letter, the plaintiff has only stated that, if the defendants hand over the vehicle, the plaintiff will release the defendants from their liability to pay the balance monies payable under the Lease Agreement, which had been demanded by the Letter of Termination marked "ෂැ4". The plaintiff has gone to specify in ''**වි4**'' that the monies paid till then by the defendants, will not be refunded. Thus, in the light of the history of this transaction, it is clear that ''**වි4**'' is a letter by which the plaintiff offered a concession to the defendants in terms of which the plaintiff offered to release the defendants from their liability to pay the balance monies payable under the Lease Agreement provided the defendants return the vehicle as demanded the Letter of Termination marked "ෂැ4". Presumably, ***if*** the defendants had returned the vehicle as requested by ''**වි4**'', the plaintiff could have sold the vehicle and recovered all or most of the balance monies which were then due under the Lease Agreement. However, as stated earlier, the defendants did not make use of this concession offered by the plaintiff and did not return the vehicle. Thus, the letter marked ''**වි4**'' cannot be regarded as evidence that the plaintiff had recognised that the contract was frustrated.

Further, it is necessary to mention the established principle that, where parties to a contract make an express provision with regard to the party who is to bear the risk of the occurrence of a specified event, the occurrence of that event will not result in the frustration of the contract, unless there is supervening illegality. Thus, Weeramantry [Law of Contract, para 793] states, *"The parties are at liberty to make express provision in the contract for allocating the risk of unforeseen events. Where such provision is made, the risk of unforeseen events will be borne by the party who undertakes it in terms of the contract, and the contract is not deemed frustrated by the happening of the event expressly provided for."*.

When the Lease Agreement marked "පැ2" is examined in the light of this principle, it is seen that, Clause 3 of the Lease Agreement specifies that, the defendants shall be responsible *"for the selection of the Supplier"* of the vehicle *"and all other matters on connection with the obtaining and use of"* of the vehicle [which the defendants requested the plaintiff to purchase and then lease to the defendants under the Lease Agreement]. In fact, when he gave evidence, the 1st defendant admitted that he chose the vehicle after examining it. Thereafter, Clause 4.1 of the Lease Agreement, places the onus on the defendants to *"inspect"* the vehicle before issuing the Acceptance Receipt. The 1st defendant has signed the Acceptance Receipt marked "පැ3" by which he stated, *inter alia,* that, the defendants acknowledged receipt of the vehicle *"in good order and condition"*. Clause 4.2 stipulates that, in the event of the defendants issuing an Acceptance Receipt, that document would be conclusive evidence that the defendants have examined the vehicle and *"found it to be complete and satisfactory and fit for such purpose for which it may be required."*. Clause 4.2 goes on to make it clear that, the defendants agreed that the plaintiff is not liable for any defect or fault in the vehicle. Clause 5 further states that the defendants agrees that, the plaintiff does *not* lease the vehicle *"….. subject to any condition or warranty express, implied or statutory which are hereby expressly excluded and extinguished….."* and that, the plaintiff *"makes no representation with regard to the quality or fitness"* of the vehicle. Next, by Clause 6 (a), the defendants have agreed that, the defendants are responsible for maintaining the vehicle in good repair and proper working condition and that the defendants are responsible for any *"damage thereto howsoever occasioned (including fair wear and tear).".* Clause 6 (a) also stipulates that, any loss or damage to the vehicle shall *not* impair the defendants' obligations and liabilities under the Lease Agreement and that the defendants' obligations and liabilities under the Lease Agreement *"shall continue in full force and effect"* notwithstanding any damage to the vehicle. Clause 8.1 states that, the defendants *" ….. shall bear the entire risk of loss or damage to the equipment or any part thereof from whatsoever cause arising (including wear and tear)"*.

Thus, by these contractual provisions, the defendants have not only acknowledged the fact that they chose the vehicle but have agreed that the plaintiff is not liable for any defect or shortcoming with regard to the quality of that vehicle or its fitness for use that may later become apparent. The defendants have agreed to bear the risk of any such defects or shortcomings with regard to the quality of the vehicle or its

fitness for use. The defendants have also agreed that, any defects in the vehicle will not affect their liability under the Lease Agreement.

To sum up, the evidence referred to above does not suggest that the Lease Agreement marked "ඵ2" was frustrated. Further, the principle of law referred to above precludes the defendants from raising a defence of frustration of the Lease Agreement on the basis of alleged defects in the vehicle. Therefore, there is no need for this case to be sent back to the High Court for determination of an issue as to whether the Lease Agreement marked "ඵ2" was frustrated. Further, for purposes of record, I hold that, the learned trial judge erred when he answered the two additional issue no.s [12] and [13] in the affirmative.

With regard to the other issues before the High Court, the learned trial judge has correctly answered, in the plaintiff's favour, the plaintiff's issues with regard to whether the 1st and 2nd defendants were bound by the Lease Agreement, whether the 1st and 2nd defendants had failed to pay the monthly rentals and whether the plaintiff has terminated the Lease Agreement.

Next, with regard to the amount claimed by the plaintiff and set out in the Statement of Account marked "ඵ7" and the defendants' issues alleging that this amount was incorrect, the learned trial judge was of the view that the plaintiff had satisfactorily explained the amounts set out in the Statement of Account marked "ඵ7" and that there was no reason why the Court should not accept the evidence of the plaintiff's witness in this regard. Accordingly, he answered the defendants' issue in the negative.

However, since the judgment of the High Court states that, the amount claimed by the plaintiff was not closely examined because the High Court had held that the Lease Agreement was frustrated, it is necessary to examine whether the plaintiff is entitled to recover the sum prayed for in the plaint. When the Statement of Account marked "ඵ7" is scrutinised, it is seen that, although the plaintiff's witness stated in his evidence that the plaintiff repossessed the vehicle in 1999, the plaintiff has not given credit for the value of the vehicle in the Statement of Account. In the absence of any claim by the plaintiff to the contrary, it is fair to assume that, in the ordinary course of business, the plaintiff has sold the vehicle after it was repossessed. The plaintiff's reticence to reveal the sum received upon the sale, leads me to consider it reasonable to assume that the plaintiff would have received a sum of Rs.1,458,000/- which is the *"Stipulated Loss Value"* of 90% of the *"Cost of Equipment"* of Rs.1.620,000/- as mentioned in the Statement of Account marked "ඵ7" read with the Item (9) of the Schedule to the Lease Agreement marked "ඵ2".

Therefore, this sum of Rs.1,458,000/- has to be deducted from the sum of Rs.2,770,022/- which the Statement of Account marked "ඵ7" states is the sum due under the Lease Agreement as at 18th August 1998. The net sum due will then be Rs.1,312,022/-. In terms of the contract, the plaintiff is entitled to recover interest on this sum at 23.725% *per annum* from 18th August 1998 onwards. However, it is seen

that, as a result of the delay in the final determination of this case, the interest that will become due on Rs.1,312,022/- from 18th August 1998 onwards will be far in excess of the capital sum of Rs.1,312,022/-. Although the general rule is that, a plaintiff is entitled to recover interest from the date of decree till the date of payment, I am of the view that, in the circumstances of this particular case, it is fit and proper and equitable to limit the interest that may be recovered to a sum equivalent to the capital sum of Rs.1,312,022/-. Thus, the total sum which the plaintiff is entitled to recover from the 1st and 2nd defendants will be Rs. 2,624,044/-.

Lastly, with regard to the defendants' issue suggesting that the Lease Agreement had not been duly stamped, the defendants led no evidence to substantiate that claim. The learned trial judge correctly answered that issue against the defendants.

For the aforesaid reasons, the plaintiff-appellant's appeal is allowed and the judgment of the High Court is set aside. Judgment is entered for the plaintiff-appellant and against the 1st and 2nd defendants-respondents in a sum of Rs.2,624,044/- together with costs in the High Court. The High Court is directed to enter decree accordingly. In the circumstances of this case, each party will bear their own costs of appeal.

Judge of the Supreme Court

S.Eva Wanasundera, PC. J.
I agree

Judge of the Supreme Court

Upaly Abeyrathne J.
I agree

Judge of the Supreme Court

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

In the matter of an appeal.

1. **K.R. ARIYAWATHIE SENADHEERA**
   516-195, Forum Drive,
   Mississauga, L423MS
   Canada.

2. **MAHESHA DILANI SENADHEERA**
   516-195, Forum Drive,
   Mississauga, L423MS
   Canada.

PLAINTIFFS

S.C. C.H.C. Appeal No 40/2010
HC/Civil/ Case No: 25/2007/IP

VS.

1. **SHANTHA SENADHEERA**
   No. 21, Temple Road,
   Negombo.
   Presently residing at
   206, Seven Sisters Road,
   Finsbury Park, London N43NX,
   England.

2. **AMAL RANDENIYA,**
   No. 281, Colombo Road,
   Weligampitiya, Ja-Ela.

3. **SUNIL WIJESIRIWARDENA,**
   Vibhavi Academy of Fine Arts,
   No. 38, New Jayaweera
   Mawatha, Ethul Kotte, Kotte.

DEFENDANTS

AND NOW BETWEEN

1. **K.R. ARIYAWATHIE SENADHEERA**
   516-195, Forum Drive,
   Mississauga, L423MS
   Canada.

2. MAHESHA DILANI SENADHEERA
516-195, Forum Drive,
Mississauga, L423MS
Canada.

PLAINTIFFS-APPELLANTS

VS.

1. SHANTHA SENADHEERA
No. 21, Temple Road,
Negombo.
Presently residing at
206, Seven Sisters Road,
Finsbury Park, London N43NX,
England.

2. AMAL RANDENIYA,
No. 281, Colombo Road,
Weligampitiya, Ja-Ela.

DEFENDANTS-RESPONDENTS

BEFORE: S.E. Wanasundera, PC, J
Sisira J. De Abrew J
Prasanna Jayawardena, PC, J

COUNSEL: Dr. Mahinda Ralapanawe with Nisansala Fernando for the Plaintiffs-Appellants.
Dr. Harsha Cabral, PC. with Kuvera de Zoysa PC, M.U.M. Ali Sabry PC, and Kushan Illangatillake for the 2nd Defendant-Respondent.

ARGUED ON: 12th October 2016.

WRITTEN SUBMISSIONS FILED: By the Plaintiff-Appellant on 08th January 2014.
By the 2nd Defendant-Respondent on 11th June 2013.

DECIDED ON: 22nd June 2017

Prasanna Jayawardena PC. J

The book titled "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" was authored by the artist and scholar, Mr. Kulanatha Senadheera. It was first published in 1973. The work briefly surveyed and described the development of art in the western world and also the place of art in relation to social values, western culture, western philosophy and psychology. This was, perhaps, the first work on this subject in Sinhala and the book attracted a readership, which continued over the years. Mr. Senadheera died in 1987. A second edition of the book was not published prior to his death.

In September 2006, "Vibhavi Lalitha Kala Academy" [Vibhavi Academy of Fine Arts] published what is stated to be the "Second Edition" ["දෙවන මුද්‍රණය"] of the book titled "නූතන චිත්‍ර කලාවේ රසික සංකල්ප". It is common ground that, Vibhavi Academy of Fine Arts is an incorporated body. It describes itself as a non-government and non-profit making institution established as an alternative and independent school for teaching fine arts in Sri Lanka.

The front cover of this second edition has the title "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" in large font using bold type and below that, the name of the author – *ie:* "කුලනාථ සේනාධීර " – in slightly smaller but still very noticeable stylized font, which is also in bold type. The inside cover bears a photograph of the author with his name and years of birth and death – *ie:* "කුලනාථ සේනාධීර (1933-1987)". The very next page, which can be termed the Title Page, also states the same title and name of the author, in distinct font. The next page again states the same title of the book and name of the author, at the top of the page. Thereafter, the ISBN (International Standard Book Number) of the book is mentioned. Next, the abovenamed 1st defendant-respondent is named as the holder of the copyright of the book by the notation "© ශාන්ත සේනාධීර". The year of the initial publication is stated to be February 1973. The year of the publication of the second edition is given as September 2006. Thereafter, "Vibhavi Lalitha Kala Academy" of No. 38, Nawa Jayaweera Mawatha, Etul Kotte", is named as the publisher of the second edition. M/S "Sign and Graphics" of No. 123, Old Road, Nawinna, Maharagama is stated to be the printer of the second edition. All these details are in clear and distinct type and are obvious to a reader. The next page is also in the nature of a Title Page and again states the title of the book, the name of author and the name of the publisher in bold font. The following page reproduces the Foreword by the author, which was included in the first edition. At the end of this Foreword, the author's name, address and date of writing the Foreword - *ie:* "කුලනාථ සේනාධීර, 21, පන්සල පාර, මීගමුව, 1973.02.12" - are clearly stated.

Thereafter, the next two pages contain the Foreword to the second edition which has been written by the abovenamed 2nd defendant-respondent, whose name is stated at the end of that Foreword. In his Foreword, the 2nd defendant-respondent says he is a nephew of the author. He also states that the second print is being published

consequent to a suggestion made by Mr. Chandraguptha Thenuwara who founded Vibhavi Lalitha Kala Academy.

The 2nd defendant-respondent states that, Mr. Thenuwara had observed there were very few remaining copies of the first edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" for the use of students and other readers and that it will be useful to publish a second edition. The 2nd defendant-respondent has also stated that, the copyright of the book is held by the 1st defendant-respondent.

I have described, in some detail, the contents of the front cover, inside cover and first few pages of the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප", because these components prominently and unmistakably identify the author of the book to be Kulanatha Senadheera, the owner of the copyright to be the 1st defendant and the publisher to be Vibhavi Lalitha Kala Academy. I have also referred to the Foreword to the second edition of the book to demonstrate it was written by the 2nd defendant-respondent and that he has named Kulanatha Senadheera as the author of the work "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" and named the 1st defendant-respondent as the owner of the copyright to the work.

On 25th July 2007, the 1st and 2nd plaintiffs-appellants ["the 1st and 2nd plaintiffs"] instituted this action in the High Court of the Western Province exercising Civil [Commercial] Jurisdiction and holden in Colombo, against the 1st defendant-respondent ["the 1st defendant"], the 2nd defendant-respondent ["the 2nd defendant"] and the 3rd defendant who was one Sunil Wijesiriwardena of Vibhavi Lalitha Kala Academy.

The 1st and 2nd plaintiffs are the widow and daughter of Kulanatha Senadheera. The 1st plaintiff and Kulanatha Senadheera had a son named Sidath Senadheera who was also the 2nd plaintiff's brother. Sidath Senadheera was *not* joined as a party to this action, either as a plaintiff or defendant. The 1st defendant is the younger brother of Kulanatha Senadheera. The 2nd defendant is the nephew of Kulanatha Senadheera. The 1st and 2nd plaintiffs pleaded that, the 3rd Defendant is the trustee of Vibhavi Lalitha Kala Academy.

The 1st and 2nd plaintiffs pleaded that, Kulanatha Senadheera held the copyright of his work "නූතන චිත්‍ර කලාවේ රසික සංකල්ප". They claim that, after the death of Kulanatha Senadheera, all rights arising out of his copyright of the work, devolved upon the 1st and 2nd plaintiffs and Sidath Senadheera, who are the heirs of Kulanatha Senadheera.

The 1st and 2nd plaintiffs stated that, the 1st defendant has, without the agreement or knowledge of the 1st and 2nd plaintiffs, unlawfully claimed to be entitled to the copyright and published a second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" in September 2006. The plaintiffs go on to state that, the 2nd defendant had actively participated in the publication of that second edition and written a Foreword to it.

The plaintiffs pleaded that, the aforesaid acts of the 1st and 2nd defendants infringed their rights which are protected by **section 10 (1) (a)** of the Intellectual Property Act No. 36 of 2003. The plaintiffs also averred that, the 3rd defendant was the publisher of the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්පය" and, therefore, also liable for the wrongful acts of the 1st and 2nd defendants which had violated the plaintiffs' aforesaid rights.

On the basis of these averments, the plaintiffs claimed that a cause of action had accrued to them to sue the 1st, 2nd and 3rd defendants, jointly and severally for:
(i) a declaration that, following the death of Kulanatha Senadheera, all rights to the work "නූතන චිත්‍ර කලාවේ රසික සංකල්පය" under and in terms of the Intellectual Property Act, are held by the 1st and 2nd plaintiffs and Sidath Senadheera; (ii) a declaration that, the publication of the work by the 1st, 2nd and 3rd defendants has infringed the rights of the 1st and 2nd plaintiffs which are protected by section 9 of the Intellectual Property Act; (iii) a declaration that, the 1st, 2nd and 3rd defendants were not entitled to publish and distribute the work without the consent of the 1st and 2nd plaintiffs; (iv) a declaration that, the 1st and 2nd defendants have infringed the rights of the 1st and 2nd plaintiffs which are protected by section 10 of the Intellectual Property Act; (v) for the recovery of damages in a sum of Rs.600,000/- from the 1st , 2nd and 3rd defendants on account of the infringement of the rights of the 1st and 2nd plaintiffs under the Intellectual Property Act; and (vi) for the recovery of a sum of Rs.200,000/- from the 1st, 2nd and 3rd defendants on the ground of unjust enrichment. The plaintiffs prayed for reliefs based on the aforesaid cause of action, against all three defendants.

In his answer, the 1st defendant denied that he claimed or was entitled to the copyright of "නූතන චිත්‍ර කලාවේ රසික සංකල්පය" and denied that he was involved in the publication of the aforesaid second edition of the work. He stated that, the second edition had been published by the 2nd defendant and at the instance of the 2nd defendant. The 1st defendant pleaded that he had been wrongfully and unjustly made a defendant to the action and pleaded that, the action against him should be dismissed *in limine*.

In his answer, the 2nd defendant stated that, the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්පය" was published by Vibhavi Lalitha Kala Academy. He admitted that he had written the Foreword to that publication. The 2nd defendant denied that he had infringed any rights of the plaintiffs under the Intellectual Property Act. The 2nd defendant pleaded that, Vibhavi Lalitha Kala Academy *"approached"* him with a proposal to publish the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්පය" and that, when he made inquiries, the 1st defendant *"represented"* to him that, *"the 1st defendant is the owner of the copyright in respect of the said book"* and that, the 1st defendant *"consented and encouraged the 2nd Defendant"* to publish the book through Vibhavi Lalitha Kala Academy. The 2nd defendant claimed that, he informed the 1st plaintiff and Sidath Senadheera of the intention of publishing a second edition and that the 1st plaintiff gave her *"blessings"* and Sidath Senadheera

"indicated his consent". The 2nd defendant pleaded that, he *"pursuant thereto in good faith intimated to Vibhavi Academy of Fine Arts that the rights holders have consented to the publication of a second edition of `Nuthana Chitra Kalawe Rasika Sankalpa'"* and that he *"was involved with the publication of the 2nd Edition of `Nuthana Chitra Kalawe Rasika Sankalpa' with the bona fide intention of ensuring that the said book continued to be an accessible source of learning to Artists and art students in Sri Lanka".*

In his answer, the 3rd defendant admitted that, the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" had been published by the Vibhavi Lalitha Kala Academy. He went on to state that, Vibhavi Lalitha Kala Academy is an incorporated body and denied that he is a trustee of that incorporated body. He pleaded that he had been wrongly joined as a defendant.

On 18th January 2008, the plaintiffs moved that the 3rd defendant's name be struck off from the case since Vibhavi Lalitha Kala Academy was an incorporated body and the 3rd defendant was not a "trustee". On 18th February 2008, the plaintiffs moved that the 1st defendant's name also be struck off from the case in view of the contents of his answer. Thus, the case proceeded to trial between the 1st and 2nd plaintiffs and the 2nd defendant only.

When this case was taken up for trial on 18th February 2008, the plaintiff framed six issues. I will set out these issues since they delineate and limit the scope of the plaintiff's case:

Issue [1] After the death of Kulanatha Senadheera, have all rights arising out of his copyright of the work devolved upon the 1st and 2nd plaintiffs and Sidath Senadheera, who are the heirs of Kulanatha Senadheera?

Issue [2] Are the 1st and 2nd plaintiffs and Sidath Senadheera entitled to all Intellectual Property rights in the said work and have they possessed the said rights?

Issue [3] Has the 2nd defendant violated the rights of the plaintiffs **under section 10 (1) (a)** of the Intellectual Property Act? [emphasis added by me].

Issue [4] Did the 2nd defendant actively participate in the publication of the second edition of the work?

Issue [5] If the above issues are answered in the affirmative, has the 2nd defendant sought to represent that the authorship of the work was to be attributed to the 1st defendant?

Issue [6] If one or more of the above issues are answered in the plaintiffs' favour, are the plaintiffs entitled to the reliefs prayed for in the plaint?

The 2nd defendant framed fourteen issues, based on the averments in his answer. There were several sub issues in many of these issues. I will refer to the 2nd defendant's issues only if it is necessary to do so for the purposes of this judgment.

The 2nd plaintiff's evidence-in-chief was tendered to Court by way of her affidavit which was produced at the trial marked **"X"**. The 2nd plaintiff also gave verbal evidence. The 2nd plaintiff did not say whether Kulanatha Senadheera died leaving a last will or intestate. However, she did say that his only heirs were the 1st and 2nd plaintiffs and Sidath Senadheera.

With regard to the 1st defendant, the 2nd plaintiff stated that, the plaintiffs had moved that his name be struck off from the action because the 1st defendant had, in his answer, denied any knowledge of the publication of the 2nd edition and acknowledged that the copyright of the work belonged to Kulanatha Senadheera

With regard to the 2nd defendant, the 2nd plaintiff stated that, the 2nd defendant was *"directly responsible for the publication of the second edition*" of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" *"without the permission or authority of the owners of the copyright to the said work"*. Other than for a general statement that the 2nd defendant had violated the plaintiffs' rights protected by the Intellectual Property Act by the publication of the work without the authority or permission of the plaintiffs, the *only* provision of the Intellectual Property Act which the 2nd plaintiff specified or referred to in this connection, was **section 10 (1) (*a*)** when she stated that, the 2nd defendant had *"violated section 10 (1) (a)"* of the Intellectual Property Act.

The plaintiffs also led the evidence of three other witnesses. The only evidence of these witnesses which requires mention is the fact that, the witness who was the owner of M/S "Sign and Graphics", stated the Job Order to print the second edition had been placed by Vibhavi Lalitha Kala Academy, which had done the proof reading and other work related to the printing and also paid for the printing of the second edition of the book.

The 2nd defendant gave evidence. He stated that the author of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" was Kulanatha Sendaheera. who was the 2nd defendant's maternal uncle. The 2nd defendant stated that, he had been a student at Vibhavi Lalitha Kala Academy. He stated that, Mr. Chandragupta Thenuwara and others from the Vibhavi Lalitha Kala Academy suggested to him that, since very few copies of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" were available for the use of students and others, Vibhavi Lalitha Kala Academy should publish a second edition of the book.

The 2nd defendant stated that, when he made inquiries to ascertain who held the copyright of the work, the 1st defendant, who is a solicitor practicing in England and was then visiting Sri Lanka, had informed him that the 1st defendant held the

copyright. The 2nd defendant also stated that, the 1st defendant requested and authorised him to proceed with the publication of the second edition.

The 2nd defendant said that he also informed the 1st plaintiff and Sidath Senadheera of the idea of publishing the second edition and that they had verbally agreed. The 2nd defendant stated that he conveyed to Vibhavi Lalitha Kala Academy that the 1st defendant, who was the owner of copyright, and Sidath Senadheera had agreed to the publication of a second edition and that, Vibhavi Lalitha Kala Academy should proceed to publish a second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප".

The 2nd defendant said that, after the second edition was published, he had forwarded copies to the 1st and 2nd plaintiffs and Sidath Senadheera in November, 2006. The affectionate inscription addressed to the 1st and 2nd plaintiffs and Sidath Senadheera, which the 2nd defendant had written on page three of one such copy was marked **"R1/2D2"**. The 2nd defendant stated that he had no further connection with the publication of the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" and that he had not received any income from the publication.

In his judgment, the learned Trial Judge has analysed the plaintiffs' case, the 2nd defendant's case, the consequences of the plaintiffs' decision not to proceed against the 1st and 3rd defendants and the evidence placed before the Court at the trial. Having done so, the learned Trial Judge answered the plaintiffs' aforesaid issue no.s [1] and [2] in favor of the plaintiffs and answered the plaintiffs' other issue no.s [3] to [6] against the plaintiffs. Accordingly, the High Court dismissed the plaintiff's case against the 2nd defendant, with taxed costs.

The plaintiffs appealed to this Court. We have heard learned Counsel for the 1st and 2nd plaintiffs and learned President's Counsel for the 2nd defendant and also considered the written submissions filed by them.

The plaintiffs' issue no.s [1] and [2] are whether the 1st and 2nd plaintiffs and Sidath Senadheera are the widow and only two children and sole heirs of Kulanatha Senadheera and entitled to all the Intellectual Property rights in the late Kulanatha Senadheera's work titled "නූතන චිත්‍ර කලාවේ රසික සංකල්ප".

The learned trial judge held that, the evidence at the trial between the plaintiffs and the 2nd defendant was that the 1st and 2nd plaintiffs and Sidath Senadheera are the widow and only two children and only heirs of Kulanatha Senadheera and that, the 2nd defendant has *not* disputed this position and, in fact, had acknowledged this position. The learned trial judge also held that, the evidence before the Court at the trial was to the effect that, Kulanatha Senadheera had not transferred his copyright of the work to a third party during his life time and that, the copyright would have devolved upon the 1st and 2nd plaintiffs and Sidath Senadheera after the death of Kulanatha Senadheera. The learned trial judge held that, the 2nd defendant had *not* disputed this position either. Accordingly, the High Court answered issue no.s [1] and [2] in the affirmative, against the 2nd defendant.

Having perused the evidence, I am in agreement with these conclusions reached by the learned trial judge. It may be useful to add here, the observations made in Laddie, Prescott and Vitoria's "The Modern Law of Copyright and Designs" [2nd ed. vol.1 at p.585 and p.587] that, in the present time, *"Copyright is a purely statutory right and is a species of personal or movable property in the nature of a chose in action"* and that, where the owner of the copyright dies, *"….. the title to the copyright passes to the beneficiaries under the will or according to the rules of intestacy"*.

The plaintiffs' issue no. [3] is whether the 2nd defendant has infringed the rights of the plaintiffs under **section 10 (1) (*a*)** of the Intellectual Property Act. Section 10 (1) of the Intellectual Property Act enacts that, the author of a work shall, independently of his "Economic Rights" in a work and even where he is no longer the owner of those "Economic Rights", have the following "Moral Rights":

> " *(a) to have his name indicated prominently on the copies and in connection with any public use of his work, as far as practicable;*
>
> *(b) the right to use a pseudonym and not have his name indicated on the copies and in connection with any public use of his work; and*
>
> *(c) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his work which would be prejudicial to his honour or reputation."*.

It is clear that, issue no. [3] is **specific to and limited to section 10 (1) (*a*)** of the Intellectual Property Act, which only sets out the "Moral Right" of the author *"to have his name indicated prominently on the copies and in connection with any public use of his work, as far as practicable"*.

As set out earlier, the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" has prominently identified the author of the book to be Kulanatha Senadheera. This has been done in several places in the second edition. It is very unlikely that a reader of the second edition will fail to notice the identity of the author. Thus, it is obvious that there has been no violation of the "Moral Right" described in section 10 (1) (*a*) of the Intellectual Property Act. The learned trial judge correctly answered this issue no. [3] in the negative.

The plaintiffs' issue no. [4] is whether the 2nd defendant actively participated in the publication of the second edition of the work. As set out earlier, in his answer itself, the 2nd defendant has stated that, the Vibhavi Lalitha Kala Academy approached him with the proposal to publish the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" and that he made inquiries to ascertain who held the copyright to the work. The 2nd defendant has stated that, thereafter, he *"pursuant thereto in good faith intimated to the Vibhavi Academy of Fine Arts that the rights holders have consented*

to the publication of a second edition of `Nuthana Chitra Kalawe Rasika Sankalpa'* and that he *"was involved with the publication of the 2nd Edition of `Nuthana Chitra Kalawe Rasika Sankalpa' with the bona fide intention of ensuring that the said book continued to be an accessible source of learning to artists and art students in Sri Lanka". These averments in the 2nd defendant's answer, demonstrate that, the 2nd defendant has actively participated in and aided and enabled the publication of the second edition. Further, a perusal of the Foreword written by the 2nd defendant and included in the second edition, reveals that, the 2nd defendant played an integral part in the publication of the second edition. It is also very clear from the Foreword that, the 2nd defendant regarded himself as one of those who were directly responsible for the publication of the second edition. In the light of this evidence, the learned trial judge has correctly answered issue no. [3] in the affirmative.

The learned trial judge has gone on to state with regard to issue no. [3] that, the 2nd defendant had acted in good faith since he had obtained agreement to the publication of the second edition from the 1st defendant, whom he believed held the copyright to the work. The learned trial judge also held that, the 2nd defendant had no reason to suspect that, the rights of any person to the work, would be violated by the publication of the second edition.

In this regard, it is relevant to recall that, in their plaint, the plaintiffs specifically pleaded that, the **1st defendant** has claimed to own the copyright of the work and that the **1st defendant** published the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්පය" in September 2006. Their allegation made in the plaint against the 2nd defendant, is only that he had actively participated in the publication of that second edition. Although the 1st defendant has later filed answer denying that he claimed to own the copyright and denying that he had any connection with the publication of the second edition, *no* admission to that effect was made at the trial and the 1st defendant did *not* give evidence to prove the truth of those denials. However, the 2nd defendant has given clear evidence that, the 1st defendant has represented to him that the 1st defendant owned the copyright and that the 1st defendant authorised the publication of the 2nd edition.

In these circumstances, on the basis of the only evidence before the Court, the learned trial judge was justified in reaching the conclusion that, the 2nd defendant had relied on the representations made by the 1st defendant and believed the 1st defendant held the copyright. The likelihood that the 2nd defendant believed the 1st defendant owned the copyright and authorised the publication of the 2nd edition is strengthened by the fact that, the 2nd defendant has forwarded copies of the second edition to the 1st and 2nd plaintiffs and Sidath Senadheera soon after it was published. That was not the action of a person who was acting surreptitiously or dishonestly. In these circumstances, the learned trial judge was entitled to conclude that the 2nd defendant had acted *bona fide*.

However, it should be mentioned here that, since the evidence before the Court established that, the 2nd defendant was a person who was directly responsible for

and who was actively involved in the publication of the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප", his *bona fides* would have been irrelevant ***if*** there had been an **issue** before the Court with regard to whether the 2nd defendant had infringed the plaintiffs' rights under section 9 of the Intellectual Property Act by the publication of the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" without the authority of the plaintiffs who were owners of the copyright of that work. A perusal of section 9 of the Intellectual Property Act suggests that, the constituent elements of an act of infringement under section 9 read with sections 22 and 170 of the Intellectual Property Act, do not give consideration to the intention of the infringer other than with regard, in some circumstances, to the computation of liability for damages.

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By way of further explanation, it may be useful to point out here that, in the light of the facts of this case and under and in terms of section 9 (1) (*a*) of the Intellectual Property Act, an infringement of the plaintiffs' copyright by the *"reproduction of the work"* which took place when the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" was published, would have been in the nature of a "primary infringement", to borrow a term from the Copyright, Designs and Patent Act, 1988 in England. As a general principle, in the case of primary infringements of copyright, the intention, knowledge or *bona fides* of the persons who are directly responsible for such an infringement are not relevant since there is an imposition of a form of "strict liability'. Thus, in PERFORMING RIGHTS SOCIETY LTD vs. URBAN DISTRICT COUNCIL OF BRAY [1930 AC 377 PC], the plaintiff Society sued the defendant Urban District Council for the infringement of a copyright held by the plaintiff. The alleged infringement occurred when a band employed by the Urban District Council performed music to which the plaintiff owned the copyright. The Urban District Council pleaded as one of its defences, the fact that they were unaware that the performance of the music would infringe any copyright. Lord Sankey rejected that defence and commented [at p.390],*"Here again, innocence of infringement is no answer"*. On the same lines, in HAWKES & SON (LONDON) LTD vs. PARAMOUNT FILM SERVICE [1934 Ch. 593 at p.602],. Lord Hanworth MR, referring to the Copyright Act, 1911, stated *"It is quite plain from what Lindley LJ said in Hanfstaengal v. Empire Palace that we have to consider the statute on broad lines; to bear in mind the necessity for the protection of authors whether of musical or literary compositions. The Acts have to be construed with reference to that purpose, and they are not to be made instruments of oppression or extortion. On the other hand, as the learned Lord Justice says, `the intention of an infringer is immaterial'…."* In the later case of FRANCIS DAY & HUNTER LTD vs. BRON [1963 Ch. 587 at p. 624], Diplock LJ, as he then was, referring to the Copyright Act, 1956 stated *"It is, however, in my view, equally clear law that neither intention to infringe, nor knowledge that he is infringing on the part of the defendant, is a necessary ingredient in the cause of action for infringement of copyright. Once the two elements of sufficient objective similarity and causal connection are established, it is no defence that the defendant was unaware (and could not have been aware) that what he was doing infringed the copyright in the plaintiff's work."*. The learned judge went

on to observe that, the absence of knowledge on the part of the infringer may be relevant only with regard to his liability in damages.

Thus, Laddie, Prescott and Vittoria state [at p. 81], *"Guilty knowledge is not an essential ingredient of the wrong of primary infringement of copyright"*. The exception to this principle would be in the case of prosecution for an *offence* of wilful infringement of a copyright under section 178 of the Intellectual Property Act, where wrongful intention or knowledge will be an essential component of culpability for that offence.

It should also be mentioned here that, in some jurisdictions, the question of determining the intention, knowledge or *bona fides* of the infringer could arise in instances of "secondary infringement" or "contributory infringement", which may be described, in general and without attempting to define these terms, as instances where the alleged infringer has played only an indirect or subsidiary part in the production of the infringing product or performance or in its distribution. The concept of "secondary infringements" is statutorily recognized in the Copyright, Designs and Patent Act, 1988 in England while the concept of "contributory infringements" and also the concept of "vicarious infringements", are recognized and often adverted to in the United States of America. However, our Intellectual Property Act makes no reference to or distinction between "primary infringements", "secondary infringements" "contributory infringements" and "vicarious infringements". The question of whether these concepts can be properly regarded as being relevant or applicable in Sri Lanka under and in terms of the Intellectual Property Act in circumstances where a defendant has played only an indirect or subsidiary part in an alleged infringement without any intention or actual knowledge or reasonable cause to know that he is committing an infringement, will have to await consideration in an appropriate case.

In view of the submissions made on behalf of the 2nd defendant that he played only a "secondary" or "contributory" part in the publication of the second edition, it should be mentioned here that, the evidence establishes the 2nd defendant and Vibhavi Lalitha Kala Academy were directly responsible for the publication of the second edition and that the 2nd defendant's liability for the publication of the second edition cannot be properly classified as being "secondary" or "contributory" even if these concepts could be considered in Sri Lanka under our Intellectual Property Act.

Thus, in any event, the 2nd defendant was a person who was directly responsible for and who was actively involved in the publication of the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප". Therefore, the 2nd defendant could be held liable for the infringement of the plaintiffs' copyright caused by the publication of the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" ***provided*** the plaintiffs successfully proved that **the rights they have placed *in issue* at the trial** have been violated by the publication of the second edition.

To get back to the issues, the plaintiffs' issue no. [5] is whether the 2nd defendant sought to represent that the authorship of the work was to be attributed to the 1st defendant. As set out earlier, the second edition of "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" clearly identifies the author of the book to be Kulanatha Senadheera. The Foreword written by the 2nd defendant also does so. Accordingly, the learned trial judge correctly answered issue no. [5] in the negative.

Lastly, the plaintiffs' issue no. [6] is whether, if one or more of the above issue no.s [1] to [5] are answered in the plaintiffs' favour, the plaintiffs are entitled to the reliefs prayed for in the plaint. Although the learned trial judge has answered issue no.s [1], [2] and [4] in the plaintiff's favour, the result of those answers is that: (a) the High Court has held that, the 1st and 2nd plaintiffs and Sidath Senadheera are entitled to the Intellectual Property rights in the work titled "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" , as against the 2nd defendant; and (b) the 2nd defendant has actively participated in the publication of the second edition of that work. However, these issues being answered in the plaintiffs' favour does not entitle the plaintiffs to judgment against the 2nd defendant since these issues only refer to facts which form a part of the underpinning or background of the cause of action claimed by the plaintiffs. Issue no.s [1], [2] and [4] do *not* set out the alleged violation of the rights of the plaintiffs which constitutes the cause of action claimed by the plaintiffs.

Instead, the alleged violation of the rights of the plaintiffs under the Intellectual Property Act are crystallized *only* in the aforesaid issue no.s [3] and [5] which ask whether the 2nd defendant has violated the rights of the plaintiffs under **section 10 (1) (*a*)** of the Intellectual Property Act and whether the 2nd defendant has sought to represent that the authorship of the work was to be attributed to the 1st defendant. The learned trial judge has correctly answered those two issues in the negative.

The consequence has to be that, since the *only* two rights under the Intellectual Property Act which the plaintiffs placed in issue at the trial, have been correctly answered against the plaintiffs, the plaintiffs will not be entitled to judgment against the 2nd defendant. The learned trial judge has, accordingly, correctly answered the consequential issue no. [6] in the negative and dismissed the plaintiffs' action.

Before concluding this judgment, it is necessary to refer to the relief prayed for in prayer (**ඈ**) of the plaint – *ie:* a declaration that, the 1st and 2nd plaintiffs and Sidath Senadheera were entitled to the Intellectual Property rights of the work titled "නූතන චිත්‍ර කලාවේ රසික සංකල්ප". Although the learned trial judge answered the plaintiff's issue no.s [1] and [2] in the affirmative in the trial against the 2nd defendant, the learned Judge has gone on to hold that, the plaintiffs were *not* entitled to the aforesaid declaration.

The learned trial judge declined to issue this declaration because Sidath Senadheera had not been made a party to the case and had not given evidence at the trial. Therefore, the High Court was of the view that, the declaration cannot be issued

since the plaintiffs had failed to establish that Sidath Senadheera had not transferred his rights in the copyright to Vibhavi Lalitha Kala Academy or to the 1st defendant or to a third party. The High Court commented adversely on the fact that, the plaintiffs had failed to bring Sidath Senadheera, Vibhavi Lalitha Kala Academy (which has published the second edition) and the 1st defendant (who is said to have claimed to own the copyright) before the Court at the trial. The High Court correctly held that, unless these persons had been brought before the Court at the trial, the plaintiffs were not entitled to a declaration that might affect the lawful rights of these persons.

It is also necessary to refer to the relief prayed for in prayer (**ඒ**) of the plaint - *ie:* a declaration that, the publication of the work "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" by the 1st, 2nd and 3rd defendants has violated the rights of the 1st and 2nd plaintiffs which are protected by **section 9** of the Intellectual Property Act. Although the plaintiffs have prayed for the aforesaid declaration, they did *not* frame an **issue** based on an alleged violation of section 9 of the Intellectual Property Act. Section 9 (1) sets out the "Economic Rights" of the owner of copyright of a work and sub sections (*a*) to (*j*) of Section 9 (1) lists ten types of different acts relating to a work, which the owner of the copyright of that work has the exclusive right to carry out or authorize.

If the plaintiffs wished to obtain the aforesaid declaration prayed for in prayer (**ඒ**) of the plaint, they were obliged, at the very least, to frame a specific **issue** on whether the defendant had violated **section 9 (1)** of the Intellectual Property Act. However, as mentioned earlier, the *only* issues raised by the plaintiffs which allege a violation of their rights under the Intellectual Property Act, are the aforesaid issue no.s [3] and [5] which are specific to and limited to an alleged violation of section 10 (1) (*a*) and an alleged attempt to attribute the authorship of the work to the 1st defendant. There is *no* other issue on an alleged violation of the plaintiffs' rights in the work titled "නූතන චිත්‍ර කලාවේ රසික සංකල්ප".

Consequently, there was *no* **issue** placed before the High Court for determination, with regard to whether the 2nd defendant had infringed the plaintiffs' rights under **section 9** of the Intellectual Property Act. The mere fact that, when the plaintiffs pleaded their cause of action in the plaint, they claimed a cause of action to obtain the aforesaid declaration and then prayed for a declaration to that effect in prayer (**ඒ**) of the plaint, will not help the plaintiffs to obtain that declaration unless they had specifically placed **in issue at the trial,** the question of whether the 2nd defendant had infringed the plaintiffs' rights under section 9 of the Intellectual Property Act. As De Silva CJ emphasized in HANAFFI vs. NALLAMA [1998 1 SLR 73 at p.77] *"What is relevant for present purposes and what needs to be stressed is that once issues are framed, the case which the court has to hear and determine become crystallized in the issues. It is the duty of the court "to record the issues on which the **right decision** of the case appears to the court to depend" (section 146 (2) of the Civil Procedure Code). Since the case is not tried on the pleadings, once issues are raised and accepted by the court the pleadings recede to the background. The Court of Appeal was in error in harking back to the pleadings and focusing on the "validity"*

and the "legality" of the pleadings.". In these circumstances, the plaintiffs could not obtain the aforesaid declaration prayed for in prayer (අඑ) of the plaint.

For the aforesaid reasons, I affirm the judgment of the learned High Court Judge and dismiss this appeal. Each party will bear their own costs in this appeal.

Judge of the Supreme Court

I agree
S.E. Wanasundera, PC, J

Judge of the Supreme Court

I agree
Sisira J. De Abrew J

Judge of the Supreme Court

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

In the matter of an Appeal.

S.C. Appeal No.173/2011
SC/HCCA/LA No: 105/2010
WP/HCCA/GPH No.32/02(F)
D.C.Gampaha Case No. 41975/L

SENADHEERAGE CHANDRIKA SUDARSHANI,
No.497/A/1,Ranmuthugala,
Kadawatha.

PLAINTIFF

VS.

MUTHUKUDA HERATH MUDIYANSELAGE GEDARA SOMAWATHI
No.406/2/A, Welipillawa,
Ganemulla.

DEFENDANT

AND

MUTHUKUDA HERATH MUDIYANSELAGE GEDARA SOMAWATHI
No.406/2/A, Welipillawa,
Ganemulla.

DEFENDANT-APPELLANT

VS.

SENADHEERAGE CHANDRIKA SUDARSHANI
No.497/A/1,Ranmuthugala,
Kadawatha.

PLAINTIFF- RESPONDENT

AND NOW BETWEEN

SENADHEERAGE CHANDRIKA SUDARSHANI
No.497/A/1,Ranmuthugala,
Kadawatha.

PLAINTIFF- RESPONDENT -PETITIONER/APPELLANT

VS.

MUTHUKUDA HERATH MUDIYANSELAGE GEDARA SOMAWATHI
No.406/2/A, Welipillawa,
Ganemulla.

DEFENDANT-APPELLANT -RESPONDENT

BEFORE: B.P. Aluwihare, PC, J.
Upaly Abeyrathne J.
Prasanna Jayawardena, PC,J.

COUNSEL: Ms.Sudarshani Cooray for the Plaintiff-Respondent-Petitioner/Appellant.
Rohan Sahabandu, PC for the Defendant-Appellant-Respondent.

WRITTEN SUBMISSIONS FILED: By the Plaintiff-Respondent-Petitioner/Appellant on 01st November 2016.
By the Defendant-Appellant- Respondent on 28th November 2016.

ARGUED ON: 06th September 2016.

DECIDED ON: 06th April 2017.

Prasanna Jayawardena, PC J.

This appeal is about the rights to a 20 perch land in Ranmuthugala in the Gampaha District ["the land"]. The land was gifted to the Plaintiff-Respondent-Petitioner/ Appellant ["the plaintiff"] by her father, on 23rd October 1996.

About four months later, the plaintiff executed a notarially attested deed no. 14133 dated 20th February 1997 attested by D.C.Gunawathie, Notary Public. On the face of this deed, the plaintiff has transferred the land to the Defendant-Appellant-Respondent ["the defendant"] in consideration of the payment of a sale price of Rs.100,000/-. The attestation by the Notary Public before whom this Deed was

executed, states that, the Notary Public explained the nature of the deed to the plaintiff before the plaintiff executed this deed, and that the aforesaid consideration of Rs.100,000/- was paid by the defendant to the plaintiff, in the presence of the Notary Public.

About 15 months later, on 22nd May 1998, the plaintiff filed this action against the defendant in the District Court of Gampaha pleading: that, her father had title to the land described in the First Schedule to the plaint which is A:2 R:0 P:21.7 in extent; that, on 23rd October 1996, her father had gifted to her the allotment of land described in the Second Schedule to the plaint, which is a divided lot of 20 perches in extent out of the larger land described in the First Schedule to the plaint; that, in December 1996, the plaintiff needed money urgently and obtained a loan of Rs.100,000/- from the defendant which was repayable together with interest thereon at the rate of Rs.3,000/- per month; that, upon the defendant's request that the plaintiff transfers the land to the defendant as security for the repayment of this loan ["එම මුදලට ඇපයක් ලෙස "], the plaintiff executed the aforesaid deed no.14133; that, thereafter, the plaintiff paid interest on the loan to the defendant for four months; that, in or about 12th December 1997, the plaintiff sought to repay the entire loan and all accrued interest to the defendant but the defendant refused to accept repayment.

In paragraph [8] of the plaint, the plaintiff pleaded that, at the time deed no.14133 was executed, it was agreed by the plaintiff and the defendant that the defendant will transfer the land back to the plaintiff when the loan and interest thereon was repaid ["සම්පූර්ණ එකඟතාවය වූයේ ඉහත කී ණය මුදල සහ ඊට අදාළ පොලිය ගෙවා නිම කල පසුව එකී දේපල ආපසු පැමිණිලිකාරියට පවරා දීමටය"]. Thus, **the plaintiff has claimed that, there was an Agreement to Reconvey**.

In the same paragraph [8] of the plaint, the plaintiff has gone on to plead that, any right, title or interest that the defendant may have in the land is subject to a Trust in favour of the plaintiff and subject to the plaintiff's beneficial interest in the land. [විත්තිකාරියට ඉහත කී දේපල සඳහා යම් හිමිකමක් ඇත්තේ නම්, එසේ වනුයේ එම දේපල සඳහා පැමිණිලිකාරියට ඇති විශ්වාසය මත පදනම් කරගත් පලදායී හිමිකම් වලට යටත්ව බව පැමිණිලිකාරිය ප්‍රකාශ කර සිටී]. Thus, **the plaintiff claimed that, the defendant holds the land in Trust for the plaintiff**.

The plaintiff pleaded that she remained in possession of the land.

On the basis of these averments, the plaintiff pleaded her alleged First Cause of Action in paragraph [11] of the plaint, as follows: ඉහත වගන්තිවල අන්තර්ගත කරුණු අනුව මෙම පැමිණිලිකාරිය ප්‍රකාශ කර සිටිනුයේ මෙහි පහත දෙවන උපලේඛනයේ දක්වා ඇති දේපල සඳහා විත්තිකාරියට යම් කිසි ලේඛනගත හිමිකමක් ඇත්නම් එසේ වනුයේ එම දේපල සඳහා පැමිණිලිකාරියට ඇති විශ්වාසය මත පදනම් කරගත් පලදායී හිමිකම් වලට යටත්ව බවට නියෝග ලබා ගැනීමටත්, ඉහත කී රුපියල් ලක්ෂයක (රු. 100,000 /=) ක මුදල සහ ඊට අදාළ පොලිය ගෙවා නිම කල පසු අදාළ දේපල පැමිණිලිකාරිය නමට පවරා දෙන ලෙසට නියෝගයක් ලබා ගැනීමටත් පැමිණිලිකාරිය හට විත්තිකාරියට එරෙහිව නඩු නිමිත්තක් උද්ගතව ඇත.

Thus, when the plaintiff averred her First Cause of Action in paragraph [11] of the plaint, the plaintiff has *first* pleaded that, a Trust exists in her favour *and* has pleaded that, the land should be transferred back to the plaintiff upon payment of Rs.100,000/-.

On this basis, the plaintiff has prayed for the following reliefs by prayers ("ඈ") and ("ඉ") of the plaint, upon her First Cause of Action:

(i) An Order declaring that, any right, title or interest that the defendant may have in the land is subject to a Trust in favour of the plaintiff with the plaintiff having a beneficial interest in the land;

(ii) An Order that, upon the plaintiff repaying the loan of Rs.100,000/- with accrued interest thereon, the defendant was obliged to transfer the land to the plaintiff.

The plaintiff also pleaded an *Alternative* Cause of Action that, the true value of the land was about Rs.400,000/- at the time deed no. 14133 was executed and, therefore, this deed should be set aside on the ground of *laesio enormis*.

In her answer, the defendant denied the claims of the plaintiff and prayed that the action be dismissed. The defendant pleaded: that, she had duly and *bona* fide purchased the land from the plaintiff for the value of the land at the time of the transfer; that, the defendant had obtained good title to the land by deed of transfer No. 14133 executed for valuable consideration; and that, the plaintiff had placed the defendant in possession of the land after the deed was executed.

When the trial commenced, no admissions were made and the parties framed issues which were closely based on the averments in their pleadings.

The issues framed by the plaintiff included the following issues no.s [5] and [6] based on the aforementioned paragraph [11] of the plaint:

Issue No.[5] - එසේ නම් ඉහත කී ඔප්පුව අත්සන් කරන අවස්ථාවේදී පැමිණිලිකාරිය විත්තිකරියගේ සම්පූර්ණ එකඟත්වය වශයෙන් ඉහත කී ණය මුදල හා අදාළ පොලිය ගෙවා නිම කල පසු එම දේපළ පැමිණිලිකාරියට ආපසු පවරා දීමට ද ?

Issue No.[6] - එසේ නම් එම ඔප්පුවේ සඳහන් දේපළ සඳහා විත්තිකාරියට යම්කිසි හිමිකමක් ඇත්නම් එසේ වනුයේ එම දේපළ සඳහා පැමිණිලිකාරිය සතු විශ්වාසය මත පදනම් කළ පැමිණිල්ල පලදායි හිමිකම් වලට යටත්ව ද ?

It appears from the averments in paragraph [11] of the plaint, prayer ("ඈ") of the plaint, and issue no. [6] that, the plaintiff seeks to rely on the well known principle of law enacted in Section 83 of the Trust Ordinance No. 9 of 1917. Section 83

stipulates that, where the owner of property transfers the property and it cannot be reasonably inferred from the attendant circumstances that he intended to dispose of the beneficial interest in that property, the transferee must hold the property for the benefit of the owner – *ie:* that, a Constructive Trust is deemed to exist in terms of which the transferee holds the property for the benefit of the owner. However, somewhat strangely, the plaint does not refer to Section 83 of the Trust Ordinance or any other provision of the Trusts Ordinance. None of the plaintiff's issues have done so, either. That should have been done, both in the plaint and in the issues. The plaintiff would have been better served if the plaint had been drafted and the issues had been framed more precisely and with a better understanding of the applicable law.

To get back to the facts relevant to this appeal, the plaintiff, her father, her father-in-law and her husband testified in support of the plaintiff's case. The plaintiff also led the evidence of Mr.T.M.S.Pieris who had valued the land on 14th July 1998, at the request of the plaintiff. The plaintiff produced in evidence the deed of gift no. 2099 dated 23rd October 1996 by which her father gifted the land to her marked **"පැ 1"**, the aforesaid deed no. 14133 marked **"පැ 2"** and the valuation report prepared by a Mr. T.M.S.Pieris marked**"පැ 3"**, which valued the land at Rs.600,000/-.

The case presented to the Court by the plaintiff and her witnesses was that: the plaintiff's father gifted the land to her; the land remained unfenced and was part of the larger land described in the First Schedule to the plaint which was in the possession of the plaintiff's father; after the plaintiff married, she lived in her husband's home; shortly after the plaintiff's marriage, her father-in-law was in urgent need of money to repay a loan taken by him earlier from one Nagahalanda; but, at the same time, the plaintiff's father-in-law denied that he needed any money and claimed that it was his son – *ie:* the plaintiff's husband – who had needed money; in any event, in order to raise the money which was required, the plaintiff's father-in-law obtained another loan of Rs.100,000/- from the defendant; at the request of her father-in law and as security for the repayment of this loan given to him by the defendant, the plaintiff, her father-in-law , her husband and another person went to the office of the Notary Public; the plaintiff executed deed no. 14133 marked **"පැ 2"** after the Notary Public explained the nature of the deed to her [*"ඔප්පුව ලිව්වාට පසුව කියවා තේරුම් කර දුන්නා ඊට පසුව අත්සන් කළා "*]; this deed had been witnessed by the plaintiff's husband and the other person who accompanied them; the plaintiff claimed that this deed marked **"පැ 2"**was a "Mortgage Bond" [*"උකස් ඔප්පුවක් "*]; the defendant agreed that she would transfer the land back to the plaintiff upon repayment of the loan with interest at the rate of Rs.3,000/- per month; the plaintiff's father-in-law had paid four monthly interest payments of Rs.3,000/- each to the defendant; but when, in December 1997, the plaintiff's father tried to pay the defendant a sum of Rs.124,000/- being the loan of Rs.100,000/- with accrued interest for eight months amounting to Rs.24,000/-, the defendant had refused to accept repayment and refused to transfer the land; the defendant holds the land subject to a Constructive Trust in the plaintiff's favour [*"අනුමිත භාරයකට තියාගෙන "*];

and, in any event, the land had a value of Rs.500,000/- which is very much higher than the sum of Rs.100,000/-, which is the amount stated in the deed marked **"පැ 2"**.

The defendant stated in her evidence that: she wished to purchase a land and had been informed that the plaintiff wished to sell the land; accordingly, she had first inspected the land and then purchased it as set out in the deed marked **"පැ 2"**; in addition to the sum of Rs.100,000/- stated in the deed marked **"පැ 2"**, she had paid further sum of Rs.100,000/- to the plaintiff; when she purchased the land, the boundaries were demarcated by a fence; she had paid a fair price for the land; she had been in possession of the land and had then heard that, the fence had been broken; when she went to the land to repair the fence, the plaintiff's family had prevented her from entering the land; thereupon, the defendant made the Complaint marked **"වි1"** to the Police; the plaintiff had filed this action a few days after that.

The evidence of the plaintiff, her father and her father-in-law was heard by one District Judge. Thereafter, the proceedings were adopted before his successor, who heard the evidence of the plaintiff's husband, Mr.T.M.S.Pieris and the defendant and delivered the judgment of the District Court.

In her judgment, the learned District Judge observed that, there were several discrepancies in the evidence of the witnesses in the plaintiff's case and also that, the plaintiff had been unable to adduce any documentary evidence to support her claim that the transaction was not an outright sale but was a loan against the security of the land.

Nevertheless, the learned District Judge held that, the deed marked **"පැ 2"** was executed as `Security' for a loan of Rs.100,000/- which the plaintiff's father-in-law had obtained from the defendant. [**"පැ 2"** ඔප්පුව මගින් දේපල පවරා දීමක් සිදුවී විත්තිකාරියට පැමිණිලිකාරියගේ මාමා විසින් ලබාගත් රුපියල් ලක්ෂයක මුදලට **ඇපයක් වශයෙන් බවත් ය**"] [emphasis added].

Although, as set out above, the plaintiff's first Cause of Action was based on the claim that the defendant held the land in Trust for the Plaintiff, the learned District Judge did *not* consider whether a Trust had arisen and did not arrive at a specific finding as to whether there was a Trust. The learned District Judge did not consider any of the statutory provisions or other provisions of the law which define the circumstances in which a Court can hold that a Trust has arisen. The learned District Judge did not consider the decisions of the superior courts which have dealt with these matters.
However, despite not making any specific determination with regard to a Trust and or with regard to who held the beneficial interest in the land, the learned District Judge has answered, in the affirmative, the aforesaid Issue No [6] which asks whether there was a Trust. Further, despite not making a specific determination with regard to a Trust, the learned District Judge has, in her judgment, granted the declaration prayed for in prayer ("ඇ") of the plaint declaring that, any right, title or interest that the defendant may have in the land is subject to a Trust in favour of the plaintiff.

With regard to the alternative Cause of Action based on the ground of *laesio enormis*, the learned District Judge accepted the accuracy of the valuation report marked **"පැ 3"**. Having done so, the learned District Judge held that, the deed marked **"පැ 2"** was null and void on the ground of *laesio enormis*.

The defendant appealed to the High Court [Civil Appeal] of the Western Province holden at Gampaha.

In appeal, the learned High Court judges held that, the evidence did not establish a Trust and, further, that the plaintiff had failed to raise any issue with regard to a Trust. The High Court held that, instead, the evidence established there had been an Agreement to reconvey the land upon repayment of the loan but that such agreement was null and void since it was not notarially attested. The learned High Court judges also held that, the plaintiff has not proved *laesio enormis*. On the aforesaid basis, the High Court set aside the judgment of the District Court.

I have previously mentioned that, the plaintiff had, in fact, raised issue No [6] with regard to the whether a Trust exists. The learned High Court judges erred, to that extent, when they overlooked that issue. But, the other determinations by the High Court judges with regard to whether the evidence established a Trust and on the other matters which were in contention, have not been considered by this Court, as yet.

The plaintiff made an application to this Court seeking leave to appeal from the judgment of the High Court. This Court gave the plaintiff leave to appeal on the following two questions of law:

(i) Have the Honourable Judges of the Provincial High Court erred in failing to appreciate that the evidence given on behalf of the Plaintiff-Respondent-Petitioner would clearly establish a Trust in favour of the Plaintiff-Respondent-Petitioner ?

(ii) Have the Honourable Judges of the Provincial High Court erred in failing to appreciate that the attendant circumstances in this case would clearly establish that, the Plaintiff-Respondent-Petitioner did not intend to part with the beneficial interest to the land by executing the deed in favour of the Defendant- Appellant-Respondent ?

The defendant framed the following third question of law too:

(iii) If the Trial Court had come to the conclusion that there is a Trust, could the Court apply the principle of *laesio enormis* to set aside the impugned Deed ?

It is convenient to deal now with the **third question of law** raised by the defendant. This question asks whether a prayer for a declaration that any rights the defendant may have under and in terms of the deed marked **"පැ 2"** are subject to a Trust in the plaintiff's favour, can coexist with a prayer for a declaration that the very same deed, is null and void on the ground of *laesio enormis*.

In this connection, it is established law that, where a plaintiff who has executed a deed transferring a land to a defendant, prays for a declaration that the defendant holds the land in Trust for the benefit of the plaintiff, that plaintiff cannot, at the same time, also ask for a declaration that the same deed is null and void on the ground of *laesio enormis*. Thus, in FERNANDO vs. FERNANDO [19 NLR 210], Woodrenton CJ observed that, a plaintiff, who has executed a deed transferring a land to the defendant but claims that the defendant holds the land in Trust for him, cannot seek to also rely on the ground of *laesio enormis*. The learned Chief Justice stated [at p.211], *"There is, therefore, no room for the application of the doctrine of enormis laesio,1[Voet 18, 5, 16, and Juta's Digest, vol. II. , col. 2583.] as the transaction was not a sale at all."*.

This is because the first relief of a declaration of Trust can be granted only if the Court finds that title was *not* transferred absolutely and that the parties always intended that the beneficial interest in the property will remain with the transferor. In other words, Court has to determine that there was *no* true sale and that, therefore, the deed of transfer is of *no* force or effect - *ie:* that the deed of transfer is *void*. However, the second relief of setting aside the deed on the ground of *laesio enormis* can be granted only if the Court reaches the entirely different conclusion that, the deed of transfer was valid but that, nevertheless, the contract of sale should be set aside because of the gross disparity or inequality between the price paid and the true value of the property - *ie:* that the deed of transfer is *voidable*. It is this disparity or inequality between the true value of the property and the price paid for it, which is termed *laesio enormis.* As Weeramantry [Law of Contract at p.327-328] observes, this disparity *"implies something in the nature of fraud or undue influence"* and allows the vendor to have an otherwise valid contract of sale rescinded on the ground that the price he was paid is grossly inadequate and unfair.

Thus, the foundation upon which a declaration of Trust can be granted (which is that the deed of transfer is of no force or effect – *ie:* that it is *void*), contradicts and cuts across the basis of granting relief on the ground of *laesio enormis* (which is that the deed of transfer is valid but should be set aside – *ie:* that it is only *voidable*).

Therefore, the learned District Judge erred when she answered the aforesaid issue no. [6] in the plaintiff's favour and, thereby, concluded that the deed of transfer marked **"පැ 2"** is void and that the defendant held the land in Trust for the plaintiff *and*, at the same time contradicted herself by holding that, the deed marked **"පැ 2"** is valid but should be set aside on the ground of *laesio enormis*. The High Court has not considered this error of law but has held that, the plaintiff did not prove the constituent elements required to establish *laesio enormis*.

In this appeal, learned Counsel for the plaintiff concedes the aforesaid error of law on the part of the District Court but draws attention to the fact that, the plaintiff has first pleaded the Cause of Action based on Trust and, thereafter, pleaded the Cause of Action based on *laesio enormis*, *in the alternative*. Learned Counsel for the plaintiff submits that, the Cause of Action based on Trust can be decided and the Cause of Action based on *laesio enormis* can be ignored. On the other hand, it has been submitted on behalf of the defendant that, the District Judge's error of law in granting both reliefs renders the entire judgment of the District Court *"per se void*" and *"illegal"*.

In this regard, I am of the view that, the determination by the District Court that the plaintiff had established a Trust can stand independent of the `contradictory' determination that the deed marked **"පැ 2"** should *also* be set aside on the ground of *laesio enormis*. The fact that, the plaintiff has pleaded the two Causes of Action *in the alternative* supports this conclusion. I do not think that, the error of law committed by the learned District Judge when she granted *both* reliefs, vitiates the judgment of the District Court *in toto*. Therefore, I cannot accept the defendant's submission that the District Judge's error of law in granting both reliefs renders the *entire* judgment of the District Court void. It would appear that, in this instance, the proverbial caution that 'one should not throw out the baby with the bath water', is apt.

Accordingly, I answer the third question of law as follows: The District Court erred when, after answering issue No. [6] in the affirmative and, thereby, concluding that, the land was subject to a Trust in the plaintiff's favour and the deed marked **"පැ 2"** was void, *also* proceeded to *set aside* the same deed on the ground of *laesio enormis*. However, this mistake on the part of the learned District Judge does not render the judgment of the District Court with regard to the issue of whether the plaintiff had established a Trust, *"per se void" or "illegal"* as contended on behalf of the defendant.

The **first two questions of law** remain to be now considered. They both ask the same question. That is, whether the learned High Court judges erred when they held that, the evidence placed before the Court did not establish the existence of a Trust in favour of the plaintiff.

As observed earlier, the plaintiff's First Cause of Action averred in the plaint
refers to *both* a claim that, a claim that the defendant holds the land in **Trust** for the plaintiff and a claim that there was an **Agreement to Reconvey**. Thereafter, when the plaintiff gave evidence, she suggested that, the deed marked **"පැ 2"** is a "Mortgage" ["උකස් ඔප්පුවක් "]. Learned President's Counsel for the defendant has submitted that, the plaintiff's position is that there was a Mortgage and that parol evidence cannot be led to prove that the deed marked **"පැ 2"** is a Mortgage. Thus, the pleadings and the issues and evidence require examination, to ascertain what exactly the plaintiff's First Cause of Action is.

Although, at first glance, there are the aforesaid contradictions and some confusion in the pleadings, issues and evidence, a closer look makes it clear that, the plaintiff's First Cause of Action is that a Constructive Trust exists in her favour. That is because, as set out above, paragraph [11] of the plaint, prayer ("ඊ") of the plaint and issue no. [6] make it evident that, the plaintiff has claimed the existence of a Constructive Trust arising from the type of circumstances contemplated in Section 83 of the Trust Ordinance and has prayed for an Order declaring that, any right, title or interest that the defendant may have in the land is subject to a Trust in favour of the plaintiff, with the plaintiff having the beneficial interest in the land. Further, I am not inclined to place too much weight on the fact that, in the course of her evidence, the plaintiff referred to a "Mortgage". The plaintiff cannot be expected to have knowledge of legal terminology. This Court must place more reliance on the pleadings and issues and also the effect of the entirety of evidence led by the plaintiff.

When that is done, it is evident that, the plaintiff's substantive claim is that a Trust exists in her favour and that, the subsequent claim to have the property transferred back to her, is consequential to the substantative claim that a Trust exists. In the same way, prayer (ඉ) for a declaration of Trust is the `main relief ' which has been prayed for upon the First Cause of Action and prayer (ඌ) for an Order to Retransfer, is a `consequential relief'.

The plaintiff would have been better served if the plaint had been drafted and the issues had been framed more precisely and with a better understanding of the applicable law. However, these defects should not prevent the plaintiff from having her true Cause of Action adjudicated, since the Court can see that a Cause of Action based on Trust has been made out in the plaint and placed in issue and the appropriate relief has been prayed for.

Next, in view of the submission made by learned President's Counsel for the defendant that, parol evidence cannot be led by the plaintiff, it is necessary to consider whether the plaintiff was entitled to lead parol evidence which seeks to vary the terms of the notarially attested deed marked **"එ 2".**

It may be mentioned here that, if the plaintiff's Cause of Action had been that, there was an **Agreement to Reconvey** [or a Mortgage, as submitted by learned President's Counsel], the plaintiff would not have been entitled to lead parol evidence. That is because, it is established law that, the plaintiff cannot lead parol evidence in an attempt to satisfy the Court that the outright transfer set out in the notarially attested deed marked **"එ 2"** should be treated as an Agreement to Reconvey or a Mortgage. This prohibition arises since Sections 91 and 92 of the Evidence Ordinance bar the reception of parol evidence which seeks to prove that a notarially attested deed of transfer should be treated as an Agreement to Reconvey [or as a Mortgage] unless the circumstances fall within one of the provisos to Section 92. In this connection, it is to be noted that, the plaintiff does not claim the existence of fraud, intimidation, illegality, want of capacity, want of due execution or any other grounds which would bring this case within one of the provisos to Section 92. Thus,

as Jameel J stated in GUNASEKERA vs. UYANGODAGE [1987 1 SLR 242 at p.245], *"…..sections 91 and 92 of the Evidence will not permit the receipt of evidence to vary the terms of a notarially executed deed which on the face of it (as in P1) is a simple straightforward transfer and more particularly will prevent parole evidence being led to superimpose on a simple transfer deed characteristics such as mortgages or agreements to retransfer - even when those agreements between those parties are contained in contemporaneous non-notarially executed documents."*. This same rule has been enunciated in several other decisions such as MOHAMADU vs. PATHUMAH [11 C.L.R. 48], SOMASUNDERAM CHETTY vs. TODD [13 NLR 361], PERERA vs. FERNANDO [17 NLR 486], ADAICAPPA CHETTY vs. CARUPPEN CHETTY [22 NLR 417], DON vs. DON [31 NLR 73], SOMASUNDERAM CHETTY vs. VANDER POOTEN [31 NLR 270], APPUHAMY vs. UKKU BANDA [41 CLW 43], SAVERIMUTTU vs. THANGAVELAUTHAM [55 NLR 529], SETUWA vs. UKKU [56 NLR 337] and FERNANDO vs. COORAY [59 NLR 169].

But, the position is *different* with regard to the plaintiff's First Cause of Action which is that, the defendant holds the land **in Trust** for the plaintiff. That is because, it is also a well-established rule that, parol evidence can be led to prove the existence of a **Trust** over a land which is the subject matter of what appears, on the face of it, to be a deed of transfer by which the land has been transferred. As Jameel J stated in the aforesaid case of GUNASEKERA vs. UYANGODAGE [at p.245], *"….. parole evidence is always available to prove a **trust** (vide the Privy Council decisions in Saminathan Chetty v. Vendor Poorten , Vallyammai Atchi v. Majeed and Saverimuttu v. Thangavelautham."*. [emphasis added].

His Lordship, Justice Jameel, was referring to the well known principle that, although Sections 91 and 92 of the Evidence Ordinance enact the general prohibition placed by English Common Law on the admission of parol evidence aimed at contradicting or varying the terms of a written agreement, an exception is made to the reception of parol evidence required to prove the existence of a Constructive Trust over property which, on the face of it, has been unconditionally transferred by a deed of transfer or other written instrument. In such a situation, the prohibition on parol evidence stipulated by Sections 91 and 92 of the Evidence Ordinance, does not apply.

This exception is made on the following twofold basis: Firstly, the Courts recognize that, the provisions of Chapter IX of the Trusts Ordinance which, *inter alia*, set out the circumstances in which a Constructive Trust arises, require that parol evidence be admitted to prove a Constructive Trust. A moment's thought will show that, if parol evidence which seeks to prove a Constructive Trust is barred, it will be impossible to prove that a Constructive Trust had arisen. Thus, unless a person who wishes to prove a Constructive Trust is permitted to lead parol evidence, the provisions of Chapter IX of the Trusts Ordinance will be rendered nugatory. Secondly, the Courts have been disposed towards treating the circumstances which give rise to a claim that a Constructive Trust has arisen, as falling within the ambit of one of the Provisos to Section 92 of the Evidence Ordinance.

Thus, in several decisions, it has been held that, parol evidence may be admitted to prove a **Constructive Trust**. In VALLIYAMMAI ATCHI vs. ABDUL MAJEED [48 NLR 289], the Privy Council held that, oral evidence may be admitted to prove the existence of a Constructive Trust. In MUTTAMMAHH vs. THIYAGARAJAH [62 NLR 559 at p.571], H.N.G.Fernando J, as he then was, stated, *"The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise but only to establish an 'attendant circumstances' from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of Section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in Section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on Section 92 of the Evidence Ordinance are to be accepted, then it will be found that not only Section 83, but also many of the other provisions in chapter IX of the Trusts Ordinance will be nugatory. If for example 'attendant circumstances' in Section 83 means only matters contained in an instrument of transfer of property, it is difficult to see how a conveyance of property can be held in Trust unless indeed its terms are such as to create an express Trust".* In DAYAWATHIE vs. GUNASEKERA [1991 1 SLR 115 p.118], it was held that, *"….. one has to bear in mind that the Trusts Ordinance is a later enactment, and it deals expressly with trusts. Naturally in any conflict of the provisions of the Evidence Ordinance with the provisions of the Trusts Ordinance the later must undoubtedly prevail."* Recently, in FERNANDO vs. FERNANDO [SC Appeal 175/2010 decided on 17.01.2017], Sisira De Abrew J explained [at p. 7] *"In order to prove the legal principle discussed in Section 83 of the Trust Ordinance, it is necessary to lead oral evidence between the vendor and the vendee at the time of the Deed of Transfer was executed. If evidence relating to attendant circumstances that the vendor did not intend to transfer the beneficial interest is shut out, then the purpose of Section 83 of the Trust 8 Ordinance will be rendered nugatory."* His Lordship went on to hold [at p.10] *"Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not operate as a bar to lead parol evidence to prove a constructive trust and to prove that the transferor did not intend to dispose of beneficial interest in the property."* Other cases where parol evidence has been admitted to prove a Constructive Trust, include CARTHELIS vs. PERERA [32 NLR 19], FERNANDO vs. THAMEL [47 NLR 297], PREMAWATHI vs. GNANAWATHI [1994 2 SLR 171], VAN LANGENBERG vs. ANTHONY [1990 1 SLR 190], THISA NONA vs. PREMADASA [1997 1 SLR 169], PIYASENA vs. DON VANSUE [1997 2 SLR 311], FERNANDO vs. FERNANDO [CA Appeal 373/2000F decided on 08th October 2008] and PERERA vs. FERNANDO [2011 BLR 263].

It may be mentioned here that, a third reason has been adduced in cases such as VALLIYAMMAI ATCHI vs. ABDUL MAJEED and MARIKAR vs. LEBBE [52 NLR 193], as being a ground to admit parol evidence to prove a Constructive Trust. That is, the effect of Section 5 (3) of the Trusts Ordinance which states that, the usual requirement of a notarially attested written instrument in order to create a valid *inter*

vivos express Trust over immovable property, does not apply in circumstances where insisting on that requirement, will result in effectuating a fraud. However, it seems to me that, Section 5 (3) applies to Express Trusts created under Chapter II of the Trusts Ordinance while, in contrast, there is no requirement of notarial attestation in the case of Constructive Trusts arising under Chapter IX of the Trusts Ordinance. That is because the requirements of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 apply only to the creation of legal interests over immovable property and, therefore, do not apply to the equitable interests created by a Constructive Trust arising in terms of Chapter IX of the Trusts Ordinance. Thus, in JONGA vs. NANDUWA [45 NLR 128 at p.132], Keuneman J stated *"I am of opinion that where a constructive trust can be held to exist under our law, then the operation of section 2 of the Ordinance of Frauds has no application"*. Similarly, in NARAYANAN CHETTY vs. JAMES FINLAY & CO [29 NLR 65 at p.69], Garvin J observed, *"….. the local Statute of Frauds - section 2 of Ordinance 7 of 1840 - is concerned with interests in land created by the acts of parties, and not with obligations in the nature of trusts raised by operation of law.'*. As Weeramantry explains [Law of Contracts at p.635-636], the Prevention of Frauds Ordinance *"…. deals only with legal and not with equitable interests. Consequently there is nothing in section 2 repugnant to the proof by parol evidence of the transfer of equitable interests in land arising out of a Trust created by operation of law."*

Next, it also should be considered whether the fact that the plaintiff had also claimed that there was an Agreement to Reconvey, cuts across or excludes her claim that there was a Trust. It has to be kept in mind that, the facts and circumstances which give rise to a claim that there was an Agreement to Reconvey and the facts and circumstances which give rise to a claim that there is a Constructive Trust, can often be similar. This could cause some difficulty in distinguishing which is which. As Keuneman J has observed [Notes on the Law of Trust at p.17], *"It is a fine but sharp line that divides cases where there is a mere Agreement to Reconvey and those where there is a Trust."* However, drawing the distinction is important since, as set out above, the success of a case may depend on which side of the line the facts fall. Thus, as set out above: if the facts point to an Agreement to Reconvey *per se* (or a Mortgage *per se*), the case will fail by operation of Section 2 of the Prevention of Frauds Ordinance and Sections 91 and 92 of the Evidence Ordinance; On the other hand, if the facts establish that there was a Constructive Trust under Chapter IX of the Trust Ordinance, neither Section 2 of the Prevention of Frauds Ordinance nor Sections 91 and 92 of the Evidence Ordinance will apply and the claim of a Constructive Trust will succeed provided it has been proved. Each case will have to be decided upon its own facts.

However, the requirement to make the aforesaid decision does not arise here since, in the present case, as stated earlier, the Plaintiff's substantive Cause of Action is that a **Trust** exists for the benefit of the plaintiff and the claim that there was an Agreement to Reconvey has been made only as a fact in support of or as an `attendant circumstance' which helps to prove the Cause of Action based on Trust. This is a situation similar to the one which arose in MUTTAMMAH vs.

THIYAGARAJAH where H.N.G.Fernando J, as he then was, observed [at p. 571], *"The plaintiffs ought to prove the oral promise to reconvey not in order to enforce that promise but only to establish an 'attendant circumstance' from which it could be inferred that the beneficial interest did not pass."*

Thus, the aforesaid examination establishes that, the Plaintiff's First Cause of Action is nothing other than a claim that, any rights which the defendant has over the land are subject to a Constructive Trust in favour of the plaintiff. Further, it is clear that the plaintiff was entitled to lead parol evidence in her efforts to establish the existence of a Constructive Trust.

To get back to the first two questions of law to be determined in this Appeal: when considering whether the plaintiff has led the required evidence to establish that, there was a Constructive Trust in her favour, one has to look to Chapter IX of the Trusts Ordinance which sets out the circumstances in which a Constructive Trust would arise. The statutory provision in that Chapter which is relevant to the circumstances of this case is, as mentioned earlier, Section 83.

Section 83 states:

"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."

In THISA NONA vs. PREMADASA, Wigneswaran J observed [at p.172], *"What this Court has to decide is whether the 1st defendant appellant `intended to dispose of the beneficial interests in the property' or not."*. It has to be added that, in terms of the words used in Section 83, this decision must be based on the only inference which can be reasonably drawn from the attendant circumstances. Therefore, the more complete question to be asked when determining whether a Constructive Trust exists under Section 83 would be: whether the only inference that can be reasonably drawn from the attendant circumstances is that, the owner of the property did not intend to part with his beneficial interest in the property.

The words `attendant circumstances' can be broadly described as meaning the facts surrounding the transaction. In Black's Law Dictionary (9th Edition) the words `attendant circumstance', as used in the American Law, have been defined as *"A fact that is situationally relevant to a particular event or occurrence."* In MUTTAMMAH vs. THIYAGARAJAH [at p.564], Basnayake CJ, describing the words `attendant circumstances', stated, "*Attendant Circumstances are to my mind circumstances which precede or follow the transfer but are not too far removed in point of time to be regarded as attendant which expression in this context may be understood as "accompanying" or "connected with". Whether a circumstance is attendant or not would depend on the facts of each case."*

It is clear that, the use of the words *"it cannot reasonably be inferred consistently with the attendant circumstances"* in Section 83, impose a requirement on the Court to satisfy itself that, the attendant circumstances clearly point to the conclusion that the owner did not intend to dispose of his beneficial interest. If the attendant circumstances unequivocally point to that conclusion, a Constructive Trust would have arisen. However, if the attendant circumstances fail to unequivocally establish that the owner did not intend to dispose of his beneficial interest or, in other words, there is a doubt as to the conclusion which can be drawn from the attendant circumstances, a Court should, usually, reject the claim that, a Constructive Trust exists.

Further, the use of the aforesaid words in Section 83 require that, the Court applies an *objective test* when determining the intention of the owner from the attendant circumstances. Therefore, if the claim of a Constructive Trust is to succeed, the attendant circumstances must make it plainly clear to the `reasonable man' that, the owner did not intend to part with his beneficial interest in the property. A secret or hidden intention to retain the beneficial interest will not do. The attendant circumstances must be such that they would have demonstrated to the transferee that the owner intended to retain the beneficial interest in the property. The transferee is judged here as standing in the shoes of the `reasonable man'. If a `reasonable man' must have known from the `attendant circumstances' that the owner intended to retain his beneficial interest in the property, the transferee is deemed to hold the property upon a Constructive Trust in favour of the owner. However, if a 'reasonable man' may not have drawn such an inference from the attendant circumstances, the transferee holds the property absolutely, since no Constructive Trust can be deemed to have arisen.

Further, the burden of proof lies firmly on the person who claims a Constructive Trust to prove it. In this case, that is the plaintiff.

Thus, if the plaintiff is to succeed in this appeal, she should have furnished evidence which satisfies the Court that, it cannot be reasonably inferred from the attendant circumstances that she intended to part with her beneficial interest in the land.

As stated earlier, the Court has to apply an objective test when determining this question. Accordingly, the Court has to place more reliance on facts that can be ascertained from the evidence rather than unsubstantiated claims made from the witness box. The Court has to keep in mind that, a notarially attested deed of transfer should not be lightly declared to be a nullity. The Court must also guard against allowing a false or belated claim of `Trust' made by a transferor who has transferred his property and then had second thoughts or seeks to profit from changed circumstances. Dalton J's observations made close to 90 years ago in MOHAMADU vs. PATHUMMAH [at p.49] " *It is becoming not uncommon by the mere allegation of a trust to seek to evade the very salutary provisions of (Evidence) Ordinance to which I have referred.*", continues to remain a salutary caution.

The plaintiff started her case by testifying. However, when she did so, plaintiff did not claim that she had any discussions with the defendant with regard to the plaintiff retaining the beneficial interest in the land or with regard to a Trust or an Agreement to Reconvey. In fact, the plaintiff stated *"වචනයක් හරි හුවමාරු වුණේ නැහැ"*. The plaintiff did not stop at that, she went on to give the following evidence which appears to cut across her case:

Q: *"වචනයක් හෝ කතා කරගත්තාද විත්තිකාරිය ආපසු දෙනවද කියලා?",*
A: "නැහැ"

and

Q: *"තමා සහ විත්තිකාරිය අතර විශ්වාසයක් තිබ්බාද?",*
A: "එහෙම එකක් තිබුණේ නැහැ"

Further, the deed marked **"පැ 2"** is, plainly, an unconditional deed of transfer. It is in Sinhala and the plaintiff, who had studied up to Grade 11, could have easily read the deed and understood its nature. In fact, the plaintiff specifically stated that, she read the deed and that the Notary Public explained the nature of the deed to her before the plaintiff executed it. *''ඔප්පුව ලිව්වාට පසුව කියවා තේරුම් කර දුන්නා ඊට පසුව අත්සන් කළා ".* In these circumstances, the plaintiff cannot claim that she did not fully understand that she was unconditionally transferring the land to the defendant when she signed the deed marked **"පැ 2".**

Next, when the 'attendant circumstances' are examined, it is glaringly obvious that, the plaintiff has been unable to produce any documentary evidence such as an informal written agreement or a promissory note or an exchange of letters which substantiate her claim that, a loan was obtained from the defendant against the `Security' of the land or that there was an Agreement to Reconvey. The many decisions of the Courts which have dealt with transactions of the nature claimed by the plaintiff reveal that, when such a transaction occurs, the parties often enter into an informal written agreement which reflects the agreement of a loan granted against the security of the land or which set out a promise by the lender to convey the land back to the borrower upon payment of the loan. Often, there is a promissory note or other writing signed by the borrower promising to repay the loan. Payments of loan installments or interest are usually proved by receipts issued by the lender or are sometimes proved by cheques issued by the borrower. Letters are written by the parties referring to the loan and the lender's agreement to re-transfer the land when the loan is repaid. The plaintiff was unable to produce any such document.

Further, it has to be noted that, the witnesses who testified in support of the plaintiff's case with regard to the transaction, were the plaintiff, her father, her father-in-law and her husband. They were all persons who would have, naturally, desired the plaintiff to succeed. They cannot be regard as disinterested or independent witnesses. The plaintiff was unable to lead the evidence of any non-related witness who could support her claim that a loan had been obtained from the defendant

against the `Security' of the deed marked **"පැ 2"** or that, the plaintiff did not intend to dispose of her beneficial interest in the land.

As the learned District Judge observed, the plaintiff also failed to lead the evidence of the person named Nagahalanda who is said to have given the earlier loan (which had to be repaid) to the plaintiff's father-in-law. Further, the plaintiff failed to lead the evidence of the Notary Public who had attested the deed marked **"පැ 2"** or the evidence of the other witness to this deed, both of whom could have given independent and disinterested testimony with regard to any discussions had at the time the deed was executed.

There were also conflicting claims with regard to the person who needed the alleged loan that had to be repaid. In the plaint, the plaintiff avers that she needed the money. When she gave evidence, the plaintiff claimed that her father-in-law needed the money. When the father-in-law gave evidence, he claimed that the plaintiff and her husband took the alleged loan. Next, in the plaint, the plaintiff stated that she paid interest to the defendant and that she tried to repay the loan but, in evidence, it was claimed that her father-in-law paid interest to the defendant and that her father tried to repay the loan.

The circumstances and the conflicting evidence I have enumerated in the preceding paragraphs, cast substantial doubt on the truth of the plaintiff's claim of a Trust.

Next, in the aforesaid case of FERNANDO vs. FERNANDO, Salam J identified some of the other factors which would, usually, be relevant when determining whether a Constructive Trust has arisen. His Lordship, Justice Salam, citing the earlier decision of EHIYA LEBBE vs. MAJEED [48 NLR 357] stated [at p.6], *"….. the continued possession of the transferor after the conveyance, or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the deed is utterly inadequate to what would be the fair purchase money for the property conveyed are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else."*.

With regard to the possession of the land, the plaintiff and her father claimed that the land was unfenced and that the plaintiff's father possessed the land which had a few coconut trees and cashew nut trees. The plaintiff's father-in-law contradicted this position and stated that, he was in possession of the land and that he had planted it with manioc. On the other hand, the defendant claimed that she had been in possession of the land which was fenced but that, the plaintiff's family had damaged the fences and prevented her from entering the land and filed this action. What remains undisputed is that this is a bare land. If the plaintiff had wished to prove that her father continued to possess the land after the deed marked **"පැ 2"** was executed, she could have summoned the Grama Seva Niladhari or a neighbor who could have given independent and disinterested evidence with regard to who had possession of the land. The plaintiff could have produced documentary evidence that her father continued to pay Rates and Taxes relating to the land. However, the plaintiff has not

done any of this, even though the burden of proof in this case rested on her. In these circumstances, it is not possible to come to any reliable conclusion that the plaintiff's father remained in possession of the land after the deed marked **"පැ 2"** was executed.

With regard to the value of the land, the deed of gift marked **"පැ 1"** by which the plaintiff's father gifted the land to the plaintiff and which was executed on 23rd October 1996, has valued the land at Rs.50,000/-. The impugned deed of transfer marked **"පැ 2"** has been executed four months later, on 20th February 1997, and the sale price stated therein is Rs.100,000/-. Thus, the sale price stated in the impugned deed of transfer marked **"පැ 2"** is not obviously disparate with the value of the land stated in the earlier deed of gift marked **"පැ 1"**. The land is a 20 perch bare land to which access is from a road that is only five feet wide. There are only a few trees on the land and the evidence establishes that no crops of any particular value were obtained from the land. In fact, the plaintiff stated *"භුක්ති විඳින්න තරම් දේපලක් තිබුණේ නැහැ"* . It should also be mentioned that, little weight can be placed on the valuation set out in the report marked **"පැ 3"** which was obtained by the plaintiff in 1998, over a year after the case was filed. The author of the report did not possess any professional qualification in the field of valuation. He did not produce any documentary evidence to demonstrate that he had a professional practice as a Valuer. He admitted that he had not ascertained the value of other properties which were near the land. In addition, as mentioned earlier, three *different* values were ascribed to the land - *ie:* in the plaint, when the plaintiff testified and in the valuation report. Thus, there is no reliable evidence to establish that, the sale price stated in the deed of transfer marked **"පැ 2"** was much less than the real value of the land at the time **"පැ 2"** was executed.

With regard to the payment of consideration, the attestation to the deed of transfer marked **"පැ 2"** states that, the entire consideration of Rs.100,000/- was paid in the presence of the Notary Public. When the defendant gave evidence, she did say that she had paid a further Rs.100,000/-. However, that could have been payment of a further amount in addition to the amount stated on the deed since, regrettably, the undervaluing of deeds in order to evade payment of Stamp Duties is not unknown. I do not think the above evidence helps the plaintiff in her claim that there was Trust.

In FERNANDO vs. FERNANDO, His Lordship, Justice Salam also cited the earlier decision of CARTHELIS vs. RANASINGHE [2002 2 SLR 359] and stated [at p.8], *"The failure on the part of the defendants to produce the title deeds also should have been considered as favourable circumstances to infer the existence of a constructive trust …."*. However, in the present case, the question of whether or not the defendant had the title deeds, was not raised in the course of the trial or in the High Court and, therefore, cannot be considered at this stage.

Further, the defendant's evidence indicates that she knew of the land she was to purchase by the deed of transfer marked **"පැ 2"** and that the plaintiff had title to the land. There is no reliable evidence with regard to who paid the Stamp Duty.

For the reasons set out above, it is clear that, the plaintiff has failed to prove that the defendant held the land subject to a Constructive Trust in the plaintiff's favour. Therefore, the first two questions of law are answered in the negative.

It should be mentioned here that, a perusal of the many decisions which have examined whether a Constructive Trust has arisen will demonstrate that there are many types of `attendant circumstances' which could arise for consideration when a Court determines whether a Constructive Trust has arisen. In this judgment, I have only referred to the `attendant circumstances' which arose for consideration in the present case. Other cases will give rise to other `attendant circumstances' which may have to be considered in terms of Section 83 of the Trusts Ordinance.

This appeal has to be dismissed. In the circumstances of the case, each party will bear their own costs.

Judge of the Supreme Court

B.P.Aluwihare PC J

Judge of the Supreme Court

Upaly Abeyrathne J

Judge of the Supreme Court

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

S.C (FR) No. 04/2016

In the matter of an Application under Article 17 read with Article 126 of the Constitution

1. Environmental Foundation (Guarantee) Limited
No. 146/34, Havelock Road,
Colombo 5.

2. Wildlife and Nature Protection Society of Sri Lanka
No. 86, Rajamalwatte Road,
Battaramulla.

3. L. J. Mendis Wickramasinghe
31/5, Alwis Town, Hendala,
Wattala.

PETITIONERS

Vs.

1. A. Sathurusinghe
Conservator General of Forests
Department of Forest,
No. 82, Rajamalwatte,
Battaramulla.

2. Central Environmental Authority
"Parisara Piyasa"
Rajamalwatte,
Battaramulla.

3. K. P. Welikannage
Director-Central Environmental Authority
Sabaragamuwa Provincial Office,
No. 27, Vidyala Mawatha,
Kegalle.

4. G. D. L. Udaya Kumari
Divisional Secretary
Divisional Secretariat
Kalawana.

5. Hon. Minister of Mahaweli Development and Environment
Ministry of Mahaweli Development and Environment
No. 55, T. B. Jaya Mawatha,
Colombo 10.

6. Ceylon Electricity Board
Sir Chiththampalam A. Gardiner Mawatha,
P.O. Box 50,
Colombo 02.

7. Director General
Department of Irrigation
P. O. Box 1138,
230, Baudhaloka Mawatha,
Colombon7.

8. Commissioner General
Land Commissioner General's Department
"Mihikatha Madura"
Land Secretariat,
12006, Rajamalwatta Road,
Battaramulla.

9. Public Utilities Commission of Sri Lanka
6th Floor, B.O.C. Merchant Tower
St. Michael's Road,
Colombo 3.

10. Waste Management Water Power (Pvt)
No. 115, Pirivena Road,
Boralesgamuwa.

11. Dhammika Wijesinghe
Secretary General
Sri Lanka National Commission for UNESCO
Ministry of Education
5th Floor, "Isurupaya",
Battaramulla.

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

RESPONDENTS

BEFORE: Priyasath Dep P.C., C.J.
S.E. Wanasundera P.C., J. &
Anil Gooneratne J.

COUNSEL: Uditha Egalahewa P.C. with Vishva Vimukthi and
N.K. Ashokbharan for the Petitioners

Manohara de Sivla P.C. for the 10th Respondent

Viraj Dayaratne Senior D.S.G for the
2nd, 3rd, 6th, 9th & 12th Respondents

ARGUED ON: 09.02.2017

DECIDED ON: 29.05.2017

GOONERATNE J.

This is a Fundamental Rights Application filed by the Environmental Foundation (Guarantee) Limited and two other parties on 08.01.2015, mainly alleging that Petitioners' rights guaranteed under Articles 12(1) and or 14(1)(g) have been infringed by the Respondents. Petitioners claim several reliefs in their petition and allege that the contracts entered and or permission granted and or certificates issued by the 1st to 10th Respondents in pursuance of the development/implementation of a Mini Hydro Project described in P9, P10, P10(a), P12, P13, P14, P15 and P18 are illegal/null and void and of no force in law.

When this matter was taken up for support for leave to proceed and for interim relief on 03.02.2016, the 10th Respondent raised three preliminary objections regarding the maintainability of the application based on the following grounds.

(a) The affidavits of the Petitioners have been attested by the Attorney-at-Law appearing on behalf of the Petitioners in contravention of the proviso to Section 12(2) of the Oaths and Affirmation Ordinance.
(b) Petitioners' application is time barred.
(c) Petitioners have failed to name the 5th, 7th and 8th Respondents in person and it contravenes Rule 44(1) (b) of the Supreme Court Rules.

The other Respondents to this application also associated themselves with the above objections of the 10th Respondent and supported the objections so raised. All parties made oral and documentary submissions before this court, concerning the said objections.

In the submissions made on behalf of the Petitioners it is admitted that the affidavit tendered along with the petition of the Petitioners had been inadvertently attested by the same attorney on record for the Petitioner at the time of filing this application. It is one Ms. Danushka Ranasinghe Attorney at Law, the Attorney on record or the registered Attorney as appearing in the proxy of 08.01.2016. Subsequently the Attorney on record for the Petitioner was changed by revocation of proxy on or about 26.01.2016 and new proxy of Petitioners was filed by one Ms. Gayani Hewawasam, Attorney at Law. Petitioner argue that the defect in the procedure has been cured. Is it a curable defect?

I do agree that the defect in the procedure had been cured by the Petitioners, before the application was to be supported. New proxy had been filed on or about 26th January as submitted on behalf of the Petitioner. As such a mistake could be cured, as opposed to negligence. In this regard I have considered the case of *Ajith A.J. Silva Vs. Y.M. Aleckman* S.C. Application 46/5 decided on 05.07.2013 Judgement of *Thilakawardena J.* and the case of

Senanayake Vs. Commissioner of National Housing and Others 2005 (1) SLR 182 "court should not non-suit a party where non-compliance with the rules takes place due to no fault of the party". The mere mistake has been cured as such the Petitioner should not be made to suffer.

In the above circumstances I do not think the objection raised as above (a) could be maintained and no prejudice would be caused to any other party when a defect had been rectified.

The other objection raised in this application concerns time bar. I note that the petition in this application was filed on 08.01.2016, and the prayer to the petition would mainly concern the relief prayed for in subparagraphs (c), (d) and (e) of the prayer. By the said prayers, petitioner seeks the quashing of documents P9, P10, P10(c), P12, P13, P14, P15 and P18.

P9 is the Environmental Licence issued by the 2nd Respondent Authority to the 10th Respondent on 06.02.2012. I do agree that there is a lapse of about 3 years. If it was a delay of a few months Petitioners' explanation would be justified.

P10 is the annual State land permit issued to the 10th Respondent on 05.11.2014. Issued 1 year prior to filing of the present application. P12 is the no objection letter issued to the 10th Respondent by the 1st Respondent, on 08.08.2012. Issued 3 ½ year prior to filing the present application. P13 is a letter

issued by the Land Commissioner in January 2014 to Divisional Secretary to provide State land to the 10th Respondent. Issued 2 years prior to filing the present application. P14 is an approval granted to the 10th Respondent by the Irrigation Department, on 05.10.2010 (delay of 6 years) P15 is the Electricity Generation Licence issued to 10th Respondent by the 9th Respondent (6 months delay). P18 is the standard power purchase agreement entered into between 6th Respondent and 10th Respondent on 30.06.2014 (1 ½ years delay).

There is an explanation by the Petitioner to meet the position of delay by the Petitioner in the application filed in this court as in paragraphs 9, 10 and 11 of the petition. Whatever it may be I am not inclined to accept such an explanation when one peruse the entirety of the petition. Inordinate delays could be identified and the 10th Respondent has correctly considered same in his written submissions. As such I take the view that the Petitioners are not entitled to time extension as in the case of *Gamethige Vs. Siriwardena 1988 (1) SLR 384*. Petitioners being involved in environmental issues has to be vigilant as it is the primary concern of the Petitioners. If any damage is caused due to the project itself those matters may be urged but quashing of the above documents would not be justified in law, with delays demonstrated above.

The time limit in Article 126(2) of the Constitution should be strictly interpreted. The project may be on the border line of the Singharajah Forest or

its boundary. A party should be more careful and vigilant and this being public interest litigation, explain the importance to file this application within time as required by law. Further this court need also to pronounce on infringements of those who are named in the petition. However in view of the fact that this application has been filed out of time I do not wish to deal with the objection on contravention of Rule 44 (1) (b) of the Supreme Court Rules. I uphold the preliminary objection on time bar, and proceed to dismiss this application without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., C.J.

I agree

Chief Justice

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

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of a Fundamental Rights application under and in terms of Article 126 reads with Article 17 of the constitution in respect of the violation of the Fundamental Rights of the Petitioners guaranteed under Article 12 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Mallawa Weerage Chaminda Sri Lal Wijesekara,
   No. 17, Noel Senevirathna Mawatha,
   Kurunegala.

2. Mallawa Weerage Tharushi Chathurya Wijesekara,
   No. 17, Noel Senevirathna Mawatha,
   Kurunegala.

Petitioners

SC /FR/ Application No 05/2017

Vs,

1. Mrs. Soma Rathnayake,
   Principal,
   Maliyadeva Balika Vidyalaya, Kurunegala.

2. Director of National Schools,
   Ministry of Education,
   Isurupaya, Baththaramulla.

3. Secretary,
   Ministry of Education,
   Isurupaya, Baththaramulla.

4. K. Narasinghe, Member,
   (Interview Board to admit students to Grade 01)
   Maliyadeva Balika Vidyalaya, Kurunegala.

5. B.H.C.M. Abeysinghe, Member,
   (Interview Board to admit students to Grade 01)
   Maliyadeva Balika Vidyalaya, Kurunegala.

6. P.H.N. Karunasiri, Member,
   (Interview Board to admit students to Grade 01)
   Maliyadeva Balika Vidyalaya, Kurunegala.

7. S.M.P.B. Siriwardhana, Member,
   (Interview Board to admit students to Grade 01)
   Maliyadeva Balika Vidyalaya, Kurunegala.

8. D.M.B. Dissanayake, Chairman,
   (Appeal Board to Admit Students to Grade 01)
   Maliyadeva Balika Vidyalaya, Kurunegala.

9. S.A.N. de. Silva, member,
   (Appeal Board to Admit Students to Grade 01)
   Maliyadeva Balika Vidyalaya, Kurunegala.

10. Ms. E.M.P. Senehelatha, Member,
    (Appeal Board to Admit Students to Grade 01)
    Maliyadeva Balika Vidyalaya, Kurunegala.

11. Ms. U.N. Biso Menike, Member,
    (Appeal Board to Admit Students to Grade 01)
    Maliyadeva Balika Vidyalaya, Kurunegala.

12. C.D. Kahandawaarachchi, Member,
    (Appeal Board to Admit Students to Grade 01)
    Maliyadeva Balika Vidyalaya, Kurunegala.

13. W. Ananda Weerasinghe, Member,
    (Appeal Board to Admit Students to Grade 01)
    Maliyadeva Balika Vidyalaya, Kurunegala.

14. Hon. Attorney General,
    Department of Attorney General,
    Colombo 12.

Respondents

Before: **S.E. Wanasundera PC J**

B.P. Aluwihare PC J

Vijith K. Malalgoda PC J

Counsel: Dr. S.F.A. Cooray with Buddhika Gamage for the Petitioners

Suren Gnanaraj State Counsel for the Respondents

Argued on: 26.07.2017

Judgment on: 31.10.2017

Vijith K. Malalgoda PC J

Out of the two Petitioners before this court, the 2nd Petitioner is a minor aged five years and the first Petitioner is the father of the 2nd Petitioner.

The 1st Petitioner as the father, applied for admission of the 2nd Petitioner to grade one of Maliyadewa Balika Vidyalaya Kurunegala under the category, children of residents in close proximity to the school as laid down in clause 6.1 of the circular No. 17/2016 dated 16th May 2016, which governed the school admission to grade one, for the year 2017.

Clause 6 (a) of the said circular had identified seven categories under which children were admitted to government schools, and the criteria for selection and the marking scheme in respect of each category are laid down in the said circular issued by the 3rd Respondent. It is not disputed that the application submitted to Maliyadeva Balika Vidyalaya by the 1st Petitioner was under the category of children of the parents of close proximity which is identified under clause 6 a (i) of the circular.

Under clause 6.1, 50% of the total numbers of vacancies are allocated to the children who come under the said category. How such parents should establish their residence and how the marks should be allocated based on the documents produced by the Applicant is identified under the said clause.

As observed by this Court maximum of 35 marks are allocated for establishing the residence by the Electoral Registers during the last five years. If the names of the both parents were included in the electoral register for 5 years, the applicant is eligible to obtain the maximum 35 marks under that category. Maximum of 50 marks are allocated to the distance and maximum of 10 marks are given to the nature of the ownership to the property and the balance 5 marks given for the additional documents submitted in proof of the residence under the said circular.

Out of the 50 marks allocated to the proximity, 5 marks are deducted to each school that come within the distance between the Applicant's house and the school applied for, which has a primary section where the applicant can gain admission.

As revealed before us the Petitioner had applied for admission of the 2nd Petitioner to grade one of Maliyadewa Balika Vidyalaya under the aforesaid category and in support of his application, submitted several documents including, Title Deeds and extracts of Electoral Registers. At the time the Petitioner submitted the application, his permanent residence was at No. 17, Noel Senevirathne Mawatha, Kurunegala.

When the Petitioner attended the interview he was issued with a document where he has to enter marks according to the circular and according to the Petitioner, he could obtain 97.5 marks under the said category. Petitioner when faced the interview, had entered 97.5 marks in the relevant column. However the interview board had given only 71.2 marks to the Petitioner at the interview

and the said marks were entered in the third column of the document given to the Petitioner. When the final selection list was displayed, the 1st Petitioner was made to understand that, the cut of mark for the proximity category was 84 marks and therefore the application by the 2nd Petitioner was rejected. Being dissatisfied with the said decision, the 1st Petitioner had submitted an appeal under the provisions of the said circular and faced an appeal hearing, but the decision of the Selection Board was not changed by the Appeal Board.

The present application is against the decisions of both the Selection Board and the Appeal Board, where the Petitioner complains that the Fundermental Rights guaranteed under Article 12 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka had been infringed by the decisions referred to above.

As observed by me, the Petitioners' complaint before this court was mainly based on the allocation of marks under the category of establishing residence through Electoral Register, where the Petitioner is entitled to obtain 35 marks to gain admission.

In this regard the Petitioners had placed the following material before this court;

a) That the Petitioners resided at No. 79, Negombo Road, Kurunegala from 2008 to 2013 under a lease agreement attested by Buddhadeva Gunarathne Notary Public. In support of the said lease, the Petitioners have submitted before the interview panel,

    i. Lease agreement for the said period
    ii. Copy of the National Identity Card
    iii. The Electoral Registers
    iv. Bank statements

b) That the distance from the said premises to Maliyadeva Balika Vidyalaya was 711.9 meters

c) That the Petitioners had shifted to their present residence at No.17, Noel Senevirathne Mawatha, in September 2013, when the 1st Petitioner purchased the said premises on 20th September 2013 by Transfer deed No520 attested by Buddhadeva Gunarathne Notary Public.

d) That the distance from the new premises to Maliyadeva Balika Vidyalaya was 257.7 meters.

e) That both the residences referred to above; i.e. No 79, Negombo Road and No 17, Noel Senevirathne Mawatha comes under the same Polling Division (Kurunegala –'O') and Grama Niladhari Division (No. 839).

In the said circumstances the Petitioners have submitted that allocation of only 14 marks out of 35 marks under the said category was arbitrary, unreasonable, illegal and the said refusal to grant full marks under the said category when the 1st Petitioner had lived over 7 years in the same Grama Niladhari Division was discriminatory and in violation of the equal protection of the law guaranteed under Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

When considering the above material placed before this court it appears that the case before us requires careful analysis of the provisions of circular 17/2016, issued by the Secretary, Ministry of Education with regard to the school admissions for Grade 01, in the year 2017. As revealed above, the Petitioners have shifted their place of residence in the year 2013 but, continued to stay within the same Grama Niladhari Division and the Polling Division. When the 1st Petitioner submitted the application to Maliyadeva Balika Vidyalaya in the year 2016 for admission of the 2nd Petitioner for

the year 2017, the Petitioner's family had stayed only two years in the new address at No.17, Noel Senevirathne Mawatha.

As observed by this court, when an applicant had relied on his Residence in more than one place for the purpose of school admission, how the marks should be allocated in such a situation is also identified under the same circular.

The 1st Respondent who is the principal of Maliyadeva Balika Vidyalaya, whilst denying the fact that the decision to grant 14 marks, both by the Interview Panel and the Appeal Board was made arbitrary, illegally and unreasonably, had placed the following material before this court;

a) In terms of clause 6.0 (g) of the circular 17/2016 an applicant is required to submit documents in proof of residence, only with regard to the residence at which he resides at the time the application is submitted.
b) According to clause 6.1 (1) (c) of the said circular, marks should only be awarded in relation to documents submitted in connection with the place of residence at the time of submitting the application.
c) However the following exception is provided to the above rule by the said clause,

> "Where an applicant has been a resident at another address within the same area during the five years period prior to the date of application, his application can be considered for granting marks, provided that the amount of marks that would be deducted for other schools (under clause 6.iii (a)) in close proximity to such residence would be the same in respect of both addresses."

d) When the two addresses provided by the Petitioner is considered under the above provision it is revealed that,

i. The address at No 79, Negombo Road, Kurunegala, (previous address for the period 2011, 2012 and 2013) there are two schools within close proximity, for which 10 marks are deductible from the total of 50 marks

The two schools are Holy Family Balika Maha Vidyalaya and Wayamba Royal College

ii. The current address at No.17, Noel Senevirathne Mawatha, (for the period 2014 and 2015) no marks would be deductible since no other schools were in close proximity.

e) In the said circumstances the Petitioners are not entitled to be considered under the provisions of clause 6.1 (1)(c) of the said circular, since the amount of marks deductible for the two addresses are different to each other.

f) Therefore both, the interview panel and the Appeal Board were prevented from allocating any marks for the years 2011, 2012 and 2013. The only marks that could be allocated to the Petitioners were, for the years 2014 and 2015 and 14 marks were allocated to the Petitioner by adhearing to the above provisions of the circular.

When considering the above material placed before this court by the 1st Respondent, it is observed that, under the provisions in clause 6.0 (g) read with clause 6.1 (1) (c), the documents can only be produced with regard to the residence at which the Applicant resides at the time the applications are submitted and the only exception to the above rule is the proviso to clause 6.1 (1) (c) which was referred to above.

Under the provisions of the said proviso, amount of marks that would be deducted for other schools in both addresses should be the same and when the deductible marks defer from each

other, the powers of the interview panel is limited to grant marks only to the address where the Applicant resides at the time the applications are submitted.

As revealed during the arguments before us, no marks were to be reduced with regard to the address where the Petitioner resides at the time the applications were submitted, but 10 marks were to be reduced for the earlier address namely No. 79, Negombo Road, Kurunegala. In the said circumstances the Petitioner was only entitled to obtain marks for the address where he resides at the time he submitted the application.

The Petitioner could only prove residence at the new address i.e. No. 17, Noel Senevirathne Mawatha, for two years only and in the said circumstances, he could only obtain 14 marks under the said category.

The interview panel as well as the Appeal Board had given only 14 marks under the said category, and the said decision of the interview panel and the Appeal Board were based on the provisions of the circular 17/2016 dated 16th May 2016 which governed the school admissions to grade one for the year 2017.

A perusal of the material facts and a careful consideration of the said facts and the submissions, clearly indicate that the Interview Panel and the Appeal Board had strictly adhered to the provisions laid down in the circular pertaining to the admissions of children to Grade one for the year 2017 issued by the 3rd Respondent. The provisions in clause 6.1 (1) (c) is quite clear and there are no complexities on its application. Also one cannot find fault with the interpretation given by the said Panels in the allocation of marks under clause 6.1 (1) (c).

When considering the material discussed above there is no doubt that the authorities have allocated the relevant marks to the Petitioner in terms of the circular issued by the 3rd Respondent.

The Petitioner had alleged the violation of Fundermental Rights guaranteed in terms of Article 12 (1) of the Constitution by failure to admit the 2nd Petitioner to Maliyadeva Balika Vidyalaya. Article 12 (1) of the Constitution deals with the right to equality and equal protection of Law. The guarantee of equality ensures that among equals the law should be equal and should be applied equally.

Even though the Petitioners have alleged that they are entitled to get 35 marks for establishing the residence by the electoral registers for the past 5 years, it was very clear as to how the marks were allocated to the Petitioner under clause 6.1 (1) (c) of the circular. It is to be noted that the Petitioner did not show that he was singled out for such discrimination as alleged by the Petitioner.

If a person complains of unequal treatment, the burden is on that person to place before this court, material that is sufficient to infer that unequal treatment had been meted out to him.

In the case of ***Ashutosh Gupta V. State of Rajasthan (2002) 4SCC 41*** the Indian Supreme Court, discussed this position as follows;

> "There is always a presumption in favour of the constitutionality enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitutional principles. The presumption of constitutionality stems from the wide power of classification, which the legislature must, of necessity possess in making laws operating differently as regards different groups of persons in order to give effect to policies. It must be presumed that the legislature understands and correctly appreciates the need of its own people."

The Petitioner therefore must show that there were others who were situated similarly as the Petitioners, but were treated differently. The Petitioners failed to satisfy the above before this court.

For the reasons stated above I hold that the Petitioners have failed to establish that their Fundermental Rights guaranteed under Article 12 (1) of the Constitution had been violated by the Respondents. This application is accordingly dismissed. I make no order with regard to costs.

Judge of the Supreme Court

S.E. 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 Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Anjali Thivaak Pushparajah Rohan
2. Rohan Rahul Ayushman
   Both of No 161/11,
   Galle Road, Bambalapitiya,
   Colombo 04.

Petitioners

SC /FR/ Application No 06/2017

Vs,

1. Akila Viraj Kariyawasam (M.P)
   Hon. Minister of Education,
   Ministry of Education,
   "Isurupaya" Battaramulla.

2. Sunil Hettiarachchi,
   Secretary- Ministry of Education,
   "Isurupaya" Battaramulla.

3. B.A. Abeyrathna,
   Principal- Royal Collage,
   Colombo 07.

4. L.W.K. Silva
5. R.M.I.P. Karunaratna
6. L.K. Jayathilaka
7. A.G.P.A. Gunawansa
8. T. Tennakoon
   4th to 08th above all
   Members of the Interview Board
   (Admissions to Year 01)
   Royal Collage,
   Colombo 07.

9. A.G.N. Jayaweera
10. G.V. Jayasooriya
11. M. Ratnayake
12. M.H. Sunny
13. U.Malalasekara
14. Inoka Gunn

    09th to 14th above all
    Members of the Appeal Board
    (Admissions to Year 01)
    Royal Collage,
    Colombo 07.

15. P.N. Illepperuma
    Director- National Schools,
    "Isurupaya" Battaramulla.

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

Respondents

Before: S.E Wanasundera PC J
Nalin Perera J
Vijith K. Malalgoda PC J

Counsel: Ian Fernando with Dusantha Kularatne Instructed by Ms. Sumudu Ratnayake for the Petitioners

Dr. Avanthi Perera, SSC for the 1st, 2nd, 3rd 15th and 16th Respondents

Sanjeewa Jayawardena, PC for the 7th Respondent

Asthika Devendra for the 13th Respondent

Argued on: 27.10.2017

Judgment on: 30.11.2017

Vijith K. Malalgoda PC J

The two Petitioners namely, Anjali Thivaak Pushparajah Rohan and Rohan Rahul Ayushman had complained before this court, that their Fundamental Rights guaranteed under Article 12-1 of the Constitution had been infringed by not admitting the 2nd Petitioner to the grade one at Royal College, Colombo 7, for the year 2017

As submitted by the Petitioners, the 1st Petitioner tendered an application under Residency / Close Proximity category as per the circular No 17/2016 which governed the school admissions to grade one for the year 2017, to all government schools, issued by the second Respondent.

Clause 6 (a) of the said circular had identified seven categories under which children were admitted to government schools and the criteria for selection and the marking scheme in respect of each categories are laid down in the said circular. It is not disputed that the application submitted to Royal College, Colombo 7, by the 1st Petitioner was under the category of Residency/Close Proximity which identified under clause 6 (a) (I) of the said circular.

Under clause 6.1, 50% of the total number of vacancies were allocated to the children comes under the said category and how such parents should establish their residence and how the marks should be allocated based on the documents produced by the applicant is identified under the said clause.

As observed by this court maximum of thirty five marks are allocated for establishing the residence by the Electoral Registers during the past five years. Maximum of fifty marks are allocated to the distance and maximum of ten marks are given to the nature of the ownership to the property and balance five marks are given for the additional documents submitted in proof of the residence under the said circular.

Out of the ten marks given to the nature of the ownership to the property, the applicant is entitled to the maximum ten marks, if the property is in the name of the applicant and/or the spouse for five years or more but the property is in the name/names of the parents of the applicant for five years or more the applicant is only entitled to get six marks.

If the property is a leased or rented property the applicant will only get four marks out of ten marks under the said clause, if the applicant can establish the rent or lease for period of five years or more. The marks allocated under clause 6 II (a), also depends on the number of years the applicant can establish by documents and the applicant will get a percentage of the above marks depend on the number of years he had lived in the said premises as identified in the said clause.

As revealed before this court the 1st Petitioner, the mother of the child had applied for admission of the 2nd Petitioner to grade one of Royal College Colombo 07 under the aforesaid category and in support of her application, submitted several documents including title deeds and extracts of Electoral Register. At the time the Petitioners submitted the application their permanent residence was at No. 161/11 Galle Road, Bambalapitiya.

The Petitioners have received a letter dated 09.08.2016 from Royal College, requesting them to attend an interview on 26.08.2016 (P-5). When the Petitioners went for the said interview, before facing the main Interview Panel, they had to go before four panels which were assigned the following duties.

a) Panel one –Check the National Identity Card
b) Panel two- Check Electoral Registers
c) Panel three- Check the availability of other government schools within the close proximity
d) Panel four- Granting marks

The documents to be checked by each panel were completed by the first three panels and the Petitioners went before the 4th panel. Having checked all the documents including the title deeds which were in the name of the grandmother of the 1st Petitioner, the 4th Panel had informed the Petitioner that they cannot consider the application of the Petitioners and refused to grant any marks to the Petitioners.

When the Petitioners went before the interview board consisting of 3rd to the 8th Respondents, they declined to entertain the Petitioners application, obtained the signature of the 1st Petitioner on a paper and concluded the interview without granting any marks. The Petitioners further submitted before this court that the 3rd Respondent made an endorsement on the paper that she was asked to sign to the effect, “No proof to the residence deed belonging to the applicant’s grandmother”

As observed by me, the Petitioners main contention before this court was to challenge the said decision of the interview panel, when the said interview panel concluded that the Petitioners have failed to establish their residence, whereas the Petitioners had submitted documentary proof as required by the circular No 17/2016 in proof of their residence, except under clause 6 II (a) of the said circular, where she is only entitled to obtain a maximum of ten marks under the said circular and thereby the said Respondents have acted in violation of the Fundamental Rights guaranteed under Article 12 (1) of the Constitution.

Clause 9 of the circular 17/2016 had provided for an appeal process for the applicants who were not satisfied with the selections made by the Interview Panel and, acting under the said provision, the 1st Petitioner has forwarded an appeal against the decision of the interview panel. The appeal procedure is discussed under clause 10 of the said circular and according to clause 10.6, the appeal board appointed under clause 10.2 is only entitled to go through the documents submitted at the interview only and therefore they cannot go through any fresh documents during the appeal. When going through the document tendered on behalf of the Petitioners before this court I observe that, the 1st Petitioner had submitted a fresh deed in order to establish her ownership (P-12). The said deed is a deed of gift with regard to premises No. 161/11 Galle Road, Bambalapitiya, and the donors were the heirs of the late Mrs. Madasamy Marimuttu Leela who is the grandmother of the 1st Petitioner and the donee is the 1st Petitioner. The Appeal Board had correctly refused to entertain the said deed in favour of the Petitioners and the decision of the Selection Board was not changed by the Appeal Board. Since the said decision to refuse to entertain the deed 3131 produced marked P-12 by the Appeal Board was taken in accordance with the Provisions of clause 10.6 of the circular 17/2016, I am not inclined to consider the allegation against the Appeal Board with regard to the refusal to consider the said deed.

In the said circumstances the only matter before this court is to consider whether the conduct of the Selection Board when they concluded that the Petitioners have failed to establish their residence as required by circular 17 of 2016 and the conduct of the Appeal Board by confirming the said decision, had violated the Fundamental Rights of the Petitioners, guaranteed under Article 12 (1) of the Constitution.

In this regard, it is important to consider the material available before the Interview Panel and the Appeal Board and therefore I will now proceed to analyze the material placed before the said panels by the Petitioners.

Under clause 6.I.I (a) of the said circular, maximum of 35 marks are allocated for establishing the residence by the Electoral Registers during the last five years. In order to obtain full marks, names of both the parents should be in the Electoral List during the five year period. The Petitioners have tendered marked P-18-1 to 18-10 the extracts of the Electoral Register with regard to the premises number 161/11. According to the said extracts, both the father and mother of the 2nd Petitioner have established their residence by submitting Electoral Registers since the year 2007. Being the eldest child of the family, the 1st Petitioner has submitted that her name was in the Electoral Register since year 2000 until year 2006. (Extracts P-18-11 to 18-17)

As submitted by the 1st Petitioner, her family had lived in the said premises with her parents during this period and it is observed that both the electricity bills and the water bills to the above premises had been issued in the name of the 1st Petitioner's mother Mrs. M. Meenachchi. However Petitioners have submitted telephone bills of the Petitioners since year 2013 for the above premises, and other documents such as the marriage certificate, birth certificate of her children including the 2nd Petitioner's birth certificate, student record book details of her eldest daughter who is attending St. Anthony's Balika Maha Vidyalaya, Colombo 03, bank book and health cards.

When going through the above documents, it is observed by me that, the 1st Petitioner had submitted sufficient proof to establish that, she lived with her parents in the above address until her marriage which took place in the year 2007 and since then lived with her parents at the same address until she submitted the present application to Royal Collage in the year 2016. During this period she gave birth to two children and their birth certificates are also produced in poof of her residence. Since her parents were alive and lived in the same premises, she could not obtain electricity or water bills in her name and therefore one cannot expect her to submit those bills under her name.

As further observed by me, the property in which the 1st Petitioner lived with her family and her parents, were originally belonging to her grandmother but, after her death the families have not taken any interest to get their succession rights but, revealed from the material placed before court, that there were two houses bearing assessment numbers 161/11 and 161/10 and 161/11

was occupied by the mother of the 1st Petitioner and 161/10 by the uncle of the 1st Petitioner. (The only heirs according to the deed of gift to the 1st Petitioner)

As no marks were allocated to the Petitioner's application, no steps were taken to inspect the Petitioners residence prior to 01.01.2017. However, as revealed before this court, subsequent to the filing of the present application, steps were taken to inspect the premises in question. The said inspection revealed that those who went for inspection could not find a bedroom and/or bed inside the premises but some photographs and house hold utensils were observed inside the said premises.

Even though this court is reluctant to make any remark on the above observation by the team which went for the inspection, I cannot ignore the fact that there are people who live with lots of hardships and therefore one cannot expect everybody in this country to have a bedroom with a bed in their houses.

With regard to the observations made at the site inspection, the Respondent relied on the decision in ***Liyana Mudiyanselage Don Suchithra Alexander and other Vs, P. Srilal Nonis Director of National School and others*** *SC/FR/64/2010* SC minute dated 21.05.2010 where J.A.N. de Silva CJ observed the importance of site inspection reports when the court decided to dismiss an application when the school had been unable to verify whether the Petitioners were physically residing at the given address.

However when considering the material already discussed, there is no doubt with regard to the residence of the 1st Petitioner, since she was able to establish that she had been living in the said address from her childhood, and therefore I see no relevance to the above decision.

In the case of ***Dasanayakage Gayani Geethika and two others Vs, D.M.D. Dissanayake, Principal, D.S. Senanayake College, Colombo 07 and five others*** *SC/FR 35/2011,* SC minute dated 12th July 2011 Suresh Chandra (J) observed the criterion that should apply when allocating marks for 'residence' under clause 6.I as follows;

> "A consideration of clause 6.I of the circular (RI) shows that the main consideration for selection of children under the category of "Children of those who are resident close to the school," would be the Applicant's place of residence. The relevant indices or criteria that are

to be taken into account regarding the establishing of same are set out in 6.I -I- IV referred to above.

The main thread which runs through all four categories is the concept of “Residence”

The ordinary meaning that is given to “Residence” is “the place where an individual eats, drinks, and sleeps or where his family or his servants eat, drink and sleep. (wharton’s Law Lexicon).

Residence as envisaged by the said circular would imply a permanent abode which has been used for a continuous period. The manner in which 35 marks have been allotted would indicate that the continuity in residence should be at least for a period of five years. Such residence does not necessarily connote ownership as the circular speaks of leases whether registered or unregistered being acceptable for the purpose of establishing residence. Credence is also given to the acceptability of other documents such as utility bills, employment letters, bank documents, letters received etc which would all serve as items establishing the genuineness of the residence. Such documents if available for a long period of time would indicate that they have been obtained for the purpose of getting a residential qualification. Procurement of such documents is sometimes referred to as “manufacturing” of documents. Care has to be taken in identifying such “manufactured” documents from genuine documents. Therefore Interview Panels should consider all the documents that are submitted by a prospective applicant and assess them carefully and see whether the cumulative effect of such documents would establish the genuine residence of such applicant.

According to clause 6.I, 35 marks are given for the electoral register extract which seem to be the basic and most important criterion and that the other documents referred to in sub-clause 6.I-II and III substantiate or confirm the residence given in the electoral register extract. Therefore, if the electoral register extracts have been accepted and the entitlement of full marks (35) have been given, there is no reason as to why such an applicant cannot get marks under sub-clause 6.I-IV which is 50 marks less five marks for each school from the residence to the school applied.

> In R2 the interview sheet, under the category for other schools, the figure "6" being entered is significant, which would mean that there are six other schools between the residence and the relevant school for which 30 marks would be deducted and the applicant would be entitled to 20 marks. This is apparently the reason why the figures "20" have been entered in R2 within brackets and for some reason best known to the Interview Panel has been struck off with an oblique stroke and with the note "not entitled to marks as there is no valid deed.
>
> It is my view that, once marks are given under clause 6.I for the Electoral Register Extracts which satisfies the criterion of "residence", then such an applicant is entitled to marks under clause 6.I –IV. Therefore accepting the fact that 20 marks could have been given as is seen in R2, to deprive the Petitioners of such marks is incorrect and they are entitled to 20 marks on that score."

When considering the observations by Suresh Chandra (J) referred to above, I observe that the facts and circumstance in the present case are almost similar to the said case. However during the argument before us, attention of the court was drawn to clause 6.1.III (a) by the Senior State Counsel and submitted that the granting 50 marks for proximity can only be considered, if the residence is proved by the Petitioner, and in the absence of title deeds, the Petitioner has failed to establish her residence as required by the said circular.

I cannot agree with the said submission of the Senior State Counsel and in this regard I agree with the view taken by Justice Suresh Chandra when he held that, once marks are given under clause 6.1 for Electoral Register Extracts which satisfied the criterion of 'residence', then such applicant is entitled to marks under clause 6.1-IV.

As further observed by me, the Interview Panel had refused to grant marks to the 2nd Petitioner and therefore there is no material before this court to ascertain the marks entitlement of the 2nd Petitioner.

However in the written submissions filed on behalf of the 1st, 2nd, 3rd, 15th and 16th Respondents, the maximum marks the 2nd Petitioner would have been entitled, has been identified as follows;

> 6. I (I) Electoral Register 35/35

6. II (a) Deeds etc 0/10

6. I (II) (b) Additional Documents 03/05

6. I (III) Proximity 0/40

In view of the position this court has now taken, that the 2nd Petitioner is entitled for marks under proximity category, it is presumed from the above marking, that the 2nd Petitioner is entitled for 40/50 under proximity category.
As revealed during the argument, the cut-off mark under Tamil speaking category for the year 2017 at Royal College, Colombo 07 was 63 marks and the 2nd Petitioner is entitled for 78 marks to gain admission to Royal College.

Under paragraph 28 of the Petition, the Petitioner's have submitted 19 names of students who were selected for Admission to Royal College for the year 2017 under the said category and submitted that, the said 19 students who should have been placed below the 2nd Petitioner as per the distance to their Residence from the school. The above position taken up by the Petitioners confirms the fact that the 2nd Petitioner is entitled to obtain marks, well above the cut-off mark.

The Interview Panel has failed to evaluate the document submitted on behalf of the 2nd Petitioner and allocate marks to him. The said Panel had acted arbitrarily when they decided not to grant marks. The Panel appears to have considered the concept of residence in a very abstract manner. They failed to consider the documents submitted on behalf of the Petitioners, when the said documents clearly establish the residence of the Petitioners. The Interview Panel should have been mindful of the fact that it is the ambition of every parent to admit their child to a school of their choice and look at the documents not in a stereo typed manner but in a reasonable manner, to grant the entitlement of every child who come before them.

In the above circumstances I hold that the 3rd to the 14th Respondents have violated the Fundamental Rights guaranteed under Article 12 (1) of the Constitution when they refused to grant any marks to the 2nd Petitioner at the interview and thereby refused admission to the 2nd Petitioner to grade one at Royal College, Colombo 07.

Therefore I make order directing the Respondents to take steps to admit the 2nd Petitioner to Grade 1 or to the appropriate Grade of Royal College, Colombo 07 forthwith.

Judge of the Supreme Court

S.E Wanasundera 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 SRI LANKA

In the matter of an application under and in terms of Articles 17 & 126 of the Constitution of the Republic of Sri Lanka.

1.Suriyarachchige Lakshman de Silva
2.B.M.Ajantha Weerasinghe
Both of 19/1 'Eksath" Mawatha,
Kadawatha.

PETITIONERS

SC.FR Application No:-09/2011

V.

1. Officer-In- Charge,
Edirisuriya Patabendige Chaminda Edirisuriya.
Police Station Kiribathgoda,
Also at residence:-No.94, Maya Mawatha Kiribathgoda.
2. Officer-In-Charge, Crime Division,
M.A.D.Ruwan Viraj,

Police Station, Kiribathgoda.

Also at residence:-No.109, Galpothgoda Pugoda, New Town.

3. Sergeant P.L.R. Percey Dissanayake,
Crime Division, Police Station,
Kiribathgoda.
Also at residence:-No.421/A/1,
Ahugammana, Demalagama,Miragawatta

4. Police Constable R.M.Sanjwwea Suriya Ruwan,
Police Station, Kiribathgoda.
Also at residence:-No.8, Anumethigama, Bingiriya.

5. B.Carmer, (Proprietor)
K.C.C.Engineering Co (PVT) Ltd, No.690, Kapuwaththa, Ja-Ela.
Also at residence:- No.214/15, Fathima Mawatha, Kiribathgoda.

6. Deputy Inspector General of Police
Police Station, Peliyagoda.

7. Pujitha Jayasundera, Sri Lanka Police
Department, Police Head Quarters,

Colombo 1.

8. The Hon. Attorney General,

Attorney General's Department,

Hulftsdorp, Colombo 12.

RESPONDENTS

BEFORE:-S.E.WANASUNDERA, PCJ.

UPALY ABERATHNE, J.

H.N.J.PERERA, J.

COUNSEL:- Pulasthi Hewamanne with Sulakshana Senanayake for Petitioners.

Jagath Abeynayaka for 1st to 4th Respondents

Nayomi Wickremasekera, SSC for 6th to 8th Respondents

ARGUED ON:- 20.10.2016

DECIDED ON:-03.03.2017

H.N.J.PERERA, J.

The Petitioners in this application alleged that their fundamental rights guaranteed under Articles 11, 12(1), 13(1), 13(2), 13(4) & 13(5) of the Constitution were violated by the Respondents. This Court granted leave to proceed under Article 11 and 12(1) of the Constitution.

The 1st Respondent is the Officer-in-Charge of the Police Station, Kiribathgoda. The 2nd Respondent is the Officer-in Charge of the Crime

division, Police Station, Kiribathgoda. The 3rd Respondent is a Police Sergeant attached to the Crime division, Police Station, Kiribathgoda and the 4th Respondent a Police Constable attached to the Police Station, Kiribathgoda. The 5th Respondent is the person who made a complaint to the Police station about a theft committed at his residence. The 6th respondent is the Deputy Inspector General of Police, Police Station Peliyagoda, and the 7th Respondent Inspector General of Police and 8th Respondent is the Attorney General.

The 2nd Petitioner is married to the 1st Petitioner who is a sub-contractor who does blasting paint work on heavy metal items such as ships, tanks, heavy machinery etc. The Petitioners state that from on or about 2003, the 1st Petitioner commenced work with the 5th Respondent Businessman, accepting sub-contracts from the said Respondent. The Petitioners state that on or around 2009 approximately Rs.450,000/=was owed on credit to the 1st Petitioner by the 5th Respondent for a completed sub-contract. The Petitioners state due to non-settlement of the said sum there was disagreement between the said Respondent and the 1st Petitioner, and the Petitioners state that from the time of the said disagreement, the said 5th respondent has been openly hostile towards the Petitioners.

According to Petitioners on 10.08.2010 at about 12.45 a.m whilst the Petitioners and their children were visiting relatives and when they were not at home , the 1st, 2nd, 4th and 5th Respondents had visited the Petitioners' residence in the 5th Respondents vehicle had forcibly instructed the 1st Petitioner's mother and nephew to allow them to search their house. Soon thereafter whilst still in their home, the 1st Respondent telephoned the 2nd Petitioner and ordered her to bring her husband to Kiribathgoda Police Station immediately. Due to the abusive language, and threatening manner in which the 1st Respondent addressed the 2nd Petitioner, she informed the said Respondent that she

would inform the 1st Petitioner to present himself to the Police Station on the following morning instead. After which the 1st Respondent instructed the 2nd Petitioner to bring her husband the 1st Petitioner to the police station or to come with her children. Thereafter the Respondents had left the Petitioners house.

The Petitioners' state that thereafter, on 10.08.2010 around 9.30 a.m , the 2nd Petitioner went to the Kiribathgoda Police Station and was instructed to see the 1st Respondent. Accordingly she went to the 1st Respondents office and saw the 1st and 3rd Respondents present. To the 2nd Petitioner's dismay, the 3rd Respondent Sergeant, grabbed her by her hair and dragged her to another nearby room in which a female Police Officer only identified as "Seetha" was present. When she inquired as to why she was being treated thus, the 3rd Respondent repeatedly slapped her face and abused her in derogatory, contumelious abusive language and forcefully asked her where her husband was. When she inquired as to why the Police were searching for her husband she was informed that he was wanted in connection with some theft and that the Police had video recorded proof of the 1st Petitioner's involvement. The 2nd Petitioner professed her husband's innocence and at that stage 'Seetha" too assaulted her. The 2nd Petitioner claims that thereafter the 3rd Respondent repeatedly slapped her and questioned her about the where about of her husband and that she was not allowed to leave the Police Station till 12.08. 2010. She claims that during the detention the 5th Respondent was an intermittent visitor to the Police Station. And on several occasions verbally abused the 2nd Petitioner and threatened the life of her family.

The 2nd Petitioner states that she came to know that the Police officers from the Kiribathgoda Police Station had visited her home and arrested a relative named G.A.Asitha. The 2nd Petitioner further claims that on 11.08.2010 the said Asitha was detained at the Police station and he

informed her that the Police had ransacked their house and taken into custody the 1st Petitioner's Passport and Contracts.

The 2nd Petitioner further claims that on the following day ,11.08.2010 around 10.00 am Indunil Basnayake [the 2nd Petitioner's younger brother] visited the kiribathgoda Police Station with the 2nd Petitioner's daughter and youngest son and she saw the said Indunil Basnayake being intimidated by the 3rd Respondent. The 3rd Respondent repeatedly asked the said Indunil Basnayake where the 1st Petitioner was hiding and accused him of harboring a criminal and detained him in the Police cell.

The 2nd Petitioner further claims that the children were permitted to stay with her and thereafter on 11.08.2010 the 3rd Respondent used obscene language and abused the Petitioners' daughter and threatened the life of the Petitioners and their family repeatedly asking her where her father was hiding. The Petitioners state that their daughter suffered severe mental trauma due to the said ordeal. And on 11.08.2010, the 2nd Respondent was instructed by the 3rd Respondent, to sign a letter agreeing to hand over her husband to the Kiribathgoda Police Station immediately and due to the fear she signed the said letter. The Petitioners state that thereafter at around 11 p.m, the 2nd and 3rd Respondents informed the Petitioners daughter that she was free to go home. However, due to the late hour, and as her mother the 2nd Petitioner was not permitted to leave, she indicated to the Respondents that she would remain with her family. Soon thereafter, on 12.08.2010, at around 2.am the 2nd to 4th Respondents verbally abused the 2nd Petitioner and her two children and thereafter informed them that they were free to leave, however due to the late hour the 2nd Petitioner remained at the Police Station and left at around 5 a.m in the morning.

The 2nd Petitioner further states that as she was detained at the police Station, she came to know that her husband the 1st Petitioner visited a

friend's house in the hope of retaining legal representation and that he was arrested by the kiribathgoda police on the 13th August at about 8.30 am.

This Court granted leave to proceed for the alleged infringement of Articles 11 and 13(1) of the Constitution.

The 2nd Petitioner's allegation against the 1st, 2nd and 3rd Respondents was that she was arrested on 11.08.2010 without any basis and that she was assaulted at the time she was so arrested on 11.08.2010.

Of the allegations made against the 1st to 4th respondents, let me first consider the alleged violation of Article 13(1) of the Constitution. Article 13(1) of the Constitution, which relates to freedom from arbitrary arrest, read 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."

According to the 2nd Petitioner the respondents arrested her at the Kiribathgoda Police Station on 11.08.2010 when she arrived at the said Police station to inquire as to why the police were searching for her husband. On the previous day night she was asked by the 1st Respondent to bring her husband to the police Station or to come with her children to the police station on the following day morning.

The 2nd Petitioner had also filed an affidavit from one Asitha. On consideration of the aforementioned affidavit it is apparent that the 2nd Petitioner was in police custody when he (Asitha) arrived at the police station on 11.08.2010.

Section 32 of the Code of Criminal Procedure Act No 15 of 1979 describe the instances where peace officers could arrest persons without a warrant. According to section 32(1)(b):-

"Any person 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."

It is common ground that the 2nd Petitioner was arrested by the 1st Respondent.

The contention of the 1st Respondent is that the 2nd Petitioner was arrested on 11.08.2010 around 10.30 am on suspicion of offence relating to receiving stolen property and obstructing lawful arrest of a suspect. (Affidavit para 09).

The 2nd Respondent in paragraph 13 of his Affidavit states that the 2nd Petitioner was arrested on 11.08.2010 at 10.20 am at the Police Station on suspicion of receiving stolen property and causing obstructing to lawful apprehension of a person.

The 3rd Respondent too in paragraph 08 of his Affidavit states that the 2nd Petitioner was arrested on suspicion of obstructing a legal arrest of the 1st Petitioner and receiving stolen property at around 10.10 am on 11.08.2010 and released on the same day after recording her statement.

The 2nd Respondent has produced the relevant extract of the information book marked 2R3. On perusal of the said document marked 2R3 it is clearly seen that it states that the 2nd Petitioner was arrested for helping the 1st Petitioner to go into hiding. Nothing is stated that she was arrested on suspicion for retaining stolen property. It is also very clear from the statement of the 1st Petitioner marked 2R9, from the relevant extract of the information book marked 2R8 that the 1st Petitioner was

arrested only on 13.08.2010 at around 8.15 am. These documents do not support the fact that any stolen articles had been recovered by the Police officers attached to the Kiribathgoda Police Station prior to the release of the 2nd Petitioner from police custody.

The fact that the 2nd Petitioner was arrested on 11.08.2010 at around 10.30 am at the Police Station Kiribathgoda is admitted by the 1st, 2nd and 3rd Respondent in their affidavits. The fact that the 2nd Petitioner was arrested when she arrived at the Police Station Kiribathgoda on 11.10.2010 is not denied by the Respondents.

The question that arises is whether the arrest and detention of the 2nd Petitioner is in accordance with the procedure established by law. In order to arrest a person under Section 32(1) there should be a reasonable complaint, credible information or a reasonable suspicion. Mere fact of receiving a complaint or information does not permit a peace officer to arrest a person. The evidence in this case very clearly establish the fact that the 2nd Petitioner arrived at the Police Station Kiribathgoda after receiving a phone call from the 1st Respondent to inform her husband the 1st Petitioner to come to the police Station or to be present at the police station the following day morning with her children. The evidence in this case does not disclose that there was any complaint made against the 2nd Petitioner or for that matter that she did try to hide the 1st Petitioner from the Police officers of Kiribathgoda Police Station.

The 2nd Respondent in his objections has stated that after receiving a complaint from the 5th Respondent he received information that the 1st Petitioner was involved in this offence. Accordingly, he informed the officers in the mobile duty patrolling the area to look for the suspect the 1st Petitioner at his residence. He further states that he came to know that a team of officers had visited the said residence of the Petitioners

and since the 1st Petitioner was not available they informed the inmates of the house of the 1st Petitioner to report to the police station on his arrival. The Petitioners have stated that they came to know that certain police officers had arrived with the 5th Respondent at their residence when they were not at home at about 12.45.a.m on 10.08.2010. The 1st Respondent had telephoned her and ordered to bring the 1st Petitioner to the Kiribathgoda police station and that she informed him that she would inform the 1st Petitioner to be present himself to the police station the following morning. According to the 2nd Petitioner the 1st Respondent asked her to inform the 1st Petitioner to be present at the police station or for her to come to the police station with the children. The 2nd Petitioner's position is that she was detained when she arrived at the following morning to the police station and released only on the 12th morning. The 2nd Respondent or for that matter anyone of the Respondents had stated in their objections, when or how the 2nd Petitioner obstructed the police. Nor they have stated that they recovered anything belonging to the 5th Respondent from the possession of the 2nd Petitioner either.

The evidence in this case clearly shows that the Respondents had arrested and kept the 2nd Petitioner in police custody in order to compel the 1st Petitioner to arrive at the police Station or surrender to the police and the fact that the children of the 2nd Petitioner too joined her at the police station and that they too had to stay at the police station with their mother till she was released by the respondents on the following morning is not denied.

The 2nd Petitioner admits the fact that she was asked to inform her husband to be present at the Kiribathgoda Police Station the following day morning. But the 1st Petitioner has failed to appear at the police station the following day morning. Only the 2nd Petitioner has arrived at the police station and she had inquired from the Respondents as to why

they want her husband to come to the police station. But there is nothing before this Court to show that she has obstructed the legal arrest of the 1st Petitioner as alleged by the Respondents.

In Muttusamy V.Kannangara (1951) 52 N.L.R 324 it was held that:-

"A peace officer is not entitled to arrest a person on suspicion under section 32(1)(b) of the Criminal Procedure Code , except on grounds which justify the entertainment of a reasonable suspicion."

In Corea V. queen 55 N.L.R 457 it was held that "the arrest must be made upon reasonable ground of suspicion. There must be circumstances objectively regarded- the subjective satisfaction of the officer making the arrest is not enough…."

"An arrest without lawful reason and justification or legal cause for such arrest in terms of material to the contrary is arbitrary arrest which would not be "according to the procedure established by law". Munidasa V. Seneviratne SC (FR) 115/91, SCM 3.4.92

In this case the police commenced investigations consequent to a complaint made on 11.08.2010 by the 5th Respondent. The question is whether it is a reasonable complaint made against the 2nd Petitioner. Clearly the complaint was not made against the 2nd Petitioner and has nothing to show that she had anything to do with the said alleged theft committed at the premises of the 5th Respondent. The Respondents has recovered nothing from the possession of the 2nd Petitioner. And this court cannot see an iota of evidence against the 2nd Petitioner to connect her with the said theft.

The 1st Respondent has filed an 'A' report before the Magistrate Court marked 2R7 on 14.08.2010 after releasing the 2nd Petitioner from custody. It states that the 2nd Petitioner has been detained and questioned regarding retention of stolen property and released. There is

no evidence what so ever to show that any productions had been recovered from her after her arrest and before she was released from police custody. The evidence in this case clearly indicate that the 2nd Petitioner arrived at the kiribathgoda police Station on 11.08.2010 around 10.00 am and was arrested and detained in police custody until she was released on the 12th morning around 10.20 am. The document marked 2R7 indicate that the 1St Petitioner was arrested on the 13th August around 8.15 am. A statement had been recorded from him on 13th evening at around 6 p.m. The document 2R8, the notes of the 2nd Respondent indicate that the 1st Petitioner was arrested on 13.08.2010 at around 8.15 am and certain articles were recovered from the room where the suspects were staying.

It is clear from all these documents that the 1st to 4th Respondents did not have any reasonable ground to arrest the 2nd Petitioner on 11.08.2011 when she arrived at the police Station on 11.08.2010. It is also very clear from the facts in this case that the Respondents had arrested and detained in custody the 2nd Petitioner just to harass the said family of the 1st Petitioner and to compel the 1st petitioner to be present at the Kiribathgoda Police Station. There was no good reason to arrest the 2nd Petitioner when she arrived at the Police Station on 11.08.2010 by the Respondents.

Detention of the spouse or a family member or a relative of a suspect merely to compel or to induce a suspect to surrender to the police cannot be a reasonable reason for the Peace officer to arrest and detain such a person in police custody under section 32(1)(b) of the Criminal Procedure Code. The arrest and detention of a spouse or a family member or any other relative of a suspect by a peace officer must be condemned and discouraged by Courts of law in this Country. The arbitrary deprivation of the liberty of the 2nd Petitioner was caused by the Respondents not because they bona fide suspected that the 2nd

Petitioner was involved in the commission of an offence, but for the wholly improper illegal purpose of compelling the 1st Petitioner to surrender to the police. It is very clear that the Respondents kept the 2nd petitioner at the police Station as a hostage in order to compel the 1st Petitioner to arrive at the police station.

In the case of Premalal de Silva V. Inspector Rodrigo 1991 (2) S.L.R 307 321 Kulatunga J. warned that if police arrest persons in the hope of getting a break in the investigations by interrogating them, it would end up in the use of third degree methods.

In Muttusamy V. Kannangara (supra) Gratiaen J. observed:-

"I have pointed out, that the actions of police officers who seek to search homes or to arrest private citizens without a warrant should be jealously scrutinized by their senior officers and above all by the Courts."

The importance of observing the 'correct and proper procedure' was correctly evaluated by justice Frankfurter in McNabb V.U.S [1943] 318 U.S 332 where he had stated that :-

"The history of liberty has largely been the observance of procedural safeguards."

As observed by Shirani Bandaranayake, J in W. Nandasena V. U.G.Chandradasa, OIC Police Station, Hiniduma and 2 others 2005[B.L.R]104:-

"The purpose of following the correct procedure is therefore to safeguard the liberty as well as maintain law and order and thereby to mete out justice and fair play."

In the case of Namasivayam V. Gunawardena [1989] 1 S.L.R 394, at page 402, Sharvananda CJ states that the liberty of an individual is a matter of great constitutional importance … should not be interfered with,

whatever the status of the individual maybe, arbitrarily without justification.

Article 13 of the Sri Lankan Constitution declares the rights relating to personal liberty and criminal procedure. Articles 13(1) and (2) permit the curtailment of personal liberty only in accordance with "procedure established by law". It is essential, therefore, that liberty should be restricted strictly as laid down by law and also strictly for the purposes laid down by law.

Where a person is arrested on suspicion that he or she has committed an offence, such suspicion must be reasonable. In Dumbell V. Roberts [1944] 1 All ER 326 Scott LJ observed:

"The principle of personal freedom, that every man should be presumed innocent until he is found guilty, applies also to the police function of arrest…..For that reason it is of importance that no one should be arrested by the police except on grounds which in the particular circumstances of the arrest really justify the entertainment of a reasonable suspicion."

In Muttusamy V Kannangara (supra) Gratien J emphasized that the arresting officer must entertain such reasonable suspicion before he arrests the person concerned. Thus, the arresting officer cannot arrest a person in the course of voyage of discovery.

In Dhammarathana Thero V. OIC Police Station, Mihintale, SC(FR)313/2009. SC Minutes 9.11.2011-the Court observed that "there should be a reasonable complaint, credible information or a reasonable suspicion where arrests are made without a warrant."

Considering the circumstances of this matter, it is clear that the 1st Respondent did not have any reasonable suspicion that the 2nd Petitioner had committed any cognizable offence. In such a situation the arrest of

the 2nd Petitioner cannot be regarded as a legal arrest and therefore the 2nd Petitioner's claim with regard to Article 13(1) of the Constitution should succeed. Therefore I hold that the arrest and detention of the 2nd Petitioner in these particular circumstances is a violation of her fundamental rights guaranteed under Article 13(1) of the Constitution.

The 2nd Petitioner has complained that the 3rd Respondent and another female police officer only identified as 'Seetha' assaulted her and thereby she has alleged that the Respondents had violated her fundamental rights guaranteed in terms of Article 11 of the Constitution.

Article 11 of the Constitution refers to freedom from torture and states as follows:-

"No person shall be subjected to torture or cruel, inhuman or degrading treatment of punishment."

The 2nd Petitioner complained that when she arrived at the Kiribathgoda Police Station o 11.08.2010 3rd Respondent grabbed her by her hair and dragged her to a nearby room in which a female police officer only identified as "Seetha" was present. When the 2nd Petitioner inquired as to why she was being treated thus, the 3rd Respondent repeatedly slapped her face and abused her in derogatory, contumelious abusive language and forcefully asked her where her husband was. It is her position that aforementioned 'Seetha" also assaulted her and the 3rd Respondent repeatedly slapped her and questioned her about the whereabouts of her husband. Except for her petition and affidavit where she refers to the said assault, the 2nd Petitioner has not produced any medical evidence to substantiate her allegations against the Respondents. She also has not tendered any other document to substantiate her allegations against the Respondents. On the other hand the 2nd Respondent has produced the Medico-Legal Examination Form No.421/10 dated 11.08.2010 by Dr. S.Perera to contradict the position

that the 2nd Petitioner was assaulted by the Respondents and had injuries as alleged by her. According to 2R5 Dr.S.Perera has examined the 2nd Petitioner at the District Hospital Kiribathgoda in ward No 5 at 2.12 P.M on 11.08.2010. 2R5 states that there were no injuries what so ever.

In W. Nandasena V.U.G. Chandradasa, OIC Police Station, Hiniduma 2005 [B.L.R] 105 , Justice Shirani Bandaranayake ,J observed that:-

"When there is an allegation based on violation of fundamental rights guaranteed in terms of Article 11 of the Constitution it would be necessary for the petitioner to prove his position by way of medical evidence and /or by way of affidavits and for such purpose it would be essential for the petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden."

Considering the non-availability of any medical evidence or any other documents produced by the 2nd Petitioner to substantiate her allegations against the Respondents, I am of the view that the 2nd Petitioner has not been able to satisfy this Court that her fundamental rights guaranteed in terms of Article 11 were infringed by the Respondents.

Therefore, though I hold that the 2nd Petitioner has not established that her fundamental rights, assured to her by Article 11 has been violated by the respondents, I hold that since the Respondents had unlawfully arrested the 2nd Petitioner on 11.08.2010, the 1st to 4th Respondents had violated 2nd Petitioner's fundamental rights assured to her by Article 13(1).

I now turn to the alleged infringement of fundamental rights of the 1st Petitioner by the Respondents.

According to 1st Petitioner, he visited a friend's house in the hope of retaining legal representation on 13.08.2010 and at around 3.a.m, the 5th Respondent Businessman, along with the 2nd and 4th Respondents

along with several other members of the Kiribathgoda police Station, surrounded the aforesaid friend's house and arrested the 1st Petitioner. Although no reasons were given for the said arrest, the presence of 5th Respondent, led the 1st Petitioner to believe that this was due to disagreement they had about the business transaction.

The 1st Petitioner states that he was immediately taken in the vehicle of the 5th Respondent, to the 5th Respondents house and was severely assaulted in the garden of the 5th Respondent by the 2nd, 4th and 5th Respondents. The said Respondents assaulted the 1st Petitioner using a long pole and fists and feet and he lost consciousness. When the 1st Petitioner regain consciousness he found himself in a room inside the Kiribathgoda Police Station and he was stripped down to his under wear. Soon thereafter around 9.00 a.m he was taken to a nearby room by the 3rd and 4th Respondents, in which a large horizontal iron rod was affixed approximately 6 or 7 feet from the ground. The 1st Petitioner's hands were behind his back, and he was hung from the said rod and subjected to torture and cruel, inhuman and degrading treatment.

The 1st Petitioner states that he was subjected to various forms of torture over several dates but due to post traumatic stress conditions he could recall only few methods used by the said interrogators.

The 1st Petitioner states that the 3rd Respondent assaulted the 1st Petitioner using a long wooden pole, and repeatedly asked him where the stolen goods were. The 3d Respondent used hot coals to burn the soles of the 1st Petitioner's feet. The 1st Petitioner was forced to inhale smoke from a container which he verily believes contained hot coals and a substance of chillie powder.

The 1st Petitioner further states that a cigarette lighter was used to burn 1st Petitioner's ear lobes, and the 3rd Respondent threatened to use the

said lighter on the 1st Petitioner's eyes as well if he did not confess to where the alleged stolen goods were. When the 1st Petitioner pleaded with the said Respondent, his eye brows were burnt instead.

The 1st Petitioner states that he was tortured till he lost consciousness, and later had to undergo treatment for the injuries suffered by him. The 1st Petitioner states that another prisoner at the said police station had been similarly assaulted during the time the 1st Petitioner was detained, and subsequently died due to assault, causing the 1st Petitioner mortal fear for his life and that of his family. The 1st Petitioner states that before he was produced before the Magistrate on 26.08.2010 the 3rd Respondent made the 1st Petitioner take about 9 to 10 medicinal tablets and also applied oil and used a medicinal spray on injuries suffered by the 1st Petitioner. The Petitioners verily believe this was to permit the 1st Petitioner enough time to heal before he was produced before a Magistrate.

The petitioner's state that the 2nd Petitioner came to know that her husband had been arrested on 13.08.2010 around 8.30 a.m and visited the Kiribathgoda Police station to see her husband and was told that he was not detained at the police station. Thereafter the 2nd Petitioner fearing for her husband's life, made a complaint to the office of the Inspector General of Police. The 2nd Petitioner further states that the officials at the police headquarters thereafter made inquiries from the Kiribathgoda police station and thereafter she was informed that there was a purported Detention Order against the 1st Petitioner and that he was in fact detained at the said police station.

The 1st to 4th Respondents state that the 1st Petitioner was arrested on 13.08.2010 at or around Gampaha by a team of police officers led by the 2nd Respondent. According to the 2nd Respondent, the 5th Respondent lodged a complaint at the police station alleging that his house has been

broken into and property worth Rs.17,25,000/- including jewelry, computers and stock of foreign liquor had been stolen, while he was on pilgrimage to Madhu Church with his family. The 2nd Respondent states that he received information from an informant that the 1st Petitioner was involved in this matter, accordingly he informed the officers in the mobile duty patrolling the area to look for the 1st Petitioner at his residence. It is apparent that the Respondents did not have any reasonable grounds to suspect that the 1st Petitioner was in fact involved in the theft complained.

The 2nd Respondent further states that he came to know that the 1st Petitioner was not at his residence and instructed the said officers to inform the persons at home to inform the 1st Petitioner to report to police station on arrival. The facts relating to the complaint had been reported to the Magistrate Court under B report No 9605/05 on 11.08.2010. (2R2). The 2nd Respondent states that the 1st Petitioner was arrested on information received by the 2nd Respondent on 13.08.2010 at 8.15 a.m. at Gampaha while hiding and running away from lawful arrest. The 4th Respondent too admits the fact that he was also member of the team who arrested the 1st Petitioner near Gampaha at about 8.a.m on 13. 08.2010.

It is the position of the 2nd Respondent that a statement was recorded from the 1st Petitioner and on the facts transpired in his statement took steps to obtain an order of detention under emergency regulations under Ref.DM/ER/2010/1514 to investigate further into any involvement of the 1st Petitioner in Terrorist activities while he was in Trincomlee. The 2nd Respondent further states that since the investigations did not transpire anything substantial to sustain any further detention of the 1st Petitioner the Detention Order was withdrawn and the 1st Petitioner along with the accomplice was

produced before Magistrate Court No 5 in case No. B 9605/05 of Colombo whereupon the suspect was enlarged on bail.

The Respondents had clearly admitted that they arrested the 1st Petitioner on 13.08.2010 at 8.15 a.m. at Gampaha. It is not denied that the 1st Petitioner was thereafter kept in police custody until he was produced before the Magistrate on 26.08.2010. The 2nd Respondent states that he obtained under emergency regulation a Detention Order DM/ER/2010/1514 to detain the 1st Petitioner in custody. Although in his objections dated 06.09.2011 in paragraph 13, the 2nd Respondent had sought Courts permission to tender a certified copy of the said Detention Order once available by way of motion, but has failed to produce a copy of the said Detention Order to this Court.

Accordingly, the Respondents contend that a complaint had been made by the 5th Respondent to the police station Kiribathgoda (2R1), and the police had investigated into the said complaint and reported about the said complaint to the Magistrate Court by a B report (2R3) and thereafter produced the suspects before the Magistrate on 26th.08.2010. The 2nd Respondent also had produced document marked 2R7 to show that an A report had been filed regarding the arrest and detention and the release of the 2nd Petitioner and one Asitha and Indunil regarding the complaint made by the 5th Respondent.

Therefore, it is very clear that the 1st Petitioner has been arrested on the 13th August 2010 and was in the Respondents custody till the 26th August 2010 until he was produced before the Magistrate. It is the Respondents contention that they kept the 1st Petitioner in their custody till the 26th August 2010 under a detention order.

The Petitioners in their counter objections had stated that no Detention Order was produced, and put the Respondent to strict proof of the same.

The Respondents had clearly failed to annex a copy of the said Detention order with their affidavits. In fact, no such Detention Order issued on the 1st Petitioner had been tendered by the Respondents to substantiate the same.

Detention of the 1st Petitioner at the Kiribathgoda police station would have been lawful only if there had been a detention order under Emergency Regulations. There was no good reason why the 1st Petitioner was not produced before the Magistrate Court according to the procedure established by law. The Respondents do not dispute the fact that they arrested and kept the 1st Petitioner in police custody until he was produced before the Magistrate on 26.08.2010. There is no detention order produced by the Respondents in this instance to support the fact that the 1st Petitioner was kept in custody under a detention order. There is evidence clearly to establish that the 1st Petitioner's fundamental rights guaranteed under Article 13(1) had been violated by the Respondents. I hold that the arrest and detention of the 1st Petitioner in these particular circumstances is a violation of his fundamental rights guaranteed under Article 13(1) of the Constitution.

The 1st Petitioner has complained that 1st to 4th Respondents had assaulted him at the Kiribathgoda police station. The brutal assault on him by the said Respondents caused to him severe physical pain and thereby alleged that the 1st to 4th Respondents had violated his fundamental rights guaranteed in terms of Article 11 of the Constitution.

Article 11 of the Constitution refers to freedom from torture and states as follows:-

"No person shall be subjected to torture or cruel, inhuman or degrading treatment of punishment."

The fundamental rights guaranteed in terms of 11 are not restricted to merely physical injury. The words used in Article 11, viz., torture, cruel, inhuman or degrading treatment or punishment would take many forms of injuries which could be broadly categorized as physical and psychological and would embrace countless situations that could be faced by the victims. Accordingly, the protection in terms of Article 11 would not be restricted to mere physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such action.

In W.M.K.De Silva V. Chairman , Ceylon Fertilizer Corporation (1989) 2 Sri.L.R 393, Amerasinghe J. said :-

"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."

The 1st Petitioner was arrested on 12.08.2010 at about 3.00 p.m.at a friend's house by the 2nd and 4th Respondents and was taken to the house of the 5th Respondent and was severely assaulted by the 2nd, 4th and 5th Respondents in the garden of the 5th Respondent. It is alleged that the said Respondents assaulted the 1st Petitioner using a long pole and fists and feet and that he lost consciousness.

The 2nd Respondent in his objections has stated that he 1st Petitioner was arrested on 13.08.2010 at 8.15 a.m at Gampaha while hiding and running away from lawful arrest. The 2nd Respondent further states that the 1st Petitioner ran away obstructing his arrest and in the said attempt he tried to leap over a wall and fell.

The 4th Respondent too in his objections states that he was also a member of the team who arrested the 1st Petitioner near Gampaha at about 8.00 a.m on 13.08.2010 and that the 1st Petitioner physically resisted the arrest by running away and attempting to jump over a wall.

But the document marked 2R8 tendered by the 2nd Respondent with his objections clearly contradicts this position taken up by the Respondents in this case. According to the said I.B. extract marked 2R8 dated 13.08.2010 the 2nd Respondent had very clearly recorded that whilst trying to flee from custody the 1st Petitioner had knocked against a tree and has fallen down and was accordingly arrested.

The 1st Petitioner further allege that when he regained consciousness, it was morning and he was in a room inside the Kiribathgoda police station, and he was stripped down to his underwear. Soon thereafter he was taken into a nearby room by the 3rd and 4th Respondents, in which a large horizontal iron rod was affixed approximately 6 or 7 feet from the ground. The 1st Petitioner's hands were tied behind his back, and he was hung from the said rod and subjected to torture. The 1st Petitioner states that the 1st Petitioner suffered several injuries and was subjected to various forms of torture for several days. The 1st Petitioner states that he was –

a) Assaulted by the 3rd Respondent using a long pole
b) The 3rd Respondent, used hot coals to burn the soles of his feet
c) His genitals were burnt using chillie powder
d) A cigarette lighter was used to burn his ear lobes
e) His eye brows were burnt

The 1st Petitioner had been produced before the Magistrate at about 4.p.m on 26.08.2010. The said Magistrate has directed that the 1st Petitioner be produced before a JMO. On 26.08.2010 when the 1st

Petitioner was produced before the Magistrate Colombo, the Counsel appearing for the 1st Petitioner had informed the court that the 1st Petitioner had been subjected to torture whist in police custody and also had drawn the attention of the Magistrate that that there are marks in the body of the 1st Petitioner to suggest that he had been subjected to torture whilst in police custody.(2R13).Accordingly the Magistrate had ordered that the 1st Petitioner be produced before the JMO Colombo and the document marked P4 clearly indicates that the Magistrate has directed the JMO to examine the 1st Petitioner and to report whether the 1st Petitioner has any injuries in his body, whether there are healed injuries and if so whether such injuries had been caused very recently.

The 2nd Respondent in his objections in paragraph 31 had stated that the 1st Petitioner was produced before a doctor before being produced in the Magistrate Court Colombo in case No 9605/B on 26.08.2010. The 2nd Respondent had tendered a true copy of the Medico Legal Examination form marked R12 to substantiate the same.

The 2nd Petitioner in her counter objections has denied the document marked 2R12 and states that the said document is contrary to document marked P5. P5 is the Diagnosis Ticket issued by Dr. S.D.F.Jayasekera National Hospital Colombo on 30th August 2010 on the admission of the 1st Petitioner to the said Hospital. According to the said document marked P5, the 1st Petitioner had been admitted to the said Hospital on 30.08.2010 and had been discharged on 25.09.2010.

It is to be noted that in the B report marked 2R2 it is nowhere stated that the 1st Petitioner was produced before the MO-DH on the 26.08.2010. According to the said Medico Legal Examination Form No 431/10 1st Petitioner has been produced before Dr. K.R.G.S.Kahatuduwa on 26.08.2010 at 12.40 p.m . The 1st Petitioner has been produced before the said doctor by PS 16012 Weerasekera and states that there were no

injuries found on the 1st Petitioner. No injuries are marked on cage 10 of the Form. The proceedings before the Magistrate's Court No 5 Colombo dated 25.08.2010 marked R13 does not disclose the fact that the 1st Petitioner was produced before a Doctor at the Kiribathgoda National Hospital before being produced before the Colombo Magistrate Courts on 26.08.2010 was brought to the notice of Court. According to document marked R13 on the application made on behalf of the 1st Petitioner by his Counsel the Magistrate has called for a medical report from the JMO Colombo.

It is common ground that the 1st Petitioner was arrested by the Respondents. It is also an admitted fact that the 1st Petitioner had been in the custody of the Respondents at the Kiribathgoda Police station until he was produced before the Colombo Magistrate's Court No 5 on 26.08.2010. It is clear that the 1st Petitioner had received any injuries if at all after he was arrested by the Respondents 0n 13.10.2010.

According to the Diagnosis Ticket marked P5 Dr.S.D.F.Jayasekera as the background history it is stated that the patient has informed that he was assaulted and burnt by police Kiribathgoda whilst he was under police custody. Imprisoned since 13.08.2010 Further it is stated that assaulted by sticks -burnt toes and penis 13.08.2010 using charcoal. Left side 4th and 5th toes, right side 2nd toe and 5th toe. Numbness of both upper limb. Under observations it is stated that Trans-line contusion on both lower limb and scapula. Blisters on left side 4th, 5th toes. Scar -right side 5th toe. It is also stated that genitalia – no mark of burn – right side 5th toe scares, left side 4th, 5th toe blisters. According to the treatment sheet 8 it is stated that the patient has stated that he finds it difficult to sit, numbness of left hand. In page 9 of the treatment sheet it is again clearly stated that Trans-line contusion both limbs, blisters of left side foot.

In page 15 of the treatment sheet Dr.Liyanage Neurosurgeon has informed Dr.Jayasekera that the Patient needs nerve conduction studies.

Accordingly, the 1st Petitioner had been referred to the Department of Clinical Neurophysiology Institute of Neurology, NHSL, Colombo and the said report contains the comments made by the said Institute at page 30. It states that the findings are suggestive of:-

1.Left C6,7,8 T1 lesion

2.Bilateral median nerve lesions at wrist. (not possible to differentiate

From Carpal Syndrome)

3.Bilateral superficial radial (sensory) nerve lesions.

The 1st Petitioner had been in the said Hospital till the 25.09.2010 and had under gone various examinations and treatments. On page 3 of the Treatment sheet under 'procedures' made it is clearly recorded that cleaning and dressing done, and the Burns Unit had been directed to apply medicine and admit the patient' to the said Unit. A Burn Chart had been prepared and superficial injuries observed on toes of both feet.

The documents submitted to Court by the JMO Colombo does not refer to the probable period of time the assault would have taken place on the 1st Petitioner. The 1st Petitioner while giving the history to the Medical Officer, had informed him that he was assaulted after the arrest and the Petition and the Affidavit too confirms the position taken by the 1st Petitioner. In paragraph 21 of the Petition it is stated that the 2nd Petitioner returned to the Kiribathgoda Police station at or around 6.30 p.m , and was permitted to see the 1st Petitioner her husband. The 2nd Petitioner specifically states that her husband who was detained in the police cell looked in severe pain, and could not even stand upright

unsupported. The affidavit submitted by the 2nd Petitioner too confirms the position taken by the 1st Petitioner. Document marked P5 the Diagnosis ticket and the Bed head ticket and the treatment sheet and the Reports submitted by the Medical Records Officer of the National Hospital Colombo corroborates and substantiates the version given by the 1st Petitioner with regard to his assault. Medico legal Examination Form 2R12 produced by the 2nd Respondent is self serving evidence and no reliance could be placed on it. The contents of the document 2R12 is totally contradicted by the document marked P5 and other treatment sheets submitted to Court by the Medical Records Officer Colombo submitted pursuant to an examination carried out on an order by the Magistrate made on 26.08.2010. These documents are not challenged by the State. In the circumstances this Court cannot place reliance on the document marked 2R12.

The history given by the 1st Petitioner to the JMO Colombo refers to the ways in which the 1st Petitioner was ill treated by the Police at Kiribathgoda police station. There were blisters on left side b4th and 5th toes. Scar on the right side 5th toe. There were Trans-line contusion on both lower limb and scapula area. The telltale mark observed by the JMO reveals the severity of the attack to which the 1st Petitioner was subjected. And the process of penis and toes being burnt with charcoal would undoubtedly have caused severe pain to the 1st Petitioner so as to mount to torture as defined above. Before he was produced before the Magistrate Colombo the 1st Petitioner states that some members of the Kiribathgoda police station and particularly the 3rd Respondent, made the 1ST Petitioner take approximately 9 to 10 medicinal tablets. The said Respondents also applied oil and used a medicated spray on the injuries suffered by the 1st Petitioner.On a perusal of P5 it is clearly seen that the 1st Petitioner has very

clearly informed the Doctor about the police assaulting the 1st Petitioner whilst he was in the police custody. Before that when the 1st Petitioner was produced before the Colombo Magistrate on 26.08.2010 the Counsel appearing for the 1st Petitioner has also informed the Court about the harassment meted out to the 1st Petitioner by the police and accordingly the Magistrate had referred the 1st Petitioner to the JMO Colombo for medical examination. The 2nd Petitioner too has made a complaint to the Inspector General of Police on 13.08.2010 and a complaint also has been made to the Human Rights Commission on 11th and 19th August 2010 by the Petitioners.

In Ansalin Fernando V. Sarath Perera (1992) 1 Sri.L.R 411, it was held that depending on the circumstances, an allegation of a violation of Article 11 could be proved even in the absence of medically supported injuries. In the said case Kulatunga, J observed:-

"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 of each case. The allegation can be established even in the absence of medically supported injuries."

The 1st Petitioner has also stated that up to date he suffers from pain throughout his body including his ears, resulting in dizzy spells and further states that he experiences numbness and loss of dexterity in his hands preventing him from carrying out his chosen work of 'blasting paint'.

I accordingly hold that the 1st Petitioner has been successful in establishing that his fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution have been violated by the actions of the 1st to 4th Respondents.

For the foregoing reasons I hold that the 1st to 4th Respondents had violated the 1st Petitioner's fundamental rights guaranteed under Articles 13(1) and 11 of the Constitution. I also hold that the 1st to 4th Respondents had violated the 2nd Petitioner's fundamental rights guaranteed under Articles 13(1) of the Constitution.

The state shall pay each Petitioner Rs.50,000/- as compensation and Rs 25,000/- as costs. I further direct 1st to 4th Respondents each personally to pay a sum of Rs. 25,000/- to the 2nd Petitioner and 2nd to 4th Respondents each to pay a sum of Rs.100,000/- to the 1st Petitioner as compensation. All payments to be made within 3 months from today. I direct the Registrar of the Supreme Court to send copies of this judgment to Hon. Attorney General and the Inspector General of Police for necessary investigations and action to be taken against the persons who perpetrated torture.

JUDGE OF THE SUPREME COURT

S.E WANASUNDERA, PCJ.

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 & 126 of the Constitution of the Republic.

N.H.Palitha Nandasiri,
Rathumalpitiya, Harangalagama,
Nalapitiya.

Petitioner

SC FR (Application) No.12/2012

1. N. A. T. Jayasinghe, Assistant Superintendent, Special Investigation Unit, Police Head Quarters Colombo 01.

2 Vidyajothi Dr. Dayasiri Fernando (Chairman)

3 Mr.Palitha Kumarasinghe P.C. (Member)

4 Mrs. Sirimavo A. Wijeratne (Member)

5. Mr. S. C. Mannapperuma (Member)

6. Mr. Ananda Seneviratne (Member)

7. Mr. N. H. Pathirana (Member)

8. Mr.S. Thillanadarajah (Member)

9. Mr. M. D. W. Ariyawansa (Member)

10. Mr.A. Mohamed Nahiya (Member)
The 2nd to 10th Respondents of The Public Service Commission 177, Nawala Road, Narahenpita.

11. Inspector General of Police, Sri Lanka Police Head Quarters, Colombo 01.

12. R. A. Karunasoma, Inquiring Officer, Disciplinary Inquiry, 176A, Kadawathgama, Hulangama, Matale.

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

Respondents

BEFORE: B. P. Aluwihare, PC, J
Priyantha Jayawardena, PC, J &
Upaly Abeytrathne, J.

COUNSEL: J.C.Weliamuna with Pulasthi Hewamanne for the Petitioner.

Rajiv Goonatillake, SSC, for the Respondents.

ARGUED ON: 07.03.2017

DECIDED ON: 04.08.2017

ALUWIHARE, PC, J:

In this application the Petitioner complains that the holding of a disciplinary inquiry against him and the subsequent decision to demote the Petitioner from the rank of Sergeant to the rank of Police constable by the Inspector General of Police (the 11th Respondent) is irrational and arbitrary and had resulted in the infringement of his fundamental rights.

The court granted leave to proceed for the alleged violations under Articles 12 (1) and 14 (1) (g) of the Constitution, against the 1st, 11th and 12th Respondents.

The grievances complained of appear to be twofold:-

(1) The disciplinary inquiry was conducted contrary to Police Departmental orders.
And
(ii) The demotion of the Petitioner was without sufficient cause and is excessive and contrary to principles of fairness and proportionality.

It is further alleged that the demotion meted out to the Petitioner was due to one Ranjith Abeysinghe prevailing upon the police and influencing the decision making process, with regard to the punishment meted out to the Petitioner.

Facts:

On the 7th of November, 2009, the Petitioner who was attached to the Traffic Branch of the Hatton Police has been on duty accompanied by Constable Wickramasinghe. Petitioner had stopped a vehicle due to the erratic manner in which it was being driven. When he approached the vehicle, he had observed that both the driver and the passengers in the vehicle were under a state of

intoxication. The driver had identified himself as Ranjith Abeysinghe and the Petitioner says the driver did not possess a valid driving license.

Having brought the vehicle concerned and the driver and the other occupants to the Police Station, when the Petitioner took steps to subject the driver Ranjith Abeysinghe to a Breathalyzer test, he had not cooperated. As a result, the Petitioner states that he had had to produce him before the medical officer Dickoya Base Hospital, who had given a report to the effect that Abeysinghe's breath was smelling of alcohol.

Having returned to the Police Station, the petitioner had got another officer to record a statement from Abeysinghe and he had been released on (police) bail with instructions to appear before the Hon. Magistrate of Hatton on 10th November, 2009. On the said date Ranjith Abeysinghe had pleaded guilty to both counts; driving after consuming liquor and driving without a valid driving license and a fine of Rs. 7,500/-. had been imposed on him.

The Petitioner goes on to say that on the day of the detection referred to above, Ranjith Abeysinghe was released from Police Station within about three and half hours, after attending to the formalities in connection with the detection. The Petitioner had added that while Abeysinghe was at the Police Station several acquaintances of his had come to the police station and the two passengers had wanted the petitioner, via their mobile phones, to speak to prominent politicians, and senior police officers, but the Petitioner state that he did not accede to their requests. Further the Petitioner had wanted them to use their phones outside the area where he was attending to the duties.

About a month after the incident, somewhere in December, 2009 both the Petitioner and Constable Wickremasinghe had had to make statements to the

Police Special Investigation Unit (SIU) over a complaint made by Abeysinghe against the Petitioner.

Subsequent to the recording of the statements, a charge sheet containing 10 charges had been served on the Petitioner which was followed by an inquiry presided over by the 12th Respondent who acted as the sole inquiring officer.

Petitioner asserts that the inquiring officer (12th Respondent) was accompanied by the complainant Ranjith Abeysinghe every time he came to the inquiry as well as, when he left it.
The inquiry, the Petitioner states, had been concluded in seven days and he had been found guilty of 9 charges leveled against him and the 11th Respondent had demoted him from the rank of Sergeant to Constable as a punishment.

As referred to earlier, the Petitioner had alleged that, on one hand the disciplinary inquiry was held in a manner to please Ranjith Abeysinghe due to his connections to senior officers of the Police and politicians and further alleges that the disciplinary inquiry was held contrary to the Police Departmental Order A7 (Annex 1).

With regard to the first aspect of the complaint of the Petitioner, it would be pertinent to consider the position taken up by Ranjith Abeysinghe at the inquiry. In his statement (to the S.P. Ganeshanadan) he had said that he holds the post of General Manager (Sales) at C.I.C Agro Industries and had admitted that he was at the wheel of the vehicle, in question. He had also admitted that he was driving the vehicle after consuming liquor and that he was not in possession of a driving license at the time. He also had stated that he got various individuals, including Senior Police Officers, Secretaries to various Ministries and Judicial Officers to

speak to the Police to resolve this issue without proceeding with the matter any further. Abeysinghe says the Petitioner did not heed to any of them, but informed him that he would be prosecuted.

Although the conduct of Abeysinghe is not in issue in these proceedings, it must be noted that Abeysinghe's conduct cannot be condoned and certainly unbecoming of one purportedly holding such a position in a prestigious organisation like C.I.C. Abeysinghe had a moral obligation to assist the Petitioner in the conduct of his investigation when he was found driving a vehicle without his license and having consumed alcohol to the detriment of the other road users. Not only had he committed a serious misdeed by attempting to interfere with the course of justice, but had also refused to take the Breathalyzer test which all law abiding citizens are required to undertake when requested by the law enforcement.

The Petitioner alleges that Abeysinghe was motivated by his refusal to drop the prosecution, without causing an embarrassment. He alleges further that the decision to demote him was also due to Ranjith Abeysinghe's influence.

At the inquiry, Abeysinghe and some others who gave evidence had referred to the foul language the Petitioner is alleged to have used in addressing Abeysinghe. The words are too offensive to be quoted in a judgment.

Abeysinghe had a duty to assist a police officer in the discharge of the duties in view of the fact that not only were the charges serious, he had also admitted them and pleaded guilty in court. Instead, he not only refused to take the Breathalyzer test, but attempted to prevail upon the Petitioner not to perform his duty. Further, he had aggravated the matter of getting others who were in authority

and who he thought could influence the Petitioner in the performance of his duties, to speak to him. Abeysinghe in his statement to the Inquiry Officer (R1) had said even after he came to Colombo he phoned the Petitioner and asked whether the case could be dropped.
Given the nature of the human mind, it is quite possible that the conduct of Abeysinghe and his acquaintances would have irked the Petitioner.

The Petitioner being a police officer, however, is required to act without getting ruffled even in the face of such reactions by the public and is expected to perform his duties in a dignified manner and cannot under any circumstances afford to use disparaging language. It had been pointed out by the 11th Respondent that the Petitioner had been previously found guilty of such misconduct and had been dealt with disciplinary (R4). Perusal of R4, however, reveals it had been an incident subsequent to the one referred to in these proceedings. Thus, it appears that there had been no similar complaints against the Petitioner up to the date of the impugned incident which was the 7th November, 2009.

The Petitioner in this application had sought, among other reliefs, to have, the charge sheet and the findings of the disciplinary held against him declared null and void on the basis that the inquiry had been conducted contrary to the Police Departmental Order A7 (P15b)
The Petitioner had subjected himself to the jurisdiction of the inquiry and if he was of the opinion that the constitution of the inquiry was not in conformity with the applicable rules, it was up to him to raise the issue as a preliminary matter.

In *Rathnayake vs. Attorney General 1997 2 SLR pg.* 98 Chief Justice G.P.S. De Silva held that every wrongful act is not sufficient grounds to complaint of an

infringement of fundamental rights. The Petitioner must establish unequal or discriminatory treatment.

It was also the contention of the learned counsel for the Petitioner that the Disciplinary Order, by which the Petitioner was demoted to the rank of constable, was excessive under the circumstances of the case and contrary to the principles of fairness and proportionality.

It was further submitted that the Deputy Inspector General of Nuwara Eliya, upon receiving the disciplinary findings against the Petitioner, recommended that one increment of the Petitioner's salary be deferred. The Respondents have not denied this assertion, although there is no document before us, to that effect.

The 11th Respondent in his Disciplinary order (P13) had taken into account the importance of maintaining discipline within the Police Department and that the manner in which the Petitioner has conducted himself is not a conduct that is expected of, by the public. The 11th Respondent, however, does not appear to have taken into account the mitigatory factors in favour of the Petitioner referred to above, which the 11th Respondent ought to have considered prior to deciding on the punishment that was to be meted out to the Petitioner. In that context, I am of the view the Petitioner had been denied the protection of the law envisaged in article 12 (1) of the Constitution.

Accordingly, I hold that the Petitioners' fundamental right enshrined in article 12 (1) of the Constitution has been violated by the 11th Respondent.

Accordingly the Disciplinary Order P13 is quashed and this court directs the Inspector General of Police to impose a punishment that is commensurate with the disciplinary breaches, the Petitioner had been found guilty o after considering the aggravating factors as well as migratory factors favourable to the Petitioner.

In all circumstances of the case I order no costs

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE UPALY ABEYRATHNE

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.15/2010

1. Shanmugam Sivarajah
2. Sivarajah Sarojini Devi

Presently residing
in Sagetrastrasse 12,3
133
Belp, Switzerland.

Petitioners

Vs.

1. Officer in Charge, Terrorist Investigation Division, Chaithya Road,
Colombo 01

2. Director, Terrorist Investigation Division, Police Headquarters, Chaithya Road, Colombo 01.

3. Deputy Inspector General of Police, Terrorist Investigation Division, Chaithya Road, Colombo 01.

4. Inspector Abdeen, Terrorist Investigation Division, Chaithya Road, Colombo 01.

5. Subair, Terrorist Investigation Division, Colombo 01.

6. Mr. Mahinda Balasuriya, Inspector General of Police, Police Head Quarters, Colombo 01.

6A. Mr. N.K.Illangakoon, Inspector General of Police, Police Headquarters, Colombo 1.

7. Secretary to the Ministry of Defence, Public Security and Law and Order, Ministry of Defence, Colomb o 02.

7A. Mr. B.M.U.D Basnayake
Secretary to the Ministry of Defence, Public Security and Law and Order, Ministry of Defence, Colombo 2.

7B Eng. Karunasena Hettiarachchi,
Secretary to the Ministry of Defence,
Ministry of Defence,
Colombo 2.

8. Mr. H. K. Balasuriya, Additional Secretary, Ministry of Defence, Public Security and Law and Order, Ministry of Defence, Colombo 02.

8A Mr. S.Hettiarachchi,

Additional Secretary,
Ministry of Defence, Public Security and Law and Oder,
Ministry of Defence,
Colombo 2.

8B Mr. S.Hettiarachchi,
Additional Secretary Ministry of Defence, Ministry of Defence,Colomb
Colombo 2

9. Mr. Lalith Weerathunga, Secretary to His Excellency the President, Presidential Secretariat, Colombo 01.

9A P.B.Abeykoon,
Secretary to His Excellency the President,
Presidential Secretariat, Colombo 01.

10. The Honourable Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents.

BEFORE: Priyasath Dep, PC, C J.
B. P. Aluwihare, PC, J &
Anil Gooneratne, J.

COUNSEL: Saliya Pieris with Asthika Devendra and Thanuka Nandasiri for the Petitioners.
Shanaka Wijesinghe, DSG for the Respondents.

ARGUED ON: 13.03.2017

DECIDED ON: 27.07.2017

ALUWIHARE, PC, J

The petitioners in this case seek a declaration that their fundamental rights guaranteed by Article 12 (1) of the constitution have been infringed by the 1st to the 10th respondents.

Leave to proceed was granted by this court for the alleged violation of Article 12 (1) of the Constitution, on 29-04- 2010.

The gravamen of the Petitioners' complaint is that, the order of forfeiture of the property owned by the petitioners, in terms of Regulation 7 (1) of the Emergency (Proscription of the Liberation Tigers of Tamil Elam) Regulations 2009 was made without considering the relevant material, in violation of the rules of natural justice and that the said order of forfeiture is unreasonable and unfair. The Petitioners are seeking, by way of relief, an order from this court, a declaration that the said order made by his Excellency the President in his capacity as the Minister of Defence, is null and void and of no force in law.

The Regulations aforesaid (hereinafter referred to as Emergency Regulations), were proclaimed by Gazette extraordinary bearing number 1583/12 of 7th January 2009 and subsequently amended by Gazette extraordinary bearing number 1606/12 of 18th June 2009.

Background :

Petitioners to the present application became the owners of the building in question by a deed of transfer bearing No.7143 attested by Notary Public Mrs. S Ganagatharan on 22nd of August 2005. The said premises originally bore the assessment number 18/1, 1st Chapel lane, but presently bears three separate assessment numbers 18/1,18/1-1/1 and 18/1-2/1, 1st Chapel Lane, Colombo 6.

The petitioners who are at present domiciled in Switzerland had executed a special power of attorney in favour of Ms. Valarmathy Suntharalingam to act as their attorney in order to, inter *alia* superintend, manage and control the said

premises and also to appear before any court in Sri Lanka, in all matters in connection with the said property.

Petitioners had executed an additional power of attorney on the 12th.04. 2010, so as to avoid any doubt regarding the previous power of attorney in favour of the aforesaid Ms. Valarmathy Suntharalingam.

Initially, a Sivapragasm Vijayanesan, a cousin of the 2nd petitioner, had looked after the premises in question. In 2006 Mr. Sivapragasam Vijayanesan had given the 1st floor of the aforesaid premises on lease to an organization named "Centre for Health Care". Subsequent to the execution of the said lease, in 2008, Mr. Vijayanesan had migrated to Australia. Thereafter, upon the request of the petitioners, another cousin of the 1st petitioner, their present attorney Ms. Valarmathy Suntharalingam had come into occupation of the ground floor of the premises and further had collected the rent from the tenants on the other two floors.

Petitioners had been informed by Ms. Suntharalingam, that on 26th June 2009, several police officers attached to the Terrorist Investigation Division, including 4th and 5th Respondents had come to the said 'Centre for Health Care' and arrested three Tamil persons who had been working for that Centre. The said Respondents had also arrested the caretaker of the building, namely Wigneshwaran Kandusami who had been employed by the Centre for Health Care.

As per the reports filed by the 1st Respondent, the Centre for Health Care a non-governmental organisation, was alleged to have been a front organisation for the LTTE. On the very same day, Ms. Suntharalingam who had proceeded to the Wellawatte Police station to lodge a complaint and she had been directed to the Terrorist Investigation Division (hereinafter also referred to as the TID).

Ms. Suntharalingam, thereafter, on the advice of the petitioners had met the 1st Respondent, the OIC-TID, on 28.072009 and had complained to him that the

premises concerned has been unlawfully occupied purportedly under the authority of the OIC-TID. The 1st Respondent, however, had refused to entertain the complaint on the ground that Ms. Suntharalingam has no right /authority over the premises.

The Petitioners states that there was no justification for the1st Respondent's action as Ms. Suntharalingam as the holder of the power of attorney, is legally empowered to act on their behalf who happened to be the holder of their power of attorney.

There is ample material in documents filed by the Petitioners, to establish that the Petitioners were the owners of the premises concerned at the time relevant to the incident referred to in this application. The documents have not been challenged by the Respondents other than to say that the "Centre for Health Care" was run by the LTTE.

It was in this backdrop that his excellency the President, in his capacity as the Minister of Defence, acting under the aforesaid Emergency Regulations made an order forfeiting the premises in question, to the State.

By the document marked and produced as P10A, Additional Secretary (police) of the Ministry of Defence, Law and Order had communicated to the Inspector General of Police, that his excellency the President had authorised the forfeiture of certain properties inclusive of the premises in question.

Interestingly, it's the Additional Secretary (police) who had sought permission from Secretary Defence to request his excellency the President to authorise the forfeiture of property in terms of Regulation 7 (1), asserting that the IGP had confirmed, that the Centre for Health Care was being run with the funding from the LTTE. (Documents P10B).

The Secretary Defence, on the same document, had made an endorsement addressed to his excellency the president seeking authorisation for the forfeiture,

(P10C). At the foot of that document, P10C, his excellency the president had made an endorsement "approved" and had placed the signature.

In terms of Regulation 7 (1) of the Emergency (Proscription of the Liberation Tigers of Tamil Eelam) Regulations, published in the Gazette dated 7th January 2009 bearing No.1583/2, power is vested with the Minister of Defence to forfeit to the state, moneys, securities or credits which are being used or intended to be used for the purposes of the proscribed organisation or **any other movable/immovable property belonging to such organization**. The order must be in writing, and is to be made only after such inquiry, as the Minister thinks fit.

The above Regulation had been amended by insertion of Regulation 7A by the Gazette of 18-6-2009 bearing number 1606/23 and which, inter alia reads thus:

No Person shall-

(a)….

(b)…

*(c) **rent, lease or obtain or procure any movable or immovable property, material or other thing:***

(d)…

(e)…

On behalf of himself or any person or body of persons (whether incorporated or unincorporated) in

contravention of the provisions of these regulations, with to or for, the Organisation styled the "Liberation Tigers of Tamil Elam" or any member of such organisation.

*(2) Any person who acts in contravention of the provisions of paragraph (1) of this regulation **shall be guilty of an offence***

and all property or money, which is the subject of such offence shall be forfeited to the State.

In his recommendation to the 7th respondent (P10B), the Additional Secretary claims, the Inspector General of Police has established after inquiries, that the Centre for Health Care is a Non-Governmental Organisation **run** by the LTTE and that the movable and immovable property had been used for the purposes of the LTTE and that the Inspector General of Police had recommended that the property referred to, in the Annexure A4 be forfeited.

Nowhere in 7th Respondent's recommendation, (P10B) is it asserted that the premises in question belongs to the LTTE.

Analysis of the Emergency Regulations aforesaid would be critical in my view in deciding as to whether the decision to forfeit the property is arbitrary and unreasonable and the forfeiture is illegal as claimed by the Petitioners, which forfeiture in turn had infringed their fundamental rights.

It is clear that the applicable provision for the order of forfeiture in the instant case is Regulation 7, in as much there is no evidence that any one had been charged under Regulation 7A (1), the only other section under which forfeiture can be affected.

Before an order for forfeiture can be made, however, it is imperative to establish that the property concerned should belong to a proscribed organization, in the instant case, the LTTE. It is a further requirement that the minister should hold such inquiry as he thinks fit before the decision is made.

The petitioners complain that no such inquiry had been held and as they have title to the property which could have been easily established through title deeds, they were not given an opportunity to make representations. Furthermore, the Centre for Health Care had leased only one of the floors of the premises in question and in proof of that, a letter written on behalf of the Centre For Health Care in 2007 had been marked and produced as P5. By the said letter Programme

Co-ordinator of Centre for Health Care had requested an extension of the lease of the premises 18/1, Chapel lane. This letter was written much before the relevant Emergency Regulations came into force.

I have given my mind to the objections filed on behalf of the 1st Respondent, the Officer-in-Charge of the TID and the only objections filed on behalf of the Respondents in this case. He asserts that the deed number 7143 was executed in transferring the property in favour of the Petitioners at a time both Petitioners were out of the country. This is a frivolous objection and shows the abysmal ignorance of the law. The presence of the buyer (transferee) is not a requirement to execute a deed of transfer and the absence of the Petitioners has no bearing on the execution of the deed or its validity.

The issue that this court has to answer is, did the minister hold the inquiry as required by the regulations and if so, did the minister go into the ownership of the premises 18/1, 1 Chapel Road Wellawatte before making the order of forfeiture.

Petitioners have, in these proceedings, furnished the title deed (P1), the survey plans (P2 and P2A), certificate of registration of ownership, issued by the Colombo Municipal Council (P2B1and P2B2) and statutory notice of assessment (P2C1- P2E3) and had argued that the petitioners are the lawful owners of the premises in issue. It was also contended on behalf of the Petitioners that as oppose to the material furnished on behalf of the Petitioners, the Respondents have failed to establish any nexus between the Centre for Health Care and the Petitioners, nor is there any material to say that the acquisition of the property had been financed by the LTTE.

In the objections filed on behalf of the 1st Respondent, it is pointed out that a sum of Rs. 5.7 million had been paid from a joint account held by one Iyampille Gunamalan and Karthigesu Sivanesharajah and the balance was paid in cash by Sivapragasam Vijayanesan, implying that the money that was paid to the seller did not come from the Petitioners. According to the Petitioners, however, the said

Vijayanesan is a cousin of the 2nd Petitioner who had been entrusted with the property, the same to be looked after.

The basis, however, for the initial seizure of the property in issue, according to the 1st respondent, had been the suspicion that the property was being used for committing offences and for illegal activities. The 1st Respondent had averred in his objections that *"Since it came to light that the property was being used for committing offences and for illegal activities the property was sealed as per the gazette notification No.1 of 2005 dated 13-08-2005".*

The 1st Respondent, however, had not referred to what those offences are or whether any person who had any association with the Centre for Health Care, had been charged in a court of law. It is the assertion of the Petitioners that the persons arrested by the TID have been discharged without any one of them being firmly arranged. The Respondents have not refuted this position. When one considers the objections filed on behalf of the Respondents, one gets the impression that the respondents are implying that the monies that went into the purchase of the property did not come from the Petitioners.

The material placed before us, there is nothing to indicate that the basic requirements that the minister was required to adhere to under the Regulations had been followed in the instant case. Specifically, the fact that an inquiry was held by him. It was argued on behalf of the Petitioners that the 1st to the 6th Respondents had failed to place relevant facts before the Minister and there was a duty on the Respondents to appraise the President of the full facts of this matter and the Petitioner contend that what can be deduced from these facts is that no inquiry had been held.

The Emergency Regulation, no doubt impinges on the property rights of the citizens and an order of forfeiture of property is purely an exercise of administrative discretion. Therefore, the minister is required to hold an inquiry in to the matter before a decision is taken in terms of the applicable Regulation.

House of Lords in the case of *Padfield Vs, Ministry of Agriculture 1968 (A.C) 997* rejected the concept of unfettered executive discretion. Lord Denning signifying the duty to exercise the discretion according to law, stated that "*the discretion of a statutory body is not unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant*." It appears that in the instant case number of relevant matters does not appear to have been considered. Specifically, failure on the part of the Respondent to establish any nexus between the Petitioners and the Centre for Health Care. When one peruses P10 C and P10E it appears that the Minister (his excellency the President) had acted on the unverified reports of the police and abdicating his authority had proceeded to make an order of forfeiture that is nothing more than mechanical.

It was strongly urged on behalf of the Petitioners that the Respondents (Police) had made wrong representations without a proper consideration of the materials before him stating that the property in question was owned by the Centre for Health Care, whereas the said property was owned by the petitioners on whose behalf the 1st floor bearing the assessment 18/1 -1/1 was leased to the said Centre for the Health Care.

It also appears that his Excellency the President (in his capacity as Defense Minister) was misled by the 6th respondent in issuing an order to seize the premises by convincing that 18/1 Chapel lane Wellawatte was owned by the Center for Health Care. It was not disclosed to the President that the premises in question was owned by the petitioners and that there are no allegations against the petitioners of any involvement with the LTTE.

In view of the wording used in Regulation 7 (1) which specifically states that "where the Minister **is satisfied**, after such **inquiry** as it thinks fit…..", it is imperative that minister holds an inquiry before making an order to forfeit any property. Thus, the empowering Regulation requires the Minister to come to a specific finding objectively, that the property in question belongs to the proscribed organisation. In my view, it is important to consider whether an

inquiry was conducted by the Minster of Defense as per required by the regulation 7 (1) of the Gazette No.1583/12 dated January 7th 2009. The above regulation specifically states that "where the Minister is satisfied, after such **inquiry** as **it thinks fit**….."

The legal definition of the term inquiry means the examination or investigation of facts or principles. There is no established degree of inquiry required by the Gazette. Also, the term "as it thinks fit" gives the discretion to the Minister to decide as to the extent of the inquiry that should be conducted and that could be varied from case to case.

In the material placed before this court there is nothing to say that the minister has arrived at such specific finding, hence in my view, there had been an error in the exercise of power by the minister in this instance.
In the case of *The Manager, Government Branch Press Vs Beliappa AIR1979 SC 429*, in interpreting Article 14 of the Indian Constitution, Justice Bhagawathi held:- *"In order to establish discrimination or denial of equal protection it is not necessary to establish the due observance of the law in the case of others who form part of that class in previous instances. The Rule of Law, which postulates equal subjection to the law, requires the observance of the law in all cases."*

In the instance case the petitioners ought to have been afforded an opportunity to be heard or place any material in their favour and in my view, the term "inquiry" in Regulation 7 (1) postulates giving an opportunity to all parties that may be affected by an order of forfeiture. This court had consistently held that noncompliance of the rules of natural justice in particular the *audi ultra partem* rule tantamount to an infringement of fundamental rights under Article 12 (1). vide: *Prassana Withanage V. Sarath Amunugama 2001 1SLR 391 and Jayawardena V. Dharani Wijeyathilke 2001 SLR 132*

As to the exercise of power by authorities, Justice Mark Fernando remarked in the case of *Bandara v. Premachandra 1994 1SLR 304* "*Powers are conferred on*

various authorities in the public interest….. and their exercise must be governed by reason and not caprice; they cannot be regarded as absolute, unfettered, or arbitrary, unless the enabling provisions compel such a construction".

It would, in my view, pertinent to refer to the pronouncement made by His Lordship Justice Wanasundera in the case *Jayanetti v Land Reform Commission 1984 2 SLR 172* wherein his lordship said:

"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 any act of the state from whichever organ it emanated*** *and compel it is to justify its legality. It was not confined only to legalization, but extended 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"* Therefore, it is clearly evident that there is a violation of Article 12 (1) as a Fundamental right of the petitioners.

All attended facts and circumstances considered, I hold that the forfeiture of the Petitioners' property by the order (P10E) made by his excellency the President in his capacity as the Minister of Defense has infringed the petitioner's fundamental right under Article 12(1) of the Constitution, and the said order forfeiting the premises bearing assessment no. 18/1 Chapel Lane Wellawatte Colombo 6 in terms of Regulation 7(1) of the Emergency(proscription of the Liberation Tigers of Tamil Elam) Regulations 2009, is null and void and is hereby quashed.

In the course of the hearing of this matter it was submitted on behalf of the Petitioners that officers of the Terrorist Investigation Division of the police are still in occupation of the building. I make a further direction to the 1st to the 3rd Respondent and the 6B Respondent to take immediate steps to hand over vacant

possession of the premises aforesaid to the Petitioners, if this assertion is correct and in any event not later than eight (08) weeks from the date of this judgement.

The 1st to 3rd Respondent and the 7th Respondent have acted in total disregard of the essential requirements of justice in making the recommendation to His excellency the President. However, this does not appear it to have been done with any malicious intent against the Petitioners, hence I am of the view that, this is not an instance where the Respondents should be called to pay compensation personally.

I consider it is equitable to award the Petitioners a sum of Rupees five hundred thousand, (Rs.500,00/=) as compensation and are entitled to the cost of this application.

JUDGE OF THE SUPREME COURT.

Justice Priayasath Dep P.C

I agree

CHIEF JUSTICE

Justice Anil Gooneratne,

I agree

JUDGE OF THE SUPREME COURT

JUDGE OF THE SUPREME COURT

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

Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Palitha Victor Mendis Rajakaruna
   Wathuru Villa,
   Kahaduwa.
2. Hakmana Kodithuwakkuge Jayathissa
   22/4, Guru Pura Rd.,
   Mathugama.
3. Herath Mudiyanselage Panchananda Athula Bandara Herath
   Kuruvee Kotuwa
   Kengalla,Kandy.

S.C. F/R No: 32/14

4. Chaminda Pasquel Dilanka,
   32, Meddegoda Rd.,
   Mathugama.
5. Rathanayake Mudiyanselage Upananda Bandara Rathnayaka
   22/8, Udaperadeniya,
   Peradeniya.
6. Sri Lanka Nidahas Ruber Inspectors' Union,
   96/6, Mollamure Avenue 2,
   Kegalle.

Petitioners

~ Vs~

1. R. B. Premadasa
Director-General,
Rubber Development
Department,
No.55/75, Vauxhall Lane,
Colombo 2.

2. Mrs. Sudharma Karunaratne
Secretary,
Ministry of Plantation
Industry,
55/75, Vauxhall Lane,
Colombo 02.

2A. Anura M. Jayawickrema
Secretary,
Ministry of Plantation
Industry,
11th Floor, Sethsiripaya
2nd Stage, Battaramulla

2B. Mr. Upali Marasinghe
Secretary,
Ministry of Plantation Industry
11th Floor, Sethsiripaya
2nd Stage, Battaramulla.

3. Dr. Dayasiri Fernando
(Former) Chairman,
Public Service Commission.

4. Palitha M. Kumarasinghe, PC.

5. Mrs. Sirimavo A. Wijeratne

6. S.C. . Mannapperuma

7. Ananda Seneviratne

8. N. H. Pathirana

9. S. Thillanadarajah

10. M. D. W. Ariyawansa

11. A. Mohamed Nahiya
All (Former)Members of the
Public Service Commission.

12. Mrs. T. M. L. C. Senaratne
(Former) Secretary,

Public Service Commission,
No.177, Nawala Road
Narahenpta.

12A. H.M.G.Seneviratne
Secretary,
Public Service Commission,
177, Nawala road,
Narahenpita

13. Neville Piyadigama
(Former)Co-Chairman,
National Salaries and Cadre
Commission

14. Ravi Dissanayake
(Former)Co-Chairman
National Salaries and Cadre
Commission
Room 2-G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 07.

15. D. Godakanda
Director-General,
Department of Management
Services, Ministry of Finance
and Planning,
General Treasury, Colombo 01

16. Attorney-General,
Attorney-General's
Department,
Colombo 12.

17. Neville Piyadigama,
(Former)Co-Chairman,
National Pay Commission.

17A. K.L.L.Wijeratne
Chairman,
Salaries and Cadre
Commission,
BMICH,
Bauddhaloka Mawatha,
Colombo 07.

18. J. R. Wimalasena Dissanayake,
(Former)Co-Chairman,
19. Wimaladasa Samarasinghe,
(Former) Member,
20. V. Jegarasasingham,
(Former)Member,
21. G. Piyasena,
(Former) Member,
22. Rupa Malini Peiris,
(Former) Member,
23. Dayananda Vidanagamachchi
(Former)Member,
24. S. Swarnajothi,
(Former) Member,
25. B. K. Ulluwishewa,
(Former) Member,
26. Sujeewa Rajapakse,
(Former) Member,
27. H. W. Fernando,
(Former) Member,
28. Prof. Sampath Amaratunga,
(Former) Member,
29. Dr. Ravi Liyanage,
(Former) Member
30. W. K. H. Wegapitiya,
(Former) Member,
31. Keerthi Kotagama,
(Former) Member,
32. Reyaz Mihular,
(Former) Member,
33. Priyantha Fernando,
(Former) Member,
34. Leslie Shelton Devendra,
(Former) Member,
35. W.W.D.S.Wijesinghe,
(Former) Member,
36. G. D. S. Chandrasiri,
(Former) Member,
37. W. H. Piyadasa,

(Former) Member,

18th to 37th Respondents all of the (Former) National Pay Commission,
Room No. 2-116, B.M.I.C.H.
Bauddhaloka Mawatha,
Colombo 7.

38. Justice Sathya Hetige PC,
(Former) Chairman,
Public Service Commission.

38A. Dharmasena Dissanayake,
Chairman,
Public Service Commission,

39 S.C.Mannapperuma
(Former) Member

39A. Prof. Hussain Ismail
Member

40. Ananda Seneviratne
(Former) Member

40A. Santi Nihal Seneviratne
Member

41. N.M.Pathirana
(Former) Member

41A. D. Shirantha Wijayathilaka
Member

42. S.Thillanadarajah
(Former) Member

42A. V. Jegarasasingham
Member

43. A. Mohamed Nahiya
(Former) Member

43A. S. Ranugge
Member

44. Kanthi Wijetunge
(Former) Member

44A. D. L. Mendis
Member

45. Sunil S. Sirisena

(Former) Member
45A. Sarath Jayathilake
Member
46. Dr. I. M.Zoysa Gunasekera
(Former) Member
46A. Dr. Parathap Ramanujam,
Member
All of Public Service
Commission,
No.177, Nawala road,
Narahenpita, Col. 5.

RESPONDENTS

BEFORE: Buwaneka Aluwihare PCJ
Priyantha Jayawardena PCJ
Upali Abeyrathne J

COUNSEL: Mrs. Chamanta Weerakoon with Oshadi Premarathne and Ms. Lumbini Kodituwakku for Petitioners.
Mrs. Shahida Barrie, SSC for Respondents.

ARGUED ON: 10.09.2015

DECIDED ON: 16.06.2017

Aluwihare PC.J

In the main, the grievance of the Petitioners is that; although they were eligible to be promoted to the post of Rubber Development Officers- Grade 1, way back in the 1990s, their promotions were granted only with effect from 2nd August, 2013 and the executive and/or administrative action on the part of the Respondents, in fixing the date 2nd August, 2013 as the date for the promotions is unreasonable and arbitrary and had infringed the rights guaranteed under Article 12 (1) of the Constitution.

The 1st to the 5th Petitioners who are Rubber Development Officers in the Department of Rubber Development had filed this application on their

behalf as well as on behalf of 30 other such officers who are members of the 6th Petitioner Trade Union.

The facts are as follows:

Some of the Petitioners along with others, whose names are reflected in the document marked and produced as P1 (a) had joined the then Rubber Control Department, which had been established by the Rubber Control Act No.11 of 1956, as Rubber Inspectors-Grade II. Sometime in the year 1994, Rubber Control Department and the Advisory Services Department that came under Rubber Research Board had been amalgamated, consequent to a Cabinet Memorandum which had received Cabinet approval to form the Rubber Development Department and the Rubber Control Department ceased to exist.

Thereby, with effect from 1st July, 1994 Rubber Inspectors in the Rubber Control Department, as well as Rubber Extension Officers of Advisory Services Department of the Rubber Research Board became employees of the Rubber Development Department. The Petitioners submit that both these categories of officers were designated as Rubber Development Officers and retained the same grades they had been in, under their former employers.

It was also contended that by the date of formation of the Rubber Development Department, 13 Rubber Inspectors under the Rubber Control Department had been selected to be promoted to Grade- I. Giving effect to the said decision the 13 officers who were selected had been promoted as Rubber Development Officers Grade-I, after the Rubber Development Department was formed.

The Petitioners submit that although they were informed about the change in the designations by the letter dated 31st October,1994 (P4) under the hand of the Director General of the Rubber Development Department, the said designations had not been approved by the Management Services Department even up to the point this application was filed in 2014.

Furthermore there had also not been any change in the salaries and they continued to draw the salary scale applicable to the Clerical and equivalent grades-11A.

Although it may not be directly relevant to the present issue before us, the Petitioners also have averred that the Rubber Extension officers, were absorbed to the Rubber Development Department from the Advisory Services Department, an arm of the Rubber Research Board, became entitled to draw the same benefits, namely salary increments, salary revisions and allowances as their former colleagues in the Rubber Research Board by virtue of an order made by this court in the Fundamental Rights Application No. SC FR 961/97.

Petitioners have drawn the attention of this court to the fact that since the formation of the Rubber Development Department in 1994, no promotions were effected in the post of Rubber Development Officers, save for the 13 officers who were promoted to Grade-I, a decision that had been taken when the Rubber Control Department existed and implemented after the formation of the new Department.

If what the Petitioners claim is correct the Department had not taken any steps to effect promotions to officers employed as Rubber Development Officers Grade II up to 2013, July when applications had been called to fill vacancies of Rubber Development Officers Grade-1 which was almost 20 years since the formation of the Rubber Development Department.

The Petitioners have in their Petition referred to numerous instances where they had made efforts to make representations to the relevant authorities with regard to anomalies of the salary scale they were placed. I do not see any necessity to dwell into those matters as they have no bearing on the matter at hand.

The learned counsel for Petitioners contended that the Rubber Development Officers who were promoted to Grade I had service periods varying from 17 years to 29 years and fixing a common effective date for promotion i.e. 2nd August, 2013 is arbitrary and by this action, the Public Service Commission, had virtually wiped off the period of service of the affected Rubber Development Officers.
In terms of the annexure to the document marked and produced as P9(a), a Rubber Inspector Grade-II is required to have 10 years satisfactory service in that Grade and is also required to complete the Efficiency Bar Examination to become eligible to be promoted to Grade-I. The Petitioner

and all other affected officers, save for one, had in fact completed both these requirements having passed the Efficiency Bar examination in 2001. It was pointed out that the said examination had not been held since then, for Grade II Rubber Development officers.

Interviews had been held on 1st August, 2013 after calling for applications to fill vacancies of Grade-1 from Grade II Rubber Development Officers who have qualified for promotion.

The Petitioners as well as the other affected officers had been informed by the Director General (The 1st Respondent) that they have been promoted as Grade- I Rubber Development Officers with effect from 2nd August, 2013.

The Petitioners complain, that fixing the date of promotion as 2nd August, 2017 is unreasonable, arbitrary, discriminatory and as a result, the petitioners' fundamental rights guaranteed under Article 12 (1) had been infringed.

To illustrate their argument further, it is pointed out that subsequent to the promotions the 1st Petitioner who had served 29 years as a Grade- II officer, and the 4th Petitioner who has only 17 years' service, are on par as being of the same seniority.

It was the contention of the Petitioners that the fixing of the effective date of promotion to 2nd August, 2013 is arbitrary as it effectively wiped out the period of service of the affected officers.

It was also contended on behalf of the Petitioners that further prejudice was caused to them, by fixing the date of promotion to 2nd August, 2013, as they are required to serve a further period of 6 years in order to become eligible to be promoted to Special Class and as most Petitioners and the affected officers have almost reached the retirement age, they would never be in a position to be promoted to the Special Class.

The table below depicts the dates on which the affected officers joined the former Rubber Control Department and the years of service they have put in, by August 2013.

	Name	Date of Birth	Age As at 2. 8. 2013	Date of Appointment	Years Of Service	Efficiency Bar Completed year
01	A.V.C Ranaweera	1956.02.17	57	1983.12.01	29	1993-12-06
02	R.A.D Sisira Kumara	1959.08.06	53	1983.12.01	29	1990-11-24
03	N.M.G Senarath Bandara	1956.07.08	57	1983.12.01	29	1989-13-26
04	R.A Sarath Kumara	1956.12.09	56	1983.12.01	29	1990-11-24
05	W.V Karunarathne	1962.01.24	51	1983.12.01	29	1990-13-26
06	P.V.M Rajakaruna	1959.05.24	54	1983.12.01	29	1990-11-24
07	W.S Devananda De Silva	1961.06.05	52	1983.12.01	29	1990-11-24
08	W.K Jinadasa	1957.09.30	55	1985.03.15	27	1990-11-24
09	R.A.I Wijesinghe	1959.03.24	53	1985.03.15	27	1990-11-24
10	E.W Laxman Rathnasiri	1955.10.31	57	1985.03.15	27	1993-12-26
11	G.H.H.B Wijewardene	1959.06.01	54	1985.03.15	27	1990-11-24
12	B.G Ranawaka	1961.10.14	51	1985.03.15	27	1990-11-24
13	R.W.D. Chandrapala	1958.10.31	54	1985.03.15	27	1993-12-26
14	P.R.H Ariyarathne	1961.03.01	52	1985.03.15	27	1993-12-26
15	G.K.M Jyawardene	1957.11.02	55	1985.03.15	27	1990-11-24
16	J.A.A.D Jayakodi	1959.03.07	54	1985.03.15	27	1990-11-24
17	H.K. Jayatissa	1957.10.13	56	1985.03.15	27	1990-11-24
18	M.A Kasunathilaka	1962.01.17	55	1985.03.18	27	1990-11-24
19	M.W.G Weeragoda	1963.05.09	51	1986.04.16	26	1993-12-26
20	A.M.J.G. Alahakoon	1963.05.09	50	1986.04.16	26	1990-11-24
21	J.M. Mettananda Gamini	1964.01.03	49	1986.04.16	26	1989-03-26
22	L.D.Withanarachchi	1960.03.17	53	1986.04.16	26	1989-03.26

23	W.S. Sumathipala	1958.02.07	55	1986.04.16	26	1990-11-24
24	H.R.A.A. Jayathilaka Bandara	1960.11.03	52	1986.04.16	26	1990-11-24
25	R.I.B Kumarasinghe	1957.10.30	52	1986.04.16	26	1989-03-26
26	U.M.D Udugoda	1957.07.20	56	1986.04.16	26	1990-11-24
27	S.Subawikrama	1957.07.20	56	1986.04.21	26	1990-11-24
28	P.A.B Herath	1958.06.24	55	1986.04.21	26	1990-11-24
29	M. Ranjith	1962.08.15	51	1996.06.03	17	2001-11-17
30	N.C Palihawadana	1968.05.17	45	1996.06.03	17	-
31	W.J Liyanage	1972.07.24	41	1996.06.03	17	2001-11-17
32	Sunanda Rajapakse	1972.11.30	40	1996.06.03	17	2001-11-17
33	K.A.G Sirisena	1968.05.14	45	1996.06.03	17	2001-11-17
34	R.M.U.B Rathnayake	1967.11.24	45	1996.06.03	17	2001-11-17
35	C.Pasquel	1969.06.27	44	1996.06.03	17	2001-11-17

The Petitioners have pointed out that, the 1st Respondent, the Director General of the Rubber Development, had sought approval of the Public Service Commission to make the promotion effective from the date that each officer became eligible for promotion.

It was contended on behalf of the Petitioners that at the time the promotions to grade-1 were made, there were 52 vacancies in the said Grade, and as such, all 35 affected officers could have been promoted.

The 38th Respondent, the then Chairman of the Public Service Commission in his affidavit had averred that the 1st Respondent sought approval of the Public Service Commission to promote 41, Grade II Rubber Development Officers to Grade 1, which clearly indicates that there had been more than 35 vacancies at that point of time. The 38th Respondent also admits that the 1st Respondent, the Director General of Rubber Development Department, made a request to consider back dating the promotions to the year 1996.

The 38th Respondent states that the Public Service Commission called for proof of approved cadre that existed in 1996 from the 1st Respondent. It is further averred by the 38th Respondent that of the staff schedule submitted by the Department of Management Services, in respect of the year 1996, indicate only an estimated cadre and for that reason it was not considered as the actual number of posts existed as of 1996. The Chairman, Public Service Commission had further averred that there was no documentary proof of approval by the Department of Management Services for the changing the designation of the Petitioners from "Rubber Inspector" to "Rubber Development Officer".

It was the position of the Public Service Commission, according to the 38th Respondent that, as there was no proof acceptable to the Public Service Commission as to the cadre that existed in 1996, promotions cannot be given from 1996.

To my mind, it is up to the relevant authorities, in the exercise of its powers vested in them to obtain all details relevant to consider the promotions. An employee cannot be penalized or deprived of his entitlements as a result of ineffectiveness or inability on the part of the authorities to obtain the necessary information or statistics with regard to the cadre of grade-1 officers of the relevant post.

The Petitioners have averred that no Efficiency Bar Examination had been held since 2001. This application was filed in 2014. Therefore, it appears that the relevant authorities have lamentably failed in their duty towards the employees.

Having considered the facts of the case I am of the view that, in the context of the 35 officers referred to in document marked and produced as P1 (a), the decision of the then Chairman and the members of the Public Service Commission to fix the date of promotion to Grade I with effect from 2nd August, 2015 is both arbitrary and unreasonable.

The Petitioners have sought a declaration from this Court to the effect that the administrative action on the part of the Respondents, have infringed the fundamental rights of the Petitioners of equality before the law and equal protection of the law guaranteed under Article 12 (1) of the Constitution.

Equality before the law in Article 12 of the Constitution envisages right to equal treatment in similar circumstances, without discrimination between persons who are similarly circumstanced. As per Justice Sharvananda (Fundamental Rights in Sri Lanka, "A commentary") equal protection guarantees protection from both legislative and executive by way of discrimination. Justice Sharvananda goes on to say that "the guarantee of equality is directed against arbitrary discrimination".

In the case before us I doubt whether the Petitioners could say that they have been discriminated, in the true sense of its meaning, in that they were treated differently among persons who are substantially in similar circumstances. On the other hand going by the strict wording in Article 12, one might argue that the Petitioners have failed to establish that the Petitioners were subjected to inequality, when it came to the application of the law.

In the course of governance, discretionary power has to be conferred on officers who are vested with administrative functions as well as other state organs that carry out similar functions. As held by the Supreme Court of India in the case of *Air India Vs. Nagesh Meerza 1981 S.C 1829,* a law conferring absolute or uncontrolled discretion in an authority, negates the equal protection because such a power can be exercised arbitrarily so as to discriminate between persons similarly situated without reasons.

In the case of *Breen v. Amagalamated Engineering Union and others 1971 AER 1148 ,*Court of Appeal (England), rejected the concept of unfettered executive discretion. Lord Denning, signifying the duty to exercise the discretion according to law stated (at pg. 1153).

> *"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand, no matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside."*

The issue as to whether arbitrariness encapsulates Article 14 and 16 of the Indian constitution was considered in the case of *Royappa v. State of Tamil Nadu 1974 AIR SC 555* by a five judge bench of the Indian Supreme Court.

The article 14 of the Indian Constitution, which is similar to the Article 12 of our constitution, reads thus:-

> "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India…"

In the said case, the Supreme Court of India held, as per Justice Bhagawati:

> *"Equality is a dynamic concept with many aspects and dimensions and it cannot be, cribbed, cabined and confined within the traditional doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sold enemies; one belongs to the rule of law in the Republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of article 14 and if it affects any matter relating to public employment……. Articles 14 and 16 strikes at the arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid, relevant principles applicable alike to all similarly situate and must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant, but is extraneous and outside the area of permissible considerations, it would amount to Mala fide exercise of power and that is hit by articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice; in fact the latter comprehends the former. Both are inhibited by articles 14 and 16"*

The Supreme Court went on to hold that:

> *"The ambit and reach of Article 14 and 16 are* ***not limited to cases where the public servant affected has a right to a post..."*** *(emphasis added)*

In the instant case the decision of the Public Service Commission, not to backdate the date of the promotions of the affected officers, on the basis that there were insufficient proof as to the availability of vacancies, in my view is arbitrary and lacks fairness, and would be violative of article 12 of the Constitution applying the rationale in the case of *Royappa v. State of Tamil Nadu (supra).*

Furthermore, fixing a common date of the promotions to the Petitioners and the other affected officers had been done disregarding the dates of appointment of each officer and the said decision in my view is, a decision outside the permissible area of consideration'.

I hold that the action of the 38th respondent and 39th to 46th Respondents, the former Chairman and former members respectively, of the Public Service Commission, by their decision not to backdate the promotion to Grade I of the 1st to 3rd Petitioners have infringed their fundamental rights guaranteed under article 12 (1) of the Constitution.

This court directs the present Chairman and the members of the public Service Commission to back date the appointment of the Petitioners and the other affected officers whose names appear in the table in this judgment with effect from the date each of them became eligible to be promoted to the post of Rubber Development officer Grade-I if the officers concerned have satisfied the criteria referred to, in the letter of the Director General of Rubber Development dated 08-07-2013 reference, No.RDD/1/5/1/3/recruitment (P10).

This must be done upon ascertaining the number vacancies that existed in the said post, from the 1st Respondent.

This court further directs the 1st Respondent, the Director General, Rubber Development Department to furnish the Public Service Commission, the number of vacancies that existed on the respective dates each of the Rubber Development Officers (whose names appear in the table of this judgement) became entitled to be promoted as Rubber Development Officer Grade- I

In view of the circumstances of the case and the relief granted, I do not wish to make an order as to compensation.

JUDGE OF THE SUPREME COURT

Justice Priyantha Jayawardena P.C

I agree

JUDGE OF THE SUPREME COURT

Justice Upaly Abeyrathne

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

1. Paniyanduwage Saman,
   No. 110/2, Maha Ambalangoda,
   Ambalangoda.

2. Paniyanduwage Gigum Shavindra,
   No. 110/2, Maha Ambalangoda,
   Ambalangoda.

   (Appearing by his next friend and father, the above-mentioned 1st Petitioner - Paniyanduwage Saman, No. 110/2, Maha Ambalangoda, Ambalangoda)

Petitioners

SC /FR/ Application No 43/2017

Vs,

1. Hasitha Kesara Weththimuni,
   Principal,
   Dharmashoka Vidyalaya,
   Ambalangoda.

2. K.P. Dayaratne,
   Vice Principal,
   Dharmashoka Vidyalaya,
   Ambalangoda.

3. Dasan Nainduwawadu,

4. K.K. Kema Chandani,

5. Sujani Senaratne,

6. G.D. Nalaka De Silva,

7. Tharaka Maduwage,

(All members of the Admissions Interview Board to Grade 1 of Dharmashoka Vidyalaya, Ambalangoda, and c/o. Dharmashoka Vidyalaya, Ambalangoda)

8. Francis Welage,
   Chairman,
   Admissions Appeal Board,
   Dharmashoka Vidyalaya,
   Ambalangoda

9. Shantha Ariyaratne,
   Chairman,
   Admissions Appeal Board,
   Dharmashoka Vidyalaya,
   Ambalangoda.

10. P.M. Vikum Priyalal,

11. K.A. Nishanthi,

12. Lushman Waduthanthri,

13. Ujith Indikaratne,

14. B. Anthony,
    (All of whom were members of the Admissions Appeals and Objections Board of Dharmashoka Vidyalaya, Ambalangoda)

15. Sunil Hettiarachchi,
    Secretary,
    Ministry of Education,
    "Isurupaya", Pelawatte,
    Battarammulla.

16. S.P Chandrawathie,
    Zonal Director of Education,
    Zonal Education Office,
    Ambalangoda.

17. Y. Wickramasiri,
    Provincial Secretary of Education,
    Southern Province Provincial Ministry of Education,
    2nd Floor, Talbert Town Shopping Complex,
    Dickinson Junction,
    Galle.

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

Respondents

Before: Priyantha Jayawardena PC J
Anil Goonaratne J
Vijith K. Malalgoda PC J

Counsel: Nilshantha Sirimanne with Uween Jayasinghe for the Petitioners

M.I.F. Razik, SSC for the Attorney General

Argued on: 19.10.2017

Judgment on: 05.12.2017

Vijith K. Malalgoda PC J

The two Petitioners namely Paniyanduwage Saman and Paniyanduwage Gigum Shavinda, a father and his minor son had filed the present application before this court, alleging violation under Article 12 (1) of the Constitution.

As revealed before this court, the 1st Petitioner had submitted two applications for admission of his son Gigum Shavinda, the 2nd Petitioner to grade one at Dharmashoka Vidyalaya,

Ambalangoda for the year 2017 under the category, children of residents in close proximity to the school as laid down in clause 6.1 and brothers and sisters who are already studying in the school as laid down in clause 6.3 of the circular 17/2016 dated 27th May 2016 which governed the school admission to grade one for the year 2017.

Under clause 6.1, 50% of the total number of vacancies and under clause 6.3, 15% of the total number of vacancies are allocated to the children who come under the said categories. How such parents should establish their claims and how the marks should be allocated based on the documents produce by the applicant is identified under the said clauses.

As observed by this court, maximum of 10 marks are given to the nature of the ownership to the property under both these categories and considerable percentage of marks were given for establishing the residence by electoral register during the past five years and to the proximity to the school from the place of residence under both these categories.

As revealed before this court, the 1st and the 2nd Petitioners were residing at No. 110/2, Maha Amabalangoda, Ambalangoda, at the time the applications were submitted to Dharmashoka Vidyalaya under both the said categories. In support of the said applications, the 1st Petitioner had annexed several documents as required by the circular referred to above.

In order to establish the residence at the above address, the 1st Petitioner had submitted extracts of the electoral register for the past five years, other documents such as utility bills and two title deeds including a deed of transfer and a deed of declaration. Since the decision challenge before this court is mainly depend on the deeds referred to above, it is necessary to consider the said deeds in order to understand the cases submitted by the two parties before this court.

As submitted above, the Petitioners have strongly taken up the position that they reside at 110/2 Maha Amabalangoda, Ambalangoda. Out of the two deeds submitted to establish the ownership to the said premises, the transfer deed 6911 referred to an undivided share from a land called “ඉරදිග පතිරවත්ත” identified in plan 961 prepared by H.B. Gunawardena LS on 14.12.1929. The said transfer had taken place on 25th September 1996.

Even though the plan 961 referred to above is not produced along with the deed 6911, subsequent plan prepared in the year 1985 was produced along with the deed of declaration 3256 submitted by the Petitioners.

By the said deed of declaration attested on 18th December 2012, lot A8 in plan No 1127 prepared by P.A. Rabin Chandrasiri LS on 23rd October 1985 had been declared as the land referred to in deed 6911, said to have purchased by the 1st Petitioner, and it is further declared that the premises referred to as 110/2 is also within the said premises.

It is the position taken up by the Petitioner that he continued to live in the premises identifies as 110/2 since 1997 with his wife and children, after building a house with two bedrooms, kitchen and a living room. His parents with whom the Petitioner lived prior to the purchase of the land referred to in deed 6911, continued to live in the parental house bearing assessment No 110/1, which is situated North of his land, outside "ඉරදිග පතිරවත්ත". Between 1998 and 2008 the 1st Petitioner had purchase 3 more undivided shares of the said land by 3 more deeds bearing Nos. 1146 dated 17.06.1998, 1150 dated 27.05.1998 and 1944 dated 02.05.2008 and the said shares referred to in the plan 1127 as lot A7 which is on the South of lot A8.

According to the Petitioner, his brother too had built a house in lot A8 but at present there is no house in lot A7. In the said circumstances the Petitioner had submitted that, there is a house occupied by his parents bearing assessment No 110/1, North of "ඉරදිග පතිරවත්ත", two houses in lot A8 of "ඉරදිග පතිරවත්ත" bearing assessment Nos. 110/2 and 110/2A occupied by him and his brother and lot A7 continued to be a bare land.

Whilst placing the above position with regard to the deeds he produced at the interview, the Petitioners have further submitted that,

a) The Petitioners have attended the formal interview on 27.09.2016 at 9.00 a.m. under the children of residents in close proximity and at 11.00 a.m. on the same day under the brothers/sisters of students studying in the school at present
b) According to the applicable marking scheme provided for in the circular 17/2016 the 2nd Petitioner was entitled to receive a total of 95 marks under the category of, children of residents in close proximity and a total of 68 marks under the category of brothers/sisters of students studying in the school at present

c) On or about 12.11.2016 officials from Dharmashoka Vidyalaya, Ambalangoda including the 1st Respondent and two other persons had visited the 1st Petitioner's residence on site inspection but, the 1st Petitioner, his wife or the children were not at home on that day. However the said team of officials had visited the 1st Petitioner's parental house bearing assessment No 110/1.

d) On 16.11.2016 the 1st Petitioner received a telephone call from Dharmashoka Vidyalaya, Ambalangoda requesting him to be present for a meeting with the 1st Respondent Principal.

e) When the 1st Petitioner met the 1st Respondent the same day, the said 1st Respondent alleged that he had submitted false documents to prove his residence. It was further alleged that the Petitioner did not reside at No 110/2, Maha Ambalangoda, Ambalangoda.

f) At the said meeting the 1st Petitioner had once again produce all the relevant documents before the 1st Respondent, but the 1st Respondent had selectively kept copies of deed No 181 and plan No 560 with him.

g) On the same day around 5.00 pm the 1st Respondent along with few other officials visited the house of the 1st Petitioner.

h) The following day (i.e. on 17.11.2016) the 1st Respondent once again visited his house and took photographs. On both the said occasions, when the 1st Respondent arrived on site inspection, the Petitioner was at his parental house (110/1) but, the Petitioner showed his house and other properties referred to above to the 1st Respondent.

i) On 18.11.2016 the temporary list containing the names of children selected to grade one was released and displayed in the notice board but, to the 1st Petitioner surprise, the 2nd Petitioner's name was not on the said list.

j) Being dissatisfied with the said decision, the 1st Petitioner lodged two appeals requesting the authorities to reconsider the said decision but the said Appeals Board did not change the decision of the Interview Board.

When going through the material placed before this court by the 1st Petitioner referred to above, it is clear that the Petitioner had taken a strong stand that, at the time he submitted the applications, he was permanently residing at 110/2, Maha Ambalangoda, Ambalangoda with his family only. However his parental house bearing No. 110/1 was situated North of his house and most of the time the children use to stay at the parental house (110/1) but as a family they eat,

drink, live and sleep at their residence, No 110/2 Maha Ambalangoda, Ambalangoda at all times material to the present application.

However, the Respondents whilst challenging the said position, submitted material before this court to establish that there wasn't two houses bearing assessment Nos. 110/1 and 110/2 in the adjourning lands as submitted by the 1st Petitioner, but, both the Petitioners' family and his parents lives in one house bearing assessment no. 110/2. In other words, the 1st Petitioner and his family was permanently residing with his parents at the parental house and therefore the Petitioner is not entitled to obtain full marks under any of the categories, he applied, for the ownership of the property in question.

It was further submitted by the Respondents that, when the 1st Petitioner met the Principle on 16.11.2016 as submitted by the 1st Petitioner above, the 1st Respondent had discovered a deed of gift bearing No. 181 dated 12th May 2015 written by one Thotawattage Wijitha Manel who is the mother of the 1st Petitioner, to the Petitioner, among the documents submitted to him by the 1st Petitioner. The said deed referred to a Plan 560 dated 05.05.2015. Since the said deed referred to premises 110/2, the 1st Respondent had obtained, copies of the said deed and the Plan referred to above.

As observed by me, the 1st to the 3rd paragraphs of the said deed of gift reads as follows;

මෙහි ඇතැම් තැනක "ත්‍යාග දීමනාකාරිය" (මෙයින් ඇයගේ උරුමක්කරුවන් පොල්ම:කරුවන්, අද්මිනිස්ත්‍රාසිකරුවන්, බලකරුවන ද වේ) ලෙස හඳුනවනු ලබන ශ්‍රී ලංකා ප්‍රජාත්‍රාන්තික ජනරජයේ දකුණු පළාතේ, ගාල්ල දිස්ත්‍රිකයේ, අම්බලන්ගොඩ, මහ අම්බලන්ගොඩ, අංක 110/2 දරණ ස්ථානයේ පදිංචි තොටවත්තගේ විපිතා මානෙල් (ජා.හැ.අංක 545060507V) වන මට,

මට ප්‍රසිද්ධ නොතාරිස් ඩී. එච්. ඩික්සන් ගුණවර්ධන මහතාගේ වර්ෂ 2008 ක් වූ සැප්තැම්බර් මස 19 වන දින සහ අංක 2007 දරණ සින්නකර ඔප්පුව ප්‍රකාරව අයිතිව නිරවුල්ව භුක්ති විඳගෙන එනු ලබන මේ පහත උපලේඛනයේ මනාව විස්තර වන ඉඩම ද ඊට අදාල එහි කොටසක් හැටියට ඒ සමඟ භුක්ති විඳින ගොඩනැගිලි, ගහකොල සමඟ වෙනත් සියළුම දේ ද ශ්‍රී ලංකාවේ වලංගු මුදලින් රුපියල් ලක්ෂ හතර (400000/)කට වටිනාකම නියම කර

තෑගි දීමනා කාර තොටවත්තගේ විපිතා මානෙල් වන මාගේ ජීවිත භුක්තියට යටත් කොට,

මෙහි පහත ඇතැම් තැනක "ත්‍යාග ලැබුම්කරු" යැයි හඳුනවනු ලබන ත්‍යාග දීමනාකාර මාගේ ආදරණීය පුතණුවකු වන ශ්‍රී ලංකා ප්‍රජාත්‍රාන්තික ජනරජයේ දකුණු පළාතේ, ගාල්ල දිස්ත්‍රිකයේ, අම්බලන්ගොඩ, මහ අම්බලන්ගොඩ, අංක 110/2 දරණ ස්ථානයේ පදිංචි පනියන්දුවගේ සමන් (ජා.හැ.අංක 752752281V) යන මාගේ පුතණුවන් කෙරෙහි මාගේ සිත්තුල පවත්නා ආදරය, කරුණාව, දයාව සහ වෙනත් පවත්නා යහපත් සංකල්පනාවන් කරණා කොට ගෙන ඉහත තෑගි දීමනාකාර තොටවත්තගේ විපිතා මානෙල් වන මම පහත

සඳහන් දේපල ඉහත නම් සඳහන් එකී ත්‍යාග ලැබුම්කරු වන පනියන්දුවගේ සමන් යන අයට මෙයින් තෑග්ගක් වශයෙන් අයිතිකර හිමකම් පවරා දුනිම්

Even though the 1st Petitioner whilst submitting the said deed marked as P6a before this court had taken up the position that the said deed of gift referred to the land on which his parental house bearing assessment No 110/1 is situated, it appears that there is specific reference that, the donor and the donee both lives at 110/2, Maha Ambalangoda, Ambalangoda.

The Respondents have further relied on the electoral register submitted by the 1st Petitioner at the interview and according to the said extracts of the electoral register submitted by the Respondents marked R-11a-11e (the Petitioners have not produced the above extracts along with the Petition and the affidavit), Paniyaduwage Sumithradasa (said to have been the father of the 1st Petitioner) Thotawattage Wijitha Manel (mother of the 1st Petitioner) Paniyanduwage Saman (the 1st Petitioner) and his wife Gusthinnadura Nirosha Damayanthi de. Silva along with several other members of their family had registered themselves under No. 110/2, Maha Ambalangoda, Ambalangoda for the period 2011-2015.

The Respondents have submitted marked R-12a-12e the extracts of the electoral register for the house bearing assessment number 110/1, Maha Ambalangoda, Ambalangoda and according to the said extracts one Liyanage Sirisena, Liyanage Tharaka Madushanka, Magage Dayaseeli de Silva and Liyanage Himeshi Indurangi had been registered under the said assessment number. In the said circumstance, Respondents have submitted that the position taken up by the Petitioner that their parents live in a separate house bearing assessment number 110/1 cannot be accepted.

During the argument before this court, the Petitioners whilst challenging the above position, had tried to contradict the above by submitting another plan bearing No 866 prepared by Upali Akuretiya LS (CA-3) indicating where the two houses bearing assessment Numbers 110/1 and 110/2 are situated but, as admitted by the Petitioners, the house built by the 1st Petitioner's brother on lot A8 is not marked on the said plan. In the said circumstance, it appears to me that their own document CA-3 contradicts the position already taken up by the Petitioners before this court.

As submitted by the Petitioners, all three occasions the 1st Respondent and/or his agents visited, they only visited the parental house bearing assessment No 110/1 where his parents

live and on two such occasions the 1st and 2nd Petitioners were also in the parental house but, showed their house to the 1st Respondent and /or his agents. Whilst relying on the Supreme Court decision in ***Dasanayakage Gayani Geethika and two others V. D.M.D. Dissanayake Principal D.S. Senanayake College and five others*** SC/FR/35/2011 SC minute dated 12.07.2011, where Suresh Chandra (J) had observed,

> "A consideration of clause 6.I of the circular (RI) shows that the main consideration for selection of children under the category of "Children of those who are residing close to the school", would be the Applicant's place of residence. The relevant indices or criteria that are to be taken into account regarding the establishing of same are set out in 6.I -I- IV referred to above.
>
> The main thread which runs through all four categories is the concept of "Residence"
>
> The ordinary meaning that is given to "Residence" is "the place where an individual eats, drinks, and sleeps or where his family or his servants eat, drink and sleep. (Wharton's Law Lexicon)"

and submitted that the 1st Respondent had ignored to consider his place of residence, which he proved by submitting documents even though his children spent time in his parental house during the day time.

However as observed by me, the most important fact to be considered in the present case is the fact whether the Petitioners are living with the parents of the 1st Petitioner in the one and the same house and the said house bears the assessment No. 110/2. Even though the 1st Petitioner takes up the position that his parents live at 110/1, he had failed to establish this by submitting any documentary proof. In the contrary, documents P6A and R-11a-11e confirms the fact that the 1st Petitioner as well as his parents resides at No.110/2, Maha Amabalgoda, Ambalangoda.

Whilst submitting the material referred to above, the Respondents have, drawn the attention of this court to part 8 of the application where the Petitioner has made the following declaration,

"I hereby declare that my child is not attending any government school; government approved private schools or any other school at present for his/her studies. I also declare that the details

furnished above are true and correct and I agree further to submit satisfactory evidence relating to my permanent residence and other information indicated here. **I am also aware that my application will be rejected if any information furnished by me is found to be false/ forged**. If it is revealed after the admission of my child that the information furnished is false/ forged I agree to remove child from the school and admit him/her to another school in the area nominated by the department of Education" (emphasis added) and submitted that, the Respondents are entitled to reject the application submitted by the 1st Petitioner to gain admission for the 2nd Petitioner to Dharmashoka Vidyalaya, Ambalangoda since the information provided by the 1st Petitioner with regard to his residence along with deeds bearing Nos. 6911 (P4a) 3256 (P4b) and plan 1127 are false.

When considering the material already discussed above, I see no reason to reject the above position taken up by the Respondents before me. I therefore hold that the Respondents have not acted in violation of the Fundamental Rights guaranteed under Article 12 (1) of the Constitution when they decided to reject the application submitted by the 1st Respondent to gain admission for the 2nd Petitioner to Dharmashoka Vidyalaya, Ambalangoda. I make no order with regard to costs.

Application dismissed.

Judge of the Supreme Court

Priyantha Jayawardena 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 and in terms of Article 126 of the Constitution read together with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.F.R. Application No.45/2016

1. **CENTRAL ENGINEERING CONSULTANCY BUREAU ENGINEERS' ASSOCIATION**
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

2. **I.R.P. GUNATHILAKE**
   President,
   Central Engineering Consultancy Bureau Engineers' Association,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

3. **S.V. MUNASINGHE**
   Secretary,
   Central Engineering Consultancy Bureau Engineers' Association,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

4. **S. WIJESINGHE**
   Deputy General Manager,
   Central Engineering Consultancy Bureau Engineers' Association,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

5. **W.S.U. KUMARA**
   Engineer,
   Central Engineering Consultancy Bureau Engineers' Association,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

PETITIONERS

VS.

1. **CENTRAL ENGINEERING CONSULTANCY BUREAU**
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

2. **G.D.A. PIYATHILAKE**
   Chairman,
   Central Engineering Consultancy Bureau,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

3. **K.L.S. SAHABANDU**
   General Manager,
   Central Engineering Consultancy Bureau,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

4. **T.D. WICKRAMARATNE**
   Corporate Additional General Manager,
   Central Engineering Consultancy Bureau,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

5. **S.P.P. NANAYAKKARA**
   Corporate Additional General Manager,
   Central Engineering Consultancy Bureau,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

6. **LALANI PREMALTHA**
   Administrative Officer,
   Central Engineering Consultancy Bureau,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

7. **A.GALKETIYA**
   Engineer,
   Central Engineering Consultancy Bureau,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

8. **J.J. JAYASINGHE**
   Engineer,
   Central Engineering Consultancy Bureau,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

9. **G.A.U.GAMLATH**
   Engineer,
   Central Engineering Consultancy Bureau,
   No. 415, Bauddhaloka Mawatha,
   Colombo 07.

10. **H.M.T.N. DHANAWARDENA**
    Engineer,
    Central Engineering Consultancy Bureau,
    No. 415, Bauddhaloka Mawatha,
    Colombo 07.

11. **K.K.IRESHA**
    Architect,
    Central Engineering Consultancy Bureau,
    No. 415, Bauddhaloka Mawatha,
    Colombo 07.

12. **U.G.N.N. GAMLATH**
    Engineer,
    Central Engineering Consultancy Bureau,
    No. 415, Bauddhaloka Mawatha,
    Colombo 07.

13. **H.M.G.U.KARUNARATHNE**
Engineer,
Central Engineering Consultancy Bureau,
No. 415, Bauddhaloka Mawatha,
Colombo 07.

14. **J.D.N.P. JAYASOORIYA**
Engineer,
Central Engineering Consultancy Bureau,
No. 415, Bauddhaloka Mawatha,
Colombo 07.

15. **J.M.M. JAYASINGHE**
Engineer,
Central Engineering Consultancy Bureau,
No. 415, Bauddhaloka Mawatha,
Colombo 07.

16. **HON. ATTORNEY- GENERAL**
Attorney-General's Department,
Colombo 12.

RESPONDENTS

BEFORE: K. Sripavan, CJ.
Prasanna Jayawardena PC, J.

COUNSEL: Saliya Pieris with Migara Doss for the Petitioners.
Manohara De Silva, PC with Ms. S.H.H.C.U. Senanayake and R.Rizwan for the 1st to 6th Respondents.
Viraj Dayaratne, Senior DSG, for the Attorney-General.

ARGUED ON: 06th December 2016

WRITTEN SUBMISSIONS: Filed by the Petitioners on 16th December 2016.
Filed by the 1st to 6th Respondents on 19th December 2016.

DECIDED ON: 01st February 2017

Prasanna Jayawardena, PC. J

This Order is on the preliminary objection raised by learned President's Counsel appearing for the 1st to 6th Respondents. The objection is that, the Petitioners have failed to file this application within a period of one month from the date of the alleged infringement of their fundamental rights in compliance with the condition stipulated in Article 126 (2) of the Constitution. Learned President's Counsel submits that, for this reason, the Petitioner's application should be dismissed *in limine*.

The 1st Petitioner is a registered Trade Union and the 2nd and 3rd Petitioners are the President and Secretary of the 1st Petitioner Trade Union. The 2nd, 3rd, 4th and 5th Petitioners are all employees of the 1st Respondent, namely Central Engineering Consultancy Bureau ["the CECB"], which is a public corporation registered in terms of the State Industrial Corporation Act No. 49 of 1957. The other Respondents are officers and employees of the CECB.

The dispute in this application arises from the allocation of House No. D2 in the CECB's `Official Residence Complex' located at Colombo 7. There are several houses in this residential complex and all of them are owned by the CECB. When House No. D2 fell vacant in October 2015, the General Manager of the CECB [the 3rd Respondent] called for applications from Staff Officers of the CECB who wished to have this house allocated them to them as their residence. The 4th and 5th Petitioners applied. The 7th to 16th Respondents also applied. Thus, there were twelve applicants for this house.

In December 2015, the Chairman of the CECB [the 2nd Respondent] appointed a four man committee to evaluate these applications in terms of Section1.4.4 of Chapter X of the Administrative Code of the CECB. This committee consisted of the 4th, 5th and 6th Respondents and the 2nd Petitioner. It was chaired by the 4th Respondent. During the deliberations of this committee, there was a difference of opinion between the 2nd Petitioner and the other members of the committee with regard to the 7th Respondent's eligibility to be allocated a house. The 2nd Petitioner states that he believed the 7th Respondent was not qualified to obtain House No.D2 because the 7th Respondent had been allocated an official residence at Digana.

The Committee prepared a Report which was submitted to the Chairman of the CECB [the 2nd Respondent] under cover of a letter dated 12th January 2016 signed by the 4th Respondent, who was the chairman of the committee. This letter dated 12th January 2016 and the annexed Report of the committee, have been filed with the Petition, compositely marked **"P20"**.

In this Report, three members of the four man committee [*ie:* the 4th, 5th and 6th Respondents] have recommended that House No.D2 be allocated to the 7th Respondent. The 4th, 5th and 6th Respondents, who constitute a majority of the committee, have signed the Report on 04th January 2016 and that date has been typed below their signatures on the last page of the Report.

However, on that same day (*ie:* on 04th January 2016), the 2nd Petitioner, who was the other member of the committee, has made two handwritten minutes on the last page of the Report stating that, the 7th Respondent has been allocated an official house at Digana and the 8th Respondent has a house at Moratuwa and that, these issues should be investigated before the committee reaches a decision. Both these minutes bear the date 04th January 2016. Thereafter, on 12th January 2016, the 2nd Petitioner made a further handwritten minute on the last page of the Report to the effect that he does not agree with the decision of the committee and stating that he will not sign the Report. This minute made by the 2nd Petitioner has been dated 12th January 2016 and it has been marked **"P20B"**.

A perusal of **"P20"** shows that, upon receipt of the letter dated 12th January 2016 and the attached Report, the Chairman of the CECB made a handwritten endorsement on the letter addressed to the General Manager of the CECB stating, *"Pl proceed as per Committee recommendations and allocate the house to Eng. A. Galkatiyage"* . Thus, the Chairman of the CECB has accepted the recommendation made by the majority of the committee (*ie:* the 4th, 5th and 6th Respondents) and ordered that House No.D2 be allocated to the 7th Respondent. The Chairman of the CECB has then signed below his endorsement and dated it 13th January 2016. Thus, the Chairman's order to allocate House No.D2 to the 7th Respondent was made on 13th January 2016.

The present application was filed in this Court on 12th February 2016. That is within one month of both 12th January 2016 when the 2nd Petitioner made the minute marked **"P20B"** on the Report and of 13th January 2016 when the Chairman of the CECB made the endorsement accepting the recommendation of the majority of the committee and directing that House No. D2 be allocated to the 7th Respondent.

The substantive reliefs prayed for by the Petitioner are a declaration that the majority findings set out in the Report marked **"P20"** are null and void, an Order prohibiting the 1st to 6th Respondents from acting upon the Report marked **"P20"**, an Order quashing the Report marked **"P20"**and an Order quashing any further decision taken by the 1st to 6th Respondents in furtherance of the Report marked **"P20"**.

Accordingly, the impugned act which is alleged to be a violation of the Petitioners' fundamental rights is constituted by the Report which together with the letter marked 12th January 2016, are compositely marked **"P20"**. The aforesaid endorsement made by the Chairman of the CECB on 13th January 2016 directing that, House No.D2 be allocated to the 7th Respondent is also part of **"P20"** and, therefore, is a constituent element of the alleged infringement.

Learned President Counsel for the Respondents submits that, this alleged infringement occurred on 04th January 2016 since the Report bears that date and was signed by the 4th, 5th and 6th Respondents, who constitute a majority of the committee, on that day. He goes on to submit that, therefore, the present application is out of time since it was filed more than one month later, on 12th February 2016.

Learned Counsel for the Petitioners submits that, although the Report bears the date 04th January 2016, which is the day on which the 4th, 5th and 6th Respondents signed it, the Report of the committee became *"finalized"* only on 12th January 2016 when the 2nd Petitioner made the minute marked **"P20B"** thereon stating that he does not agree with the decision of the committee and that he will not sign the Report and, thereupon, the Report was submitted to the Chairman of the CECB under cover of the letter dated 12th January 2016. He goes on to submit that, the documents filed with the Petition marked **"P21"**, **"P22"** and **"P23"** further establish that, the Report was not complete until 12th January 2016 which was when the 2nd Petitioner recorded on the Report the fact that he disagreed and refused to sign. Learned counsel submits that, in any event, the recommendation made in the Report became effective only on 13th January 2016 when the Chairman of the CECB made his endorsement ordering that, House No.D2 be allocated to the 7th Respondent. On this basis, it is submitted that, the alleged infringement occurred on 13th January 2016 and that the present application has been filed before the expiry of one month from that day.

Thus, the question before us is whether the alleged infringement occurred on 04th January 2016 or on 12th January 2016/13th January 2016. If the answer is `04th January 2016', the present application is time barred and is liable to be dismissed *in limine*. If the answer is either `12th January 2016' or `13th January 2016', the present application has been filed within the time limit of one month and the Petitioners are entitled to proceed further.

In this regard, the letter dated 28th December 2015 marked **"P19"** is relevant. By this letter, the Chairman of the CECB has appointed the aforesaid committee to evaluate applications for House No.D2 and recommend the applicant to whom the house should be allocated. **"P19"** states that, the committee was appointed in terms of Section 1.4.4 of Chapter X of the Administrative Code of the CECB.

Chapter X deals with matters relating to the Official Residences [`නිල නිවාස'] of the CECB. Section 1.1 states that, when a vacancy arises in one of the official residences of the CECB, applications should be called for from staff officers of the CECB who would like to be allocated the vacant house. Section 1.4 sets out the procedure to be followed when evaluating applications which are received. Section 1.4.4 requires the Chairman to appoint a committee to evaluate the applications. Section 1.4.4.4 specifies that, the recommendation of the committee has to be submitted to the Chairman for his approval. Section 1.4.5 states, official houses will be allocated to the selected applicants depending on the service exigencies of the CECB and in accordance with the approval of the Chairman [*"නිර්දේශිත අයදුම්කරුවන් සඳහා කාර්යාංශයේ සේවා අවශ්‍යතාවය මත සභාපතිතුමාගේ අනුමැතිය අනුව නිවාස ලබා දීමට කටයුතු කරනු ඇත"*]. Section 1.3.5 also states with regard to the eligibility of applicants to obtain official residences, that the allocation of official houses requires the approval of the Chairman of the CECB ["ඉහත සඳහන් සුදුසුකම් මත තෝරාගනු ලබන අයදුම්කරුවන්ට නිල නිවාස ලබා දෙනුයේ සභාපතිතුමාගේ අනුමැතිය ලබා ගැනීමෙන් පසුවය"].

Thus, it is evident that, in terms of the Administrative Code of the CECB, the Report of the committee was only a recommendation. It is also evident that the, allocation of House No.D2 to the 7th Respondent took place only on 13th January 2016 when the Chairman of the CECB made his endorsement on the letter dated 12th January 2016 directing that this house be allocated to the 7th Respondent.

Further, a perusal of **"P20"**, **"P21"**, **"P22"** and **"P23"** establish that: on 04th January 2016, the 4th, 5th and 6th Respondents signed the Report and the 2nd Petitioner made two minutes thereon stating that, further matters need to be investigated before the committee can take a decision; on the same day, the 4th Respondent, who was the chairman of the committee, addressed the letter marked **"P21"** to the General Manager of the CECB seeking a clarification regarding the allocation of official residences in terms of Sections 1.0 and 1.3.6 of Chapter X of the Administrative Code of the CECB. It is clear that, the 2nd Petitioner made this request seeking a clarification as a direct result of the two minutes made by the 2nd Petitioner on 04th January 2016 where he stated that further matters need to be investigated before the committee could reach a decision; on 05th January 2016, the General Manager made a minute on **"P21"** requesting the Senior Legal Officer to provide her comments on the issue raised by the 4th Respondent; on 07th January 2016, the Acting Senior Legal Officer addressed her memo marked **"P22"** to the General Manager setting out her views on the issue raised by the 04th Respondent; on 09th January 2016, the General Manager forwarded **"P22"** to the 4th Respondent; on 11th January 2016, the 4th Respondent addressed the memo marked **"P23"** to the 2nd Petitioner attaching the clarification provided by the General Manager and requesting the 2nd Petitioner to *"Kindly provide your concurrence/dissention on the report finalized by the committee"*; on the next day - *ie:* on 12th January 2016 – the 2nd Petitioner made the minute marked **"P20B"** on the last page of the Report stating *"I do not agree with the comment made by the LO on the official residence of Digana. Hence I will not sign the report"*; Thereupon, the 4th Respondent, as the chairman of the committee, forwarded the Report to the Chairman of the CECB under cover of his aforesaid letter dated 12th January 2016.

The documents marked **"P20"**, **"P21"**, **"P22"** and **"P23"** establish that:

(i) Although the 4th, 5th and 6th Respondents signed the Report on 04th January 2016, the 4th Respondent, in his capacity as the chairman of the committee, considered that there was issue which had to be clarified *before* the decision of the committee could be finalized and, therefore, he sought clarification with regard to this issue from the General Manager who, in turn, referred this question to the Senior Legal Officer.

(ii) This clarification was received by the 4th Respondent on or about 09th January 2016;

(iii) The 4th Respondent, in his capacity as the chairman of the committee, considered that, it was essential that, the decision of the 2nd Petitioner,

who was the other member of the committee, was received and recorded *before* the Report of the committee could be finalized and, therefore, on 11th January 2016, requested the 2nd Petitioner to state his views on the Report;

(iv) The 2nd Petitioner recorded his disagreement and refusal to sign the Report by his minute marked **"P20B"** written by him on the last page of the Report on 12th January 2016;

(v) The 4th Respondent considered that, the Report was finalized when the 2nd Petitioner's decision was received and recorded on 12th January 2016 and, accordingly, the 4th Respondent forwarded the Report to the Chairman of the CECB on that same day.

The actions of the 4th Respondent, who was the chairman of the committee, demonstrate that, even though a majority of the committee had signed the Report on 04th January 2016, the committee did not consider that, their decision was finalized on that date since an issue still had to be clarified. Instead, the conduct of the 4th Respondent reveals that, he considered that, the Report could be finalized only after the issue raised by the 2nd Petitioner was clarified and he received and recorded the 2nd Petitioner's decision. It is evident that, the 4th Respondent did not consider the Report to be complete until the decision of *all* four members of the committee was obtained and placed on record and the Report could then be submitted to the Chairman of the CECB.

In this connection, it hardly needs to be pointed out that, the reason for appointing a committee such as the committee in this case, is to obtain the benefit of the input of all members of the committee in an attempt to reach a consensual decision with regard to an issue. What is expected and is required is that, the members of the committee collaboratively examine the subject referred to them, bringing to bear their individual and collective knowledge, experience and views. The input of each of the members is equally important in this process. They are expected to strive to reach a collective decision on the subject *or* where there is disagreement among them as to the correct decision, reach a majority decision after considering and recording, the views of those who dissent. It is only when all of these steps are completed, that the committee can be properly considered to have reached a decision. These are requirements dictated by common sense. They are also, in my view, the requirements of the Law since the Law, most times, crystallizes common sense. The validity of this conclusion is illustrated by the decision in COOK vs. WARD [1876 CPD Vol. II 255] where Coleridge CJ held that, in the absence of specific authority empowering one member of a committee of three to take a decision, the powers conferred on the committee must be exercised by all of the members of the committee acting in concert. Lindley J stated [at p.263] *"Whatever is done by the persons so selected must be the joint act of the three; it was not competent for the committee to delegate any of their powers to one or two of their number."*. On the same lines, Shackleton on the Law and Practice of Meetings [8th ed. at p.46] citing

the decision in RE LIVERPOOL HOUSING STORES ASSOCIATION,LIMITED [1890 59 LJ Ch. 616] states, *"Where a board of directors delegates its powers to a committee, without provision as to the committee acting by a quorum, all acts of the committee must be done in the presence of all the members of the committee."*. MORRIS vs. GESTETNER LTD [1973 1 WLR 1378] illustrates the application of a similar rule with regard to a decision taken by a tribunal. In that case, an industrial tribunal was required to determine whether an employee had been unfairly dismissed by his employer. Two members of the tribunal held that here had been an unfair dismissal. The other member disagreed. Thereafter, the decision on the question of whether reinstatement should be recommended was made by only two members of the tribunal since the member who had dissented earlier did not participate in deciding the issue of reinstatement. The Court held that, this procedure was irregular since all three members of the tribunal were required to consider whether reinstatement should be recommended. The Court stated [at p.1383], *"….. it was for the tribunal and every member of it to consider whether there should be a recommendation."*. Similarly, in R. KENSINGTON AND CHELSEA RENT TRIBUNAL [1974 1 WLR 1486] where a rent tribunal, which consisted of three members, had reached a decision which did not appear to have been considered by all three of them, Lord Widgery CJ, referring to a submission made by counsel, observed [at p.1490], *"…under the Act the tribunal consists of a chairman and two other members; he submits quite rightly that no decision can be taken except by a tribunal so constituted."*.

The conduct of the 4th Respondent, who was the chairman of the committee, demonstrates that he, very correctly, recognized these requirements and obtained the decision of the 2nd Petitioner on record before the Report could be completed and submitted to the Chairman of the CECB on 12th January 2016.

I am of the opinion that, in the absence of a specified quorum for the committee, the Report was completed only when all four members of the committee had set out their decisions on the Report – *ie:* on 12th January 2016. To draw a familiar parallel, an order or judgment is completed only when all the members of the panel or bench which heard and determined the matter, have signed it. The only circumstance in which the decisions of all four members of the committee were not essential to complete the Report would have been if one of them had ceased to be a member of the committee by resigning or by his or her conduct and the membership of the committee had been reduced to the three persons who signed the Report on 04th January 2016. However, in such circumstances, the question will arise as to whether the committee had to be reconstituted. In any event, such questions do not arise here since the 2nd Petitioner continued to actively participate in the decision making of the committee.

Accordingly, I hold that, the Report of the committee was completed only on 12th January 2016 when the 2nd Petitioner set out his views on last page of the Report and, thereby, *all* four members of the committee had stated their views so that the Report could be submitted to the Chairman of the CECB.

Before I move on to consider the next issue which arises, I should refer, at this point, to the submission made on behalf of the Respondents that, the steps reflected in the documents marked **"P21"**, **"P22"** and **"P23"** cannot interrupt the running of time from the date the majority of the committee signed the Report. In doing so, learned President's Counsel relies on the decisions in GAMAETHIGE vs. SIRIWARDENA [1988 1 SLR 384] and JAYAWEERA vs. NATIONAL FILM CORPORATION [1995 2 SLR 120] which held that, the time limit of one month begins to run when the infringement occurs and that, the pursuit of administrative remedies after the infringement occurred, do not prevent or interrupt the running of time.

However, the principle stated in these two cases is entirely inapplicable to the present issue since **"P21"**, **"P22"** and **"P23"** are not `appeals' made *after* the impugned decision but are steps taken *prior to* reaching the impugned decision. Thus, the Report, which is a composite element of the impugned act, was completed only on 12th January 2016 *after* the date of **"P21"**, **"P22"** and **"P23"**.

For the reasons set out above, I hold that, the Report of the committee was completed on 12th January 2016.

Next, as mentioned earlier, Section 1.4.4.4 of Chapter X of the Administrative Code of the CECB makes it clear that this Report was only a recommendation made to the Chairman of the CECB. Thereafter, Section 1.4.5 and Section 1.3.5 which I cited earlier, establish that, this recommendation became effective only on 13th January 2016 when Chairman made his endorsement on the letter dated 12th January 2016 which is part of **"P20"**, directing that House No. D2 be allocated to the 7th Respondent.

Therefore, I hold that, the alleged infringement which is referred to in the Petition was completed only on 13th January 2016 when the Chairman of the CECB made his decision with regard to the allocation of House No. D2 and that decision became known to the Petitioners.

Before I conclude this Order, I should also refer to two other submissions made on behalf of the Respondents.

Firstly, learned President's Counsel submits that, since the 2nd Petitioner is the President of the 1st Petitioner Trade Union and the 3rd Petitioner is the Secretary of that Trade Union, the 1st and 3rd Petitioners became aware, *"through association"*, of the decision of the majority of the committee reached on 04th January 2016. I cannot agree with this submission since, on the material before this Court, I see no reason to surmise that the 2nd Petitioner was guilty of the impropriety of conveying the inner workings of the committee to persons who were not members of the committee. Therefore, there is no reason to hold that, the other Petitioners became aware of the alleged infringement until the decision of the Chairman of the CECB was made on 13th January 2016 and it became known to them. In any event, as determined earlier

in this Order, the committee had not reached a decision on 04th January 2016 and the alleged impugned act did not occur on that day.

The second submission is that, Prayer (d) of the Petition prays that the *"majority findings of the Committee"* be declared null and void and that the other reliefs which have been prayed for in Prayers (e) to (g) of the Petition cannot be granted unless this Court first quashes the *"majority findings of the Committee"* as prayed for in Prayer (d). Learned President's Counsel submits that, the decision of the majority of the committee was reached on 04th January 2016 and, therefore, the relief prayed for in Prayer (d) is time barred and, consequently, the other reliefs prayed for in Prayers (e) to (g) of the Petition cannot be granted. I am unable to agree with this submission since Prayer (f) stands independently and prays that this Court *"Make order quashing the Report at **P20**".* There is no reference to the *"majority findings of the Committee"* in Prayer (f). Thus, Prayer (f) can stand independently even if Prayer (d) is refused. If the relief prayed for in Prayer (f) is granted, the reliefs prayed for in Prayers (e) and (g) may be granted, if the Court so decides. Thus, this application can be proceeded with even if Prayer (d) is disregarded. In any event, when one looks at the averments in the Petition and the Prayers to the Petition as a whole, it is evident that, the Petitioners are seeking reliefs from this Court quashing the letter and Report compositely marked **"P20"** and also the allocation of House No.D2 to the 7th Respondent, which was done by the Chairman's endorsement on the letter. In view of this, I do not think it is fitting for this Court to seize upon a few words in one Prayer of the Petition to justify dismissing this application *in limine*. In reaching this decision, this Court keeps in mind the guiding principle enunciated by Sharvananda CJ 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."*

For the aforesaid reasons, I see no substance or merit in the preliminary objection raised on behalf of the 1st to 6th Respondents. I hold that this application has been filed within one month of the alleged infringement of the Petitioners' fundamental rights. The preliminary objection is overruled. The 1st Respondent shall pay the 1st to 5th Petitioners, jointly, costs in a sum of total sum of Rs.50,000/-. This application should now be supported for leave to proceed, upon its merits.

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 for the relief and redress under Articles 126(2) of the Constitution in respect of the violation of the Fundamental Rights to equality before the law and to the equal protection of the law guaranteed to the Petitioner under Article 12 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Disapala Medagedara,

No. 124/25, Veediya Bandara Mawatha,

Nattandiya.

And also at,

National Livestock Development Board,

Official Quarters,

Welisara Farm,

Welisara.

Petitioner

SC /FR/ Application No 55/2016

Vs,

1. National Livestock Development Board,
   No. 40, Nawala Road,
   Narahenpita, Colombo 05.

2. Prof. H.W. Cyril,
   Chairman,
   National Livestock Development Board,
   No. 40, Nawala Road,
   Narahenpita, Colombo 05.

3. D.U. Jayawardena,
   General Manager,
   National Livestock Development Board,
   No. 40, Nawala Road,
   Narahenpita, Colombo 05.

4. Mrs. T.D.S. Wasantha,
   Audit Superintendent,
   Auditor General's Department,
   Polduwa Road,
   Sri Jayawardenapura Kotte,
   Battaramulla.

5. W.C. Ranjan,
   No. 348/9 Maligathenna,
   Gurudeniya, Kelaniya.

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

Respondents

Before: **Sisira J. De. Abrew J**
Anil Goonaratne J
Vijith K. Malalgoda PC J

Counsel: Dr. S.F.A Cooray for the Petitioner

Ronald Perera PC with A. Kaluarachchi and Chandana Perera for 2nd and 5th Respondents

Viraj Dayarathne SDSG for the Attorney General

Argued on: 07.11.2017

Judgment on: 12.12.2017

Vijith K. Malalgoda PC J

Petitioner Disapala Medagedara has filed the present application before the Supreme Court alleging the violation of the Fundamental Rights to the equal protection of law guaranteed under Article 12 (1) of the Constitution.

When this matter was supported on 14.03.2016 for notices, this court after granting leave for alleged violation under Article 12 (1) of the Constitution, had further granted interim relief as

prayed in paragraph (f) to the prayer preventing the 1st to the 3rd Respondents from recruiting anyone to the post of Deputy General Manager (Corporate Operations) pending the final hearing and determination of this application.

When the matter was taken up before this court for argument, the Respondents objected for the filling of additional documents by the Petitioner without obtaining prior approval of court. Based on the above objection, the court decided, not to consider new material submitted by the Petitioner by way of the said two motions dated 11th August 2017 and 11th September 2017. However in the same manner the 2nd and 5th Respondents too had filed a motion dated 29th August 2017, and submitted additional material with regard to a complaint made on behalf of the 1st Respondent against certain documents relied by the Petitioner and the said matter was once again raised before us in the written submissions too. However stick to the decision taken with regard to the additional material placed before this court by the Petitioner, I decided not to consider any fresh material submitted by either party in my judgment.

The 1st Respondent National Livestock Development Board by an advertisement published on 18th May 2012 in the English news paper "Daily News" had called for applications for the post of Deputy General Manager- Corporate Operations. (P-1)

In the said notice the qualifications required for the above post was advertised as follows;

> "Bachelor's degree in Agriculture/Plantation Management/ Veterinary Science/ Animal Husbandry/ Management/ Public Administration/ Business Administration/ Commerce with a Postgraduate qualification (Masters) or membership of a recognized professional institute or fellow/ Associate Member of ICASL/CIMA/ACCA with a minimum of 18 years experience in managerial level out of which three years post qualifying experience in a senior management level."

The Petitioner who was holding a Bachelor's Degree in Agriculture from the University of Peradeniya as well as a Masters Degree in Agriculture from the same university applied for the above post as he thought that he had the sufficient qualifications and experience to apply for the above post.

At the time the said application was tendered, the Petitioner was working at the Coconut Cultivation Board as a lecturer at Coconut Development Training Center Lunuwila. The Petitioner

was called for an interview by the 1st Respondent Board and he attended the said interview. By letter dated 9th August 2012, the 1st Respondent Board had informed the Petitioner that he has been appointed to the post of Deputy General Manager (Corporate Operations) with effect from 3rd September 2012.

After accepting the said post at the 1st Respondent Board, the Petitioner made all endeavors to discharge his duties to his maximum, and his services were commended by the 1st Respondent Board and its Chairman on several occasions (P-13 and P-14). During this period the Petitioner was able to increase the profits of the 13 farms, 82 million in 2014 to 93.6 million in the year 2015 (P-12) and the Petitioner was granted his annual salary increments for the years 2013 and 2014.

The relationship between the Petitioner and the 1st Respondent Board was disturbed towards the end of the year 2015 and the documentation submitted by both the Petitioner and the Respondents confirms this position. The Petitioner while explaining the reason for this change had submitted that the Petitioner was requested by the 2nd Respondent Chairman, to recommend a proposal of the 2nd Respondent to purchase poultry feed for the National Livestock Development Board farms from a supplier by the name 'Gold Coin Feeds Mills (Lanka) Limited.'

In view of the high price quoted and the adverse reports of the laboratory tests regarding the quality of the feeds, the Petitioner refused to recommend the said proposal of the 2nd Respondent. Over this issue the 2nd Respondent threatened the Petitioner of serious consequences. However the said proposal was implemented by the 2nd Respondent and by letter dated 22.09.2015, (P-19) Acting General Manager informed all farm managers, the decision to purchase Poultry Feed from Gold Coin Feeds Mills (Lanka) Limited.

Although this letter was copied to all the Assistant General Managers of the four regions, it was not copied to the Petitioner, under whom the said Assistant General Managers were functioning.

During the same period, Petitioner went on a pilgrimage to India with his family members. The said pilgrimage was scheduled between 17th August to 24th August 2015 and the Petitioner had applied overseas leave well in advance on 22nd June 2015. The said application was approved by the General Manager of the 1st Respondent and was communicated to the Petitioner by letter dated 09.07.2015 (P-21). Accordingly the Petitioner had left Sri Lanka on the said pilgrimage as scheduled, but during his absence on approved overseas leave, by letter dated 21st August 2015,

the Acting General Manager (3R) had issued a letter, calling for explanation from the Petitioner, for leaving the country on overseas leave without obtaining Prime Minister's Approval. (P-22)

Even though the Petitioner had taken up the position that under section 23.5 of Chapter XII of the Establishment Code it is the duty of the sanctioning authority to forward the sanctioning letter to the Prime Minister's Office, the 2nd Respondent by letter dated 09th September 2015 (P-25) rejected the Petitioner's explanation and taken disciplinary action against the Petitioner by extending the probation period by one year. Even though the Petitioner had appealed to the 2nd Respondent against the said decision by letter dated 23rd September 2015, it was not replied to.

During this period the responsibilities and duties entrusted on the Petitioner, including the farm supervision and tender board activities were removed and was stopped being called for meetings and kept in the pool without entrusting any duties.

By letter dated 16th November 2015 the 3rd Respondent informed the Petitioner that as per the Report of the Auditor General's Department, a preliminary inquiry was to be held on the 17th of November 2015, with regard to the Petitioner's service experience and his academic qualifications for the post of Deputy General Manager- Corporate Operations, and requested the Petitioner to be present for the said inquiry with the necessary certificates and other documents to establish his service experience and academic qualifications.

The preliminary inquiry referred to above was conducted by the 5th Respondent, and the Petitioner took part in the said inquiry and submitted documentation to support his academic qualifications and service experience before the inquiring officer. By letter dated 1st January 2016 the 2nd Respondent wrote to the Petitioner informing that,

> "it is transpired from the preliminary inquiry conducted based on the Audit quarry, that the Petitioner does not possess the senior managerial experience for three years after obtaining the Masters Degree and therefore he has not fulfilled the requirement to confirm him in his post under Chapter 11.7 of the Establishment Code and therefore calling his explanation as to why his services should not be terminated within 07 days." (P-28)

As revealed before this court, the Petitioner has requested two weeks time to reply the said letter, but the said request was turned down by the 2nd Respondent by letter dated 05.01.2015.

However the Petitioner had submitted his explanation (P-32), within the stipulated time but by letter dated 21.01.2016 the services of the Petitioner was terminated by the 2nd Respondent with effect from 31.01.2016.

When going though the matters referred to above by the Petitioner, it appear that the services of the Petitioner was terminated under section 11.7 of Chapter II of the Establishment Code which reads as follows;

11.7 if the officer is not judged as fit and qualified for confirmation in all respects, either his appointment should be terminated or the period of probation or the acting period should be further extended by the appointing authority subject to the section 11:9 or 11:10 and ……

The said termination under section 11.7 has come into operation with effect from 31.01.2016, four months after the probation period of the Petitioner was extended by one year as revealed by document produced marked P-25. As further observed by this court, at the time P-25 was issued there was no inquiry pending against the Petitioner but within two months an inquiry was commenced based on an audit quarry raised by the Auditor General.

As complained by the Petitioner before this court, the audit quarry raised by the Auditor General was not made available to the Petitioner at any stage of the inquiry or even thereafter.

A copy of the said Auditor General's Report dated 30th October 2015 received by the Chairman's office of the 1st Respondent on 5th November 2015 is produced by the 2nd Respondent before this court marked R-1. When going through R-1, I observe that it is a 33 page report containing several observations with regard to the functioning of the 1st Respondent Board and the farms managed by the 1st Respondent Board and in page 12 of the said report, under clause 2.5 (j) it was raised that,

2.5 (ඒ) "බඳවා ගැනීම් පටිපාටිය අනුව තනතුර සඳහා අවශ්‍ය වෘත්තීය සුදුසුකම් සපුරා නොමැති නිලධාරියෙකු නියෝජ්‍ය සාමාන්‍යාධිකාරී (සංස්ථා හා මෙහෙයුම්) තනතුර සඳහා මණ්ඩලය විසින් 2012 වර්ෂයේදී බඳවා ගෙන තිබුණි"

The above observation by the Auditor General is not clear as to whether it refers to the professional qualifications required for the above post or it refers to any other requirement under the scheme of recruitment. However as referred to above, according to the paper

advertisement (P-1) there is a requirement either to have a Master Degree or fellow/ associate member of ICASL/CIMA/ACCA. Since the Petitioner relied on the first limb, question of obtaining professional qualifications as referred to in second limb won't arise in the case in hand.

However the 1st Respondent Board has understood the above observation as the Petitioner not obtaining 3 years post qualifying experience in the Senior Management Level, and made an attempt to submit before this court that the inquiry referred to above was held to ascertain whether the Petitioner holds the necessary requirements with him when he applied for the above post.

As revealed before this court the preliminary inquiry referred to above was commenced on 17th November 2015 and the Petitioner's services were terminated with effect from 31.01.2016 and therefore it is understood that the proceedings of the preliminary inquiry conducted by the 5th Respondent was concluded by January 2016. However the 2nd Respondent along with his statement of objection had submitted several documents obtained in May 2016 with regard to the Petitioner's previous employments, indicating the interest the 2nd Respondent had taken to obtain information with regard to the Petitioner, which was not available even after the preliminary inquiry.

The second Respondent had produced marked R-10 the mark sheet of the interview held by the 1st Respondent and raised the following issues against the Petitioner;

a) At the interview, marks were given only to the Petitioner. The other applicants were not given any marks at the interview
b) The interview board consisted of only two persons, the Minister's Co-ordinating Secretary and the then Chairman of the 1st Respondent. It did not include any permanent officer of the 1st Respondent Board
c) This interview Board was constituted in irregular manner as stated above
d) This interview has thus deprived the rights and or opportunities of suitably qualified internal applicants by not selecting any one of them to the post of Deputy General Manger (Corporate Operations) at the 1st Respondent Board
e) This interview board did not consider the internal applicants who attended this interview who had fulfilled the Higher Management Level experience and educational qualifications as stated in P-1

However when going through the documents placed before this court and the oral submissions made by both the President's Counsel who represented the 2nd and 5th Respondents and the Senior Deputy Solicitor General who represented the 1st, 3rd and 6th Respondents I observe that the said Respondents have failed to substantiate any of the above submissions placed before this court. As further observe by me, the Respondents cannot find fault with the Petitioner if there is any laps in the interview conducted by the 1st Respondent Board and that has to be taken against those who are responsible for conducting the interviews in a disorganized manner.

The 2nd Respondent whilst taking up the position that the Petitioner did not possess the required qualifications of 18 years experience as required to be appointed as the Deputy General Manager had submitted marked R-8 a latter of termination dated 23.03.2011 where the services of the Petitioner had been terminated on disciplinary grounds by his previous employer the Coconut Cultivation Board.

However the above position taken by the 2nd Respondent was challenged by the Petitioner and submitted marked P-42 (c)-(g) documents to establish that the Petitioner was re-instated with all back wages at the Coconut Cultivation Board and was in active service at the time he submitted his application for the post of Deputy General Manager through his employer the Coconut Cultivation Board.

When considering the material placed before this court it is observed by me that,

a) The Petitioner had applied for the post of Deputy General Manager (Corporate Operation) based on an advertisement appeared in "Daily News" news paper
b) There is no material to rule out that the interview to select the Petitioner was conducted by a panel consist the following;
    1. Mr. M.G.D. Meegoda — Advisor to the Hon. Minister
    2. Mr. Kulasiri Fernando — Senior Assistant Secretary
    3. Dr. B. Sivayoganathan — Director (Animal Breeding)
    4. Mr. R.M.B. Ellegala — Chairman NLDB
c) The said interview panel after considering the material submitted by the Petitioner and having interviewed him, selected him for the above post
d) The Petitioner had a pleasant working relationship with the 1st Respondent Board until early part of 2015

e) In the month of May 2015, the Petitioner was issued with a warning letter reprimanding him for using abusive language to an Assistant Manager after having a disciplinary inquiry by an outside inquirer

f) Between August and September 2015, the responsibilities and duties entrusted on the Petitioner including farm supervision and tender board activities had been removed

g) Explanation was called from the Petitioner by 3rd Respondent for leaving the country without informing the Prime Minister's Office between 17th to 24th August even though the Petitioner had obtained approval from the 1st respondent Board

h) Immediately after his return the Petitioner replied the above letter indicating the necessary provisions of the Establishment Code but the 2nd Respondent by letter dated 9th September rejected the explanation

When considering the sequence of events took place in the year 2015 as referred to above, it appears that, the relationship between the Petitioner and the 1st Respondent Board, specially with the 2nd Respondent, had deteriorated during this period and the 2nd Respondent with the help of the 3rd Respondent had harassed the Petitioner. In this regard this court is further mindful of the fact that the Petitioner was the most senior Deputy General Manager at the 1st Respondent Board, only below the Chairman and the Director Board and the General Manager. As submitted by the Petitioner, the 3rd Respondent who was appointed the acting General Manager was six months junior to him in the position of Deputy General Manager when the General Manager's post become vacant in July 2015.

In the said circumstances it is observed by me that the punishment imposed on the Petitioner by P-25 is disproportionate and issued with *mala-fides*. It is further observed by me that the 1st Respondent Board had (specially the 2nd and 3rd Respondents) made use of the Auditor General's Report to victimize the Petitioner having made use of the decision conveyed to the Petitioner by P-25, without affording him an opportunity to face a proper inquiry, following the rules of natural justice which indicates the *mala-fides* on the part of the 2nd and 3rd Respondents.

In the case of ***Sasanasirithissa Thera Vs. P.A. de. Silva (1989) 2 Sri LR 356*** the Supreme Court discussed the term *mala-fides* in the context of a Fundamental Rights violation as follows:

> "In its narrow sense *mala-fides* means personal animosity, spite, vengeance, personal benefit to the authority itself or its relations and friends. At times the courts use the

phrase *'mala-fides*' in the broad sense of any improper exercise or abuse of power, it does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended. Where power is used unreasonably or for improper purpose such conduct is *mala-fide* even though the authority may not be guilty of intentional dishonesty."

Article 12 (1) of the Constitution deals with right to equality and states as follows;

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

However, this concept does not mean that all persons in a society are always equal. As such a mechanical concept may create unnecessary injustices in a society. The true meaning of the concept therefore is that equals should not be treated as unequals and similarly unequals should not be treated as equals.

In the said context, it is evident that the decision conveyed to the Petitioner by P-33 was reached in violation of the Fundamental Rights guaranteed under Article 12 (1) of the Constitution for equal protection of law.

I therefore declare that the Fundamental Rights of the Petitioner guaranteed under Article 12 (1) had been violated by the conduct of the 1st to the 3rd Respondents as discussed in this judgment and make order directing the said Respondents to re-instate the Petitioner in the post of Deputy General Manager (Corporate Operations) with effect from 31st January 2016 with all back wages, on or before 31st January 2018. I further direct the payment of Rupees 1.5 million as compensation to the Petitioner by the 1st Respondent Board. The second and third Respondents are directed to pay Rs. 200,000/- each as compensation to the Petitioner in their personal capacity.

The 1st Respondent is further directed to pay a sum of Rupees 100,000/- to the Petitioner as cost.

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

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.

CAPTAIN CHANNA D.L. ABEYGUNEWARDENA
No.322/55, Saraswathie Estate,
Thalawathugoda.

PETITIONER

S.C F.R. 57/2016

VS.

1. **SRI LANKA PORTS AUTHORITY**
   No.19, Chaithya Road,
   Colombo 01.
2. **DHAMMIKA RANATHUNGA**
   Chairman,
   Sri Lanka Ports Authority,
   No.19, Chaithya Road,
   Colombo 01.
3. **SARATH KUMARA PREMACHANDRA**
   Managing Director,
   Sri Lanka Ports Authority,
   No.19, Chaithya Road,
   Colombo 01.
4. **MAGAMPURA PORT MANAGEMENT COMPANY (PRIVATE) LIMITED,**
   Ports Administration Complex,
   Mirijjawila, Hambantota.
5. **DAMMIKA RANATHUNGA-CHAIRMAN**
6. **DR. LALITH PERERA**
7. **SANJEEWA WIJERATNE**
8. **THAMEERA MANJU**
9. **UDITHA GUNAWARDENA**
10. **SHIRANI WANNIARACHCHI**
11. **JAYANTHA PERERA**
    Directors of Magampura Port Management Company (Pvt) Limited.
12. **SARATH PERERA**
    General Manager, Magampura Port Management Co. (Pvt.) Ltd,

Port Administration Complex
Mirijjawila,
Hambantota.

13. HON. ATTORNEY-GENERAL
Attorney-General's Department,
Colombo 12.

RESPONDENTS

BEFORE: K. Sripavan, CJ
Anil Gooneratne, J.
Prasanna Jayawardena, PC, J.

COUNSEL: Upul Jayasuriya with Sandamal Rajapakse for the Petitioner.
Uditha Egalahewa, PC. for the 1st to 3rd Respondents instructed by Ms.Aparna Tilakaratne.
Athula Bandara Herath with Ms. Shashika de Silva for the 4th and 12th Respondents instructed by Nirosha Herath.
Ms. S. Barrie, Senior State Counsel, for the Attorney-General.

ARGUED ON: 17th October 2016.

WRITTEN SUBMISSIONS FILED: By the Petitioner on 20th July 2016.
By the 1st to 3rd Respondents on 08th July 2016.
By the 4th and 12th Respondents on 30th June 2016.
By the 13th Respondent on 15th July 2016.

DECIDED ON: 20th January 2017

Prasanna Jayawardena, PC, J

The Petitioner was employed as the Deputy General (Bunkering) of the duly incorporated Company named Magampura Port Management Company Ltd ["MPMC"], which is the 4th Respondent.

MPMC is fully owned by the Sri Lanka Ports Authority ["SLPA"], which is the 1st Respondent. The 2nd Respondent is the Chairman of the SLPA, the 3rd Respondent is the Managing Director of the SLPA. Both of them are also Directors of MPMC. The 5th to 11th Respondents are the other seven Directors of MPMC. The 12th

Respondent is the General Manager of MPMC. The Hon. Attorney General is the 13th Respondent.

The Petitioner states that, he was suspended from service without pay, by a letter dated 18th December 2015 which has been filed with the Petition marked **"P24"**. This letter has been signed by the 3nd Respondent, who has signed as *"Managing Director"*, presumably of the SLPA. Somewhat curiously, **"P24"** is not typed on a letterhead of the SLPA or of MPMC. However, the envelope in which **"P24"** is said to have been sent to the Petitioner by Registered Post, is printed with the name and address of the SLPA.

"P24" also requires the Petitioner to show cause as to why disciplinary action should not be taken against the Petitioner on account of eight Charges set out therein. The Petitioner replied by his letter dated 24th December 2015 addressed to the 2nd Respondent in his capacity as the Managing Director of the SLPA [*"To: Mr.S.K.Premachandra, Managing Director, Sri Lanka Ports Authority, Colombo 1"*] setting out the Petitioner's response and explanation with regard to the Charges.

A disciplinary inquiry was not held. Instead, about one month later, the 12th Respondent, in his capacity as the General Manager of MPMC, addressed a letter dated 20th January 2016 marked **"P27"** to the Petitioner terminating his services stating *"….. your position with MPMC has become redundant resulting in the termination*.*"*.

The Petitioner filed this application alleging that, the Respondents' acts of suspending him from service and subsequently terminating his services, were a violation of the Petitioner's fundamental rights guaranteed by Articles 12 (1), 12 (2) and 14 (1) (g) of the Constitution.

The substantive reliefs prayed for by the Petitioner are: an Order quashing the letter marked **"P24"** by which he was suspended from service; an Order quashing the letter marked **"P27"** by which his services were terminated; an Order directing the Respondents to reinstate the Petitioner in service with back wages; and Damages.

On 30th May 2016, when the Petitioner's application for leave to proceed was to be supported, learned President's Counsel appearing for the 1st to 3rd Respondents and learned Counsel appearing for the 4th and 12th Respondents raised two preliminary objections to the Petitioner's ability to maintain this application. Their first objection is that, the impugned acts do not constitute *"executive or administrative action"* as contemplated in Article 126 of the Constitution and that, therefore, this Court does not have the jurisdiction to entertain this application. Their second objection is that, in any event, the impugned acts do not attract a Public Law remedy and, for that reason, the Petitioner cannot invoke the fundamental rights jurisdiction of this Court.

Having heard Counsel with regard to these preliminary objections, this application was fixed for Inquiry into the preliminary objections and the parties were directed to tender their written submissions on these issues. Written submissions have been filed on behalf of the Petitioner, the 1st to 3rd Respondents, the 4th and 12th Respondents and by the Hon. Attorney General, who is the 13th Respondent. When

this Inquiry was taken up, we heard learned Counsel appearing for the parties. Thereafter, this matter was reserved for Order.

As set out above, the first question to be determined by this Order is whether the alleged infringements the Petitioner complains of, amount to *"executive or administrative action"* as contemplated in Articles 17 and 126 (1) of the Constitution.

Learned Counsel appearing for the Petitioner has submitted that, although MPMC is a Company incorporated under the Companies Act No. 07 of 2007, MPMC is a body fully owned by, financed by, operated by and answerable only to the Government of Sri Lanka. He also submits that, the control exercised by SLPA permeates the functioning of MPMC at every level. He goes on to submit that, the composition of the Board of Directors of MPMC reveals this control exercised by SLPA. It has been further submitted that, the facts before the Court make apparent the close nexus and inextricable link between the State, SLPA and MPMC. On this basis, he submits that, the impugned acts amount to *"executive or administrative action"* as contemplated in Article 126 (1) of the Constitution.

The submissions made by both learned President's Counsel appearing for the 1st to 3rd Respondents and learned Counsel appearing for the 4th and 12th Respondents are, firstly, that, on the basis of the material which is before the Court, MPMC is independent of the State and cannot be regarded as being *"an agency or instrumentality"* of the State. They submit that, the material which is before the Court establishes that, the State does not have *'deep and pervasive"* control over the management of MPMC. Secondly, they also submit that, in any event, the impugned acts arise from or relate to a Contract of Employment which is commercial in nature and which has no *'statutory underpinnings'* and that, therefore, the Petitioner's remedy is limited to Private Law. On this twinfold basis, they submit that, the Petitioner is not entitled to invoke the fundamental rights jurisdiction of this Court.

Learned Senior State Counsel has tendered comprehensive written submissions which set out the decisions of this Court on the two issues before the Court and presents a thoughtful analysis of the development of the Law in this field.

As stated earlier, the alleged infringements which the Petitioner complains of, are the suspension and subsequent termination of the Petitioner's services effected by the letters marked **"P24"** and **"P27"**. Thus, what has to be determined in this Order is whether these two impugned acts amount to *"executive or administrative action"* as contemplated in Article 126 (1) of the Constitution. It is only if these two impugned acts amount to *"executive or administrative action"* that, this Court will have the jurisdiction to hear and determine the present application made under Article 126 (1) of the Constitution.

The Constitution does not define or describe what is meant by the term *"executive or administrative action"*. Thus, while Chapter III of the Constitution sets out the several fundamental rights guaranteed by the Constitution and the limited situations in which the exercise of these fundamental rights may be restricted, Article 17 in Chapter III only provides that, every person shall be entitled to apply to the Supreme Court in respect of the infringement of any of his fundamental rights by *"executive or*

administrative action". In turn, Article 126 (1) only stipulates that, the Supreme Court shall have jurisdiction to hear and determine any question relating to the infringement of fundamental rights by *"executive or administrative action"* and Article 126 (2) only provides that, any person who alleges that any of his fundamental rights have been infringed by *"executive or administrative action"*, may apply to the Supreme Court for redress.

Although the term *"executive or administrative action"* has not been specifically defined or described in the Constitution, Article 4 (d) indicates that, this term refers to organs of the Government when it states *"the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of the government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided*;*"*.

Thus, in the early case of **PERERA vs. UNIVERSITIES GRANTS COMMISSION** [1978-79-80 1 SLR 128 at 137-138], Sharvananda J, as he then was, explained that, *"Constitutional guarantees of fundamental rights are directed against the State and its organs. Only infringement or imminent infringement by executive or administrative action of any fundamental right or language right can form the subject matter of a complaint under Article 126 of the Constitution. The wrongful act of any individual, unsupported by State authority is simply a private wrong. Only if it is sanctioned by the State or done by the State authority, does it constitute a matter for complaint under Article 126. Fundamental rights operate only between individuals and the State. In the context of fundamental rights the `State' includes every repository of State power. The expression `executive or administrative action' embraces executive action of the State or its agencies or instrumentalities exercising Governmental functions. It refers to exertion of State power in all its forms".*. On the same lines, in **WIJETUNGA vs. INSURANCE CORPORATION** [1982 1 SLR 1 at p.5-6], Sharvananda J observed, *"All organs of Government are mandated to respect the fundamental rights referred to in Chap.3 of the Constitution and are prohibited from infringing same. Action by the organs of the Government alone constitutes the executive or administrative action that is a sine qua non or basis to proceedings under Article 126 "The term 'executive action' comprehends official actions of all Government Officers …… When private individuals or groups are endowed by the State with power or functions, governmental in nature, they become agencies or instrumentalities of the State subject to the constitutional inhibitions of the State."*.

Accordingly, it is evident that, in the above cases, this Court recognized that, the term *"organs of the government"* used in Article 4 (d) of the Constitution encompasses both the State **and also** its *"agencies and instrumentalities"* which exercise Governmental functions. It should be made clear that, in the context of the meaning of the term *"executive or administrative action"*, the words "State" and "Government" are used interchangeably and with the same meaning. Naturally so, since acts by the State or on behalf of the State are performed by the members and officers of the Government.

When an impugned act is committed by or on behalf of the State by an Officer of the State or by a Department of the State, such an act will constitute *"executive or*

administrative action" since in each such case it is, quite obviously, an *"organ of the Government"* which commits the act.

However, the position is less clear when the act is committed by an incorporated body which has been established by the State or which is connected to the State. In such circumstances, the corporate body which commits the impugned act has a legal *persona* and identity which is distinct from the State. This may make it not immediately evident whether or not the act committed by that corporate body, amounts to *"executive or administrative action"* as contemplated in Articles 17 and 126 (1).

Therefore, in such situations where it is alleged that an impugned act committed by a corporate body amounts to *"executive or administrative action"* as contemplated in Articles 17 and 126 (1), it is necessary to ascertain whether that corporate body can be properly regarded as falling within the aforesaid description of an `*agency or instrumentality of the State'* referred to by Sharvananda J in **PERERA vs. UNIVERSITIES GRANTS COMMISSION** and **WIJETUNGA vs. INSURANCE CORPORATION**.

There have been a series of decisions of this Court which have examined the circumstances in which a corporate body should be regarded as an *"agency or instrumentality of the State"*. As MPMC is a corporate body which is a duly incorporated limited liability Company, it will be useful to examine these decisions and seek to identify the characteristics which should be present in MPMC, if it is to be regarded as an *"agency or instrumentality of the State"*.

In early decisions such as **WIJETUNGA vs. INSURANCE CORPORATION, CHANDRASENA vs. NATIONAL PAPER CORPORATION** [1982 1 SLR 19] and **WIJERATNE vs. PEOPLE'S BANK** [1984 1 SLR 01], this Court took the view that, the hallmarks which identify a corporate body as being an agency or instrumentality of the State are: the exercise of an aspect of the 'sovereign power' of the State, the performance of functions of public importance which are of a governmental nature, ownership by the State, almost total control by the State and financial dependence on the State. Further, the Court took the view that, the presence of one of these factors alone many not suffice and that it was necessary to look at whether there was a combination of these factors which showed that the corporate body was, in fact, an agency or instrumentality of the State. As Sharvananda J stated in **WIJERATNE vs. PEOPLE'S BANK** [at p.13] *"Consideration of any single factor may not suffice, a Court will have to consider the cumulative effect of these various factors to arrive at its decision. 'It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each as being individually insufficient to support a finding of State action. It is the aggregate that is controlling' - per Douglas, J. in Jackson v. Metropolitan Edition Co. It is the cumulative effect of all the relevant factors that determines the measure of State responsibility.".*

Applying these criteria, Sharvananda J decided in the above three cases that, the Insurance Corporation, National Paper Corporation and the People's Bank respectively, which were all corporate bodies established by Statute, were not agencies or instrumentalities of the State. On an application of the same criteria,

Sharvananda J decided in **PERERA VS. UNIVERSITIES GRANTS COMMISSION** that, the University Grants Commission, which was a corporate body established by Statute, performed a *"very important governmental function"* and was financed by the State, which made it *"an organ or delegate of the Government"*. Applying the same criteria, in **JAYANETTI vs. LAND REFORM COMMISSION** [1984 2 SLR 172], Wanasundera J held the Land Reform Commission, which was a corporate body established by Statute, was an instrumentality of the State since it was set up to manage vast acres of State land in compliance with State policy and subject to close State control in its activities and its finances. In **DAHANAYAKE vs. DE SILVA** [1978-79-80 1 SLR 47], the Ceylon Petroleum Corporation was regarded as an agency of the State since it had a monopoly on the sale of petroleum products which are not a mere consumer item of private trade and since it provided an essential service by distributing and selling these petroleum products to the people.

The aforesaid criteria applied in the above decisions are sometimes referred to as the "functional test" and the "Governmental control test". The approach taken in these cases appears to have been on the lines that, the "functional test" would be satisfied only if the Statute establishing the corporate body vested it with the duty of performing important Governmental functions which have traditionally been the sole and exclusive preserve of the State and that, the "Governmental control test" would be satisfied only if the Statute establishing the corporate body made it subject to very close State control coupled with financial dependence on the State. Thus, Sharvananda J stated in both **WIJETUNGA VS. INSURANCE CORPORATION** and in **PERERA vs. PEOPLE'S BANK** that a corporate body would be regarded as being an agency or instrumentality of the State where it was evident that the corporate body was an *"alter ego or organ of the State"*.

However, in subsequent cases, this Court has, while not jettisoning the "functional test" and the "Governmental control test", adopted a more investigative approach when determining whether a corporate body is an agency or instrumentality of the State. This Court has been more ready to pull aside the veil of incorporation and probe deeper to see whether *"the brooding presence of the State"* as evocatively termed by Krishna Iyer J in **SOM PRAKASH vs. UNION OF INDIA** [AIR 1981 SC 212 at p.229], lies behind the corporate body making it, in truth and in fact, an agency or instrumentality of the State. Consequently, the somewhat narrow and rigid tests referred to in the aforesaid early cases were expanded in the later Cases with this Court preferring to adopt a less restrictive approach which looked to ascertaining the *real* relationship which exists between the State and a corporate body.

This approach was necessary since the Court was alive to the reality that, the modern State has an array of corporate entities which are formed by the State or on the directions of the State, to engage in a variety of activities including the provision of services, administration, manufacturing and commerce. Though these corporate bodies are legal persons in their own right and their legal identity is distinct from the State, they often operate in terms of State policy or are closely associated with the State or perform functions on behalf of the State or are largely controlled by the State or are financed by the State. In many cases, they conform to many or all of these characteristics. Frequently, the power and authority of the State lies behind

these corporate bodies when they deal with the people. They are, in truth and fact, agencies or instrumentalities of the State which, therefore, must be held to be bound by Article 4 (d) of the Constitution, which requires all organs of the Government to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution.

Thus, in **RAJARATNE vs. AIR LANKA LTD** [1987 2 SLR 128], Atukorale J observed [at p.146] *"But by resorting to this device of the corporate entity, the government cannot be permitted to liberate itself from its constitutional obligations in respect of fundamental rights which it and its organs are enjoined to respect, secure and advance. In the circumstances I am of the opinion that the expression 'executive or administrative action' in Articles 17 and 126 of the Constitution should be given a broad and not a restrictive construction."*

Atukorale J cited with approval the judgment of Mathew J in **SUKHDEV SINGH vs. BHAGATRAM** [AIR 1975 SC 1331] and the decisions of **RAMANA DAYARAM SHETTY vs. THE INTERNATIONAL AIRPORT AUTHORITY OF INDIA** [AIR 1979 SC 1682], **AJAY HASIA vs. KHALID MUJIB** [AIR 1981 SC 487] and **SOM PRAKASH vs. UNION OF INDIA** in which the Indian Supreme Court described some of the identifying characteristics which show a corporate body to be, in fact, an agency or instrumentality of the State. His Lordship followed the approach taken in these Indian decisions, which he described [at p.146] as *"the test of governmental agency or instrumentality"*. Adopting this approach, Atukorale J held that, Air Lanka Ltd, which was a Company incorporated under the Companies Ordinance, was an agency or instrumentality of the State since it performed a function of great public importance, was financed by the State and its management was controlled by the State. His Lordship held [at p.148-149] *"The juristic veil of corporate personality donned by the company for certain purposes cannot, for the purposes of the application and enforcement of fundamental rights enshrined in Part III of the Constitution, be permitted to conceal the reality behind it which is the government. The brooding presence of the government behind the operations of the company is quite manifest. The cumulative effect of all the above factors and features would, in my view, render Air Lanka an agent or organ of the government. Its action can therefore be properly designated as executive or administrative action within the meaning of Articles 17 and 126 of the Constitution".*

This broader and more investigative approach was adopted in **ROBERTS vs. RATNAYAKE** [1986 2 SLR 36] where De Alwis J held that a Municipal Council was an agency or instrumentality of the State since it performed Governmental functions and was subject to some degree of control by the State. Then, in **WIJENAIKE vs. AIR LANKA LTD** [1990 1 SLR 293, Kulatunga J considered Air Lanka Ltd, which was a Company incorporated under the Companies Ordinance, to be a *"government agency"*. In **WICKREMATUNGA vs. RATWATTE** [1998 1 SLR 201], Amerasinghe J held that, Ceylon Petroleum Corporation, which was a corporate body established by the Statute, was an agency or instrumentality of the State since it performed functions of vital national importance and was subject to the control of State. In **SAMSON vs. SRI LANKAN AIRLINES LTD** [2001 1 SLR 94], Ismail J held that, following Emirates being vested with the exclusive power of management and control, Sri Lanka Airlines Ltd had ceased to be agency or instrumentality of the State. But, it is evident from the judgment of Ismail J that, His Lordship considered

Sri Lanka Airlines Ltd to have been an agency or instrumentality of the State prior to Emirates taking over the management and control. However, it appears that, in this case, the Court did not go on to consider the question of whether Emirates was exercising control as the agent of Sri Lanka Airlines Ltd which had been recognized to be an agency or instrumentality of the State.

In **JAYAKODY vs. SRI LANKA INSURANCE AND ROBINSON HOTEL COMPANY LTD** [2001 1 SLR 365], Fernando J addressed this question and held that, a duly incorporated limited liability Company which carried on a solely commercial enterprise was an agency or instrumentality of the State if the State had effective ownership and control of that Company. His Lordship held that this would be so even if the ownership was through another legal entity and the control was exercised through another legal entity who acted as the agent. Thus, Fernando J held [at p.373] *"The chain of ownership and control may extend indefinitely: e.g. the State may set up a corporation which it (in substance) owns and controls; that corporation may set up a limited liability company which it (in substance) owns and controls; and that company in turn may set up another company or other entity . . . and so on. But however long the chain may be, if ultimately it is the State which has effective ownership and control, all those entities - every link in that chain - are State agencies. I hold that the 2nd Respondent is a State agency. Even if it was performing purely commercial functions, it would nevertheless be a State agency, albeit a State agency performing commercial functions."* and [at p.376]*, "The liabilities which direct action would attract, could not be evaded by resorting to indirect action."*.

In **ORGANIZATION OF PROTECTION OF HUMAN RIGHTS & RIGHTS OF INSURANCE EMPLOYEES vs. PUBLIC ENTERPRISE REFORM COMMISSION** [2007 2 SLR 316]. Bandaranayake J, as she then was, held that, following the State divesting the Shares it held in Sri Lanka Insurance Corporation Ltd and ceasing to have any effective control over that corporate body, Sri Lanka Insurance Corporation Ltd, which was a duly incorporated Company, was not an agency or instrumentality of the State.

In **DHARMARATNE vs. INSTITUTE OF FUNDAMENTAL STUDIES** [2013 1 SLR 367], Marsoof J identified the several tests that have been developed to ascertain whether a corporate body is an agency or instrumentality of the State and stated [at p.373] *"Consistent with this approach, our courts have applied various tests to determine whether a particular person, institution or other body whose action is alleged to be challenged under Article 126 of the Constitution, is an emanation or agency of the State exercising executive or administrative functions. Where the body whose action is sought to be impugned is a corporate entity these tests have focussed, among other things on the nature of the functions performed by the relevant body, the question whether the state is the beneficiary of its activities, the manner of is constitution, whether by statutory incorporation or otherwise, the dependence of the body whose action is sought to be challenged on state funds, the degree of control exercised by the State, the existence in it of sovereign characteristics or features, and whether it is otherwise an instrumentality or agency of the State. However, as will be seen, these tests flow into each other."*

In this case, Marsoof J examined whether the Institute of Fundamental Studies, which was a corporate body established by Statute, was an agency or

instrumentality of the State. His Lordship held that, though it was not immediately apparent that, the Institute of Fundamental Studies performed functions of a public or governmental nature and there was no material before Court to suggest that it received substantial financial assistance from the State, the fact that the President of the Republic and the Board of Governors, the majority of whom were appointed by the President, exercised control over the Institute of Fundamental Studies and also the fact that, the State granted benefits to Institute of Fundamental Studies which suggested the existence of *"contact as well as a symbiotic relationship"* with the State, made the Institute of Fundamental Studies, an agency or instrumentality of the State.

In the recent decision of **WIJEWARDHANA vs. KURUNEGALA PLANTATIONS LTD** [S.C F.R.24/2013 decided on 03.09.2014], it was not disputed by the parties and accepted by the Court that, a duly incorporated limited liability Company which was subject to ministerial control, was to be regarded as being an agency or instrumentality of the State.

Drawing from the aforesaid decisions of this Court and Indian decisions, some of the identifying characteristics which show a corporate body to be an agency or instrumentality of the State, may be collated as follows:

(i) The State, either directly or indirectly, having ownership of the corporate body or a substantial stake in the ownership of the corporate body;
(ii) The corporate body performing functions of public importance which are closely related to Governmental functions;
(iii) The corporate body having taken over the functions of a Department of the State;
(iv) The State having deep and pervasive control of the corporate body;
(v) The State having the power to appoint Directors and Officers of the corporate body;
(vi) The State providing a substantial amount of financial assistance to the corporate body;
(vii) The corporate body transferring its profits to the State;
(viii) The State deriving benefits from the operation of the corporate body;
(ix) The State providing benefits, concessions or assistance to the corporate body which are usually granted to organs of the State ;
(x) The Accounts of the corporate body being subject to audit by the Auditor General or having to be submitted to the State or an official of the State;
(xi) The State having conferred a monopoly or near monopoly in its field of business to the corporate body or the State protecting such a monopoly or near monopoly;
(xii) Officers of the corporate body enjoying immunity from suit for acts done in their official capacity.

It should be added that, as pointed out in **RAJASTHAN STATE ELECTRICITY BOARD vs. MOHAN LAL** [AIR 1967 SC 1857], the conferring of power on a corporate body to make rules, regulations or directions with the power to enforce

them, is strong evidence that, the corporate body exercises an aspect of 'sovereign power' and is, accordingly, an organ of the State.

Although I have, for purposes of easy reference, set out the above list of some of the identifying characteristics of a corporate body which is an agency or instrumentality of the State, it is important to keep in mind that, this list is by no means exhaustive. Further, it must be stressed that, the presence of one or more of these identifying characteristics does not, necessarily, lead to the conclusion that a corporate body is an agency or instrumentality of the State. Instead, it is, usually, the cumulative effect of some of these identifying characteristics being found in a corporate body, which leads to the conclusion that it is an agency or instrumentality of the State. As Bhagwati J, as he then was, emphasised in **RAMANA DAYARAM SHETTY vs. THE INTERNATIONAL AIRPORT AUTHORITY OF INDIA** [at p.642], *"….. it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is governmental instrumentality or agency….It is the aggregate and cumulative effect of all the relevant factors that is controlling."*.

I will now consider, in the light of the aforesaid characteristics of a corporate body which is an agency or instrumentality of the State, the first preliminary objection raised by the 1st to 3rd Respondents and 4th and 12th Respondent – namely, the contention that, the impugned acts do not constitute *"executive or administrative acts"* as contemplated in Articles 17 and 126 (1) of the Constitution and that, therefore, this Court does not have the jurisdiction to entertain this application.

The impugned acts – *ie:* the suspension of the Petitioner's services by the letter marked **"P24"** and the termination of the Petitioner's services by the letter marked **"P27"** - have been done by MPMC or on behalf of MPMC. Since the impugned acts were done by or on behalf of MPMC, it is necessary to examine whether MPMC, which is a limited liability Company incorporated under the Companies Act, can be correctly considered to be an agency or instrumentality of the State. As set out above, it is only if the answer to that question is in the affirmative, that this Court will have the jurisdiction, under Article 17 read with Article 126 (1) of the Constitution, to entertain this application.

When answering this question, it has to be kept in mind that, as mentioned earlier, the modern State often resorts to the mechanism of incorporating Statutory Bodies and Companies to carry on the myriad activities which a modern State engages in, including commercial enterprises. It also has to be kept in mind that, although at first blush these corporate bodies may seem to be distinct from the State by virtue of their incorporation as limited liability Companies or because they engage in a solely commercial enterprise or for other reasons, some of them are, in truth and in fact, agencies and instrumentalities of the State which not only enjoy the privileges of an organ of the State but also have the power of the State strengthening their hand when dealing with the people.

Therefore, this Court, which is entrusted with the guardianship of fundamental rights under the Constitution, has a duty to ensure that, if a corporate body is, in truth and in fact, an agency or instrumentality of the State, that corporate body is held

accountable to honour and abide by Article 4 (d) of the Constitution which requires all organs of the government to respect, secure and advance the fundamental rights which are declared and recognized by the Constitution. It is apt to reiterate here Atukorale J's observation in **RAJARATNE vs. AIR LANKA LTD** that, *"….. by resorting to this device of the corporate entity, the government cannot be permitted to liberate itself from its constitutional obligations in respect of fundamental rights which it and its organs are enjoined to respect, secure and advance.*

Consequently, when ascertaining whether a corporate body is an agency or instrumentality of the State, the Court should endeavour to perceptively examine with an investigative bent of mind, the character of the corporate body and the features of its management and operations and, thereby, determine whether the corporate body is, in truth and in fact, an agency or instrumentality of the State. A Court has to look behind any cosmetic artifices of incorporation or illusory distancing placed between State and the corporate body and dissect the flesh, blood and bones of the corporate body to expose its real kinship and association with the State. As Bhagwati J, as he then was, observed in **AJAY HASIA vs. KHALID MUJIB** [at p.492],*"Where Constitutional fundamentals vital to the maintenance to human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool; for constitutional law must seek the substance and not the form."*.

To get back to examining whether MPMC possesses the characteristics of an agency or instrumentality of the State, it should be mentioned at the outset that, the fact that MPMC is a limited liability Company incorporated under the Companies Act or the fact that it engaged in an enterprise which has commercial aspects, does not prevent it from being regarded as an agency or instrumentality of the State if it possesses the characteristics of one. As set out above, this has been recognised in several decisions of this Court including **RAJARATNE vs. AIR LANKA LTD**, **JAYAKODY vs. SRI LANKA INSURANCE AND ROBINSON HOTEL COMPANY LTD** and **WIJEWARDHANA vs. KURUNEGALA PLANTATIONS LTD**. In this regard, Douglas J stated in **NEW YORK vs. UNITED STATES** [1945 326 US 572], *"A State's project is as much a legitimate governmental activity whether it is traditional or akin to private enterprise."*.

Thereafter, it is appropriate to first ascertain whether the State, directly or indirectly, owns MPMC. In this connection, it is undisputed that, MPMC is fully owned by the SLPA. Not only that, Article 4 (i) and (ii) of the Articles of Association marked **"P5"** stipulate that SLPA shall, at all times, be the sole shareholder of MPMC and that, MPMC is prohibited from offering its Shares to the public.

A perusal of the Sri Lanka Ports Authority Act No. 31 of 1979 establishes, beyond any doubt, that, the SLPA is an agency or instrumentality of the State. This is evident for the reasons, *inter alia*, that, the objects of the SLPA are to develop, maintain and operate the principal Ports of Sri Lanka and provide Port Services, all of which are functions of vital public importance which are governmental in nature; the SLPA took over all the property of the Colombo Port Commission; the members of the SLPA and the General Manager of the SLPA are appointed by specified Ministers of the State; the Minister has the power to make Rules which regard to the operations of

the SLPA; the SLPA is subject to close control by the State in its management and operations ; provision is made for the issue of Government guarantees to secure monies borrowed by the SLPA; the SLPA is eligible to receive several benefits from the State; obstructing the SLPA in the performance of its duties, evading paying amounts due to the SLPA by way of dues or charges and the contravention of the provisions of the Act, are all offences; and officers of the SLPA are regarded as public servants for the purposes of the Penal Code and have immunity from suit or prosecution for acts done in good faith.

Thus, it is evident that, since MPMC is fully owned by the SLPA which is indisputably an organ of the State, the State has effective ownership of MPMC. As Fernando J pointed out in **JAYAKODY's** case, the fact that it is indirect ownership, does not make a difference.

Secondly, Article 3 of the Articles of Association show that, the Objects of MPMC can be fairly described to be of public importance and governmental in nature since they include developing the Mahinda Rajapaksa Port in Hambantota to a modern international sea port, establishing an industrial zone within that Port and performing duties and functions relating to the operation and management of that Port as are assigned to MPMC by the SLPA.

Thirdly, it is evident that, the State, through the SLPA, exercises absolute control over MPMC since the SLPA is the sole shareholder of MPMC. It hardly needs to be stated that, where a duly incorporated Company has a sole shareholder, that shareholder wields absolute power to determine any aspect of the Company's operations and even existence. Since the State controls the sole shareholder of MPMC, the State wields this absolute power over MPMC.

Further, though MPMC has its own Board of Directors, consisting of 09 Directors, which manages the business and affairs of MPMC in terms of Article 15 (1), all these Directors are nominated by Ministers of the State or by the SLPA. Thus, the first Managing Director, who is an executive Director and an employee of MPMC, is nominated by the Minister in charge of the SLPA. With regard to the other 08 Directors, 02 Directors are nominated by the Minister in charge of the SLPA from among the members of the Board of Directors of the SLPA. 03 more Directors are nominated by the Minister in charge of the SLPA. 01 Director is a representative of the General Treasury nominated by the Minister in charge of Finance. The remaining 02 Directors are the Director-Operations and the Director-Finance of the SLPA. All these Directors (other than the Managing Director of MPMC and the Director-Operations and the Director-Finance of the SLPA) are subject to removal by the Minister who appointed them. Thus, it is evident that, as a result of the Minister in charge of the SLPA and the SLPA having the power of determining the constitution of the Board of Directors of MPMC, the SLPA and the Minister exercise effective control over the business and affairs of MPMC.

The fact that, SLPA has control over MPMC is tellingly illustrated by the letter dated 18th December 2015 marked **"P24"** which requires the Petitioner to show cause as to why disciplinary action should not be taken against him and suspends the Petitioner's services. As mentioned earlier, **"P24"** has been signed by the 3nd Respondent, who has signed as *"Managing Director"*, presumably of the SLPA. The

envelope in which **"P24"** is said to have been sent to the Petitioner by Registered Post, is printed with the name and address of the SLPA. Thus, **"P24"** establishes that, the SLPA was inextricably engaged in the management and control of MPMC to such an extent that, the Managing Director of the SLPA considered it well within his duties to issue a 'show cause letter' to an employee of MPMC and suspend that employee from service. The fact that this was the accepted *status quo* is further revealed by the Petitioner's reply marked **"P25"** which was sent to the Managing Director of the SLPA.

Next, the Gazette dated 21st September 2015 marked **"P6"** indicates that, the Minister in charge of Ports and Shipping has the duty and function of supervising MPMC and formulating the policies, programmes and projects of MPMC since the Minister is stated to be in charge of the SLPA and *"its Subsidiaries and Associates"* .

Thereafter, there is material before this Court to indicate that, the Minister in charge of Ports and Shipping exercised authority and took decisions relating to the operations of MPMC. This is evidenced by the report dated 06th October 2015 marked **"P13(e)"** which reveals that, reports relating to the operations of MPMC were submitted to the Minister for decisions and the letter dated 11th November 2015 marked **"P19"** which reveals that, the Minister chaired a meeting at which officials of the SLPA and the Petitioner participated and at which the Petitioner was directed to compile a report regarding a purchase of Diesel Oil.

There is also material before this Court which establishes that, the State exercises a significant degree of control over the finances of MPMC. This is seen from Article 15 (v) and (vi) of the Articles of Association of MPMC which require that, the Business Plan of MPMC must be submitted to the General Treasury for approval and that, the annual Budget of MPMC must be submitted to the General Treasury. Further, the document marked **"P20"** establishes that, a "Report on the Tank Farm and Bunkering Activities" of MPMC was submitted to the Auditor General who required MPMC to furnish an explanation with regard to the losses incurred by MPMC and the remedial steps that MPMC intends to take. Further, the letter dated 10th December 2015 marked **"P22"** establishes that, the Minister of Finance called for an explanation from MPMC with regard to a purchase of bunker fuel and a loan obtained by MPMC and also that, a memorandum was submitted to the Cabinet on this issue.

The circumstances I have referred to above establish that, the State both directly and through its organ, the SLPA, has deep and pervasive control over MPMC. Here too, as Fernando J pointed out in **JAYAKODY's** case, the fact that it is indirect control through SLPA, does not make a difference.

Learned President's Counsel appearing for the 1st to 3rd Respondents has submitted that, the fact that, the Articles of Association of MPMC do not expressly provide for ministerial directions affecting the operations and administration of MPMC, establishes that MPMC is free from State control. I do not think this contention is correct. While the Articles of Association are undoubtedly relevant, they are not conclusive. As mentioned earlier, this Court must look to the reality of the situation rather than the rules in Articles of Association. The facts I have recounted establish that the reality of the situation is that the State controls MPMC. It is apt to recall the

words of Krishan Aiyar J in **SOM PRAKASH vs. UNION OF INDIA** [at p.218] who stated, *"…..merely because a Company or other legal person has functional and jural individuality for certain purposes and in certain areas of law, it does not necessarily follow that for the effective enforcement of fundamental rights under our constitutional scheme, we could not scan the real character of that entity; and if it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State and in effect an incarnation of the State, constitutional lawyers must not blink at these facts and frustrate the enforcement of fundamental rights……"*.

To sum up, the fact that, the State has effective ownership of MPMC, the fact that MPMC performs functions of public importance which are governmental in nature and the fact that, the State, both directly and through the SLPA, exercises deep and pervasive control over MPMC, lead me to conclude that, MPMC must be regarded as an agency or instrumentality of the State. Consequently, the impugned acts done by MPMC or on behalf of MPMC must be regarded as constituting *"executive or administrative acts"* within the meaning of Articles 17 and 126 (1) of the Constitution.

Accordingly, I overrule the first preliminary objection.

The second preliminary objection has to be now considered. Namely, the contention that, the impugned acts arise from or relate to a Contract of Employment which is commercial in nature and which has no statutory basis or connection. It is submitted that, therefore, the Petitioner's remedy is limited to Private Law and the Petitioner is not entitled to invoke the fundamental rights jurisdiction of this Court.

In support of this contention, it has also been submitted that, Article 15 (iv) of the Articles of Association of MPMC specifies that it is the Board of Directors of MPMC which must formulate the schemes of recruitment and promotion of employees of MPMC and the code of rules of discipline applicable to employees of MPMC. On this basis, it is submitted that, there is no provision for State control or interference in MPMC's dealings with its employees and that, therefore, the contract of employment between the Petitioner and MPMC is one which is entirely commercial in nature with no statutory basis or connection - *ie:* with no *'statutory underpinnings'* as it is sometimes said.

In pursuance of this argument, Counsel appearing for the 1st to 3rd Respondents and 4th and 12th Respondents submit that, the Contract of Employment set out in the Letter of Appointment marked **"P4"** provides for the termination of the Petitioner's employment with one month's notice and that there is no contractual obligation to hold a disciplinary inquiry before terminating the Petitioner's employment. They submit that, the Petitioner is not a `public servant' and that, therefore, the Petitioner's remedy, if any, lies in Private Law and that the Petitioner cannot invoke the fundamental rights jurisdiction of this Court. In support of this argument, learned Counsel have cited and rely on the decisions in **ROBERTS vs. RATNAYAKE** and **WIJENAIKE vs. AIR LANKA LTD**.

In **ROBERTS vs. RATNAYAKE**, the majority judgment held that, where the State or one of its agencies entered into a contract with another party, the State was bound to not violate the fundamental rights of that person during the `threshold' stage of

awarding the contract and entering into the contract. It was held that, once the contract was entered into and the `threshold' stage was passed, the rights of the State and the other party to the contract were governed solely by the contract unless the contract had a statutory basis or connection – *ie:* unless the contract has what is sometimes referred to as `statutory underpinnings'. The Court held that, after the `threshold' stage was passed, the fundamental rights of the other party ceased to have any application to the dealings between the State and that party under the contract unless the contract has a statutory basis or connection.

Thus, Ranasinghe J, as he then was, held [at p. 44-45], *"Any act done, therefore, in pursuance of a term or condition, set out in a contract entered into between a citizen and the State, would not, ordinarily, come within the term `law' so set out in the said Article; and a breach or violation of any such term or condition would not attract to it the provisions of Article 12 (1). An act, done in pursuance of a term or condition contained in such a contract and which said act is said to be a violation, could found a complaint of an infringement of the right embodied in Article 12 (1) only where such term or condition has a statutory origin, or has, at least, what has been referred to in another connection, a `statutory flavour'. It is only where the State has acted in the context, and in the sphere of `law', as defined in Article 170, that any invocation of Article 12 (1) could be entertained ….. where the State enters into a contract with a citizen in pursuance of any statutory power, the State, or such State agency is, at the `threshold stage', or the stage at which such contract is being entered into, bound by the operation of the provisions of Article 12(1) of the Constitution: that, once such an agreement is validly entered into, all parties to such agreement – the State, the State agency, and the citizen - are all ordinarily bound only by the terms and conditions set out in such agreement;"*.

In **WIJENAIKE vs. AIR LANKA LTD**, Kulatunga J endorsed the view taken by the majority in **ROBERTS vs. RATNAYAKE** that, where the State has entered into a contract, fundamental rights have no application after the 'threshold' stage of the contract is passed. With regard to contracts of employment where the State or its agencies or instrumentalities is the employer, Kulatunga J took the view that, unlike in the case of `public servants' whose employment by the State is characterized by, in the words of Sharvananda CJ in **PERERA vs. JAYAWICKREMA** [1985 1 SLR 285 at p.301],*"The concept of equality (which) permeates the whole spectrum of a public servant's employment….."*, the rights of employees who are not classified as `public servants' are governed only by their contracts of employment unless these contracts of employment are governed by a statute or subsidiary legislation which requires that, the employer must accord equal treatment to all its employees and refrain from discrimination etc. His Lordship held [at p.316] *"….. in the case of a public corporation which is an agency of the government a breach of contract between an employee and the agency would not per se attract the provisions of Article 12 (1). Such an employee can complain of a violation of that Article only if the rights and obligations under the contract of employment are imposed by statutory provisions….. If the remedy sought arises purely from the contract based on the consent of parties, Articles 12 (1) and 126 have no application, in which event the dispute must be resolved by an ordinary suit provided by private law, even if the dispute involves an allegation of discrimination."*.

However, the subsequent decisions of this Court in cases such as **GUNARATNE vs. CEYLON PETROLEUM CORPORATION** [1996 1 SLR 315], **SMITHKLINE BEECHAM BIOLOGICALS SA vs. STATE PHARMACEUTICAL CORPORATION** [1997 3 SLR 20], **WICKREMATUNGA vs. RATWATTE** [1998 1 SLR 201], **SILVA vs. RATWATTE** [1998 1 SLR 350], **WICKREMASINGHE vs. CEYLON PETROLEUM CORPORATION** [2001 2 SLR 409] and **WIJEWARDHANA vs. KURUNEGALA PLANTATIONS LTD** have taken a different view. These decisions have held that, the fact that State enters into a contract does not exempt the State from its obligation to refrain from violating the fundamental rights of the other party to the contract in the course of dealings under the contract, whether at the 'threshold stage' or thereafter. These decisions, which are very relevant to the second preliminary objection, have not been cited by Counsel in their submissions in support of the preliminary objection raised by them.

In **GUNARATNE vs. CEYLON PETROLEUM CORPORATION**, the Court held that, although the contract entitled Ceylon Petroleum Corporation to terminate a Dealership Agreement at its sole discretion, the termination was arbitrary and, therefore, violated the fundamental rights of the Dealer. Fernando J rejected the submission that, the fundamental rights jurisdiction of this Court cannot be invoked where the impugned act is one done by the State in the course of its dealings under a contract. His Lordship stated [at p.323], *"The principle of equality embodied in Article 12 does not make any exception, in regard to contracts in general, or particular types of contracts, or the stage at which a contract is. Indeed, the proviso to Article 12 (2), as well as Article 12 (3), militate against the contention that contracts are excluded."*.

Similar views were expressed by Amerasinghe J in **SMITHKLINE BEECHAM BIOLOGICALS SA vs. STATE PHARMACEUTICAL CORPORATION** and **WICKREMATUNGA vs. RATWATTE** and by Silva CJ in **WICKREMASINGHE vs. CEYLON PETROLEUM CORPORATION**. In the **SMITHKLINE BEECHAM** case, Amerasinghe J stated [at p. 29], *"I am also unable to agree with the view that a distinction should be drawn between cases in which there is a contract and those in which the matter is at a threshold stage or some stage before the making of the contract: In my view, where there is a breach of contract and a breach of Article 12 (1) brought about by the same set of facts and circumstances, it cannot be correctly said one of the remedies only can be availed of, the other being thereby extinguished; nor can it be correctly said that the aggrieved party must be confined to his remedy under the law of contract, unless there is a violation of statutory obligations:"*. In **WICKREMATUNGA' s** case, Amerasinghe J stated [at p.230-231], *"….. I am unable to agree with the view advanced by learned counsel for the second and third respondents, that in the sphere of contracts, public authorities and functionaries do not have to conform to Constitutional requirements, and in particular those set out in Article 12: They cannot, in my view, avoid their Constitutional duties by attempting to disguise their activities as those of private parties. This Court has always said or acted on the assumption that government departments and agencies, institutions and persons performing public functions or clearly entwined or entangled with government, must comply with the provisions of Article 12 ….. The drawing of a distinction between cases in which there is a contract and those in which the matter is at a threshold stage or at some stage before the making of a contract is, in my view, artificial, narrow and inappropriate."*. In **WICKREMASINGHE's** case, Silva CJ

stated [at p.412] *"….. the termination of the Petitioners dealership is in compliance with specific terms of the Agreement (P1) and the Petitioner may not be entitled to any relief in respect of the termination under the law of contract and the common law on the subject. But, that is from the perspective of the Private Law. In these proceedings, the termination is challenged from the perspective of Public Law on the basis of an alleged infringement of the fundamental right to equality, guaranteed by Article 12(1) and (2) of the Constitution. Therefore the matters to be considered transcend the mere examination of the terms of the Agreement and a review of the legality of the termination in the light of the Law of Contract and enter the domain of the constitutional guarantee of equality enshrined in Article 12."*.

More recently, in **WIJEWARDHANA vs. KURUNEGALA PLANTATIONS LTD** where the Respondent took up the position that its refusal to extend the lease was in exercise of its' contractual rights and, therefore, not subject to review in a fundamental rights application, Wanasundera J examined the different views taken in the aforementioned decisions and endorsed the latter view adopted by Fernando J, Amerasinghe J and Silva CJ. Her Ladyship held [at p.8], *"I am of the view that the 1st Respondent's refusal to extend the lease period should be reviewed not from the narrow perspective of only the terms of the agreement but from the broader perspective of the exercise of executive and administrative action. The refusal to extend the lease period by the Respondent is an act of agency of the Government and the Constitutional guarantee of equality should guide the exercise of power under the agreement.*

When determining the aforesaid second preliminary objection raised in the present case, I would respectfully follow the line of authority set out in the aforesaid later decisions which hold that, the fundamental rights jurisdiction of this Court can be invoked by a Petitioner who alleges that an organ, agency or instrumentality of the State has violated his fundamental rights in the course of dealings under and in terms of a contract entered into between them.

It seems to me that, this has to be so for the simple reason that, Article 4 (d) of the Constitution has an overarching effect which binds all organs, agencies and instrumentalities of the State in all things they do and at all points of time. Therefore, the fact that an organ, agency or instrumentality of the Government has entered into a contract cannot release it from its duty, under Article 4 (d) of the Constitution, to respect, secure and advance the fundamental rights of the contracting party in the course of dealings under that contract. This duty will, necessarily, continue at all stages of the contract. This is a duty which an organ, agency or instrumentality of the State cannot escape from by entering into a contract and it is a right which the contracting party cannot cede or abandon by entering into a contract. The validity of this conclusion is confirmed by the fact that, Article 15 of the Constitution allows restrictions on fundamental rights only in the limited situations specified therein and only if so prescribed by Law. There is no provision made in the Constitution to restrict the operation of fundamental rights by contract.

This duty operates at the `threshold stage' of awarding or entering into the contract and continues to operate in the course of the dealings under the contract. As Verma J, as he then was, observed in **SRILEKHA VIDARTHI vs. STATE OF U.P.** [AIR 1991 SC 537 at p.550], *"The State cannot be attributed the split personality of Dr.*

Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfill the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily-subject only to the contractual obligations and remedies flowing from it." .

To move on, the terms of the contract between the State and the contracting party will, naturally, determine the rights and obligations of both parties and a Court would give full recognition to the principle that, parties are free to determine the contents of the contract and should be held to what they have agreed to. Thus, the terms and conditions of the contract would usually determine whether or not the rights of either party have been violated. However, when one of the contracting parties is an organ, agency or instrumentality of the State, there is the overriding obligation cast on it to comply with Article 4 (d) of the Constitution and not violate the fundamental rights of the other party in the course of dealings under the contract.

In practice, this means that, while the terms of the contract would, usually, be the determining factor when assessing whether an organ, agency or instrumentality of the State has violated the rights of the other party in the course of dealings under a contract and the general rule is that, a party who acts in accordance with the terms of the contract does not violate the rights of the other party, the position would be different if the organ, agency or instrumentality of the State has used the terms of the contract as a cover for malicious, perverse or arbitrary acts. This is so since the State and its organs, agencies and instrumentalities are enjoined to act with good faith in their dealings with the people including where such dealings are in pursuance of a contract. As Amerasinghe J stated in **WICKREMATUNGA's** case [at p.213], *"It is well settled that a public body like the Ceylon Petroleum Corporation, a statutory public corporation – must act in good faith and act reasonably"*. In this regard, it is also apt to cite the decision of the Supreme Court of India in **F.C.I. vs. KAMDHENU CATTLEFEED INDUSTRIES** [1993 1 SCC 71] where it was held that, the State must conform to the requirements of Article 14 of the Constitution of India [which is on similar lines to Article 12 of our Constitution] when the State enters into contracts and that this imposes a duty to act fairly and to adopt procedure that is `fairplay in action' which is the legitimate expectation of every citizen.

Thus, organs, agencies and instrumentalities of the State are to be guided by the requirement of good faith in their contractual dealings and a departure from this standard by misusing a contractual term or committing a deliberate breach of contract in a malicious or perverse or arbitrary or manifestly unreasonable manner, could well amount to an act which violates the fundamental rights of the victim if the impugned act violates one or more of his fundamental rights declared and recognized in Chapter III of the Constitution.

It should be made clear that, where an organ, agency or instrumentality of the State acts in breach of a contract due to *bona fide* commercial or operational factors or inadvertence or unavoidable circumstances or as a result of a *bona fide* revised policy or for similar reasons, that breach *per se* is unlikely to amount to a violation of the fundamental rights of the other party and would, usually, attract only the remedies available under the contract. A Court would, naturally and advisedly, be

unwilling to substitute its own opinion of what should have been done under the contract in place of the decision taken by the contracting party.

But, where there has been a deliberate misuse of a term of the contract or a deliberate breach of the contract in a malicious or perverse or arbitrary or manifestly unreasonable manner, then there could be a violation of the fundamental rights of the other party. This is because, in such cases, the impugned act may amount to a violation of Article 12 (1) or another Article in Chapter III of the Constitution by reason of the malice, perversity, arbitrariness or manifest unreasonableness of the impugned act.

Each such case would have to be determined upon the facts and circumstances before the Court and in the context of the contract between the parties. When doing so, it should be kept in mind that, as mentioned earlier, the parties have agreed to be bound by the terms of the contract and the remedies available under the contract and that, therefore, unless the nature of the impugned act warrants the invocation of the fundamental rights of this Court for the reasons set out above or for such other reasons as the Court may consider relevant, the parties should be required to seek their remedies under the contract they have entered into.

I am of the view that these principles are equally applicable whether the contract is of a commercial nature or is a contract of employment. An employer which is an organ, agency or instrumentality of the State, has the duty, under and in terms Article 4 (d) of the Constitution, to respect, secure and advance the fundamental rights of its employees. This entitles an employee of an organ, agency or instrumentality of the State to invoke the fundamental rights jurisdiction of this Court if he alleges that his employer has violated his fundamental rights in connection with the contract of employment in the manner set out above. The fact that, the employee is not categorized as a `public servant' cannot disentitle him from that constitutional right. It is apt to cite Fernando J in **HEWAMALLIKAGE vs. PEOPLE'S BANK** [291/93 SCM 14.10.1994] who stated *"I hold that the appointment, transfer, dismissal, and disciplinary control of employees of the State and State agencies constitute `executive or administrative action' within the meaning of Article 126."*.

When the aforesaid principles are applied to the present case, the second preliminary objection has to be overruled.

For the aforesaid reasons, I overrule the two preliminary objections taken by the 1st to 3rd and 4th and 12th Respondents and hold that this Court has the jurisdiction to proceed to hear and determine this application. The 1st and 4th Respondents must pay the Petitioner costs in a sum of Rs.50,000/-. Thus, the Petitioner is entitled to a total sum of Rs.100,000/- as costs. This application should now be supported for leave to proceed, upon the merits of the Petitioner's case.

Judge of the Supreme Court

K. Sripavan CJ.
I agree

Chief Justice

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 Republic

1. Naragal Nilantha de Silva,
No.48, Kanda Road,
Ambalangoda

2. Naragal Rasindu Harshana de Silva
(minor)
No.48,Kanda Road,
Ambalangoda.

SC FR Appln No. SCFR 59/15

Petitioners

Vs.

1. Akila Viraj Kariyawawsam **(M.P.)**
Hon. Minister of Education,
Ministry of Education,
"Isurupaya", Battaramulla.

2. Upali Marasinghe,
Secretary – Ministry of Education,
"Isurupaya", Bataramulla.

2(A) W.M.Bandusena
Secretary – Ministry of Education,
Isurupaya, Battaramulla.

3. Sumith Parakramawansha,
Former Principal – Dharmashoka Vidyalaya
Galle Road, Ambalangoda.

3A. W.T.Ravindra Pushpakumara,
Principal – Dharmashoka Vidyalaye,
Galle Road, Ambalangoda.

4. R.N.mallawarachchi
5. Diyagubaduge Dayarathne
6. M.Shirley Chandrasiri
7. N.S.T.de Silva

4th to 7th Above All:
Members of the Interview Board,
(Admissions to Year 1)
C/o Dharmashoka /Vidyalaya,
Galle Road, Ambalangoda.

8. W.T.B.Sarath
9. P.D.Pathirathne
10. K.P.Ranjith
11. Jagath Wellage

4th and 8th to 11th above All:
Members of the Appeal Board,
(Admission to Year 1)
C/o Dharmashoka/Vidyalaya,
Galle Road, Ambalangoda.

12. Ranjith Chandrasekara,
Director-National Schools,
Isurupaya, Battaramulla.

13. Hon. The Attorney General,
Attorney General's Department,
Colomb o 12.

Respondents

BEFORE: S.E.WANASUNDERA, PC, J,
B.P. ALUWIHARE, PC, J &
UPALY ABEYRATHNE, J

COUNSEL: Crishmal Warnasuriya with Udani Galappathi and J. Wickramasuriya for the Petitioners.
Rajitha Perera, SSC for the1st, 2nd, 3rd, 8th and 13th Respondents.

ARGUED ON: 21.01.2016

DECIDED ON: 28.07.2017

ALUWIHARE, PC, J:

The 1st and the 2nd Petitioners, who are the father and son respectively have alleged, that by the failure on the part of the Respondents to admit the 2nd Petitioner to Grade1 of the Dharmashoka ViDdyalaya, Ambalangoda for the year 2015, the Respondents have violated their fundamental rights guaranteed under Article 12(1) of the Constitution.

Leave to proceed was granted by this court under the said Article on 15th June,2015.

The facts of the case as submitted by the Petitioners are as follows:-

It is common ground that admissions of students to government schools for the year 2015 was governed by circular issued by the Ministry of Education bearing No. 23/2013 dated 23.05.2013. It was also not in dispute that the cut off mark for the admission to grade one students for the said school for 2015 was 94.25.

The 2nd Petitioner sought admission to the school under Residency (Proximity/feeder area) category. In terms of the circular P3, the applicant is required to produce proof of residency and marks are allotted for the proximity category based on the criteria laid down in clause 6.1 of the circular P3.

The Petitioners have averred that under the category 6.1 the Petitioners expected to get 96 marks which is well above the cutoff mark referred to above.

The Petitioners have attended an interview on 6th October,2014, held to evaluate the eligibility of the 2nd Petitioner to be admitted to the school concerned. The Petitioners state that the Board of Interview comprising of 3rd to 7th Respondents awarded the 2nd Petitioner 91 marks under the category applied for.

The Petitioners state that, on or about 5th January, 2015 the temporary list containing those who were selected was displayed on the notice board. However, the 2nd Petitioner's name had not been among the applicants selected for admission.

Aggrieved by the exclusion of the 2nd Petitioner an appeal had been lodged with the 3rd Respondent, the Principal of Dharmasoka Vidyalaya as provided for in clause 9.1 of the circular P3.

The main contention on behalf of the Petitioners was the deduction of 5 marks due to the fact that Devananda Vidyalaya is more proximate to the Petitioners' residence. This deduction was made at the initial interview Petitioner faced on the 6th October,2014 and the Appeal Board (which comprised of 4th, 8th and 9th to 11th Respondents) also had been of the view that the deduction of 5 marks referred to above was justified, in view of the fact that the petitioners' residence is more proximate to Devananda Vidyalaya.

When the final list of students selected was released, the 2nd Petitioner's name had not been there. Petitioners thereafter had sought administrative relief from various quarters but those details are of not much relevancy to decide the issue in this case.

The admission to Grade1 of government schools is a competitive process and the cut off mark is set accordingly.

For the admission to Dharmashoka for the academic year 2015, the cut off mark had been 94.25. As such all applicants who secured the cut off mark or marks above that were taken in.

Hence what is pivotal to the decision in the instant application is to consider whether the 2nd Petitioner had been deprived of any marks that should have been allotted to him.

As far as allocation of marks are concerned the 2nd Petitioner had obtained 91 marks at the initial interview and that had been confirmed when his case was heard by the Appeal Board.

As to the allocation of marks the Petitioner complains that 5 marks were deducted on the basis that there was another school proximate to the residence of the Petitioner than Dharmashoka College, Ambalangoda, namely Devananda Vidyalaya.

The Petitioners have ie not denied the fact that the said school is more proximate to their residence, and had contended further that they had received a letter from Devenanda Vidyalaya with regad to the enrollement of the 2nd Petitioner to that school, but had not done so due to the distance and the medical condition of the 2nd Petitioner.
In the objections of the 3A Respondent, Principal Dharmashoka Vidyalaya, he had admitted the fact that 5 marks were deducted due to the proximity of Devananda College and in support of that had annexed an extract from "Google map"(3AR4) which shows the location of the residence of the Petitioners and the two schools.According to the same, the distance from the residence of the Petitioners to Devananda College is 397 meters whereas the distance to Dharmashoka Vidiyalaya is 470 meters.

Having considered the submissions of the parties and the documents filed I am of the view, the deduction of marks in respect of the school closer to the Petitioners' residence than Dharmashoka Vidyalaya thus seem justified.

As far as computation and allocation of marks are concerned this is the only aspect raised by the Petitioners and I hold that the Respondents had not deprived the Petitioners the marks due.

The Petitioners have also pointed out that the Respondents have acted in contravention of the express guidelines with regard to the admission criteria.

It was contended on behalf of the Petitioners that only four members of the Appeal Board have signed the final list whereas clause 11.4(a) of the circular requires all members of the Appeal Board to sign the list. In addition, it had ben alleged that as per clause 11.6 of the circular which requires the applicant to be

informed in writing of the specific reason for the rejection of the application, had been violated by not informing the Petitioners the reason for the rejection of their application.

In response to the breaches alleged by the Petitioners, it is the position of the 3A Respondent that the 5th member of the Appeal Board did sign the list subsequently and had produced the copy of the impugned document marked 3AR12. The position of the 3A Respondent is that Clause 11.6 of the circular was complied with by informing the Petitioner with regard to the outcome of the application for admission to the school, which the Petitioners have admitted in their counter affidavits.

I have considered the breaches of the circular alleged by the Petitioners and the responses to the same by the 3A Respondent. At best they are technical in nature, and even if this court is to hold that the alleged breaches have taken place, still it will not have any impact on the marks allotted to the 2nd Petitioner.

It was held in the case of *Rathnayake vs. Attorney General 1997 2 SLR pg.* 98 Chief Justice G.P.S. De Silva held that every wrongful act is not enough ground to complaint of infringement of fundamental rights. The Petitioner must establish unequal or discriminatory treatment.

I am of the view that the breaches of the circular alleged by the Petitioners are of technical nature and had caused no substantial prejudice to the Petitioners.

In the case of C.W.Mackie and Company Ltd. Vs. Hugh Molagoda, Commissioner General of Inland Revenue and others (1986) 1 SLR 300, Chief Justice Sharvananda observed that the equal treatment guaranteed by Article 12 is equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act via Article 12, one cannot seek execution of any illegal or invalid act……Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, formulated in law in contradiction to an illegal right which is valid in law.

The decision referred to above had been consistently followed by the Supreme Court and with approval I wish to refer to the statement made by Justice M.D.H.Fernando in the case of Gamaethige Vs. Siriwardane (1988) 1 SLR 384, wherein His Lordship said "Two wrongs do not make a right, and on proof of the

commission of wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong.

Justice Dr. Shirani Bandaranayakefollowing the decision in case C.W.Mackie and Company Ltd, referred to above held in the case of Dissanayake Vs. Piyal de Silva (2007) 2 SLR 134, that Article 12 (1) of the Constitution provides only for the protection of the law and no for the equal violation of the law.

Considering the above I hold that the Petitioners have failed to establish that the Respondents have violated the fundamental right enshrined in Article 12(1) of the Constitution as far as the 2nd Petitioner is concerned.

Accordingly the application is dismissed, but in all the circumstances, without costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC, J.

I agree

JUDGE OF THE SUPREME COURT

UPALY ABEYRATHNE, J.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution of the Republic

1. Seekkuge Rashantha,
No.22, Saman Madura Watta Road,
Heppumulla
Ambalangoda

2. Seekkuge Iduwara Umanjana (minor,
No.22, Saman Madura Watta Road,
Heppumulla
Ambalangoda

.

SC FR Application No. 60/15

Petitioners

Vs.

1. Akila Viraj Kariyawawsam (M.P.)
Hon. Minister of Education,
Ministry of Education,
"Isurupaya", Battaramulla.

2. Upali Marasinghe,
Secretary – Ministry of Education,
"Isurupaya", Bataramulla.

2 (A) W. M. Bandusena
Secretary – Ministry of Education,
Isurupaya, Battaramulla.

3. Sumith Parakramawansha,
Former Principal – Dharmashoka Vidyalaya
Galle Road, Ambalangoda.

3A. W. T. Ravindra Pushpakumara,

Principal – Dharmashoka Vidyalaye,
Galle Road, Ambalangoda.

4. R. N. Mallawarachchi
5. Diyagubaduge Dayarathne
6. M. Shirley Chandrasiri
7. N.S.T.de Silva

4th to 7th Above All:
Members of the Interview Board,
(Admissions to Year 1)
C/o Dharmashoka /Vidyalaya,
Galle Road, Ambalangoda.

8. W. T. B. Sarath
9. P. D. Pathirathne
10. K. P. Ranjith
11. Jagath Wellage

4th and 8th to 11th above All:
Members of the Appeal Board,
(Admission to Year 1)
C/o Dharmashoka/Vidyalaya,
Galle Road, Ambalangoda.

12. Ranjith Chandrasekara,
Director-National Schools,
Isurupaya, Battaramulla.

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

Respondents

BEFORE: EVA WANASUNDERA, PC, J,
B.P. ALUWIHARE, PC, J &
UPALY ABEYRATHNE, J

COUNSEL: Crishmal Warnasuriya with Udani Galappathi and
J. Wickramasuriya for the Petitioners.
Rajitha Perera, SSC for the1st, 2nd, 3rd, 8th and 13th Respondents.

ARGUED ON: 21.01.2016

DECIDED ON: 02.08.2017

ALUWIHARE, PC, J:

The 1st and the 2nd Petitioners, who are the father and son respectively, have alleged, that by their failure to admit the 2nd Petitioner to Grade1 of the Dharmashoka Vidyalaya, Ambalangoda for the year 2015, the Respondents have violated their fundamental rights guaranteed under Article 12 (1) of the Constitution.

Leave to proceed was granted by this court under the said Article on 15th June, 2015.

The facts of the case as submitted by the Petitioners are as follows:-
It is common ground that admissions of students to government schools for the year 2015 was governed by a circular issued by the Ministry of Education bearing No. 23/2013 dated 23.05.2013. It was also not in dispute that the cut off mark for the admission to grade one students for the said school in 2015 was 94.25.

The 2nd Petitioner sought admission to the school under Residency (Proximity/feeder area) category. In terms of the circular P3, the applicant is

required to produce proof of residency and marks are allotted for the proximity category based on the criteria laid down in clause 6.1 of the circular P3.

The Petitioners have averred that under the category 6.1 the Petitioners expected to get 95 marks which is well above the cutoff mark referred to above.

The Petitioners attended an interview held on 17th October, 2014, held to evaluate the eligibility of the 2nd Petitioner to be admitted to the school concerned. The Petitioners state that the Board of Interview comprising of 3rd to 7th Respondents awarded the 2nd Petitioner 95 marks under the category applied for.

The Petitioners state that, on or about 5th January, 2015 the temporary list (P9) containing those who were selected was displayed on the notice board. However, the 2nd Petitioner's name had not been among them.

Aggrieved by the exclusion of the 2nd Petitioner an appeal had been lodged with the 3rd Respondent, the Principal of Dharmasoka Vidyalaya as provided for in clause 9.1 of the circular P3, pointing out that the 2nd Petitioner had obtained marks over and above the cut off mark.

The main complaint of the Petitioners was that the deduction of further 5 marks on the basis that Kandegoda Vidiyalaya is also more proximate to the Petitioner's residence than the school applied for. This deduction had been made after the initial interview Petitioner faced on 17th October, 2014. As a result of this deduction, the marks allotted had been adjusted to 90. The Appeal Board (which comprised of 4th, 8th and 9th to 11th Respondents) also had been of the view that 10 marks have to be deducted, in view of the fact that the petitioners' residence is more proximate to Devananda Vidyalaya as well as Kandegoda Vidyalaya, which the Petitioners had denied.

When the final list of students selected, that was released also did not bear the 2nd Petitioner's name. Petitioners thereafter had sought administrative relief from various quarters, but those details are of not much relevance to decide the issues of this case.

The admission to Grade1 of government schools is a competitive process and the cut off mark is set accordingly.

For the admission to Dharmashoka for the academic year 2015, the cut off mark had been 94.25. As such all applicants who secured the cut off mark or marks above that, were taken in.

Hence, what is pivotal to the decision in the instant application is to consider whether the 2nd Petitioner had been deprived of any marks, preventing him from reaching the cutoff mark.

As far as allocation of marks is concerned, the Petitioners claim that the 2nd Petitioner was awarded 95 marks at the initial interview. It was submitted on behalf of the Respondents that the 2nd Petitioner had been awarded these marks provisionally after the interview. The Petitioners admit that after the interview, on or about the 14.12.2014, the 3rd to the 7th Respondents visited their residence for an inspection. It is the position of the Respondents that after the site inspection the makes awarded to the 2nd Petitioner was revised to 90 as it revealed that Kandegoda vidiyalaya is also more proximate to the petitioner's residence than Dhrmashoka Vidiyalaya.The document 3AR3 is the marking schedule that refers to marks allotted under the scheme.In terms of the marking scheme 5 marks are deducted for each school that is proximate to the Petitioners residence than the school applied for and initially 5 marks had already been

deducted due to the residence of the Petitioners being more proximate to Devananda Vidiyalaya.

As to the allocation of marks, the Petitioners complain that the deduction of further 5 marks on the basis that Kandegoda Vidiyalaya is also more proximate to the residence of the Petitioner than Dharmashoka Vidiyalaya, is erroneous and arbitrary.

The Petitioners also contended that the primary education is of pivotal importance of mind-building and socialisation process of the 2nd Petitioner and due to these reasons he was accommodated at Devananda Vidiyalaya.

The Respondents had filed the document marked 3AR4, an extract from Google Maps, depicting the distances (as a crow flies) to the three schools referred to, from the residence of the Petitioners.

The distances are as follows.

Shri Devananda Vidiyalaya 645 metres

Kandegoda Maha Vidiyalaya 686 meters

Dharmashoka Vidiyalaya 800meters

Having considered the submissions of the parties and the documents filed, I am of the view, that the deduction of marks on the ground that there was another school closer to the Petitioner's residence than Dharmashoka Vidyalaya, thus seem justified.

As far as computation and allocation of marks are concerned, this is the only aspect raised by the Petitioners and I hold that the Respondents had not deprived the 2nd Petitioner any the marks that he was entitled to.

The Petitioners have also pointed out that the Respondents have acted in contravention of the express guidelines with regard to the admission criteria.

It was contended on behalf of the Petitioners that only four members of the Appeal Board have signed the final list, whereas clause 11.4 (a) of the circular

requires all members of the Appeal Board to sign the list. In addition, it had been alleged that clause 11.6 of the circular which requires the applicant to be informed in writing of the specific reason for the rejection of the application, had been violated by not informing the Petitioners the reason for the rejection of their application.

In response to the breaches alleged by the Petitioners, it is the position of the 3A Respondent that the 5th member of the Appeal Board did sign the list subsequently and had produced the copy of the impugned document marked 3AR12. The position of the 3A Respondent is that Clause 11.6 of the circular was complied with by informing the Petitioner with regard to the outcome of the application for admission to the school, which the Petitioners have admitted in their counter affidavits.

I have considered the breaches of the circular alleged by the Petitioners and the responses to the same by the 3A Respondent. At best they are technical in nature, and even if this court is to hold that the alleged breaches have taken place, still it will not have any impact on the marks allotted to the 2nd Petitioner.

In *Rathnayake vs. Attorney General 1997 2 SLR pg.* 98 Chief Justice G.P.S. De Silva held that every wrongful act is not enough ground to complaint of an infringement of fundamental rights. The Petitioner must establish unequal or discriminatory treatment.

I am of the view that the breaches of the circular alleged by the Petitioners are of a technical nature and had caused no substantial prejudice to the Petitioners.

I shall now consider the aspect of discrimination alleged by the Petitioners.

In paragraph 18 of the Petition, it is alleged that the student M.J.V.De Soyza who lives further away than the Petitioners who also received 90 marks at the 1st interview had been wrongfully brought into the final list

with 95 marks and submits this action of the Respondents is violative of the Petitioner's right to equal treatment as provided by the Constitution.

The Petitioners specifically averred that they are not seeking any specific relief against the "wrongfully selected applicant" and had further averred that the Respondents have discriminated against the Petitioners and had arbitrarily selected candidates who are unqualified and/or unsuitable for admission.

Before I consider the alleged discrimination it must be reiterated that what is required for admission to the school applied for, is to gain a minimum of 94.25 marks, by establishing the residency under the "occupancy category".

As referred to earlier, as far as allocation of marks are concerned, based on the documents and other relevant factors are concerned, there is nothing to indicate that the 2nd Petitioner had been deprived of any marks that he was entitled to.

Thus, what is left with is for this court to consider whether the selection of the applicant M.J.V.De Soyza amounts to discrimination of the 2nd Petitioner and for that reason, whether the Petitioner's fundamental right to equal protection of the law had been infringed.

In the case of *C.W.Mackie and Company Ltd. Vs. Hugh Molagoda, Commissioner General of Inland Revenue and others (1986) 1 SLR 300,* Chief Justice Sharvananda observed that the equal treatment guaranteed by Article 12 is equal treatment guaranteed in the performance of a lawful act and via Article 12, one cannot seek execution of any illegal or invalid act……Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, formulated in law in contradiction to an illegal right which is valid in law. The decision referred to above had been consistently followed by the Supreme Court and with approval I wish to refer to the statement made by Justice M.D.H.Fernando in the case of *Gamaethige Vs. Siriwardane (1988) 1 SLR 384,* wherein His Lordship said "Two wrongs do not make a right, and on proof of the

commission of wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong.

Justice Dr. Shirani Bandaranayake following the decision in case C.W.Mackie and Company Ltd, referred to above held in the case of *Dissanayake Vs. Piyal de Silva (2007) 2 SLR 134*, that Article 12 (1) of the Constitution provides only for the protection of the law and no for the equal violation of the law.

Considering the above I hold that the Petitioners have failed to establish that the Respondents have violated the fundamental right enshrined in Article 12(1) of the Constitution as far as the 2nd Petitioner is concerned.
Accordingly the application is dismissed, but in all the circumstances, without costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC, J.

I agree

JUDGE OF THE SUPREME COURT

UPALY ABEYRATHNE, J.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C. W. Jayasekera
No.4, Stadium Cross Road
Anuradhapura

PETITIONER

Supreme Court (FR)
Application No.63/2013

-Vs-

1. Municipal Council
   Anuradhapura
2. H. P. Somadasa
   Mayor
   Municipal Council
   Anuradhapura
3. S. R. Dharmadasa
   Municipal Commissioner
   Municipal Council
   Anuradhapura
4. The Honourable Attorney General
   The Attorney General's Department
   Colombo 12.

RESPONDENTS

BEFORE: B.P.ALUWIHARE, PC., J
UPALY ABEYRATHNE, J &
ANIL GOONARATNE, J

COUNSEL: Senany Dayaratne for the Petitioner
Dharmasiri Karunaratne for the 1st to 3rd Respondents
Rajitha Perera, SSC for the 4th Respondent.

ARGUED ON: 27.11.2015

DECIDED ON: 26.07.2017

ALUWIHARE, PC, J:

The Petitioner had been an employee of the Municipal Council of Anuradhapura (1st Respondent) and had served as a Store Keeper from 1981 to 2001, the year in which he retired from service.

The Petitioner had been allocated a house as evidenced by P5 with effect from 15th February, 1982, which the Petitioner alleges he and his family occupied right throughout and even at the time the present application was filed which was in 2013. Thus, it appears that even after his retirement from service from the Municipal Council the Petitioner had continued to occupy the premises provided to him by his employer.

In April 2002, the Municipal Council in writing requested the Petitioner to hand over the residence to an official nominated by the Director Works of the 1st Respondent Council (P10).

The Petitioner in the same month respondent to the said letter referred to above and requested the mayor of the 1st Respondent Municipal Council to grant him permission to continue occupying the premises on a rental basis as he had been in occupation of the house for a period over 20 years and that he had no other house. In the said letter, he had referred to the fact that some occupants of the same housing complex where his house is, had been successful in obtaining the houses they occupy on a rental basis [P11 (a)].

A few days subsequent to letter 11 (a), the Petitioner wrote again to the Mayor of the 1st Respondent Municipal Council and in the said letter, he intimated to the Mayor that he has no intention of handing over the house and reiterated his request to provide the residence he is occupying on a rental basis.

The Municipal Council, however, had issued a formal "notice of quit" to the Petitioner in May, 2002, in terms of Local Government Official Quarters (Recovery of Possession) Act.

Aggrieved by this decision the Petitioner had challenged this decision, unsuccessfully though, by filing a writ application before the High Court of Anuradhapura, seeking a writ to quash the decision of the Municipal Council to evict him. It is the position of the Petitioner that he had appealed against the order made by the High Court and the matter is pending before the Court of Appeal.

The main grievance complained of by the Petitioner in these proceedings is that the Petitioner is occupying a house built by the State under the "Low cost housing scheme" which is now vested with the Municipal Council. The Municipal Council had let these houses on rent to officers and employees of the Municipal Council, and he had been allocated one such house. The Petitioner asserts that in terms of Section 5A read with Section 3 of the Local Authorities Housing Act No.14 of 1964 as amended, where a house that had been let to any person under the provisions of the said Act, of which monthly rental of such house immediately prior to such letting did not exceed twenty five rupees, the local authority within the administrative limits of which the house is situated shall, by an instrument of disposition, transfer, free of charge, that house to that person.

The Petitioner had asserted further that some of the houses under the scheme had been handed over to the occupants as stipulated by the Act.

In support of this position the Petitioner had marked and produced documents P1 to P4, some of which I shall advert to later in this judgment.

The Petitioner complains, however, that several requests made by him had gone unheeded (P6 to P9), and the Petitioner had a legitimate expectation that he too would become the owner of the house that he is in occupation, in terms of the provisions of the Act aforesaid.

It is in this backdrop that the Petitioner asserts that, somewhere in 2002, officials of the Municipal Council had called over at his residence to collect the keys to the house, requesting that the possession of the house be handed over to the Municipal Council.

While the Petitioner was battling out his case before the Court of Appeal, in 2012, he had come to know that two other employees of the Municipal Council who were less qualified than he and who had been given houses on rent to be

used as alternative official quarters had been granted absolute ownership to the occupants.

The Petitioner asserts that granting absolute ownership of houses to the two employees who had joined the Municipal Council after him and is less entitled than him, is *exfacie* discriminatory against the Petitioner.

It was contended on behalf of the Petitioner that the act of granting absolute ownership to then two employees, K. B. Dharmadasa and Ranjith Silva demonstrates that persons similarly circumstanced are entitled to be granted absolute ownership of the houses they occupy.

It is on this premise that it was argued on behalf of the Petitioner that the failure or the refusal of the 1st to 3rd Respondents to grant the Petitioner absolute ownership of the house that he is in occupation is arbitrary, discriminatory and violative of Petitioner's fundamental right to equality before the law enshrined in Article 12 (1) of the Constitution.

The position taken up on behalf of the 1st and 2nd Respondents was that the premises at No. 4¸Stadium Cross Road, Anuradhapura allocated to the Petitioner, is an Executive staff quarters and is not one of the "Low cost Housing Scheme" houses as referred to by the Petitioner; that in terms of Section 11A of the Act, provisions of the Act have no application to any house which is given as official quarters.

It was also pointed out that these houses had been built on fairly large extent of land ranging from 15 perches to 30 perches. It was the contention of the said Respondents that some employees of the Municipal Council did occupy houses in the Low-Cost Hosing Scheme along with others who were not employees of the Municipal Council; that Dharmadasa and Ranjith Silva belonged to the latter category, hence Petitioner does not fall into the same category and he is not similarly circumstanced.

It was argued on behalf of the Respondents that the provisions of the Act have no application to the premises at issue on the ground that the premises at issue is not a "Low Cost House".

It is evident from the document P5 that the premises in issue had been allocated to the Petitioner as an "Official Quarters" and there is nothing to indicate that house is a Low- cost house. P5 lays down a number of conditions and one of them is that, if the house is in need of repairs, the petitioner was required to give a month's notice to the Special Commissioner, Anuradhapura.

The same stipulates a further condition that the Petitioner cannot accommodate outsiders without the permission of the Special Commissioner, if accommodation is to be provided for a period of more than 3 days.

Some of the Rent receipts issued to the Petitioner even after his retirement refers to the premises as "Official quarters" (P14, P15 and P16).

The Petitioner has also filed along with his Petition the document marked P4 (b) to demonstrate that that steps were taken to convey outright, the houses given on rent to the workers of the Municipal Council [P4 (a)]

The document P4 (b) clearly sets out that, as required by the Act, only houses that attract a rent that is less than Rs.25/- could be considered for outright conveyance.

In terms of the document P5, when the house was allocated to the Petitioner the monthly rent the Petitioner was required to pay was Rs.45/-. Further, the document P4 (b) reflects that the conveying of 35 houses to the tenants was under consideration by the 1st Respondent Council, but none of those houses is from "Stadium Cross Road" where the premises given to the Petitioner is situated. In this context, the assertion of the 1st and 3rd Respondents that the house occupied by the Petitioner is an executive staff quarters and not one of the Low-Cost Housing Scheme seems credible.

If the 1st Respondent Municipal Council requires the house given to the Petitioner to be used continuously as official quarters, the refusal of the request by the Petitioner, to have the premises concerned conveyed outright to the Petitioner, cannot be said arbitrary or capricious and as such I hold that the Respondents have not infringed the fundamental right enshrined in Article 12 (1) of the Constitution.

Accordingly, I make order dismissing the application of the Petitioner.

In the circumstances of the case I make no order as to costs.

JUDGE OF THE SUPREME COURT

UPALY ABEYRATHNE, 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 (FR) Case No. 118/2013

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution of the Republic

Wijekoon Herath Mudiyanselage Nimal Bandara
No. 20/4, Thekkawatta Road,
Thennekumbura, Kandy.

PETITIONER

Vs.

1. National Gem and Jewellery Authority
   No. 25, Galle Face Terrace,
   Colombo 3.
2. Prasad Galhena

2A. Amitha Kumara Gamage

2B. Anura Gunawardena

2C. Asanaka Sanjeewa Welagedara
Chairman and Chief Executive Office
National Gem and Jewellery Authority
No. 25, Galle Face Terrace, Colombo 3.

SUBSTITUTED 2ND RESPONDENT

3. Sarath Samarakoon

3A. D.M Rupasinghe

3B. B.M.P.N.M. Wickramasinghe

4. Janaka Ratnayake

4A. A.K. Seneviratne

5. Chandra Ekanayake

5A. Bandula Egodage

5B. Ajith Perera

6. Nalaka Thiyambarawatta

6A. A.M. Puviharan
6B. Upali Suraweera
7. R.M Jayathilaka
7A. Navaratne Bandara Alahakoon
8. A.K Seneviratne
8A. Raja Pieris
9. T.H.O Chandrawansha
9A. Nevi Bandara Wegodapola
10. Dr. Nevi Gunawardena
10A. N. Godakanda

Board of Directors
National Gem and Jewellery Authority
No. 25, Galle Face Terrace, Colombo 3.

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

12B. B.G Indika Kumudu Samaraweera
13. Chandra Kanthi Indira Malwatta
14. C.M.J.Y.P. Fernando
15. W. A. Chulananda Perera

Board of Directors
National Gem and Jewellery Authority
No. 25, Galle Face Terrace, Colombo 3.

RESPONDENTS

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

Anil Gooneratne J. &

Vijith K. Malalgoda P.C., J.

COUNSEL: Nigel Hatch P.C. with S. Galappaththi and S. Illangage
for the Petitioner

Kushan D'Alwis P.C with Kaushalya Nawarathna and
Rajiv Wijesinghe for the 1st, 2C, 5th, 6th, 8th & 9th Respondents

Ms. Yuresha de Silva S.S.C for the Attorney General

ARGUED ON: 30.11.2017

DECIDED ON: 13.12.2017

GOONERATNE J.

The Petitioner in this application was the Director General of the 1st Respondent Authority. He was appointed to the said post on 11.08.2011. (vide P4, P5 & P6). In paragraph 8 of the petition it is pleaded that the 1st Respondent Authority was running at a loss and the Petitioner was responsible for curbing such a loss and bring it to be a profitable organisation, as he introduced several progressive changes in the business. As such by letter P7 the 2nd Respondent allocated further duties to the Petitioner. In this case the main issue, is that the Petitioner was sent on vacation of post in the manner pleaded in paragraph 9 to 15 of the petition and in the corresponding affidavit. The Supreme Court on 05.10.2013 granted Leave to Proceed in terms of Articles 12(1) and 14(1)(g) of the Constitution.

The Respondents have taken up the following preliminary objections in their statement of objections.

(1) Petitioner does not disclose an infringement or an imminent infringement of a fundamental right.
(2) Mala fides of Petitioner
(3) Misrepresentation of material facts

(4) Suppression of material facts

(5) Lack of Uberrima Fides

No doubt the Respondents pleadings refer to same but unfortunately none of the above was substantiated to court on behalf of Respondent in an acceptable manner. It is also pleaded that the Petitioner whilst discharging his official duties acted in a harmful and prejudicial manner which is harmful to the interest of 1st Respondent Authority. It is stated that the Petitioner failed and neglected to discharge the official duties diligently and as a result of irresponsible and negligent conduct of the Petitioner an internal panel of inquiry was held (X1 & annexture to same marked X2). In the objection of the Respondent at paragraph 13(a) it is pleaded that Petitioner whilst abusing the power of office wrongfully obtained possession of his personal file and removed the documents in the file. In the same sub paragraph (e) document X3 is annexed and pleaded as part and parcel of the paragraph thereof. It is stated X3 is a letter issued on behalf of the 1st Respondent to the Secretary of the Ministry of Environment and Renewable Energy. Perusal of X3 does not indicate that it has anything to do with the contents of sub paragraph (e) and that it was addressed to the said Secretary. X3 is a letter addressed to the Petitioner by the 2nd Respondent regarding absentisam of attendance, by the Petitioner. Paragraph 14 of the objections refer to voluntarily refraining from reporting for

work. In fact the Petitioner has been terminated from service on that account and nothing else. In this regard X4 a Disciplinary Code (X4) has been submitted along with the objections.

Our attention was draw to Clause 2:8 and 2:10 of the Disciplinary Code which deals with notice of absence and vacation of post, due to absence. According to Clause 2:10 he should have informed the Chairman of his absence. Petitioner has failed to do so. In this way the Respondents seek to justify the termination.

Article 14(1)(g) confers on a citizen the right to engage with any lawful trade, business, occupation or profession subject to the restrictions contained in Article 15(5) and (7) of the Constitution. Article 23(1) of the universal declaration of Human Rights provides "everyone has the right to work, to free choice of employment. This article protects the right to work for a living which is the very essence of personal freedom".

The Petitioner assumed duties in the 1st Respondent Authority on or about 11.08.2011. The 2nd Respondent has by letter marked P7 allocated certain responsible duties to the Petitioner. That was by January 2013. This is an indication of the fact that the Petitioner had diligently performed his duties, It appears to this court that all troubles started for the Petitioner with the matters highlighted in document P8, wherein the Commission to investigate Bribery or

corruption required certain details from the Petitioner regarding a consultant of the 1st Respondent. Authority called Krish Weerasinghe. This way a request for details from another important State Agency, which the Petitioner had to comply within his official capacity. As such the version of the Petitioner becomes more probable, and there is justification for the Petitioner to act accordingly. I accept the position that from then onwards the 2nd Respondent became hostile towards the Petitioner and the Petitioner fell so ill as a result. This can be so when a head of the organisation is hostile towards the Petitioner who also hold a responsible position in the 1st Respondent Authority. In this regard letter P10 sent by the Petitioner to the Secretary of Ministry of Environment support the Petitioner's version, which is more probable.

I have also examined all the notes pertaining to Petitioners absence (P8 (a) to P8 (e). These notes are addressed to Senior Manager called (P &A) Acting P8 (d) has in fact been submitted to the Chairman 1st Respondent Authority. All these notes have been acknowledged in the note itself. P9 is a medical certificate. Leave has been recommended form 22.02.2013 to 01.03.2013. This court has no reason to dispute any of the above. The 2nd Respondent the then Chairman has acted with Malice where the Petitioner is concerned. Material made available to court by either party is sufficient to come to a conclusion that the then Chairman of the 1st Respondent Authority has due

to his own reasons which is tainted with malice has taken the step to discontinue the Petitioner's employment. This court having weighed the pros and cons of the case in hand has to make a just and equitable order, and as such need to intervene in the circumstances of the case. I am convinced with the Petitioner's version.

Lord Denning observed that "a man's right to work at his trade or profession is just as important to him as, perhaps more important then his right to property. Just as the courts will intervene to protect his rights to property, so they will also intervene to protect his right to work" 1966 (1) AER 689 at 694.

In all the circumstances of this case I grant the relief as prayed for in sub paragraphs (b) and (c) of the prayer to the petition. The petitioner will be entitled to compensation in a sum of Rs. 400,000/- payable by the 1st Respondent Authority and cost in a sum of Rs. 100,000/-.

Application allowed with costs.

JUDGE OF THE SUPREME CO U RT

S.E. Wanasundera P.c. J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda 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 of the Democratic Socialist Republic of Sri Lanka.

SC /FR 126 / 2008

1. Uspatabendige Buddhi Iwantha Gunasekera,
   Dommie Jayawardena Mawatha,
   Eranavila, Meetiyagoda.
2. Uspatabendige Jayantha Gunasekera,
   Dommie Jayawardena Mawatha,
   Eranavila, Meetiyagoda.

Petitioners

Vs.

1. Sub Inspector Athukorala
   Crime Division,
   Police Station, Meetiyagoda.
2. Inspector Nissanka,
   Officer in Charge,
   Police Station, Meetiyagoda.
3. Home Guard Soysa,
   Police Station, Meetiyagoda.

4. W. T. Siripala,
   Domanvila,
   Meetiyagoda.
5. The Inspector General of Police,
   Police Headquarters,
   Colombo 1.
6. Hon. Attorney General,
   Attorney General's Department
   Colombo 12.

Respondents

BEFORE	:	B. P. ALUWIHARE, PC, J. UPALY ABEYRATHNE, J. K. T. CHITRASIRI, J.
COUNSEL	:	Viran Corea with Sarita de Fonseka for the Petitioner Indunil Punchihewa SC for the 5th and 6th Respondents The 1st to 4th Respondents are absent and unrepresented
ARGUED ON	:	03.05.2016
DECIDED ON	:	11.07.2017

UPALY ABEYRATHNE, J.

The Petitioner has complained that his fundamental rights to equality guaranteed by Article 12(1) of the Constitution of Sri Lanka has been infringed by the 1st, 2nd and 3rd Respondents.

At the time of the alleged incident, the 1st Petitioner was a 14-year-old student in Grade 10, Nindana Maha Vidyalaya, Ambalangoda, and the 2nd Petitioner was the father of the 1st Petitioner. On 7th March 2008, around 3.30 p. m. when the 1st Petitioner was at home with his mother the 1st to 4th Respondents with two other Police Officers had come to their compound with a sniffer dog and inquired as to the whereabouts of the 2nd Petitioner. Since the 2nd Petitioner was in his paddy field the 1st Petitioner, having obliged to assist the Police to find the way to the paddy field which was about seven kilometres away from his house had got in to the Respondents' vehicle. Thereafter the 1st Petitioner was taken to Meetiyagoda Police Station.

At the Police Station the 2nd Respondent had grabbed the 1st Petitioner by his hair and assaulted him asking in sinhala 'badu deepan'. Thereafter the 2nd Respondent who was wearing shoes, had pulled the 1st Petitioner on to the ground and trampled the 1st Petitioner whilst kicking him. At that time, the 2nd Respondent had received a telephone call and had ordered the 1st Respondent to move the 1st Petitioner out of the room. Upon the said directions, the 1st Respondent had taken the 1st Petitioner to the Crime Division and had assaulted him again.

At this point, the 3rd Respondent, who brought a club had assaulted the 1st Petitioner on his buttocks whilst the 1st Respondent was holding the 1st Petitioner by the shoulders. Thereafter the 1st and 3rd Respondents had taken the 1st Petitioner to a room and tied his hands behind his back with a rope while the other end of the rope was thrown over a beam which was pulled by the 3rd Respondent. The 1st Respondent had raised the 1st Petitioner by his legs and the 3rd Respondent had tied the other end of the rope to a nearby concrete pillar. Thereafter the 1st Petitioner had been beaten by the 3rd Respondent whilst questioning him about the jewellery and money taken by him breaking a house.

At about 8.00 p. m. the 2nd Respondent arrived at the Police Station and directed the 1st Respondent to keep the 1st Petitioner in the cell. At this moment, the Petitioners had noticed that a Police Officer was taking down statements of the 4th Respondent's sister-in-law, her husband and her son.

On the following day, the 1st Petitioner had been produced before the Magistrate, Balapitiya, and was bailed out. On the following day, the 1st Petitioner had been admitted to the Balapitiya Base Hospital and discharged from the Hospital on the 13th March, 2008. Thereafter, on the next day the 1st Petitioner had been re-admitted to the same Hospital and warded till the 24th of March 2008. On 14th of March 2008, the 1st Petitioner had been examined by the Judicial Medical Officer.

On the 11th March 2008, the 2nd Petitioner has made a complaint to the ASP Elpitiya, and on 27th March 2008 the ASP has recorded the statements. Also, by letter dated 19th of March 2008, the 2nd Petitioner has complained to the Human Rights Commission about the assault to the 1st Petitioner by the 1st, 2nd and 3rd Respondents.

The Petitioners have averred that the traumatic and brutal acts of the 1st, 2nd and 3rd Respondents have caused a great physical pain and grave psychological distress and trauma to the 1st Petitioner. As a result of the torturous acts the 1st Petitioner was unable to attend to his day to day work for more than three weeks. The Petitioners have complained to this court that the 1st Petitioner was subjected to torture and to cruel, inhuman and degrading treatments by the 1st, 2nd and 3rd Respondents and the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution has been infringed by the 1st, 2nd and 3rd Respondents.

The 1st to and 3rd Respondents were absent and unrepresented at the hearing of this case. Journal Entries of the original docket indicates that the Said Respondents have been represented by a counsel until 21.09.2015. They have been duly noticed by this court to attend and defend their case.

The 1st, 2nd and 3rd Respondents have filed their statement of objections dated 21st July 2008. In the said statement of objections the 1st to 3rd Respondents have not specifically denied the several allegations levelled against them in paragraphs 4, 6, 7, 8, 9 and 10 of the petition dated 07.04.2008. They have merely stated that they are unaware of the said allegations contained in the said paragraphs. Also, the 1st to 3rd Respondents have neither denied nor answered the allegations levelled against them in paragraphs 13 to 18 of the said petition.

It is very important to note that in paragraph 14 of the petition it is averred that the conduct of the 1st to 3rd Respondents and their failure to afford equal protection of the law, have resulted in the Petitioner's rights guaranteed under Article 12(1) of the Constitution being violated. Also, in paragraph 16 of the petition it is stated that due to the aforesaid violations the Petitioners have suffered substantial and grave physical, psychological and financial harm, damage and loss and therefore the Petitioners entitled to substantial compensation in a sum determined by court. Since the 1st to 3rd Respondents have not denied and/or answered to the said allegations levelled against them by the Petitioners the said allegations will have to be considered on the facts and circumstances pleaded by the Petitioners.

The 1st Petitioner had been examined by the JMO and the Medico Legal Report dated 05.02.2009 has been filed of record. According to the Medico-Legal Report the 1st Petitioner had been examined by the JMO on 13.03. 2008 and

14.03.2008. The JMO has found 08 non-grievous injuries on the body of the 1st Petitioner.

The 1st to 3rd Respondents answering the averments contained in paragraph 5(viii) of the Petition, in paragraph 7 of their statement of objections has stated that one M. Tennyson who was in the police cell on 07.03.2008, had seen the 2nd Petitioner reprimanding the 1st Petitioner and also beating him. Said M. Tennyson in his affidavit has stated that when he was in the police cell he noticed bringing a child to the Police Station. On 07.03.2008, at about 07.00 p.m. when the said child was seated in a plastic chair in front of the police cell, father of the said child came to the police station and proceeded to the child after obtaining permission of the Reserve Police Officer and reprimanded the child whilst beating him on his back and shoulders.

It is surprising to note that the said Reserve Police Officer has not made minutes with regard to the said assault took place in the Police Station. With regard to such an assault the best evidence would have been the said Reserve Police Officer. But the 1st to 3rd Respondents have failed to adduce such evidence in defending their case.

In cases where the fundamental rights have been infringed, a burden lie on the Petitioner to adduce evidence to the satisfaction of court since the court will look for a high degree of probability in deciding which of the facts alleged have been established. That does not mean that an undue burden is placed on a Petitioner in his mission for access to justice, by court. When Respondents remain silent on the matters that have to be explained by them, then such conduct of the Respondents will ease the burden cast on the Petitioner. At such situations, the court will act on the materials placed before court by the Petitioner.

Needless to reiterate the duty cast upon the police towards a person taken in to custody that the Police are not entitled to lay a finger on a person arrested, even if he is a hardened criminal, unless the suspect resist the arrest or attempts to escape.

In view of the custodial relationship between the 1st to 3rd Respondents and the 1st Petitioner their conduct was high handed and in deliberate disregard of the 1st Petitioner's rights. The 1st Petitioner has been severely assaulted when he was in police custody and his right to the equal protection of law has been denied by the 1st to 3rd Respondents. Therefore, I hold that the 1st Petitioner's fundamental rights guaranteed under Article 12(1) of the Constitution have been violated by the 1st to 3rd Respondents. Hence the 1st Petitioner is entitled to compensation for the injuries sustained, hospitalisation and pain suffering and humiliation suffered by him.

Accordingly, I make order that the 1st, 2nd and 3rd Respondents shall pay a sum of Rs. 300,000/= (Rs. 100,000/- per each) as compensation and a sum of Rs 75,000/= (25,000 per each) as costs to the 1st Petitioner.

Judge of the Supreme Court

B. P. ALUWIHARE, 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

S.C (FR) Application 136/2014

In the matter of an Application under and in terms of Articles 17 & 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Naomi Michelle Cokeman,
8, Waveley Road, Coventry England
CV 13 AH, United Kingdom.

PETITIONER

Vs.

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

2. Police Sergeant Upasena (22143)

3. Police Inspector Suraweera,
   Acting Officer-In-Charge

   THE 2ND AND 3RD RESPONDENTS OF POLICE STATION, KATUNAYAKE

4. Officer-In-Charge
   Negombo Prison, Negombo.

5. N.K. Illangakoon
   Inspector General of Police,
   Police Headquarters,
   Colombo 1.

6. Chulananda De Silva
   Controller General of Immigration and Emigration,
   Ananda Rajakaruna Mawatha,
   Colombo 10.

RESPONDENTS

BEFORE: S.E. Wanasundera P.C., J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: J.C. Weliamuna P.C. with Pulasthi Hewanna and Thishya Weragoda Instructed by Vishva de Livera Tennakoon for the Petitioner

Parinda Ranasinghe S.D.S.G. with
Lakmali Karunanayake, S.S.C. for the Respondents

WRITTEN SUBMISSIONS TENDERED ON:
17.07.2015 (BY THE PETITIONER)
17.07.2015 (BY THE RESPONDENTS)

ARGUED ON: 26.10.2017

DECIDED ON: 15.11.2017

GOONERATNE J.

The Petitioner in this application is a British citizen and a Nurse at the Hawkesbury Lodge, Rehabilitation, Mental Health Services, United Kingdom. The petition and affidavit of the Petitioner describes her as a devout practicing

Buddhist and attends meditations retreats in countries like Nepal, Thailand, Cambodia and India. In the petition filed of record it is stated that "as an apt tribute to and as a personal expression of her devotion to Buddhist teachings displays a tattoo on her upper right arm of Lord Buddha seated on a lotus flower of Buddhist path". It is stated that this was done as a mark of respect, but ultimately led to unfortunate incidents in Sri Lanka on her arrival to the island on 21.04.2014. It is pleaded that subsequently the Petitioner was arbitrarily arrested, detained and she complains of degrading treatment, culminating in her arbitrary, irrational, capricious and ultra vires deportation.

Supreme Court on 03.07.2014 granted Leave to Proceed on alleged violations of Articles, 11, 12(1) and 13(1) of the Constitution. On the day in question as pleaded Petitioner arrived in Sri Lanka at the Katunayake airport. All official steps as clearance from Customs AND Immigrations were attended and was permitted entry. She proceeded towards the exit of the airport. Petitioner was approached by a taxi driver called 'Kelum' who was later identified and another bystander informed her that the tattoo she was displaying on her right arm is objectionable in Sri Lanka. Thereafter another person claiming to be a member of the Civil Defence Force came to the scene and initially informed the Petitioner that the tattoo was unacceptable, and also informed her that she should proceed to the nearest police station. It is pleaded that all efforts to

reason out with the civil defence officer was of no avail and as there was no option, proceeded to the Katunayake police station with the taxi driver, Kelum and the civil defence officer. It is pleaded that there were other several uniformed officers outside the airport who took no notice nor offence of Petitioner's tattoo.

The Petition filed in this court refer to some of the following sub headings. It is relevant to consider same to ascertain the depth and extent to which the Petitioner was treated or harassed by the Respondents and all those involved in this unfortunate incident.

(A) Incidents at the Katunayake police station
(B) Events that took place in the Negombo Magistrate's Court.
(C) Detention at the Negombo prison.
(D) Detention at the Mirihana Immigration detention camp
(E) Unlawful deportation of the Petitioner.

(A) Taxi driver accompanied the Petitioner and was the translator who translated the instructions of the police. Whilst waiting in the police an officer took photographs of Petitioner. 3rd Respondent questioned the Petitioner in poor English as to why she had a tattoo. Petitioner explained but the 3rd Respondent could not understand, according to the Petitioner. 3rd Respondent confiscated the passport of the Petitioner and refused to answer any questions or inform the charges levelled against the

Petitioner. No statements recorded but Petitioner was told to make a written statement which she did and explained her position. Petitioner was informed by the police that she would be produced before the Magistrate but the police did not inform what the charges are to her.

Petitioner was not given an opportunity to contact the British High Commission in Sri Lanka. A friend of Petitioner called 'Jennifer Hadley', was to arrive in Sri Lanka and she had no alternative but to inform the taxi driver 'Kelun' to give details of Petitioner to her friend 'Jenny' who would arrive at the airport.

(B) Petitioner was taken to the Magistrate's Court and detained behind bars with several other female suspects. Prison Guards introduced the Petitioner to an Attorney-at-Law who appeared for a fee of Rs. 5000/- for his services. However Petitioner had no opportunity to give proper instructions to the Attorney or consultant and obtain legal advice. Whilst being behind bars in the court cell, prison guard in charge of the Petitioner made several lewd, obscene and disparaging remarks of a sexually explicit nature to the Petitioner (paragraph 6(b) of petition). The Petitioner's case was called in open court. In (Case No. B 354/14) Proceedings were held in Sinhala and Petitioner was unable to understand. It is pleaded (paragraph 6 (e) that neither the Judge, officials of the court, and Attorney-at-Law

made submissions or orders in the English Language at least for the Petitioner to understand.

At the conclusion of the hearing before the Magistrate, the Attorney-at-Law who represented the Petitioner informed her that the Petitioner would be deported. Passport returned to her. 'B' report 354/14 does not give details of the provisions of law she was arrested, charged convicted or detained (paragraph 6 h).

(C) At about 3.00 p.m. on 21.04.2014 Petitioner was escorted by a woman prison officer and the prison guard who harassed her whilst in the Magistrate's Court cell. She was taken to the Negombo Prison, where she was subject to harassment and degrading treatment as follows (Paragraph 8 of the petition).

(i) Woman Police Constable (WPC) searched petitioner's belonging and demanded Rs. 10,000/- from the amount of Rs. 13,000/- of Petitioner. WPC attempted to take Petitioner's mobile phone. Ultimately WPC took Rs. 2000/- of Petitioner's money. The prison guard who was in charge of the Petitioner continued to make obscene lewd remarks. He too demanded money. Petitioner's belongings handed over to another officer.

(ii) Petitioner subject to a body search and kept in the area where about 60 inmates were housed and one of the inmates provided a mat to the Petitioner to sleep. On 22.04.2014,

Petitioner informed that she would be taken to a detention centre, namely 'Mirihana Immigration Detention Camp'.

(D) Petitioner taken to immigration office on 22.04.2014 prior to taking her to the Detention Camp. Petitioner's passport was confiscated by the officer at the Immigration office. Several camera crews took Petitioner's photograph. Petitioner was permitted to speak with the British High Commission in Colombo. Petitioner taken to Detention Camp and detained at the camp for two nights. Petitioner's friend Jennifer Hadley visited her at the camp. Officials of the Department of Immigration questioned the Petitioner as to how she was treated during detention. Petitioner narrated the entire incident. On 24.04.2014 Petitioner was informed by the British High Commission that the Sri Lanka Tourist Board would fund her return to the United Kingdom and provide her with a Business Class Ticket.

(E) Petitioner was escorted to the airport by officers of the Department of Immigration and Emigration. Petitioner met her friend at the airport and checked into the Business Class by flight UL 503. Petitioner 's passport kept with the cabin crew and returned to her on arrival in U.K.

Petitioner is advised that deportation of foreigners from Sri Lanka are governed by Immigration & Emigrations Act No 20 of 1948. Power of deportation is with the Minister in charge of the subject.

Petitioner is advised to state that the unlawful detention was based on an order by the Magistrate who did not have jurisdiction to make such order.

I have also perused the affidavit of the Petitioner's friend Jennifer Headly, who met the Petitioner subsequent to her arrest, and both were on tour as planned earlier. This affidavit of Jennifer sets out the details and the events described by the Petitioner to an extent. The affidavit somewhat support the version of the Petitioner but the Respondents have failed to contradict Jennifer Headlys' affidavit. I note the following salient matters in her affidavit.

(i) Received a text message on her mobile phone from the Petitioner just as she landed at Katunayake airport on 21.04.2014. Message state Petitioner is in the police station, and was to be taken to court, as she had a tattoo of Lord Buddha. She had the tattoo when she came to Sri Lanka earlier. Taxi driver 'Kelum will pick her up and bring her to the court house.

(ii) Went to the court house in 'Kelum's taxi. She saw Petitioner in the cell looking very pale and worried. Petitioner was crying. Lawyer approached her and said Petitioner would be deported. She saw the Petitioner was quite shaken.

(iii) Lawyer told her that Petitioner would have to go back to U.K. As such Petitioner would be in detention. Lawyer also told her to find a hotel nearby so that she could spend the day.

(iv) When coming out of the court house a female officer surround by male guards demanded for money, saying "you English woman give me money" She got into a taxi and the driver told her that the guard should be given some money. She gave Rs. 500/-. Then another guard came to ask for money, and at which point she broke down and started to shout. The guard walked away. She took charge of Petitioner luggage, went to a nearby shop to get some water and food for the Petitioner. Petitioner was seated in the court house. She gave the Petitioner food and water. She lent over to hug the Petitioner and the guard behind her threateningly put his hand on his pistol as a warning not to get closer to the Petitioner.

(v) Taxi driver took her to a hotel near the court house and the taxi driver demanded Rs. 20,000/- although Petitioner paid Rs. 5000/-, ultimately she paid 17,000/-.

(vi) She stayed at the Golden Star Beach Hotel. 'She called the British High Commission and found that they knew nothing about a British woman being arrested. On 22.04.2014 in the company of a foreign lady she went to the prison. A bus came by and the Petitioner was in the bus. Petitioner shouted out for her and at that moment itself a prison guard gave details of Mirihana Detention Centre.

In the afternoon of 22nd April she got to the detention centre.

The 2nd Respondent to this application deny the allegation of the Petitioner referred to in her affidavit and state that the Petitioner had a tattoo

of Lord Buddha on a lotus flower and below it a male and female embracing, which was also observed by P.C. Jayatilleke. It is averred that many civilians present in the vicinity too became aware. The people gathered at the scene were disturbed or otherwise agitated. 2nd Respondent states he perceived an imminent disturbance of peace by the public. Statement of three witnesses are annexed to the affidavit marked and produced as 2R1, 2R2 & 2R3. 2nd Respondent states in view of above there was a need to take the Petitioner to a safer place, and he requested the Petitioner to proceed to the police station. Petitioner proceeded to the police in a taxi. At the police the Petitioner was in the custody of a female officer. 2nd Respondent aver on instructions of 3rd Respondent produced the Petitioner to the Magistrate's Court of Negombo. 2nd Respondent's notes are annexed marked R4. The 2nd Respondent states:

(a) Facts were correctly reported to the Magistrate.
(b) No charges were framed and the question of pleading guilty did not arise.
(c) Hon. Attorney General's sanction will be required only if charges were being framed.

2nd Respondent affirm that he did not act maliciously. I wish to observe that 2R1, 2R2 and 2R3 are belated statements. It is nothing but self-serving statements produced to support the version of the 2nd and 3rd Respondents. The statements highlight the fact that due to the tattoo displayed by the Petitioner there were people in the crowd becoming either restless or agitated, having

seen the tattoo. Further it could result in a breach of peace. The incident took place on 21.04.2014 but statements recorded from three persons working within the airport on 15.05.2014, 26.05.2014 and 24.05.2014 respectfully.

3rd Respondent was the Acting Officer-In-Charge of the Katunayake police station, whilst denying the allegations levelled against him by the Petitioner, states he received a telephone complaint by a civilian, regarding a tattoo by a foreign lady. The Petitioner arrived in the police station in a taxi driven by driver Kelum, 2nd Respondent and P.C. Jayatilleke. He states he learnt from the 2nd Respondent due to the prevailing situation, requested the Petitioner to come to the police station. 3rd Respondent states having considered all circumstances he thought it fit to produce the Petitioner before the Magistrate for a suitable order. The Magistrate referred the Petitioner to the Mirihana Deportation Centre. 3rd Respondent states he kept the British High Commission, Senior Police Officials informed by letter 3R2, 3R3 & 3R4.

This court having considered submissions by either party states that it cannot be said that the Petitioner was not arrested. The fact that the Petitioner was produced before the Magistrate on a 'B' Report (P2) is sufficient proof of Petitioner being arrested. The 'B' Report states there was no offence allegedly committed by the Petitioner. It also reveal that police acted on information received from airport authorities and police had been convinced

that Petitioner had no intention of outrages religious feelings. By this report to court police seek an order for deportation of the Petitioner. It is further stated police do not seek to carry out further investigations. This court observes that there was no legal basis or a right to arrest the Petitioner at all. The police could arrest only on reasonable grounds of suspicion. This is nothing but an erroneous assumption of authority by the police. The 2nd and 3rd Respondents arrested the Petitioner and produced the Petitioner before the learned Magistrate of Negombo without a proper basis with a view of deporting the Petitioner. Arrest without a warrant can only be made in terms of Section 32 of the Code of Criminal Procedure Act. To permit extra judicial arrest would be detrimental to the liberty of the Petitioner. We in this court cannot encourage illegality merely to help the police.

If the Respondents acted in good faith but upon a misapprehension of the law, the courts have held that it was irrelevant in deciding whether Article 13(1) had been violated. *Premaratne and Somawathie Vs. Somapala S.C. Application 68/86; S.C Minutes 11.05.1988*. If one had a wrong appreciation of the law, court held that the infringement however remained. *Goonawardena Vs. Perera 1983 Vol 2 FRD 426 at 436*. In this case it was further held that "However anxious police officers may be to avoid the evils of laws delay and commendably assist the administration of justice, they must comply with

salutary provisions established by law designed to protect the liberty of the subject... "This also need to be done in terms of Article 4d of the Constitution which requires court to "respect, secure an advance" fundamental rights.

In *Corea Vs. The Queen 55 NLR at 464*

"police officer must also realise that before they arrest without a warrant, "they must be persuaded of the guilt of the accused". They cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man meanwhile, or taking him to some spot where they can or may find further evidence" per Lord Porter in John Lewis & Co. Ltd . V. Times 1 ((1952) A.C. 676 at 691)."

In the 'B' Report itself it is stated that the Petitioner had no intention to outrage such feelings. A charge relating to Section 291 B of the Penal Code cannot be maintained i.e "outraging the religious feelings of any class by insulting its religion or religious beliefs". There is no acceptable evidence placed before this court that there was a possibility of public outcry, though the police attempt to say so in their statements recorded. I agree with the Petitioner's learned President's Counsel that "surmises will not suffice". As stated above bona fides or mala fides of the arresting officer is irrelevant in deciding whether Article 13(1) has been violated.

I accept the version of the Petitioner. On the other hand I accept the submissions of the Respondent that public officers were adhering to a judicial order. Further judicial orders cannot be challenged in Fundamental

Rights Application. But whatever that took place prior to such judicial order, (which was an illegal order) the Petitioner having been harassed or subject degrading treatment by some officers either police or a civil defence officer and prison guards is relevant in the context of the case. Money was extracted from the Petitioner and unacceptable language used on the Petitioner even prior to taking up the case before the Magistrate by some guards are horrifying and scandalous in the circumstances and in the context of the case in hand. How money was extracted is supported by the affidavit of Jennifer Hedley.

I also wish to observe that the police, in the case in hand misrepresented facts and misled the learned Magistrate into believing that a Deportation Order could be made by such court. I accept the submissions that the learned Magistrate had no jurisdiction to make an order of deportation. The deportation of foreigners is governed by the Immigration & Emigration Act No. 20 of 1948 as Amended. The power to order removal and or deportation from Sri Lanka of a person other than a citizen of Sri Lanka is vested in the Minister in charge of same. As such the 3rd Respondent has acted in misapprehension of the law in seeking an order from court. Vide *Gunawardena Vs. Perera (1983) 1 SLR 305; Channa Peiris and Others Vs. A.G 1994(1) SLR at Pg. 51*.

In all the facts and circumstances of this case I hold that Petitioner's rights have been violated, and it is established that Article 11, 12(1) and 13(1) of

the Constitution has been violated. More particularly the 2nd and 3rd Respondents have violated Articles 12(1) & 13(1). Registrar of this court is directed to forward a copy of this Judgment to the Judicial Service Commission. The Inspector General of Police and Controller of Immigration & Emigration. The provisions of the Immigration & Emigrations Act need to be strictly followed, in a case of this nature.

I direct the State to pay the Petitioner a sum of Rs. 500000/- (Five Hundred Thousand) as compensation and costs in a sum of Rs. 200000/- (Two Hundred Thousand). I also direct the 2nd and 3rd Respondents to pay Rs. 50,000/- each as compensation to the Petitioner.

Application allowed with costs.

JUDGE OF THE SUPREME COURT

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

I agree.

ACTING CHIEF JUSTICE

Nalin Perera J.

I agree.

JUDGE OF THE SUPREME COURT

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

S.C (FR) No.164/2015 with S.C (FR) No.276/2015

In the matter of an Application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C (FR) No.164/2015

1. P. H. Balasooriya of
52, Mile Post,
Kannattiya, Mihinthale.

And 31 others

PETITIONERS

Vs.

People's Bank
People's Bank Head Office
No. 75, Sir Chittampalam A. Gardiner
Mawatha, Colombo 02.

And 13 others

RESPONDENTS

S.C (FR) No. 276/2015

1. P.P.M. Wijewickrama
"Pramuditha",
Thalahagamwaduwa
Walasmulla.

And 39 others

PETITIONERS

Vs.

1. People's Bank
   No. 75, Sir Chittampalam A. Gardiner Mawatha,
   Colombo 2.

And 3 others

RESPONDENTS

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

COUNSEL: Dr. S.F.A. Cooray with Pathum Bandara
for the Petitioners in S.C (FR) 164/2015

J.C. Weliamuna with Pasindu Silva and
Sulakshman Senanayake for the Petitioners in S.C (FR) 276/2015
Manohara de Silva PC with Hirosha Munasinghe
For the 1st – 13th Respondents in SC (FR) 164/2015
And 1st – 3rd Respondents in S.C (FR) 276/2015

Sanjay Rajarathnam P.C., A.S.G. with Rajitha Perera S.S.C
For the Attorney General in both cases

ARGUED ON: 10.01.2017

DECIDED ON: 03.03.2017

GOONERATNE J.

The above two Applications S.C (FR) 164/2015 and S.C (FR) 276/2015 which are similar in nature were taken up together for hearing. There are altogether 32 Petitioners in S.C (FR) 164/2015 and 40 Petitioners in the other application. Both sets of Petitioners seek almost the same relief. Petitioners applied for the post of Customer Service Assistants of the 1st Respondent Bank in response to a newspaper advertisement (P1). According to the advertisement P1, applicants need to (as presented in case No. 276/2015).

(a) Sit for a qualifying examination to be conducted by the Department of Examinations and meet the stipulated standard. All candidates to reside in a relevant Grama Niladari Division at least for 5 years.
(b) Successful candidates who meet the stipulated standard as above to be called for an interview, and those successful to undergo training period of 4 years covering on all aspects of banking.
(c) Successful completion of the said period result in contractual/permanent appointment of the People's Bank.

I note the submissions of counsel who appeared in both applications. It was submitted on behalf of the Petitioners that they applied for the above post as in P1. The admission card required to sit for the examination is produced marked P2 (similar card received by Petitioner in 276/2015) on or about

June/July 2013, the Petitioners received their results (P3). By letter P4 of 13.08.2013 all Petitioners were informed that they would be eligible to be present for an interview, for the above post. Interview held on or about September 2013 and all Petitioners participated. Thereafter all Petitioners received letter of 13.11.2014 from the 1st Respondent Bank that they were selected for the post of Customer Service Assistant (P5). It is specifically pleaded that having received letter P5 all Petitioners had a legitimate expectation that they will be awarded a contract of employment for the post of 'Customer Service Assistant', at the People's Bank. It was also argued on behalf of the Petitioners that the communication as above is an indication of the continuation of the published advertisement marked P1 upon which the Petitioners were only to be given formal letters of appointments. It is pleaded that the 1st Respondent Bank was to proceed with the issuing of the letters of appointment to the Petitioners but were delayed due to an announcement on the previous Presidential Elections in or about November 2014. However, consequent to the end of elections in January 2015, the appointments should have been given to the above post since it was a result of the advertisement marked P1.

Due to delays and as the Petitioners did not receive any communisation from February 2015 the Petitioners individually wrote to the Board of Directors of the 1st Respondent Bank, requesting to act on letter P5.

Petitioners have produced letter P7 in this regard. To their surprise on or about 12.04.2015 the 1st Respondent Bank by advertisement P7 once again called for applications for the post of "Customer Service Assistant". The hardship the Petitioners have to undergo due to their expectations on letter P5 are described in paragraph 16 of the petition. Eg. Petitioners employed had submitted their resignations. 1st and 2nd Petitioners who were required to sit for another competitive examination for some other post, did not sit for the examination.

It is also pleaded that some applicants who received similar letters informing that they have been selected have been given their letters of appointments from the 1st Respondent and further plead that failure of the People's Bank to issue the Petitioners letters of appointment is arbitrary, discriminatory and unlawful and amounts to a violations of the Petitioners' fundamental rights guaranteed under Article 12(1) of the Constitution. I also note that in the written submissions of the Petitioners in case No. 276/2015 it is stated that vacancies were filled by batches and the 1st batch of 510 was appointed with effect from 17.02.2014 and the 2nd batch of 323 appointed with effect from 06.05.2014, and the 3rd batch was selected at the time of filing of this application.

The position of the People's Bank is more-fully described in the affidavit of the 2nd Respondent to this application (Nos. 276/2015 and 164/2015). It is averred that the Bank had taken a policy decision to cancel the decision taken by its Board under Board paper 104/2015 to recruit 1000 customer Service Assistants at a meeting held on 24.11.2015. Accordingly the 1st Respondent Bank did not recruit any of the applicants who had applied for the post of Customer Service Assistants under advertisement marked P7. It is further averred that the decision was taken by the new administration of the 1st Respondent Bank upon change of policy to digitalise the bank and in that direction to strengthen the IT Department and to recruit a maximum of 500 personnel with IT related qualifications and place them at a suitable position to facilitate digitalization process. Internal letter 1R1 containing the decision is produced. It is pleaded that mere selection of an applicant does not necessarily result in an applicant having a legitimate expectation. Further it is pleaded that the policy decision is not selective or discriminatory. Once the bank is fully digitalized Customer Service Assistants will not be necessary.

In the counter affidavit of the Petitioner the 7th Petitioner giving details of candidates, pleads that over 800 were appointed under P1 as Customer Service Assistants. A list prepared by the Petitioner is produced P(9a) and P(9b) and a extract from official news magazine of the bank in April 2014 is

produced P10. Petitioner also provide more proof by producing further documents marked P11(a), P11(b) and P11(c) & P11(a) is a mark sheet of one Vindani issued by the Examinations Department (average marking 65.33) P11(b) is the letter of 23.01.2014 selecting Miss Vindani, sent by 1st Respondent's letter P1 (c) appointment letter of Miss Vindani.

I have also perused the petition of the several Petitioners in S.C. Application No. 164/2015. It is filed on the same footing as in S.C. Application No. 276/2015 for the same post and giving details of result sheets, letter calling for interview, selection letter etc. However more details are pleaded and makes the application prolex, but it is the same issue before court as in case No. 276/2015. In fact each Petitioner's details are pleaded in separate paragraphs of the petition. However the prayer to the petition as in sub paragraph (b) seeks to obtain a decision for an imminent infringement of fundamental rights of the several petitioners. I also note the journal entry of 20.01.2016 where certain Intervenient-Petitioners made an application to this court to intervene, but on 12.02.2016 Intervenient-Petitioners withdrew their application to intervene as they came to know that no appointments would be made by the bank and withdrawal was allowed by court.

The Supreme Court on 28.01.2016 granted Leave to Proceed for the alleged violation of Articles 12(1) and 14(1)(g) of the Constitution in both applications, I am inclined to accept the argument of the learned counsel for the Petitioners that once the process of selection was complete the Respondents should have proceeded with the formal appointments and in fact the bank is under a legal obligation to select and appoint the suitable candidates. The policy of the People's Bank as reflected in Board Paper 104/2015 taken on 24.11.2015 to cancel the decision to recruit 1000 Customer Service Assistants seems not to be applicable to the Petitioners as it intends to cancel recruitments made in 2015 (P7) and thereafter. Petitioners in both applications were selected by letter dated 13.11.2014 (P5) and surprisingly as observed by the Petitioners formalities were not followed after issuance of selection letters. There is a legal obligation to follow the formalities and make due appointments. The facts of the case discussed clearly demonstrate a legitimate expectation of all successful Petitioners in both applications. A somewhat similar situation arose in the case of *W.K.C Perera vs. Daya Edirisinghe and Others 1995 (1) SLR 148* M.D.H. Fernando J. held ....

> "whether the Rules and Examination Criteria have statutory force or not, the Rules and Examination Criteria, read with Article 12, confer a right on a duly qualified candidate to the award of the Degree, and a duty on the University to award such Degree without discrimination; and even where the University has reserved some

> discretion, the exercise of that discretion would also be subject to Article 12, as well as the general principles governing the exercise of such discretions" – at pages 156 & 157.

Respondents no doubt seek to justify the non-appointment on the 1st Respondent Bank's decision to digitalize the bank. Material furnished as an excuse by the bank as above is not supported with cogent reasons. On the other hand as a matter of law the change of policy should not defeat legitimate expectations as held in *Dayarathne and Others Vs. Minister of Health and Others 1999(1) SLR 393*

Per Amarasinghe J. at 394..

> "when a change of policy is likely to frustrate the legitimate expectation of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably. Such procedural rights have on important bearing on the protection afforded by Article 12 of the Constitution against unequal treatment, arbitrarily, invidiously, irrationally or otherwise unreasonably dealt out by the executive"

Another point raised by learned counsel for the Petitioners is that failure to give reasons of the non-appointment of the Petitioners. The Petitioners had no communication from the 1st Respondent Bank, after letter P5 was sent to them which gave the expectation of being appointed as in P1. Once selected the next step in ordinary course and circumstances should follow. In fact only in the objections filed by the 1st to 3rd Respondents it is conveyed to

court of a policy decision, without the policy decision being placed before court. It was only an internal memo (1R1) that was made available to court. I also note that Petitioners were selected inclusive of qualifications on computer literacy, among other achievements. There are several cases in which court has held the necessity to give reasons under various circumstances. Giving reasons has become, increasingly an important protection of the law. *Karunadasa Vs. Unique Gem Stones Ltd. & Others 1997(1) SLR 256. At pg. 264* it was stated that whether parties are entitled or not to be told of reasons for decision, if they are withheld, once judicial review commences the decision could be condemned as arbitrary or unreasonable. In *Suranganie Marapana Vs. Bank of Ceylon and Others 1997 (3) SLR 156 ....* failure to give reasons was held to be arbitrary, capricious and unreasonable.

In another decided case right to equality was recognised. *Dr. Elizabeth Manel Dassanayake Vs. K.E. karunathilake* SC/FR 267/2010; S.C. minute 09.02.1016 . In this case the Respondent arbitrarily stopped the appointment process to the post of Director Horticulture, Crop Research and Development Institute Gannoruwa and held right to equally guaranteed under Article 12(1) of the Constitution is violated.

As discussed above based on P1, nearly 800 candidates were already been appointed. Vide P11(a) & P11(c) and all those have passed the

same examination as the Petitioners. The Petitioners who were successful in the selection process are not considered for appointment. It is in a way discrimination and violation of Article 12(1) of the Constitution. Any other argument to support non-appointment of Petitioner cannot be accepted as the same post had been advertised in the year 2015 and 2016. What was the necessity to advertise again and again? I also observe that under the scheme candidates will be selected on a District basis for the training and should serve the District for at least 5 years. This would go beyond the period of training which is spelt out in P1 to be a period of 4 years on contract. The satisfactory performance of duties will lead them to permanent status (vide P11 (c)).

Upon a consideration of all matters placed before this court pertaining to both Applications (S.C (FR) 276/2015 and S.C (FR) 164/2015) I am of the view that the Petitioners rights are violated under Articles 12 (1) and 14 (1) (g) of the Constitution and entitled to relief, as follows:

In S.C (FR) 276/2015 relief granted as per sub paragraph (b) and (c) of the prayer to the petition. Further this court award compensation to all 40 Petitioners in a sum of Rs. 75,000/- each.

In S.C (FR) 164/2015 this court grants relief as per sub paragraph (b) and (c) of the prayer to the petition based on advertisement marked ‘X’ and letter marked P1 being letter dated 13.11.2014 sent by the People’s Bank to

each Petitioner, on being selected. Advertisement 'X' and letter 'P1C are identical to document P1 and letter P5 in S.C (FR) 276/2015 respectively. The Respondent Bank is directed to recruit the Petitioners in both applications as per letter P1, and P5 (similar letters issued in S.C 164/2015). Further court award compensation in a sum of Rs. 75,000/- to each Petitioner as above. These two applications are allowed with costs.

Application allowed.

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 Article 12(1), 12(2), 14(1) (g) and 14(1) (h) read with Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

NadarajahGunasekeram of Arasady Veethy,ThayiddyEastKKSandpresently of 105, Arasady Road,Kandarmadam.

PETITIONER

S.C F.R. No.167/2013

Vs

1. a) Gotabaya Rajapaksa Secretary
(Since left the services)
And now

b) M.D.U.Basnayake – present holder
Ministry of Defence and Urban Development
15/5, Baladaksha Mawatha,
Colombo 3.

2. a) Lieutenant General Jagath Jayasuriya,
(Former Commander of the Army)

b) Lieutenant General R.M.D.Ratnayake
Present Army Commander
Sri Lanka Army
Army Headquarters
Colombo 3.

c) Lieutenant Gen. A.W.J.C. De Silva
RWP USP
Former Commander – Sri Lanka Army
Army Headquarters, Colombo 3.

d) Major General Jagath Rambukpotha
Former Commander,
Army Headquarters – Colombo 3.

e) Major General A.W.J. Chrisantha de Silva
Present Army Commander
Army Headquarters – Colombo 3.

3. a) Major General Mahinda Hathurusinghe,
Commander, Security Forces (Jaffna)
Since transferred

b) Major General Udaya Perera
Commander Security Forces (Jaffna)
Since transferred

c) Major General Jagath Alwis
Security Forces Head Quarters, Jaffna
Present Commander

d) Major General NandanaUdawatta
Present Holder –Security Forces,
Jaffna

4. Divisional Secretary
Divisional Secretariat, Tellippalai.

5. Honourable Attorney General
Attorney General's Department,
Colombo 12.

6. Land Commissioner,
Colombo.

RESPONDENTS

BEFORE: B. P ALUWIHARE, PC, J.
UPALY ABEYRATHNE, J &
K. T.CHITRASIRI, J.

COUNSEL: A.Vinayagamoorthy with S.K.Purantharan for the Petitioner
Nerin Pulle, DSG with Yuresha de Silva, SSC, for the Attorney General.

ARGUED ON: 03.05.2016

DECIDED ON: 03.08.2017

ALUWIHARE, PC, J:
The Petitioner has invoked the fundamental rights jurisdiction of this court as a public-spirited citizen on behalf of the people of Thayiddy and his own behalf and leave to proceed was granted for the alleged infringement of fundamental right enshrined in Article 12(1) and 14(1) (h) of the Constitution.

The Petitioner states that he was living on his property at Thayiddy with his wife. He asserts that he had been displaced in 1990 due to Military operations in the area. Since then he had been living in various places with his relatives as well as in camps. The Petitioner alleges that there are about 3000 people who had faced the same predicament in Thayiddy and are waiting to be resettled. The gravamen of the Petitioner's complaint is that even after cessation of hostilities, they have been displaced are prevented from occupying their property as Valikamam area is fenced out and notice boards erected prohibiting any one from entering the area.

Petitioner further asserts that, to the best of his knowledge there is no law or regulation declaring the area in which his property is situated as a "High Security Zone". Petitioner's position is that with the lifting of State Emergency under provisions of the Public Security Ordinance, it is illegal to declare any area as a "High Security Zone".

Thus, it was contended on behalf of the Petitioner that the actions and/or omissions of the Respondents have resulted in the delay and/or failure to permit them to resettle in their property and further they have deprived from engaging in their livelihood, resulting in an infringement of their fundamental rights.

Petitioner had filed three lists containing names of 225 persons who are seeking to be resettled from Thaiyaddy North, a list containing names of 430 such persons from Thaiyaddy South and another list containing 188 persons from Thaiyaddy East.

The 1st Respondent had averred that the need has arisen to acquire land for the proposed expansion of the Palali Airport and that in addition, owing to the strategic location of the Palali Airport and the Kankasanthurai Naval Base, the presence of the Armed Forces in the Cantonment area is essential. Nonetheless, the substituted 1st Respondent, the Secretary to the Ministry of Defence had in his objection stated that the Army has released 6,250 acres of land that was within the High Security Zone since the end of hostilities. Further the 1st Respondent had averred that on a direction by his Excellency the President, of the land that is to be acquired, steps had been taken to release 1000 Acres to the people who were displaced due to the war.

In view of the requirements referred to above, the 1st Respondent states the acquisition procedure in the area situated within the Cantonment had been set in motion way back in 2013, under the Land Acquisition Act (as amended) and the requisite notices under the said Act had been published in terms of Section 5 and Section 38(a) of the said Act.

In support of the said contention the 1st Respondent had produced Gazette Notification dated 26th April,2013 bearing No. 1807/23. In terms of the Gazette (P3) the extent of the land that is to be acquired is 2578.4475 hectares and include the village of Theiyyaddi South and certain lands in Vallikamam North and Vallikamam East.

The 1st Respondent's position is that with regard to the acquisition of land, procedure established under the Land Acquisition Act will be followed and the Petitioner would be afforded an opportunity to substantiate his claim in respect of the land in question.

The 1st Respondent states that he had acted in good faith and in compliance with the applicable statutory provisions. I have considered the material placed before Court in this matter and is of the view that the Petitioner had failed to establish that his fundamental rights enshrined under Article 12(1) and 14(1)(h) have been infringed.

The application is dismissed without costs.

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 in terms of Article 126 of the Constitution.

SC(FR) No. 175/2014

Mr. S.A. Janapriya Karunathilake
166/18, Kelaniyawatta,
Hakurukumbura,
Mirigama.

Petitioner

-Vs-

1. Hon. Maithripala Sirisena,
Minister of Health,
Suwasiripaya,
Ministry of Health,
No. 385, Rev. Baddegama Wimalasena Thero Mawatha,
Colombo-10.

1A. Hon. Rajitha Senarathna,
Minister of Health,
Suwasiripaya,
Ministry of Health,
No. 385, Rev. Baddegama Wimalasena Thero Mawatha,
Colombo-10.

2. Sudharma Karunaratne,
Secretary Ministry of Health,
Suwasiripaya
Ministry of Health,
No. 385, Rev. Baddegama Wimalasena Thero Mawatha,
Colombo-10.

2A. Anura Jayawickrama,
Secretary Ministry of Health,
Suwasiripaya
Ministry of Health,
No. 385, Rev. Baddegama Wimalasena Thero Mawatha,
Colombo-10.

2B. Janaka Sugathadasa
Secretary Ministry of Health,
Suwasiripaya
Ministry of Health,
No. 385, Rev. Baddegama Wimalasena Thero Mawatha,
Colombo-10.

3. Mr. J.M.I.K. Jayathilake,
The Deputy Director General of Biomedical Engineering Services,
Division of Biomedical Engineering Services,
No.27, De Saram Place,
Colombo-10.

4. Dr. Y.D.N. Jayathilake,
Former Secretary to the Ministry of Health,
No.385, Rev. Baddegama Wimalasena Thero Mawatha,
Colombo-10.
Member of the Interview Panel

5. Dr. Siyabalagoda,
Deputy Director General (PHS II)
Suwasiripaya
Ministry of Health,
No. 385, Rev. Baddegama Wimalasena Thero Mawatha,
Colombo-10.
Member of the Interview Panel

6. Mr. R.D.A. Jayanthi
Director,
Engineering Service Board,
Ministry of Public Administration

7. Mr. S.S.L.Herath,
Director of Biomedical Engineering Services,
Division of Biomedical Engineering Services,
No.27, De Saram Place,
Colombo-10.

8. Vidyajothi Dr. Dayasiri Fernando,
Former Chairman of the Public Services Commission,
No.117, Nawala Road,
Colombo-05.

9. Mr. Palitha Kumarasinghe,
Member,

10. Mr. Sirimavo A. Wijeratna,
Member.

11. Mr. S.C. Mannapperuma,
Member.

12. Mr. Ananda Senevirathna,
Member.

13. Mr. P.H. Pathirana,
Member.

14. Mr. Thilandarajah,
Member.

15. Mr. M.D.W. Ariyawansa,
Member.

16. Mr. Mohamed Nahiya,
Member.

All former Members of the former Public
Service Commission.

17. Mr. Dharmasena Dissanayake
Chairman.

18. Prof. Hussain Ismail
Member

19. Dr. Shirantha Wijayatilake
Member

20. Dr. Prathap Ramanujam
Member,

21. Mrs. V. Jegarasasingam,
Member

22. Mr. Santhi Nihal Seneviratne,
Member.

23. Mr. S. Ranugge,
Member.

24. Mr. D.L. Mendis,
Member.

25. Mr. Sarath Jayathilake,
Member.

Members of the Present Public Service Commission

No.177, Nawala Road, Narahenapita
Colombo-05.

26. The Public Service Commission,
No.177, Nawala Road, Narahenpita
Colombo-05.

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

Respondents

Before: : **Sisira J de Abrew, J**

Priyantha Jayawardena, PC, J &

Nalin Perera, J

Counsel: : Ikram Mohamed PC with Roshan Hettiarachchi and Shihan Wijayagunawardena for the Petitioner.

Parinda Ranasinghe S/DSG for the A.G

Argued &
Decided on: : 27.11.2017

Sisira J de Abrew, J

Heard both counsel in support of their respective cases. This is an application by the Petitioner for a declaration that his fundamental rights guaranteed under Article 12(1) of the Constitution have been violated. This Court by its order dated 29.09.2014 granted leave to proceed for the alleged violation of Article 12(1) of the Constitution. Petitioner alleges that he, on an advertisement published in P13, applied for the Post of Director Bio Medical Engineering Services Division in the Ministry of Health. He went for the interview but he was not selected. Petitioner further alleges that the 7th Respondent was selected for the said post.

Learned President's counsel appearing for the Petitioner contends that the marks given to the 7th Respondents are in appropriate. The Petitioner was given 15 marks for his post graduate qualification. The 7th Respondent was given 20 marks for his post graduate qualification. The Petitioner contends that allocation of the said 20 marks to the 7th Respondent is not correct.

The main question that must be decided in this case is whether allocation of 20 marks to the 7th Respondent by the Interview Board is correct or not. The 7th Respondent has been given 20 marks on the basis that he was having a MSc qualification in Medical Physics. The question that must be considered is whether the Medical physics is in the marking scheme in P13 and the job description in P13(a). P13 carries a statement that a candidate who is having a MSc qualification is entitled to 20 marks but the said 20 marks must come under the educational qualification in the relevant field. P13(a) is a document which gives the job description. When we consider the contents in P13(a), we find that the MSc in Medical Physics does not come under the job description.

When we examine P13, we find that the MSc in Medical Physics does not come under the relevant educational qualification too. The 3rd Respondent who was a member of the interview panel by a letter dated 12.02.2014 (P14) has included MSc in Medical Physics in the field of relevant qualification. But it is to be noted that this letter has been issued after the application for the Post of Director Bio Medical Engineering Services was closed. The application for the said post was closed on 07.02.2014. This is evident by document marked P13. The 3rd Respondent has brought MSc in Medical Physics into the field of relevant qualification only on 12.02.2014 by letter marked P14. Therefore it is clear that MSc in Medical Physics has been brought into the category of relevant qualification only after the application for the relevant post was closed. When we examine the aforementioned matters, we feel that the 3rd Respondent has impliedly admitted that the MSc in Medical Physics was not in the marking scheme set out in P13 and in the job description P13(a).

Therefore we feel that the P14 was introduced for the purpose of bringing MSc in Medical Physics into the field of relevant qualification and job description.

Since the MSc in Medical Physics was not in the marking scheme (P13) and in the job description in P13(a), we feel that the allocation of 20 marks to the 7th Respondent was illegal. We therefore hold that the 7th Respondent was not entitled to the 20 marks given by the members of the Interview panel on 07.03.2014. The fact that the 7th Respondent was given 20 marks for the MSc in Medical Physics is clearly found in the document marked 3R6. This document has been signed by the 3rd, 4th,5th, 6th Respondents and another person called N.W.Ariyarathna. For the above reason, we hold that the allocation of said 20 marks to the 7th Respondent is illegal. Therefore the 7th Respondent could not have been selected for the Post of Director, Bio Medical Engineering Services Division in the Ministry of Health.

Learned S/DSG submitted that the necessary parties are not before Court. He based his objection on the basis that all members who signed 3R6 which is the mark sheet of the Interview panel are not before Court. That mark sheet has been signed by the 3rd, 4th,5th,6th Respondents and one N.W.Ariyarathna. N.W.Ariyarathna has not been brought before Court. Although the learned S/DSG takes up the said objection, he admits that the said objection has not been pleaded in his statement of objection. Learned President's Counsel submitted that at the time of filing the petition, the Petitioner was unaware of the names of all members of the Interview Board. In our view the Petitioner's case should not be dismissed on the said objection. When we consider the above matters, we hold that there is no merit in the objection raised by the learned S/DSG.

For the above reasons, we hold that the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the 3rd,4th,5th and 6th Respondents. We earlier held that allocation of 20 marks by the interview panel to the 7th Respondent is illegal. For the aforementioned reasons, we hold that the appointment given to the 7th Respondent based on the marks given at the Interview Board is illegal. The 7th Respondent has been appointed to the Post of Director, Bio Medical Engineering Services by the document marked P19. We quash the said letter marked P19 and we declare that the appointment of the 7th Respondent to the Post of Director Bio Medical Engineering Services Division in the Ministry of Health is null and void.

The Interview Board has given 69 marks to the 7th Respondent. We have earlier held that allocation of 20 marks is illegal. Therefore the 7th Respondent is entitled only to 49 marks. The Interview Board has given 67 marks to the Petitioner. Therefore the Petitioner is entitled to be appointed to the Post of Director, Bio Medical Engineering Services Division in the Ministry of Health.

We direct the 26th Respondent (the Public Service Commission) to appoint the Petitioner to the Post of Director , Bio Medical Engineering Services Division in the Ministry of Health within 01 month from today. The Deputy Director General of Bio Medical Engineering Services (3rd Respondent) is directed to take necessary legal steps to implement this Judgment. The Registrar of this Court is directed to send certified copies of this Judgment to the 3rd Respondent and 17th to 26th Respondents.

Petition allowed.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, 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

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

SC. FR. Application No. 180/2016

1. Wanigasundara Appuhamilage Don Dharmasiri Wanigasundara,
   210/D/1, Medagama, Panirendawa,
   Madampe.

2. Megesuriya Mudiyanselage Palitha Priyankara Bandara Megesuriya,
   Aludeniya, Hemmathagama.

3. Udadeniya Viyannalage Nandapala,
   No. 341/1, Negambo Road,
   Katunayaka.

4. Miyanamaditte Gedara Ranjith Wijerathna Bandara Kaduwela,
   No. 60/3, Amarathunga Mawatha,
   Mirigama.

5. Kodippili Patabendige Priyantha Nilmini Kumari
   No. 367/3, Pasyala Road, Mirigama.

6. Munasingha Appuhamilage Janaka Ravindra Munasingha,
   No. 264/3. Gorge E De Silva Mawatha,
   Kandy.

7. Badana Mudiyanselage Mahindasena,
   26, Puchibogahapitiya, Balagolla,
   Kengalla.

8. Adikari Mudiyanselage Lalith
   Parakrama Adikaram,
   No. 41/1 Heeressagala Road, Kandy.

9. Jayapathma Herath Mudiyanselage
   Amarathilaka Jayapathma,
   Dangahamulahenewatta,
   Galapitiyagama, Nikaweratiya.

10. Galabalana Dewage Karunasena,
    No. 85, Bogahawatta, Kirindiwela.
    PETITIONERS

-Vs-

1. Kalyani Dahanayake
   Commissioner General of Inland
   Revenue
   The Inland Revenue Department,
   Sir Chittampalam A Gardiner
   Mawatha
   Colombo 2.

2. U. B. Wakkumbura
   Senior Commissioner (Human
   Resources)
   The Inland Revenue Department,
   Sir Chittampalam A Gardiner
   Mawatha
   Colombo 2.

3. Dr. R.H.S. Samaratunge
   Secretary, Ministry of Finance
   Secretariat Building
   Colombo 01.

4. Dharmasena Dissanayake
   Chairman,
   Public Service commission
   177, Nawala Road
   Narahenpita
   Colombo 05.

5. A. Salam Abdul Waid

6. D. Shriyantha Wijayatilaka

7. Prathap Ramanujam

8. V. Jegarasasingam

9. Santi Nihal Seneviratne

10. S. Ranugge

11. D.L. Mendis

12. Sarath Jayathilaka
    (5th to 12th Respondent- all members of the Public Service Commission, 177, Nawala Road, Narahenpita
    Colombo 05).

13. H.M. Gamini Seneviratne
    Secretary,
    Public Service commission
    177, Nawala Road
    Narahenpita
    Colombo 05.

14. The Attorney General
    Attorney General's Department
    Colombo 12.
    RESPONDENTS

BEFORE : Sisira J. de Abrew, J.
Priyantha Jayawardena, PC. J. and
Nalin Perera, J.

COUNSEL : M. Kumarasinghe with H.L.D. Nishanthi instructed by Mrs. J. Kumarasinghe for the Petitioners.

Yuresha de Silva, SSC. for the Respondents.

ARGUED & DECIDED ON : 16.05.2017

Sisira J. de Abrew, J.

Heard both Counsel in support of their respective cases.

Petitioners joined the Inland Revenue Department as Class III, Grade II Tax Officers in August, 1993. Thereafter, in 2001 they were promoted to Class III, Grade I as Senior Tax Officers. In February, 2006 interviews were held for the promotion of officers to Class II, Grade II. For that interview only 134 officers were called and all 134 officers were selected (including the petitioners) to the said promotion.

Although the said 134 officers were selected for the said promotion only 122 officers were given the promotion. It has to be noted here the Petitioners were not given the promotion by the decision of the Public Service Commission. The decision of the Public Service

Commission to refuse to grant the approval for the Petitioners is reflected in 4R7 and 4R9.

Being aggrieved by the decision of the Public Service Commission not to grant the promotion to the Petitioners, the Petitioners appealed to the Administrative Appeals Tribunal (hereinafter referred to as the A.A.T.). The A.A.T, by order dated 12th of October 2009, directed the Public Service Commission (hereinafter referred to as the P.S.C.) to grant the promotion to the Petitioners with effect from 02nd of October 2006. It has to be noted here that the other 122 officers were granted the promotion with effect from 02/10/2006. P.S.C. implemented the order of the A.A.T. and the Petitioners assumed duties as per the order of A.A.T. The Petitioners got the promotion with effect from 02nd of October 2006. But later in March, 2016 P.S.C. back dated the date of promotion of the above mentioned 122 Officers with effect from 22nd of February 2006. After hearing the said order of the P.S.C., the Petitioners too, by document marked P6 dated 29th of April 2016, appealed to the P.S.C. to back date their promotion to the same date i.e. 22nd of February 2006. But the P.S.C. did not respond to their appeal. In effect date of the promotion of the Petitioners remained as 02nd of October 2006. Their appeal to the P.S.C. was to back date their promotion to 22nd of February 2006. Since the P.S.C. did not respond to the appeal made by the Petitioners, Petitioners have come before this Court by way of this petition.

Petitioners contend that their fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the members of the P.S.C. since they (members of the P.S.C.) did not back date their date of promotion to 22nd of February 2006.

Reasons given by the P.S.C. not to back date the date of promotion of the Petitioners to 22nd of February 2006 are found in the document marked 4R19 dated 15th of July 2016.

When we consider 4R19 it appears that the P.S.C. has taken up the position that there was no possibility to consider appeals to amend the date of appointments of the officers appointed on directions given by the A.A.T. or the Supreme Court.

Although the P.S.C. has stated those reasons in 4R19, it appears that they have taken somewhat different decision with regard to some other Officers which is found in 4R20 dated 20/10/2016. The document marked 4R20 indicates that appointments of 11 Tax Officers who were appointed on the directions given by the A.A.T. with effect from 02/10/2006 were back dated to 22/02/2006. The question that arises is as to why the P.S.C. did not apply the same rule to the Petitioners' appeal.

When we consider all the above facts, we are of the opinion that the decision of the P.S.C. not to back date the date of promotion of the Petitioners to 22nd of February 2006 is unreasonable and is violative of Article 12(1) of the Constitution. We hold that the Petitioners have not got the equal protection of law. For the above reasons, we hold that the members of the P.S.C. (4th -12th Respondents) have violated the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution.

We therefore direct the P.S.C. and the members of the P.S.C. to back date the promotion of the Petitioners to the post of Assessor Class II Grade II to 22nd of February 2006. When we consider

the facts of this case, we are of the opinion that we should not order any costs.

Registrar of this Court is directed to forward a certified of copy of this judgment to the 4th to 13th Respondents.

The P.S.C. is directed to implement the order of this Court within one month from today. In giving effect to this order, the P.S.C. must take steps not to affect the seniority of the Petitioners as it existed in February 2006.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

Nalin Perera, J.

I agree.

JUDGE OF THE SUPREME COURT

Ahm

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

In the matter of an application under and in terms of Article 17 & 126 of the Constitution of the Republic.

Sathkumara Pathirannehelage Sisira Senanayake,
No.278, Thalapathpitiya Road,
Nugegoda.

PETITIONER

SC(FR) Application 190/2016

-Vs-

1. Land Reform Commission,
   No.C81, Hector
   KobbakaduwaMawatha,
   Colombo 07.
2. Mr. SumanatissaThambugala,
   Chairman.
3. Mr. R.P.R. Rajapaksa, Member.
4. Mr. M.A.S. Weerasingha, Member.
5. Dr. RohanWijekoon, Member.
6. Mrs. N.B. HemaDharmawardhana,
   Member.
7. Mrs. K.D.R. Olga, Member.
8. Mrs. S.N. Atthanayake, Member.
9. Mrs. L.S.B. Alwis, Member.
10. Mrs. G.C.S. Thilakaratne, Member.
11. Mr. SenarathWanigathunga, Secretary.

The 2nd to 11th Respondents all of,

Land Reform Commission,
No. 81, Hector
KobbakaduwaMawatha,
Colombo 07.

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

RESPONDENTS.

BEFORE: **:** **SISIRA J.DE ABREW, J**

UPALY ABEYRATHNE, J &

K.T.CHITRASIRI, J

COUNSEL : J.C. Weliamuna with SulakshanaSenanayake for the Petitioner.

Dr. S.F.A.Coorey for the 1st to 11th Respondents.

RajithaPerera SSC for the Hon. A.G (the 12th Respondent)

ARGUED ON: **:** 27.09.2016

WRITTEN SUBMISSION
TENDERED ON : 5.10.2016 by the Petitioner
15.11.2016 by 1st to 11th Respondents
5.10.2016 by the 12th Respondents

DECIDED ON : 15.2.2017

SISIRA J. DE ABREW, J

The Petitioner by this petition seeks a declaration that his fundamental rights guaranteed by Article 12 and 14(1)(g) of the Constitution have been violated by the 1st to 11th Respondents. This court by its order dated 7.7.2016, granted leave to proceed for the alleged violation Article 12 and 14(1)(g) of the Constitution by

the 1st to 11th Respondents .

The Petitioner submits that pursuant to an advertisement published in a newspaper for the post of Director Finance of the Land Reform Commission (LRC), he submitted an application to the LRC for the said post; that after an interview, he was informed by letter dated 6.4.2016 (signed by the 2nd Respondent) that he would be appointed to the post of Director Finance of the LRC with effect from 15.5.2016; that he tendered letter of resignation to his earlier company as he got the said letter; that he informed the Chairman LRC (2nd Respondent) that he would accept the appointment; that the letter of appointment dated 22.4.2016 (P8) to the post of Director Finance with effect from 15.5.2016 was issued to him; that by letter dated 27.4.2016 (P9) he informed the 2nd Respondent that he would accept the appointment stated in P8; that on or about 5.5.2016 he received a letter dated 28.4.2016 marked P10 from the 2nd Respondent stating that his aforementioned appointment to the post of Director Finance had been temporarily suspended until further notice; that the letter marked P10 has not disclosed any reasons for the suspension of the said appointment; that he has not received any further communication from the Respondents regarding the above suspension; that he is in dire situation with regard to his employment having already given his resignation from his place of employment; and that his fundamental rights guaranteed by Article 12 and 14(1)(g) of the Constitution have been violated.

The 2nd Respondent, the Chairman of the LRC, in his affidavit filed in this court, states that the Petitioner was selected to the post of Director Finance as he was the best amongst the candidates who were present for the interview; that the letter marked P10 was sent to the Petitioner by the 1st the Respondent Commission (LRC); that the 1st Respondent received a letter sent by the Petitioner marked P9; that the reason for sending the letter marked P10 was the order received by the 1st Respondent by letter dated 22.4.2016 marked 1R3 from the Secretary to the Ministry of Lands to suspend all proceedings regarding the appointment of

Director Finance until proper investigation would be held.

The contention of learned counsel for the 1st to 11th Respondents (Dr.Sunil Cooray) was that the Minister had issued a directive to the Secretary to the Ministry of Lands to conduct an investigation/inquiry with regard to the appointment of Director Finance and as such the Secretary to the Ministry of Lands issued the letter marked 1R3 suspending all proceedings regarding the appointment of Director Finance. Dr.Cooray further submitted that the Minister has the power to do so under Section 47(1) and 47 (3) of the Land Reform Law; that the Minister should have been made a party; that the Minister is a necessary party; and that the petition should be dismissed as the necessary is not before court. I now advert to this contention. Has the Minister issued a directive to the Secretary to the Ministry of Lands to conduct an investigation/inquiry with regard to the appointment of Director Finance? On this question the 2nd Respondent relies on the document marked 1R3 which was signed by the Secretary to the Ministry of Lands. But the letter marked 1R3 does not refer to the appointment Director Finance. It refers to the appointment of an Accountant. Therefore it cannot be said that the Minister had issued a directive to the Secretary to the Ministry of Lands to conduct an investigation/inquiry with regard to the appointment of Director Finance. Further in my view, the 2nd Respondent has no authority to suspend the appointment of Director Finance acting under 1R3 since it refers to the appointment of an Accountant. It has to be noted here that the Petitioner's appointment is with regard to the Director Finance. I would further like to observe the following matters. According to 1R3 which is a letter signed by the Secretary to the Ministry of Lands, the 2nd Respondent has received it (1R3) on 22.4.2016. When the 2nd Respondent issued the letter dated 28.4.2016 marked P10, the 2nd Respondent had not referred to 1R3.

When I consider all the above matters, I am unable to agree with the contention of Dr. Sunil Cooray.

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.”

Article 14(1) (g) of the Constitution reads as follows. “Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.”

It appears from the above facts that the Petitioner has resigned from his employment in his earlier company since he was appointed to the post of Director Finance in the LRC. When I consider all the matters set out above, I hold that the letter issued on 28.4.2016 by the 2nd Respondent marked P10 temporarily suspending the appointment of the Petitioner to the post of Director Finance is illegal and violates Article 12(1) and 14(1)(g) of the Constitution and that therefore it cannot be permitted to stand.

For the above reasons, I hold that the 1st and the 2nd Respondents have violated the fundamental rights of the Petitioner guaranteed by Article 12 and 14(1)(g) of the Constitution. There is no strong evidence before court that the 3rd to 11th Respondents have violated the fundamental rights of the Petitioner.

For the aforementioned reasons, I declare that the said letter dated 28.4.2016 issued by the 2nd Respondent marked P10 to the Petitioner is null and void and direct the 1st Respondent, the 2nd Respondent (the present holder of the office of the Chairman LRC) and the present members of the LRC to appoint the Petitioner to the post of Director Finance of the LRC on the same terms and conditions stated in the letter of appointment dated 22.4.2016 issued to the Petitioner marked P8. I further direct the 1st Respondent, the 2nd Respondent (the present holder of the office of the Chairman LRC) and present members of the LRC to implement the letter of appointment issued to the Petitioner dated 22.4.2016 marked P8. They are further directed to implement the directions given in this judgment within one month from the date of this judgment. I do not make an order regarding compensation since I have ordered the implementation of P8. Considering all the

circumstances of this case, I do not order costs.

The Registrar of this Court is directed to send a certified of this judgment to all the respondents.

Judge of the Supreme Court.

Upaly Abeyratne J

I agree.

Judge of the Supreme Court.

KT Chitrasiri J

I agree.

Judge of the Supreme Court.

SC.FR 194/2012

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.

Arshan Rajinikanth

Mirishena Watte,Bulathsinghala.

Petitioner

SC/FR Application No:-194/2012

Vs

(1)Officer in Charge

Bulathsinhala Police Station

Bulathsinhala.

(2)Sub Inspector Kumaratne

Bulathsinhala Police Station,

Bulathsinhala.

(3)ASP Matugama

Office of the Assistant Superintendant

(4)SI Pathmalal

Office of the Assistant Superintendant

Of police,

Katukurunda, Kalutara.

(5)N.K.Illangakoon

Inspector General of police

Police Headquaters,

Colombo 1.

(6)Dr. R.M.A.Rathnayake

Judicial Medical Officer

Teaching Hospital, Ragama.

(7)Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondents

BEFORE:- K.SRIPAVAN C.J.

SISIRA J.DE ABREW, J and

H.N.J.PERERA, J.

COUNSEL:-Ms.Ermiza Tegal with Sumalika Sooriyaarachchi for the Petitioner

Neranjan Jayasinghe for the 1st and 2nd Respondents

Ms.Anoopa de Silva for the 7th Respondent

ARGUED ON:-24.05.2016

DECIDED ON:- 28.09.2016

H.N.J.PERERA, J.

The Petitioner complained that the 1st to 5th Respondents had violated his fundamental rights guaranteed by Article 11, 12(1), 13(1) and 13(2) of the Constitution. Supreme Court granted leave to proceed for the alleged infringements of Article 11, 12(1) 13(1) and 13(2) of the Constitution.

The Petitioner who was 22 years at the time of the incident worked as a three wheeler driver. The Petitioner states that on 13th October 2011 at about 9.30 a.m three individuals by the names of Roshan, Selvanayagam and Raja arrived on a motor bicycle at the Petitioner's residence and informed the Petitioner that he was wanted by the police. The Petitioner recognized these individuals as they lived in the same area. The two individuals named Roshan and Selvanayagam got the Petitioner on to the motor bicycle and took the Petitioner to the Bulathsinhala police station. On the way to the police station Selvanayagam accused the Petitioner of being involved in the alleged murder of a girl named Niroshini in the same area who was found dead. The Petitioner states that he had an affair with the said girl named Niroshini for some time and that in June 2011 it ended and he refuted all the allegations of having any involvement in the death of the said Niroshini.

The said Roshan and Selvanayagam took the Petitioner inside the police station and forced the Petitioner to sit on a chair. Thereafter the younger brother of the deceased woman arrived at the police station and tried to assault the Petitioner and by the intervention of the police officers this was prevented and on his request for his safety he was put inside the cell

of the police station. An hour later two officers who identified themselves as officers from the crimes division dressed in civilian clothes took the Petitioner out from the cell and while berating the petitioner in foul language took him to a room where there were three or four female officers working and questioned the petitioner regarding the death of Niroshini for about half an hour. The petitioner states that he informed the said police officers that he did not have any knowledge or information regarding the alleged murder and thereafter he was put back in to the cell.

According to the Petitioner on the 14th morning he was taken out of the cell by the 2nd Respondent and was taken to a room which appeared to be a room used by police officers to rest and sleep and was forced to sit on the floor between two beds .The 2nd Respondent questioned the Petitioner with another police officer; later assaulted the Petitioner with his hands and on his face; threatened to hang him up; and ordered the other officer to bring a rope and a pole.

On the instructions of the 2nd Respondent the other officer held his hands from behind and the 2nd Respondent again questioned the Petitioner regarding the alleged murder and questioned about the whereabouts of another person named chutte and left the room again stating that the Petitioner should be hanged. The other officer continued to question the Petitioner regarding the alleged murder and later the 2nd Respondent came back again and ordered two other officers to tie the petitioner's hands behind and a wooden pole was placed through the loop that was created by his hands and pole was raised. The Petitioner states that he screamed as he was raised in that manner and later the 1st Respondent came and ordered that he be removed from the pole and inquired from him whether he had anything to eat and was given some food on the instructions of the 1st Respondent.

In paragraph 6(f) of his petition the Petitioner alleges that after about half an hour the 2nd Respondent came back and informed that the petitioner had been saved by the 1st Respondent and ordered the petitioner to remove his sarong which the Petitioner did out of fear. The 2nd respondent with the assistance of two other police officers tied the Petitioner's hands in front of him. They also tied his legs together with rope. The Petitioners arms were forcibly wedged between his knees. A wooden pole was passed between his legs and arms and he was hoisted up. The pole was placed on the top of two adjacent bunk beds. The petitioner states that his arms felt as if they were being pulled off and caused him to scream in pain .He was turned and his head was pushed down.

The Petitioner further claims that he was blindfolded using a piece of cloth. The petitioner's head was pulled and he was told to tell the truth. The Petitioner felt blows presumably from a wooden baton on the back of his thighs. After a period of continuous physical assault using the baton for about 5 to 10 minutes the Petitioner was removed off the pole, untied and taken to the corner of the room and made to sit between two beds. The Petitioner states that he was kept hanging for about 15 minutes. The Petitioner found it extremely difficult to sit in the corner. His back was experiencing severe pain along the spine. The petitioner told a police officer who was present at that time that he was unable to continue sitting and was allowed to stand up for a while. At about 6.p.m the 2nd Respondent arrived and ordered that the Petitioner be placed back in the cell and the Petitioner spent the night in the cell. Sometime late night the saidPadmasiri alias Chuttti was also placed in the cell. The Petitioner states that he was in the cell the whole day along with the said Padmasiri alias Chutti. The said Padmasiri alias Chutta was released on 16.10.2011.

It was the position of the Petitioner that he was kept at the police station on 15,16TH and released on bail only on the 17th at about 7.30 p.m. The Petitioner further states that he was asked to report back at the police station on the 18th and he arrived at the police station with his mother around 12.00 noon. Thereafter the 1st Respondent noticing a wound on the Petitioner's hand took him to the Bulathsinghala Hospital to be examined by a Doctor. The police wanted to verify from the Doctor whether the said wound had been contracted from an infection as stated by him or whether it was an injury or bite mark caused as a result of a possible struggled with the deceased person. Thereafter a further statement was recorded from the Petitioner and he was allowed to leave the police station at around 8.pm. The Petitioner and his mother stayed over at a relative's house that night and on the following day morning left to Colombo to stay with his brother.

The Petitioner's mother returned to Bulathsinghala on or about 31st October and was informed by a neighbour that the police had left a note requiring the Petitioner to be present at the police station and thereafter was informed by the police to inform the Petitioner to come to the police station to record a statement on the following day morning. Accordingly the Petitioner went to the police station with his mother on 1st November 2011. It was the position of the Petitioner that on 1st November too he was subjected to inhuman treatment by the 1st Respondent. His mother was informed to leave the police station and the 1st Respondent proceeded to question the Petitioner about the said murder and accused the Petitioner of lying about the wound that was found in his hand alleging that it was a bite mark caused by the deceased; threatened to hang the Petitioner and to put chilli powder. The Petitioner complains that he was again subjected to inhuman and degrading treatment by the 1st Respondent at the police station on 1st November 2011.According to the Petitioner there were three police

officers including the 1st and 2nd Respondents in the room and the 1st Respondent ordered the Petitioner to lie down on the floor and stretch out his hands and thereafter he stepped on to the Petitioner's hands with his boots. The 1st Respondent started to physically assault the Petitioner with a wooden pole on his back near the spine for about ten minutes. The Petitioner states he screamed in pain. He was again ordered to stand up and was then ordered to sit on the floor by the 1st Respondent who thereafter took a piece of thick twine out of a bag and twisted it around the Petitioner's neck until it felt as if it was cutting into the neck of the Petitioner. The 1st and the 2nd Respondents thereafter left the place asking him to make a confession and thereafter another police officer began to interrogate the Petitioner till 6.30 p.m. The Petitioner had to stay at the police station till next day morning. On the 2nd November at around at about 8.30 a.m his mother visited the Petitioner and he informed the mother about the assault. He came to know that his brother had made a written complaint to the Human Rights Commission. The Petitioner was kept at the police station till the 4th November and was released by about 12.00 noon. The Petitioner and his mother left the police station and thereafter the Petitioner travelled to Colombo and arrived at his brother's house around 6.30 p.m.

The Petitioner states that he experienced pain when passing urine and was taken before a private medical practitioner who refused to treat the Petitioner and was admitted at the Ragama Hospital around 9.pm and was subjected to X-ray examination at about 12 p.m. The Petitioner was not discharged but was produced before the J.M.O. The Petitioner states that he was produced before the 6th Respondent and he made a complaint regarding the ill treatment he suffered at the hands of the 1st and 2nd Respondents at the Bulathsinghala Police station. The 6th Respondent examined him and advised the Petitioner to attend the medical clinic at the said Hospital.

It was contended on behalf of the Respondents that the Petitioner in this application is suspected of a murder of a girl and that on several occasions the Petitioner and a friend of the Petitioner was called to the police station Bulathsinghala in respect of investigation and several statements have been recorded from them. The Respondents admit the fact that they were called to police station on 15, 16 and on the 17th October and was interrogated and statements recorded but deny that they were detained at the police station as stated by the Petitioner and further state that they were released after recording their statements. It was also contended on behalf of the 1st and 2nd Respondents that the Petitioner had come out with a false story and he tries to use this complaint to delay the investigations against a very serious crime.

The Petitioner says he was taken to custody on 13.10.2011 and detained until 17.10.2011. The Petitioner has also stated that the other suspect Chutta was also with him at the police station in the same cell. Kasturisinghe Arachchige Padmasiri alias Chutta had given an affidavit and stated that he met the Petitioner at Mirissa on 13, 14 and on the 15th of October 2011. The said K.A.Padmasiri has further stated that on 15th , 16th and on the 17th October 2011 he was asked to come to the police station with the Petitioner and on every day they were released and clearly states that he or the Petitioner were never detained at the police station . The affidavit filed by the said K.A.Padmasiri clearly support the fact that he and the Petitioner were suspected and questioned by the police about the death of a girl. The said affidavit also confirms the fact that the Petitioner and the said Chutta were present at the police station on the 15th, 16th and on the 17th October 2011. But the affidavit filed by the said Chutta clearly contradicts the position taken up by the Petitioner in this case that he was kept in police custody from the 15th to 17th October.

It would be appropriate to consider at this stage the question of the burden of proof in the context of alleged infringements of fundamental rights; more particularly the quantum of proof required in this type of applications.

In Vivienne Gunawardena V Perera (1983) 1 SLR 305, where violations of Articles 11 and 13 (1) were alleged, Soza J. held that a high degree of probability is required where it is alleged that the petitioner had been subjected to cruel, inhuman or degrading treatment.

In Channa Peiris and others Vs Attorney General and others (1994) 1 SLR1. Amerasinghe, J held that three general observations apply in regard to violations of Article 11.

(1)The acts or conduct complained of must be qualitatively of a kind that a court may take cognizance of. Where bit is not so, the Court will not declare the Article 11 has been violated.
(2)Torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical;
(3)Having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a Petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment.

Thus it is clear that though alleged infringement of fundamental rights have to be proved on a balance of probability or on a preponderance of evidence as in a civil case, the Court requires a high degree of proof within that standard, typical with the nature of the allegations made, while at the same time ensuring that no undue burden is placed upon a petitioner.

Further in W.Nandasena V. U.G.Chandradasa, OIC police Station, Hiniduma & 2 others reported in 2005 [B.L.R]104, Shirani Bandaranayake,J held that when there is an allegation based on violation of fundamental rights guaranteed in terms of Article 11 of the Constitution it would be necessary for the petitioner to prove his position by way of medical evidence and/or by way of affidavits and for such purpose it would be essential for the petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden.

According to Petitioner he was arrested on the 13th October 2011. Though he was questioned regarding the death of the woman and kept inside the cell till the 14th morning, he was not subjected to assault or bodily harm on the 13th. But on the 14th October he was subjected to cruel, inhuman and degrading treatment in the hands of the 1st and 2nd Respondents. The Petitioner has described the acts of torture and inhuman and degrading treatment meted out to him in the Petition in paragraphs 5(a) to 5(i) and 13(a) to 13 (c). According to Petitioner, he was taken into custody on 13.10.2011 and detained until 17.10.2011. According to the Petitioner he was severely beaten and he was subjected to cruel treatment by the 1st and 2nd Respondents. The Petitioner does not state that he sought medical treatment after he was released by the police in the 17th October 2011.The Petitioner has stated that he was released from on the 17th October and was asked to come to the police station again on the 18th morning. The evidence does not disclose the fact that the Petitioner took treatment for any injuries he has sustained at the hands of the 1st and 2nd Respondent on the 17th after he was released from police custody. The Petitioner had arrived at the police station on the 18th October accompanied by his mother at about 12 noon. And the 1st Respondent noticing a wound in the hands of the Petitioner had questioned the Petitioner regarding the same. The

Petitioner states that it was only a skin rash and the 1st Respondent suspected it to be a bite mark caused as a result of a possible struggle with the deceased person. The Petitioner was accordingly taken to the Bulathsinghala Hospital to be examined by a doctor. The Petitioner admits the fact that a male doctor has examined him on the 18th and informed that it was only a skin rash. Thereafter he was taken back to the police station; a statement was recorded and was released. The Petitioner left the police station with his mother. Although the Petitioner was produced before a doctor on the 18th October and was examined, the Petitioner had not stated about an assault or injury caused to him by the Respondents. The Doctor who examined the Petitioner on the 18th October 2011 had not observed any other injury other than a skin rash.

On perusal of the affidavit filed by the Petitioner it is clearly seen that the 1st and 2nd Respondent did not hesitate to produce the Petitioner before a doctor when they felt suspicious about the skin rash that was seen in the petitioner's hands. The Petitioner has come to the police station accompanied by his mother and it was the Respondents who after noticing the skin rash in the hands of the petitioner were keen to produce the Petitioner before a doctor for the purpose of investigation in to the death of a deceased person. The Petitioner does not state that he complained to the said doctor about the cruel treatment meted out to him by the 1st and 2nd Respondents .If the Petitioner had any injuries, this was a good opportunity for him to complaint to the doctor about the conduct of the Respondents and also show the injuries that has been caused to him as a result of the treatment meted out to him by the 1st and the 2nd Respondents whilst he was in police custody. It was the contention of the Respondents that the Petitioner and the other suspect Padmasiri alias Chutta were called to police station on 15th, 16th and on the 17.10.2011 but they were not detained in police station. It was also contended on behalf of the Respondents that according to the version of

the petitioner he was free to make a complaint to any authority in between 18.10.2011 to 01.11.2011 and that the petitioner had not made a complaint to any authority about his arrest or his detention or cruel treatment during the period of 13.10.2011 to 17.10.2011.

It was contended on behalf of the Petitioner that the Petitioner's account of the torture, inhuman and degrading treatment is corroborated by the treatment sheet submitted by Dr. Keerthi Gunatilalake to court with motion dated 18th May 2012, whereby the complaints of pain by the Petitioner were documented. This only shows that the Petitioner has complained of police assault and also about a backache and that X-ray examinations of the Petitioner was accordingly conducted.

The Medico Legal Report of the Judicial Medical officer 1R6, does not disclose visible injuries. In the said medico-Legal Report dated 5th November 2011 Dr.R.M.A.Ratnayake , the 6th Respondent gives a history. According to the said history the Petitioner had been assaulted by the O.I.C. of the Bulathsinghala police station.

On perusal of the said treatment sheet and the Medico-Legal Report it is clear that the said documents do not support the version of the Petitioner. The said documents indicate that the Petitioner had no injuries on his body either externally or internally at the time of examination of the Petitioner by the said doctors.

The Petitioner contends that he was arrested on 13th October 2011 and released on 17th October 2011. Although he had complained about receiving cruel and degrading treatment at the hands of the 1st and the 2nd Respondents the Petitioner has failed to establish the same through medical evidence. There is no medical evidence placed before this court to substantiate the fact that the Petitioner sustained injuries on the 14. 10.2011 as stated by the Petitioner in his affidavit.

The Petitioner contends that he was arrested again on 1st November 2011 and released on 4th November 2011. Here again the treatment sheets submitted by Dr.Keerthi Gunatillake and the Medico Legal Report of the Judicial Medical Officer Dr. R.M.A.Ratnayake do not disclose any visible injuries on the Petitioner and no way support the contention of the Petitioner that he was subjected to inhuman, cruel and degrading treatment at the hands of the Respondents whilst in police custody on 2.11.2011.

It was contended on behalf of the Petitioner that the fact that the medical evidence does not support the Petitioner's version of facts alone will not prejudice the Petitioner's case. It was contended that the Petitioner's version of facts is corroborated by his mother's Affidavit and the Affidavit of his neighbour and further that the 1st to 3rd Respondents have merely denied without any official document the allegations against them, must necessarily be held in favour of the Petitioner.

Considering the circumstances of this matter, it is clear that the 1st Respondent had questioned the Petitioner as he was suspected of causing the death of a person. The Petitioner in this application is suspected of a murder of a girl. It is also alleged that she was abducted and raped. According to the mother of the deceased, the deceased had an affair with the Petitioner and after she advised the daughter she stopped the relationship with the Petitioner. According to her, there had been an enmity between the daughter and the Petitioner after that. The mother of the deceased had clearly stated that she suspected the Petitioner for the crime. Therefore there is no doubt that the Bulathsinghala police was conducting investigation in to the death of this girl and the Petitioner was the prime suspect in addition to the other suspect called Chutta.

Considering the non-availability of any medical evidence with regard to alleged assault, it would be necessary to examine carefully the supporting documents produced by the Petitioner to substantiate his allegations against the 1st to 3rd Respondents.

It is the position of the Respondents that on several occasions the Petitioner the prime suspect and another friend of the Petitioner namely Kasturisinghe Arachchige Padmasiri alias Chutta were called to the police station Bulathsinghala in respect of investigations and several statements were recorded from them. According to the Petitioner the Petitioner was taken into custody on the 13th October 2011 and detained until 17.10.2011 and also stated that Padmasiri alias Chutta was also with him at the police station in the same cell. The said Padmasiri alia Chutta had given an Affidavit and had stated that he met the Petitioner at Mirissa on 13.10.2011, 14.10.2011 and 15.10.2011. (1R4). Padmsiri alias Chutta, very clearly contradicts the position taken up by the Petitioner that he was detained at the police station from the 13th to 17th October 2011. The said Chutta has further stated that on 15.10.2011, 16.10.2011 and 17.10.2011 he was asked to come to the Bulathsinghala police station with the Petitioner and on every day they were released and further states that they were never detained at the police station .It is very clearly seen that the said Padmasiri alias Chutta does not corroborate the version of the Petitioner that both were detained at the police station and the Petitioner was severely beaten or subjected to cruel punishment.

The 1st and 2nd Respondents deny that they ever arrested the Petitioner on the 13th October 2011 or thereafter. It is the position of the 1st and 2nd Respondents that the Petitioner and the other suspect in the said murder case arrived at the police station on the 15th, 16th and on the 17th October to give statements. They deny that they arrested or detained the Petitioner at the police station as alleged by the Petitioner in his petition

and affidavit. In his affidavit Padmasiri alias Chutta denies the fact that he was ever detained at the police station together with the Petitioner. It was contended on behalf of the Petitioner that the Respondents have tendered a false affidavit from Padmasiri alias Chutta to counter the allegation made by the Petitioner in this case. Yet the fact remains that the Respondents have tendered an affidavit by Padmasiri alias Chutta contradicting the facts stated by the Petitioner in his affidavit. This definitely weakens the position of the Petitioner. The other affidavit which was tendered by the Petitioner to support his case was from one Sirmannge Hettige Milani Tharnga P5(a). It is to be noted that Milani Tharanga too has by her affidavit marked 1R5 had contradicted and denied the contents in P5(a). Although the Petitioner has stated that his brother has made a complaint to the Human Rights Commission (P1), the Petitioner has failed to submit an affidavit from his brother to support his case. Therefore the Petitioner is left only with the affidavit given by himself and his mother to support the Petitioner's case.

The Respondents had tendered the statements recorded by the said Padmasiri alias Chutta and the Petitioner on the 16.10.2011 marked 1R1 and 1R2. The statement recorded by the Petitioner on the 17.10.2011 is also marked and tendered as 1R3. These statements clearly establish the fact that the Petitioner and Padmasiri alias Chutta were questioned and their statements were in fact recorded by the Bulathsinghala police regarding the death of a person. The affidavits of the said Chutta and Milani Tharanga was marked as 1R4 and 1R5. In her affidavit Milani Tharanga has categorically stated that she too accompanied the Petitioner and his mother and Padmasiri alias Chutta to the Bulathsinghala police station on 16th, 17th and 04.11.2011 and denies the fact that the Petitioner or Padmasiri alias Chutta was ever put inside the cell or was assaulted by 1st and 2nd Respondents at the said police station.

In the instant case, when one considers the conflicting versions placed before Court by the respective parties, there is considerable doubt as to the truth of the Petitioner's version. There is doubt as to why the Petitioner did not go before a medical officer to get treatment for the injuries he suffered on the 14th at the hands of the 1st and 2nd Respondents and as to why the Petitioner did not complain to any authority about the treatment meted out to him by the 1st and 2nd Respondents on the 14th. The Petitioner had all the opportunity to get medical treatment or to complain to an authority after he was released on 17.10.2011.

Further the Petitioner was free and was able to make a complaint to any authority in between 18.10.2011 to 01.11.2011. P2 complaint to the Human Rights Commission had been made by his brother only on 02.11.2011. A detailed complaint has been made by the Petitioner thereafter to the Human Rights Commission.

Placing much reliance on the report of the J.M.O Bulathsinghala the 6th Respondent, and stressing the fact that the Petitioner had not made no complaint of torture or inhuman, degrading treatment to any person in authority before the 2.11.2011 the learned Counsel appearing for the 1st to 3rd Respondents contended that the allegations levelled by the Petitioner were false and untenable. It is also to be noted that the Petitioner has not made any allegation against the J.M.O.Bulathsinghala the 6th Respondent or against Dr.Keerthi Gunatilleke. It was contended on behalf of the Respondents that the Petitioner had come out with a false story and he tries to use this complaint to delay the investigations against a very serious crime.

On an examination of the totality of the evidence I hold that the Petitioner in the instant case has failed to establish that his fundamental rights guaranteed in terms of Article 11, 12(1), 13(1) and 13(2) of the

Constitution have been violated by the actions of the 1st to 5th Respondents. This application is accordingly dismissed, but in all the circumstances of this case without costs.

JUDGE OF THE SUPREME COURT

K.SRIPAVAN C.J.

I agree.

CHIEF JUSTICE

SISIRA J.DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT

SC(FR) No. 222/2014

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

In the matter of an application under and in terms of Article 17 read along with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC(FR) No. 222/2014

Herath Mudiyanselage Jayantha Aberathna,
No.102, Dehiketiya Watta,
Wegala, Medamahanuwara.

Petitioner

-Vs-

1. Chief Inspector B.W.C. Dharmaratna,
Head Quarter's Inspector,
Officer-in-Charge,
Police Station,
Teldeniya.

2. Sub-Inspector Wijerathna,
Officer-in-Charge, Miscellaneous
Complain Division,
Police Station,
Teldeniya.

3. Deputy Inspector General of Police,
Office of the Deputy Inspector,
General of Police,
Central Province, Kandy.

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

5. The Director General,
Civil Security Division,
Ministry of Defense,
No.23, Station Road,
Bambalapitiya.

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

Respondents

Before: **Sisira J.de Abrew, J**

Anil Gooneratne, J &

Vijith K.Malalgoda, PC, J

Counsel: Suren D. Perera for the Petitioner.

Thishya Weragoda with Chinthaka Sugathapala for the 1st and 2nd Respondents.

Ms. Nishara Jayaratne SC for the A.G.

Argued &
Decided on: 31.08.2017

Sisira J. de Abrew, J

Heard both Counsel in support of their respective cases. Learned State Counsel also made submissions.

The Petitioner in this case complains that he was arrested on 21.06.2013 by the 1st Respondent who is the Officer-in-Charge of the Police Station, Teldeniya. He was later produced before the Magistrate, Teldeniya as a suspect for stealing eleven pieces of sandalwood from the Magistrate's Court of Teldeniya. He was a Civil Security Guard attached to Teldeniya Police Station. The Petitioner further complains that after the arrest he was assaulted by the 1st Respondent. Petitioner tries to support the assault launched by the 1st Respondent by his wife's affidavit marked as P8.Petitioner's wife Renuka Malkanthi Wickramasinghe in the said affidavit states that on 21st of June 2013 around 4.00 p.m she received a telephone call from her husband to the effect that he (her husband) was in police custody and after the receipt of the said telephone call she proceeded to Teldeniya Police Station. She, in her affidavit, further states that at Teldeniya Police Station she saw her husband being assaulted by the 1st Respondent. She further states that her husband's face, hands and two sides of the body were swollen. This observation suggests that the Petitioner had sustained injuries in the said areas. But in the petition and affidavit filed by the Petitioner in this Court , he does not state that the 1st Respondent gave blows to the said areas of the body. This discrepancy itself raises certain doubts about the truth of the Petitioner's story. We further note that the Petitioner's wife has not annexed her affidavit to the original petition filed

by the Petitioner in this Court. The affidavit filed by the Petitioner's wife marked P8 has been annexed only with the counter affidavit of the Petitioner.

The Petitioner also tries to support the assault launched by the 1st Respondent by an affidavit given by Charuka Iroshana Ratnayake marked P9. According to P9, he was arrested by Police officers attached to Teldeniya Police Station around 4.30 p.m on 21.06.2013 and was brought to the Police Station, Teldeniya. We note that the said affidavit has also been marked only along with the counter affidavit of the Petitioner. The said affidavit has not been annexed to the original petition and affidavit of the Petitioner. Thus the truth of the material stated in P8 and P9 is doubtful.

After he was arrested he was produced before the Magistrate and he was granted bail on 24.06.2013. Thereafter he got himself admitted to Teldeniya Hospital. He had complained to the Doctor at Teldeniya Hospital that he was assaulted by the 1st Respondent in his genital region, lower abdomen, neck and right hand. But the Doctor has observed contusion only on left thigh. Although the Doctor observed a contusion on the left thigh, the Petitioner had not complained to the Doctor that he was assaulted by the O.I.C in his left thigh. When we consider the above material, we observe that there is a discrepancy between his complaint to the Doctor and the observations made by the Doctor.

This Court by its order dated 25.08.2014 has granted leave to proceed for alleged violation of Article 11 of the Constitution. When a person makes an allegation of torture under Article 11 of the Constitution, a high degree of certainty of his story is required. This view is supported by the judicial decision in ***Channa Pieris and others Vs The Attorney-General -***

1994(1) SLR page 01 wherein His Lordship Dr. Justice A.R.B. Amarasinghe held thus:- " Having regard to the nature and gravity of the issue, a high degree of certainty is required, before the balance of probability might be said to tilt in favour of a Petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment."

We have earlier pointed out that the story narrated by the Petitioner is doubtful. When we consider all the above matters, we are unable to place high reliance on the story narrated by the Petitioner. Therefore we hold that the Petitioner has not proved his case with high degree of certainty. When we consider all the above matters, we are unable to believe the story narrated by the Petitioner. For the above reasons, we dismiss the Petitioner's case. Considering the facts of this case, we do not make an order for costs.

Petition is dismissed.

JUDGE OF THE SUPREME COURT

Anil Gooneratne, J

I agree.

JUDGE OF THE SUPREME COURT

Vijith K.Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

kpm/-

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

S.C (FR) 224/2012

In the matter of an Application under and in terms of the Article 126 read with the Article 17 of the Constitution.

1. M. G. Nishantha Rupasinghe
   No. 59, Vihara Mawatha,
   New Puttalam Road,
   Pothanegama.

PETITIONER

Vs.

1. Dharmakeerthi Wijesundera
   No. 280A, New Town, Anuradhapura.

2. Viraj Perera
   Commissioner of Local Government
   Office of the Commissioner of Local Government Office,
   Provincial Council Building of the North Central Province,
   Anuradhapura.

3. Dumindu Dayasena Retiyala
   (Member of the Municipal Council of Anuradhapura)
   "Hotel Thammenna", Airport Road,
   Anuradhapura.

4. Headquarter Inspector of Anuradhapura
   Headquarter Inspector's Office,
   Anuradhapura.

5. W.M.R. Wijesinghe
   Assistant Divisional Secretary
   Divisional Secretariat Office (Negenahira Nuwaragampalatha), Anuradhapura.

6. Divisional Secretary
   Divisional Secretariat's Office
   (Negenahira Nuwaragampalatha),
   Anuradhapura.

7. Dayananda,
   Grama Niladari,
   No. 258, Thulana, Anuradhapura.

8. Dissanayake (Sub Inspector of Police),
   Police Station, Anuradhapura.

9. Rupasinghe (Police Sergeant – 24707),
   Police Station, Anuradhapura.

10. Nalaka (Police Constable – 9241)
    Police Station, Anuradhapura.

11. Jagath (Police Constable – 46768),
    Police Station, Anuradhapura.

12. Sirimal (Police Constable – 62953)
    Police Station, Anuradhapura

13. Keerthi (Police Constable – 22255)
    Police Station, Anuradhapura.

14. Inspector General of Police,
    Police Headquarters, Colombo 1.

15. Provincial Commissioner of Lands,
    North Central Province,
    Kachcheri Building, Anuradhapura.

16. The Hon. Attorney General
    Department of the Attorney General.
    Colombo 12.

RESPONDENS

BEFORE: Upaly Abeyrathne J.
Anil Gooneratne J. &
Prasanna S. Jayawardena P.C., J

COUNSEL: Saliya Peiris with Thanuka Nandasiri for the Petitioner

Upali Jayamanne for the 1st and 3rd Respondents

Dr. Avanti Perera S.S.C. for the 5th, 6th 15th & 16th Respondents

2nd, 7th – 13th Respondents are absent and unrepresented

ARGUED ON: 06.02.2017

DECIDED ON: 23.02.2017

GOONERATNE J.

The Petitioner is a retired Police Officer who has filed this application complaining that some of the Respondents forcefully entered his land and attempted to clear the land and cause certain destruction and even demolished Petitioners fowl pens. He refers to three incidents, for which the Respondents are responsible for causing damage to his property. In the manner described in the petition of the Petitioner I note the following.

(a) On 19.06.2011, the 2nd and 3rd Respondents with several others tried to forcefully enter the Petitioner's land claiming that the land had been leased to the 1st Respondent. Petitioner warned the gathering of people who entered the premises, of making a police complaint against them. Thereafter they left the property.

(b) On 24.06.2011 the 1st Respondent along with two others entered the property and started to clear the land. Petitioner objected to this and threatened to complain to the police. Thereafter the 1st Respondent and the other two persons left the property.

(c) On 23.01.2012 1st to 3rd and 7th Respondents to 13th Respondent and three other civilians forcefully entered the Petitioner's property and demolished the Petitioners fowl pens. On the next date on 24th January, Petitioner lodged a complaint with the police (P8). I also note the other documents produced along with P8, Photograph of the fowl pen after illegal acts P8A-P81. Two video CDs containing illegal arbitrary acts of 1st to 13th and 7th to 13th Respondents.

There is also reference to District Court, Anuradhapura Case No. 24613/L whereas Petitioner sought a declaration of rights to possession. This action was filed as the Petitioner had reliable information that 1st and 3rd Respondents were attempting to forcefully enter Petitioner's land with a view of starting a Tourist Hotel. Petitioner pleads he has also sought an interim injunction to prevent acts of 1st to 3rd Respondents. Petitioner states that whilst the inquiry into the interim injunction was pending 1st to 3rd with 7th to 13th

Respondents acted illegally as described in (c) above. According to him acts of demolition was done to make nugatory the Petitioners District Court action. However the Petitioner states the District court granted an interim injunction against the 1st to 3rd Respondents.

There is another incident described in the petition. That is on 23.12.2005 the 1st Respondent had come to his residence and abused his wife and again tried to forcefully enter the premises. Thereafter his wife filed action in the District Court for declaration of right of possession (case No. 21034/L) Petition is so prepared to project land disputes between the 1st Respondent his wife and other relatives, which has a history. There is reference to several other cases i.e possessory action, land disputes, declaration on land permits etc.

This court on or about 11.07.2012 granted leave to proceed for the alleged violation of Article 12(1) of the Constitution against the 2nd, 3rd and 7th to 13th Respondents. On the date of hearing learned Senior State Counsel informed court that no objection would be filed on behalf of the 5th ,6th ,15th and 16th Respondents. 2nd , 7th – 13th Respondents were absent and unrepresented though duly noticed. Court was also informed that the 2nd Respondent had expired. Learned Counsel who appeared for the 1st and 3rd Respondents denied any liability and submitted to court that the material placed before court does

not indicate any involvement of his clients, and or even to connect them with the alleged incidents relied upon by the Petitioner.

With regard to the Petitioner's claim that, on 23rd January 2012, the 1st to 3rd and 7th to 13th Respondents forcibly entered his land and demolished his fowl pens, counsel for the 3rd Respondent stated that, the 3rd Respondent did enter the Petitioner's land on that day but denied that any wrongful or unlawful act was committed. There is no reliable material before Court to substantiate the Petitioner's claim that any of the other Respondents entered the Petitioner's land. There is no evidence to suggest that the 3rd Respondent committed any act which is wrongful or unlawful since a viewing of the Video CD only shows a few men clearing a land which is overgrown with some plants. There is no sign of any fowl pens on the land. There are a few seconds of a video recording of a man breaking a section of a low wall which is about a foot high but he is doing that without any objection by any person. There is no evidence of any force or violence being used or of any threatening language being used. Instead, there is an amicable conversation between some men, one of whom appears to be the Petitioner from the contents of the dialogue, discussing the fact that, there are Court cases pending in the District Court over who has the rights to the land and that this dispute will have to be referred to the District Court to be resolved. Further, there is no evidence that the 3rd Respondent was acting under the

colours of his office as a member of the Municipal Council of Anuradhapura. In fact, this land is outside the Municipal Limits of Anuradhapura. All this establishes that whatever occurred on 23rd January 2012 was a private dispute between the Petitioner and the persons who entered his land on that day and that the Petitioner's remedy, if any, is a civil action for damages. In fact, counsel for the Petitioner admitted that such an action has been field in the District Court.

This court having considered the material placed before court cannot arrive at a definite finding of a violation of a fundamental right. The three incidents discussed above and the other incident alleged to have taken place on 23.12.2005 does not take the petitioner's case any further to justify a violation of a fundamental right. I am unable to find material to corroborate any one or more of such incidents. If at all incident at (c) above though suggest unlawful entry to Petitioner's land, the available material do not directly implicate any one or more of the Respondents. Police statement P8 refer to some names, but I am unable to really pin point as to who would be held responsible amongst the Respondents. Even the video CDs would not identify the Respondents. On this I have to pose the questions who? When? And where? Above all the question of identity is in grave issue. Even if this court takes a liberal view of the provisions of Article 126, I am unable to declare a violation and a liability in the public law

of the State, unproved and unestablished incidents cannot form the basis of a Fundamental Rights Application. Whatever allegation or incident should be proved to the satisfaction of court.

For the reasons set out above, I am of the view that no fundamental rights of the Petitioner has been violated. The Petitioner's Application is therefore refused and dismissed. There will be no costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne 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 a Fundamental Rights
Application in which Leave to Proceed
Was granted under Articles 11, 13(1)
And 13(2) of the Constitution.

Chaminda Sampath Kumara
Wickremapathirana.
Maithri Mawatha,
Walgama, Welimilla Junction.

Petitioner

SC FR Application No**. 244 / 2010**

Vs

1. Sub Inspector Salwatura,
   Police Station, Bandaragama.
2. Sergeant Manoj, Police Station,
   Bandaragama.
3. Constable Ashoka, Police Station,
   Bandaragama.
4. Seargeant Kithsiri , Police Station,
   Bandaragama.
5. Security Assistant Dissanayake,
   Police Station, Bandaragama.
6. Charles Wickremasinghe,
   Officer in Charge,
   Police Station, Bandaragama.
7. Assistant Superintendent of Police,
   Prasad Ranasinghe, Panadura Division,
   ASP's Office, Panadura.
8. The Inspector General of Police,
   Police Headquarters,
   Colombo 01.
9. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

BEFORE : **S. EVA WANASUNDERA PCJ.**
UPALY ABEYRATHNE J &
H.N.J. PERERA J.

COUNSEL :Ms. Ermiza Tegal with Shalomi Daniel for the Petitioner.
Jagath Abeynayake for the 1st to 5th Respondents.
Madhawa Tennekone, SSC for the 6th to 9th Respondents.

ARGUED ON 06.03.2017.

DECIDED ON 30.05.2017.

S. EVA WANASUDERA PCJ.

In this matter, Leave to Proceed was granted under Articles 11, 13(1) and 13(2) of the Constitution on 17.05.2010. The Petition was filed in this Court on 30.03.2010.

Chaminda Sampath Kumara was 31 yrs. He was a labourer. He has had no previous conviction of any offence or even a complaint against him prior to the incident which is the basis of the case in hand. He has come before this court complaining about his arrest by the Police and how much of physical and mental pain he had to go through until he was produced before the Magistrate. He has sought relief in respect of violation of his fundamental rights guaranteed by and under the Constitution. This court has granted leave to proceed under Articles 11, 13(1) and 13(2) of the Constitution.

Article 11 reads:
" No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. "

Article 13(1) reads:
" No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest. "

Article 13(2) reads:
" 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 incident which has happened prior to the filing of this Petition by the Petitioner can be narrated in summary as follows. One householder namely Wanshawathie in the Bandaragama area had complained to the Police that when she had gone out of the house during the day time on 12.10.2008, for a wedding, her house had been burgled by some person or persons and she had lost a gold ring, a mobile phone and money , the value of all of which were twenty three thousand rupees. (Rs. 23000/-). With regard to this burglary, as it is stated as such by the Police, the Petitioner was apprehended and brought to the Police Station of Bandaragama. No goods were found in his custody or found elsewhere at all. There had been two pawning receipts in the house where the Petitioner was living with his mother , sisters and brothers but neither of the said receipts were with regard to the lost ring claimed by Wanshawathie, the complainant of the day time burglary. According to the Petitioner, the pawning receipts which were found in the Petitioner's house and taken by the police by force, belonged to the Petitioner's sister and a friend who had pawned their own jewellery.

However, the Police had filed two cases in the Magistrate's Court of Bandaragama against the Petitioner with regard to this incident. **The Magistrate had acquitted the Petitioner of all charges since the evidence before court, of the police officers who did the arrest of the Petitioner and of the complainant Wanshawathie , did not bear an iota of evidence against the Petitioner.**

The Petitioner states that he was arrested on **20.05.2009** at around 11.00 a.m. when he was returning home by foot from a shop close to his house with a bag in his hand which contained chicken meat. The Petitioner was taken to his house by the 1st Respondent who was in police uniform along with four other police officers

and after searching the house and finding two gold pawning receipts therein had put the Petitioner in the Police Jeep wherein there was another villager by the name Nuwan. The Police Jeep arrived at the Police Station at about 1.00 p.m. and later on, the Petitioner had been taken to the Police barracks. He had then been subjected to torture after removing his clothes, assaulted with a club and a hose pipe and forced him to eat 'kochchi miris' and later poured crushed kochchi miris into his eyes and nose, questioning him whether he had any jewellery in his possession. At 6.00 p.m. on the same day, his brother had visited him at the Police Station and wanted to get him released. The Petitioner had informed the brother how he was tortured and at that time he had difficulty in breathing and had experienced blurredness of vision. The Police had told the brother that the Petitioner would be released shortly but it did not happen. When the Petitioner was screaming in pain the 1st Respondent had threatened to falsely charge the Petitioner with having a bomb in his possession and imprisoning him.

The next day, on 21.05.2009, the Petitioner's mother and the siblings and their families had all gone to the Police Station to visit him. When the Petitioner's sister, Achala inquired about bail for him or release of him, the 2nd Respondent had informed her that there is a detention order against the Petitioner and therefore he could be detained by the Police for five days. **The family visited the Petitioner each and every day till 26.05.2009, i.e. the day the 6th Respondent had informed that the Petitioner would be produced before the Magistrate.** The Petitioner was **not produced** before Court **even on 26.05.2009.**

The Petitioner's family members had advocated the Petitioner's release with higher officials of the Police. Further more, the Petitioner's sister Achala had made a complaint regarding the Petitioner's illegal detention and torture at the Bandaragama Police Station, to the Human Rights Commission. That Complaint is before this Court marked as **P1**. It gives precisely the date the Petitioner was arrested as 20.05.2009 and the time as 11.30 a.m.; the fact that the Petitioner is being tortured inhumanely by the Police; the fact that the Police has been postponing the Petitioner being produced before the Magistrate and **begs the Human Rights Commission to intervene and get the Petitioner to be produced in Court.**

The next day, i.e. **on 27.05.2009** , the Petitioner was not produced in the morning but as alleged by the Petitioner, after taking his signature on a blank paper, later

on in the day, at about 1 p.m. the Petitioner had **been finally produced before the Magistrate** under two case numbers, 44655/09 and 44663/09 charging him for housebreaking and theft. The certified copies of the two case records upto the date of granting personal bail to the Petitioner have been produced before this Court **as P2A and P2B**. The Petitioner had pleaded not guilty and was granted personal bail by Court. On the same day night, the Petitioner was admitted to Panadura Base Hospital due to the severe body aches and pains he had suffered as a result of torture. The Judicial Medical Officer had examined him and discharged him on 29.05.2009. The Medico Legal Report is marked **as P3** and produced before this Court. The history given by the patient, the Petitioner, states that on two dates, i.e. the 20th and 24th of May,2009, he was "hung up and beaten by the Police" and 'kochchi miris' was poured into his eyes.

The Complaint by the Petitioner himself to the Human Rights Commission was accepted by the said Commission and that letter is marked **as P4** and produced before this Court. P4 indicates that the Petitioner had lodged the Complaint on 05.06.2009 and that the number of the complaint registered is HRC 2491/09. Affidavits of the brothers, brothers in law, sisters in law and friends narrating the events that had taken place from the 20.05.2009 to 27.05.2009 are placed before this Court marked **as P5A to P5G.** These seven affidavits state the incidents in detail.

The 1st to 5th Respondents are Sub Inspector Salwatura, Seargeant Manoj, Police Constable Ashoka, Seargeant Kithsiri and Security Assistant Dissanayake. The 6th Respondent is the Officer in Charge of the Bandaragama Police Station, Charles Wickremasinghe. The 7th Respondent is the ASP Prasad Ranasinghe. The 8th Respondent is the IGP and the 9th Respondent is the Hon. Attorney General. The reason for placing the names of the Respondents herein, at this juncture is that they are referred to in the evidence before court by way of affidavits by their names and it is easy to follow by the name. At the time of hearing this matter, it was brought to the notice of Court that the **2nd Respondent is already dead**. After some of the Respondents filed their objections, the name of another Police Officer called Lasantha , Police Constable 66649 had come up in the objections and on that account, the Petitioner moved this Court to add the said Lasantha as the 10th Respondent. This Court had not allowed the said application. Counsel for the 1st to 5th Respondents, Mr. Jagath Abeynayake made submissions before this Court and referred to the Statements of Objections filed by each Respondent and

the affidavits affirming the contents of the Statements of Objections. The 6th to 9th Respondents were represented by Mr. Madhawa Tennekone, Senior State Counsel at the hearing of this matter. He relied on the Affidavits which were filed by the 6th and 7th Respondents on behalf of the 6th to 9th Respondents.

The Affidavit of the **6th Respondent** confirms the position of the Petitioner that the **Petitioner's relatives met him on 25.05.2009** and that the **6th Respondent had informed the relatives that the Petitioner will be produced in Court on 26.05.2009** as stated in paragraphs 6 and 7 of the Affidavit. Thereafter, **ironically,** in the same Affidavit, this Officer in Charge of the Bandaragama Police Station states in paragraph 9(a) of the same Affidavit that the **Petitioner was arrested on 26.05.2009 at 6.20 p.m.** How could the OIC have said on the 26th that the Petitioner would be produced in Court on the 26th if he had not been arrested prior to the 26th? The 6th Respondent has contradicted his own statement in his own affidavit. This confirms the Petitioner's position that he was arrested prior to 25th and produced in Court on the 27th. The 6th Respondent admits that the Petitioner was produced on the 27th in paragraph 9(c) of the Affidavit.

In the same Affidavit , the 6th Respondent alleges that the Petitioner had not complained to the Magistrate about inhuman treatment. Nobody who was tortured at a police station would ever be not scared to complain to the judge at such a time when he was at the mercy of the judge and the police to get bail. If any human being gets tortured by the police at any time, the victim by that time has lost confidence of the whole system of justice in the country. Such a person would not have any other feeling than to be wanting to live by getting away from the custody of the police for the time being. He would not be in his proper senses as to think what could be done next. He would have suffered mentally and physically inside a cell, without anybody to give him food or drink or medicine or to save him from the torture that he was undergoing for the period he was within the Police Station in the recent past, for whatever number of hours or days he was tortured.

The victim of torture in the hands of the police who was holding power over him perhaps would never make up his mind to complain against the police. When a human being gets beaten on the body by another holding more power than himself, the first paid is the body pain and the second pain is the mental pain. I would analyze the mental pain to be much more than the physical pain. The

physical damage may be cured with the help of medical professionals and the medicine available at the time and era when the physical damage is done to a 'body' but the mental damage is definitely not something which can be cured that easily. If I were to say that mental pain can never be cured, that is reality of life. Every time the human being who was subjected to torture of any kind remembers the same, the mind projects the scenario in front of him. Then the tears and the pain that causes the tears, spring out of this body automatically and no one could ever say when that horrible feeling would go away. The damage caused mentally, in reality, is thererfor permanent for this life.

In the case in hand, the **6th Respondent OIC has pointed out that the Petitioner had not complained of any torture to the Magistrate at the time he was produced before the Magistrate.** I find that he had pleaded so, to get advantage from such a lapse by the Petitioner. In the case of ***Sudath Silva Vs Kodithuwakku 1987 2 SLR 119***, Justice Atukorale has stated that **"** the failure of the Petitioner to complain to the Magistrate before whom he is produced **must be viewed and judged against the backdrop of his being at that time, held in police custody with no access to any form of legal representation."** The OIC of any police station should have control over the officers of that station and he should be responsible for what has happened in the police station or the barracks or about whatever action is taken by any police officer in his station with regard to a complainant or a suspect.

The 7th Respondent has filed documents 7R1 and 7R2 along with his affidavit of objections. 7R1 is the complaint made to him by the Petitioner regarding the actions of torture by the Police officers, on 19.06.2009. I find that the contents of the said statement made before the 7th Respondent by the Petitioner is consistent with his Petition before this Court. Document 7R2 is the final report of the inquiry held by the inquiry officer which states that Inspector of Police Salwathura had pleaded guilty of charges levelled against him, and that he was punished with "placing red markings in his trainee file ". The inquiry report and the police statements have been filed in this court by the State on 15.11.2010. However, this is an instance where the 1st Respondent had admitted and found guilty of wrong doing as complained by the Petitioner to the ASP, at the end of a disciplinary inquiry. Even though I find that the punishment doled out to Salwatura is abundantly less than what it should have been, proportionate to the wrong doing, one aspect is clear. That fact is, " the fact that the 1st Respondent has

admittedly tortured the Petitioner as well as proven to have done so after a full inquiry held by the 7th Respondent who is his disciplinary authority".

I would like to consider the Affidavit filed by the 1st Respondent, Salwatura. While denying everything in the Petition of the Petitioner, Salwathura had stated that the Petitioner was arrested on the 26th of May, 2009 at 6.20 p.m. on information received by the police and it is reflected in the Information Book under GCIB 176/116. However he has **not annexed even a copy of the said entry before this Court. He had failed to place proof of the date and time of arrest which is crucial to** the Application of the Petitioner before this Court. The **documents** Salwathura had filed along with his own affidavit **are other affidavits** of other persons marked as Y1, Y2 and Y3. They are affidavits of suspects who were in police custody at the particular period complained of, affirming that during the period of 20th May to 26th May, 2009 there was no person by the name of the Petitioner in the cutody of the Police at Bandaragama.

In the first instance, how can an Inspector of Police expect any Court of this country to act on affidavits by some other suspects who were at that time, in the custody of the police officers in the said police station. The said suspects are also under the power and authority of other police officers, in the 'cell of the suspects behind bars'. When asked for affidavits confirming **the absence** of another suspect by an Inspector of Police, can that suspect decline to give such affidavits? Do those suspects have any idea of who the other suspect is or what name the other suspect bears or any internal matters of the police? Do the inmates in a police cell know what each others' names are? To place this kind of very low standards **of proof of absence** of the Petitioner, during that period, inside the Police Station, is **incredible.** I view this kind of action as despicable and absurd. No court would be ever willing to rely on affidavits by suspects and detainees in the custody of the police, to safeguard the police officers under whom the said suspects and detainees were living their lives inside the cell of the police station, during that period. I do not find any evidential value in the said documents.

The 1st Respondent has challenged document marked P5A filed by the Petitioner, which is an Affidavit by the Petitioner's brother in law who had been a police constable at the Vavunia Police Station before being dismissed from service on a charge of misappropriation of funds. He has also alleged that the author of P5A is an accused in a Magistrate's Court case in Vavunia and that the 1st Respondent

was assigned to arrest him at that time and therefore the Petitioner had acted mala fide in instituting this action. In the same run, the 1st Respondent states further that all the 1st to 5th Respondents had to carry out duties regarding the investigations and arrest against the said brother in law of the Petitioner, the author of Affidavit P5 and hence the Petitioner has acted mala fide against all these five Respondents**. Yet I do not find any documents in proof of what the 1st Respondent has stated.** He has not filed any case number in MC Vaunia; he has not filed evidence to show that he was assigned to arrest the author of P5A; he has not filed any material with regard to what kind of misappropriation of funds and whether it is government funds or private funds. He has not filed any material to prove that the 1st to 5th Respondents were assigned to carry out investigations regarding that matter. It is just another statement. Court cannot find out the truth about those matters or verify any statement which he has made.

The Petitioner had filed a counter affidavit against the said statements of the 1st Respondent dated 24.01.2011 and denied totally the allegations as mentioned above and further states that there is **no such case** against the author of P5A, who is the brother in law of the Petitioner. The said brother in law has a civil case for recovery of money against him by a Bank. The counter affidavit claims that the said brother in law had been pressurized by the police officers **to demand that the Petitioner should withdraw this Fundamental Rights Application filed against them.**

In the counter affidavit filed by the Petitioner, he reiterates that he has filed this application to vindicate his rights and seek redress in view of the serious and degrading acts of torture, arbitrary arrest and detention and for no other reason.

The Affidavit filed by the 2nd Respondent has annexures 2Y1 to 2Y5. By 2Y4 and 2Y5 the 2nd Respondent tries to explain that he was not in the police station from the 24th to the 27th May, 2009. The Petitioner has complained that the 2nd Respondent was involved in the arrest of the Petitioner and torture on the date of the arrest on the 20th of May, 2009. The other documents are again affidavits by the inmates of the police cell which cannot be taken as valid evidence of the absence of the Petitioner in police custody. I am also of the view that those in the custody of the police cannot become aware of all other things that happen in the premises of the police station such as in the barracks of the police wherein the

Petitioner claims that he was tortured. I reject the contents of the affidavits of the detainees and others in custody.

The Affidavits filed by the 3rd, 4th and the 5th Respondents are also in the same lines as the affidavits filed by the 1st and the 2nd Respondents. The contents seem to be an attempt to state that the Petitioner was not taken into custody on the 20th May, 2009 and that they were not inside the police station but were on duty out of the police station implying that they could not have tortured the Petitioner at the times that he claims such actions were done.

The Petitioner has continuously been stating that he was arrested by the 1st Respondent who was in police uniform along with four other police officers who were in civilian clothes on the 20thMay, 2009 . When the Petitioner was returning home from a boutique where he had gone to buy 500 grams of chicken meat by foot, he had seen a jeep of the Police parked alongside the road near Walekade junction. The police officers had been changing a flat tire of the jeep. The 4th Respondent had held the Petitioner and asked what he was carrying. Then the 2nd Respondent too had inquired about the Petitioner's name and when the name "Chaminda" was mentioned, the 2nd Respondent had said "you are the man" and taken him to his house which was about 150 meters away from the jeep dragging him from the collar of his T-shirt. His room was searched by the police officers and they found two gold pawning receipts which allegedly belonged to the Petitioner's sister and a friend by the name of Udayanga.The Police officers had however taken the two receipts against the wishes of those in the house. The Petitioner had been taken to the Police Station. His brother Samantha who came to the Police Station had been chased out.

The Petitioner had been taken to the police barracks. The officer in a sarong in the barracks was the 3rd Respondent. The 1st , 2nd and the 3rd Respondents had commenced the torture then by ordering the Petitioner to remove all his clothes. He was made to kneel down with his hands lifted up. He was ordered and made to eat kochchi miris brought by the 5th Respondent. The 3rd Respondent wearing only a sarong had made the Petitioner sit on the floor and tied up his hands at the back. The 2nd Respondent tied up his feet with a strip of cloth at the ankles. Then the 2nd Respondent had sat behind the Petitioner on a chair and pulled the Petitioner's head back, kept it in between the 2nd Respondent's knees and held the head back tight in that same position. He then poured crushed kochchi miris

into the Petitioner's eyes and nose. He was questioned whether he had any jewellery with him. The Petitioner had denied. Then the 2nd Respondent had ordered the Petitioner to lie down on his back and they trampled the chest, the legs and poured kochchi miris once again into the eyes and nose. When the Petitioner screamed and denied having anything to do with any jewellery being in his possession, they assaulted him with a hose pipe and a club looking like a broom stick.That was the nature of the torture. On the following days after the 20th until the 26th he was again tortured having hung him up on a 'mol gaha' having tied up his ankles and wrists.

The medico legal report states that there were healing wounds at the wrists and the ankles. The history given is consistent with the wounds. At the inquiry by the ASP an identification parade was conducted to identify the police officers who had tortured him. The narration given to the Human Rights Commission and the ASP by the Petitioner is the same. The same words were repeated and the way he was tortured was told in the same manner.

This Court has granted leave to proceed and directed the 7th Respondent ASP and the SSP Panadura to forward to the Supreme Court, the reports, proceedings and statements relating to the inquiry held on the complaints made by the Petitioner against the 1st to 5th Respondents. I have gone through the said reports, proceedings and statements and find that they are consistent with what the Petitioner has placed before this Court by having placed the evidence by way of Affidavits.

The case in hand being one of torture which is not reflected very well on the face of the Medico Legal Report, I wish to quote Justice A.R.B. Amarasinghe in his book by the name "Our Fundamental Rights of Personal Security and Physical Liberty" . He states that "….Lastly, traces of torture or ill treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torturing itself leaves……few external marks".

The 1st to 5th Respondents have used 'kochchi miris' as the substance used to torture the Petitioner firstly making him eat it which burns the toungue totally, for hours on end, if bitten bare. Thereafter they had poured the juice into the eyes and the nose which pain nobody would have experienced in normal life and **the extent of the pain cannot be ever imagined by any human being**. That kind

of torture is unheard of, but for sure the said Respondents did not leave any marks of torture. That is the very reason they have used such an unusual kind of torture which the medical experts could not trace. The beating was done with a hose pipe, which once again, does not leave marks on the skin. The only marks which had left a trace by 29th May, were the marks on the wrists and the ankles of the Petitioner by which he was hung up on a 'mol gaha' parallel to the ground and beaten. The fact that the Petitioner had gone to the hospital and was admitted to the hospital and was treated for the aches and pains of the body and kept in the hospital for three days itself speaks out to confirm the history given by him to the JMO who has written the MLR.

Even though the perpetrators had tortured the Petitioner leaving only the few external marks on the body, that itself is good enough to prove the extent of torture, **due to the unwavering narration of the way he was tortured consistently before the inquiry by the ASP, before the Judicial Medical Officer and before this Court.**

The Torture Act No. 22 of 1994 , Sec. 12 defines torture a follows:

" Torture with its grammatical variations and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act which is -

(a) Done for any of the following purposes:
    i. Obtaining from such person or a third person any information or confession,
    ii. Punishing such other person for any act which he or a third person has committed, or is suspected of having committed or
    iii. Intimidating or coercing such other person or a third person or
(b) Done for any reason based on discrimination, and being in every case, an act, which is , done by, or at the instigation of, or with the consent or acquiescence of , public officer or other person acting in an official capacity."

I hold that the torture done to the Petitioner by the 1st to the 5th Respondents fall within this definition. The evidence before us placed by the Petitioner and the evidence placed by the Respondents have been considered by this Court.

This Court has analyzed the matters before us and has come to the conclusion that the 1st to the 5th Respondents have committed the act of torture on the Petitioner.

The Petitioner did not know why he was arrested at the time of arrest. His house was searched without a search warrant. The Respondents had failed to bring forth the so called 'information' given to the Police to suspect the Petitioner to be the person who might have committed house breaking. **The procedure of arrest is wrong.**

The Petitioner had been kept within the police station from the 20th May to the 27th May,2009 **illegally by the 6th Respondent as OIC of the Police Station,** Bandaragama. I hold that the 1st to 6th Respondents have violated Articles 13(1) and 13(2) of the Constitution.

I have also considered the case law of this country which is contained in many authorities which I do not want to discuss at length at this juncture as it would only lenghthen this judgment unnecessarily.

The case law contained in ***Muttusamy Vs Kannangara 52 NLR 324, Premalal de Silva Vs Inspector Rodrigo 1991 2 SLR 307, Navasivayam Vs Gunawardena 1989 1 SLR 394, Piyasiri Vs Fernando ASP 1988 1SLR 173 and Elasinghe Vs Wijewickrema and Others 1933 1 SLR 163*** have been considered by me. The counsel for the Petitioner had filed some unreported cases after the hearing was concluded. They are ***M.D,Nandapala Vs Sergeant Sunil and Others – SCFR 224/2006 – which was decided on 27.04.2009 and H.M.Y.I.Herath Vs Ajith Police Constable - SCFR 555/2009 – which was decided on 18.02.2014.*** I have considered those judgments as well.

I hold that the 1st to 5th Respondents have violated the Petitioner's fundamental rights guaranteed to him by Article 11 of the Constitution. I hold that the 1st to 6th Respondents have violated the Petitioner's fundamental rights guaranteed to him by Article 13(1) and 13(2) of the Constitution.

I order that compensation of Rs. 500,000/- be paid to the Petitioner by the 1st , 3rd, 4th and 5th Respondents, each one paying Rs.125000/- personally to the Petitioner. I order that the State should pay to the Petitioner a further sum of Rs. 500,000/- for and on behalf of the 6th Respondent who had totally failed to keep any control over the police officers and/or allowed them to do the wrongful acts to the extent it was done at the Bandaragama police station. I further order that costs of suit also be paid by the State.

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 and in terms of Articles 17 and 126 of the Constitution of the Republic.

Dr. Nalin de Silva
109/1,
Railway Avenue,
Maharagama.

S.C. FR Application No.308/2015

Petitioner

1. Ranil Wickremasinghe,
   Prime Minister of Sri Lanka,
   Prime Minist4r's Office
   No.58, Sir Earnest De Silva
   Mawatha,
   Comobmbo 07,
   Sri Lanka.

2. DEW Gunasekera,
   Former Minister of Rehabilitation and Prison Reforms.
   Communist Party of Sri Lanka,
   Headquarters, 91, Dr. N.M.Perera Mawatha,
3. Dhammika Dassanayake
   Secretary General of Parliament
   Parliament of Sri Lanka
   Sri Jayewardenepura Kotte,
   Sri Lanka.

4. P.B.Abeykoon
Secretary to the President,
Presidential Secretariat
Galle Face
Colombo 01.

5. Sujeeva Senasinghe
Former Member of Parliament
Deputy Minister of Justice,
Ministry of Justice – Sri Lanka
Superior Courts Complex
Colombo 12.

6. Arjuna Mahendran, Governor
Central Bank of Sri Lanka
P.O.Box 590, Janadhipathi Mawatha
Colombo o 1.

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7. Perpetual Treasuries Ltd.,
10, Alfred House Gardens,
Colombo3.

8. Chamal Rajapaksa,
(former) Speaker, Parliament of Sri Lanka,
c/o Secretary General of Parliament of Sri Lanka
Sri Jayewardenepura Kotte,
Sri Lanka.

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

BEFORE: **WANASUNDERA, P.C. J.**
ALUWIHARE, P.C. J.
SISIRA J. DE. ABREW, J.

COUNSEL: Rajpal Abeynayake for the Petitioner.
K.Kanag-Iswaran, PC with Suren Fernando instructed by G.G.Arulpragasam for the 1st Respondent.
Farnas Cassim with Janaka Basuriya instructed by Lanka Dharmasiri for the 5th Respondent.
Dr. Harsha Cabral, PC with Buddika Illangatillake and Sasheen Arsakularatne instructed by Julius and Creasy for the 6th Respondent.
S.A.Parthalingam, PC with Niranjan Arulpragasam for the 7th Respondent.
Milinda Gunatillake, DSG with Dr. Avanti Perera, SSC for the 3rd, 4th and 9th Respondents.

ARGUED ON: 05.08.2015 and 02.02.2016

DECIDED ON: 22.02.2017

WRITTEN SUBMISSIONS ON: 10.08.2015 (By the 6th Respondent)
11.08.2015 (By the 1st Respondent)
11.08.2015 (By the 7th Respondent)
11.08.2015 (By the 4th and 9th Respondents)
13.08.2015 (By the Petitioner)

ALUWIHARE, PC. J

When this matter was taken up for support, the learned President's Counsel for the 1st Respondent raised the following Preliminary objections as to the maintainability of this application.

(a) The Petitioner does not disclose a violation of any right guaranteed under article14(A) of the Constitution.

(b) The Petitioner does not disclose a violation of any right guaranteed under Article 12(1) of the Constitution

(c) The relief sought should not be granted in view of the provisions of the Parliament (Powers and Privileges) Act.

Background to the instant application:

The Petitioner had averred, that the Central Bank of Sri Lanka (hereinafter referred to as the CBSL) held an auction for Treasury Bonds on the 27th February,2015 and the Petitioner had come to know through the media that irregularities had taken place with regard to the issuance of the Treasury Bonds at the auction referred to and alleges that these irregularities had resulted in a considerable loss to the Government of Sri Lanka. Petitioner had stated that a Consultative Committee (COPE) consisting of five members of Parliament headed by Mr. D.E.W.Gunasekera probed into the said issue of Treasury Bonds.

The gravamen of the Petitioner appears to be the non-release of the interim report of the said Committee, referred to above.

Among other reliefs, the Petitioner had sought a directive by way of interim relief from this court, on the Chairman of COPE or the former Speaker of the Parliament or the Secretary General of Parliament to release the COPE interim

report and had also sought a declaration, that the fundamental rights of the, Petitioner, guaranteed under Article 12(1) and 14(A) had been infringed.

I shall now consider the Preliminary objections raised in the sequence, they are enumerated.

It was the contention of the learned President's Counsel for the 1st Respondent that the Petitioner had not disclosed a violation under article 14A of the Constitution. The learned President's Counsel contended that under Article 14A, a citizen's right, to access information is restricted in that, such access must be provided for by law and it is further restricted to those institutions specified in the same Article.

For ease of reference, Article 14A of the Constitution is reproduced below:

(l) Every citizen shall have the right of access to any information ***as provided for by law,*** *being information that is required for the exercise or protection of a citizen's right* ***held by:***

(a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;

(b) any Ministry of a Minister of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;

(c) any local authority; and

(d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph.

(2) No restrictions shall be placed on the right declared and recognised by this Article, ***other than such restrictions prescribed by law*** *as are necessary in a*

democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, ***protection of parliamentary privilege,*** *for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary.*

(3) In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens." (emphasis added)

When one considers the information to which the Petitioner is seeking access, the COPE report is not held by any of the entities referred to in the Article and it has to be concluded that any information held by the Parliament falls outside the pale of Article 14A of the Constitution.

On the other hand the Petitioner had neither relied on nor referred to, any provision of the law in terms of which, such information becomes accessible.

The learned Deputy Solicitor General whilst concurring with the submissions made on behalf of the 1st Respondent, submitted that in terms of Article 14A, there has to be an enabling law under which the access to information is provided for. He further contended that, other than the reference to the case law referred to in paragraph 17 of the Petition and which is also referred to in the document marked and produced as P10, the Petitioner has not referred to any positive law under which, the Petitioner becomes entitled to the information sought.

The counsel for the Petitioner argued that the courts in Sri Lanka had recognized by implication that there is a right to information and referred to the case of *Environmental Foundation v. UDA 2009 1SLR 123.*

It was held in the said case that *"Although the right to information is not specifically guaranteed under the Constitution as a fundamental right, the freedom of speech and expression including publication guaranteed under Article 14(1)(a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain ……"*

With the enactment of Article 14A, however explicit constitutional guarantee is now bestowed on the citizen. The said constitutional guarantee which were hitherto implicit now operates as an explicit right within the parameters of Article 14A. I see no conflict between the *ratio decidendi* in the case referred to above and the new Article 14A which was introduced by the 19th Amendment to the Constitution.

What is significant to note is that, what the Supreme Court recognised, in the case referred to , is the right of a person to secure information from a public authority in respect of a matter that is within public domain.

Article 14A has now specified the public authorities from which information can be secured. In the present application the Petition seeks to secure information from the Parliament, more specifically Parliamentary Committee on Public Enterprises (COPE).

Article 14A has left out the Parliament from the list of specified institutions, understandably so in view of Article 4C of the Constitution. Article 4(C) specifically ousts the exercise of judicial power, in regards to matters relating to the privileges, immunities and powers of Parliament.

Furthermore nowhere in the body of the Petition, had the Petitioner averred to an infringement of Article 12(1) of the Constitution, although the Petitioner had prayed for a declaration of an infringement of Article 12(1)

For the reasons stated above, I uphold the objections (a) and (b) that have been raised on behalf of the 1st Respondent.

The final objection raised on behalf of the 1st Respondent was, that the relief sought by the Petitioner cannot be granted in view of the provisions of the Parliament (Powers and Privileges) Act (hereinafter also referred to as the "Act").

From the averments contained in paragraph 34 of the Petition, it appears that, the information he is seeking access to; the COPE interim report, is yet to be reported to the Parliament nor has it been placed before the Parliament. In this context, it would be relevant to consider the provisions of the Act, in deciding as to whether the Petitioner would be entitled to the impugned information.

Section 17 of the Act stipulates that:

> *No member or officer of Parliament and no shorthand Writer employed to take minutes of evidence before the House or any committee shall give evidence elsewhere in respect of the contents of such evidence or of the contents of any manuscript or document laid before Parliament or any committee or in respect of any proceedings or examination had at the Bar or before any committee of Parliament without the special leave of Parliament first had and obtained.*

Section 22 of the Act states that :

(1) Each of the acts and omissions specified in the Schedule to this Act is hereby declared to be a breach of the privileges of parliament.

(2) *Every breach of the privileges of parliament which is specified in the Schedule to this Act (whether in part A or Part B thereof) shall be an offence under this Part punishable by the Supreme Court under the Provisions hereinafter contained in that behalf.*

(3) Every breach of the privileges of Parliament which is specified in Part B of the Schedule to this Act and which is committed in respect of, or in relation to, Parliament shall be an offence under this part punishable by Parliament under the provisions contained in that behalf.

Under Part B of the Act, the publication of any proceedings in committee of Parliament, before they are reported to Parliament, is an offence punishable by Parliament or the Supreme Court.

Thus any disclosure or publication of the interim report of the Committee on Public Enterprises (COPE) of the Parliament would be violative of the aforesaid provision, as the Committee had not placed the report before the Parliament.

The learned Deputy Solicitor General on behalf of the 3rd, 4th and the 9th Respondents, whilst concurring with the submissions of the learned President's Counsel for the 1st Respondent , contended that the Petitioner had not complied with Rule 44(1)(a) of the Supreme Court Rules and the application ought to be dismissed *in limine* for that reason.

It was the position of the learned Deputy Solicitor General that to successfully invoke the fundamental rights jurisdiction of this court, one must necessarily satisfy court that the alleged fundamental right exist and that the right has been violated or there is an imminent infringement of that right, by an executive or administrative act. The learned Deputy Solicitor General submitted that acts of COPE do not fall within the purview of executive or administrative acts as it is a body which is part of the legislature and therefore vested with legislative functions.

Standing Order 126(1) (of the Parliament) lays down that:

"Committee on Public Enterprises: (1) There shall be a Committee to be designated the Committee on Public Enterprises consisting of twelve members nominated by the Committee of Selection" and in terms of Standing Order 126(3), a duty is caste on COPE to report to the Parliament.

As such, the acts of the COPE are legislative acts and functions performed by the COPE do not fall into the category of executive or administrative action.

In countering the above position, it was submitted by the learned counsel for the Petitioner that what the Petitioner had alleged is, that by suppressing the impugned information it is the Prime Minister as part of the executive who is responsible for the alleged violation under Article 14A.

As referred to earlier, Petitioner's position is that the COPE had not presented its interim report with regard to the issue of Treasury Bonds to the Parliament, and as such one cannot hold the 1st Respondent responsible for the non-release of the interim report of the COPE.

Thus I hold that the Petitioner had failed to satisfy this court that any breach of the fundamental rights of the petitioner had resulted due to executive or administrative action.

Accordingly, I uphold the preliminary objection raised on behalf of the 9th Respondent as well.

For the reasons set out above I dismiss the application of the petitioner *in limine*

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 DEMOCRATI 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.

SC.Application FR. No 319/2012

Gangodagama Perumarachchige Jayalath Perera
No. 500, Madampitiya Road,
Colombo 14.

PETITIONER

-Vs-

1. Jagath Nishantha,
Sub Inspector of Police,
Divisional Crime Investigations Unit,
Police Station,
Negombo.

2. Saman Kumara,
Sub Inspector of Police,
Divisional Crime Investigations Unit,
Police Station,
Negombo.

3. Sudath Gunawardena,
Police Seargent 5315,
Divisional Crime Investigations Unit,
Police Station,
Negombo.

4. Police Seargent 32586 Dissanayake,
Divisional Crime Investigations Unit,
Police Station,
Negombo.

5. Police Constable Buddika,
Divisional Crime Investigations Unit,
Police Station,
Negombo.

6. Wimalakeerthi,
Sub Inspector of Police,
The Officer in Charge, Police Station,
Kotadeniyaya.

7. Inspector General Of Police,
Office of the Inspector General of Police,
Colombo 01.

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

RESPONDENTS

Before: : **Sisira J. de Abrew, J**

Nalin Perera, J &

Prasanna Jayawardena, PC, J

Counsel: : Walter Perera for the Petitioner.

Saliya Pieris with Lisitha Sachindra for the 1st, 3rd and 5th Respondents.

Ms. Induni Punchihewa SC for the A.G.

Argued & Decided on: : 17.01.2017

Sisira J. de Abrew, J

Heard counsel for both sides in support of their respective cases. The Petitioner by his amended petition alleges that his fundamental rights guaranteed by Article 11 and 12(1) of the Constitution have been violated by the Respondents. This Court, by its order dated 21.11.2013, granted leave to proceed for the alleged violation of Article 11 of the Constitution against the 1st ,3rd and 5th Respondents. We note that the Court did not grant leave to proceed

for alleged violation under Article 12(1) of the Constitution. Petitioner in his amended petition states that the 1st,3rd and 5th Respondents arrested the Petitioner in front of his business establishment and assaulted the Petitioner. The Petitioner further states that this assault was witnessed by the members of the general pubic. We note that no member of the general public has tendered an affidavit to this Court supporting the above position taken up by the Petitioner.

The Petitioner, in his amended petition, further states that he was assaulted and tortured by the 1st , 3rd and 5th Respondents at the Divisional Crime Investigation Unit. He, in paragraph 10 of the affidavit filed in this Court, states that the assault/torture at the said Divisional Crime Investigation Unit was witnessed by G.A. Hemantha Perera and G.A. Rathnasiri Perera who were his brothers. But surprisingly the said Hemantha Perera and Rathnasiri Perera in their affidavits marked P8 and P9 do not support the said version of the Petitioner.

They in their affidavits state that they came to know from his brother who was at the police station that he was assaulted and tortured by the police officers. When we consider the paragraph 10 of his affidavit filed in this Court and the two affidavits tendered by Hemantha Perera and Rathnasiri Perera, we hold that the Court can't place any reliance on the amended petition of the petitioner filed in this Court. The Petitioner has tendered a report by the Judicial Medical Officer. In the said report the said JMO states the following facts under the heading of 'opinions and recommendations'.

1) He had blunt force trauma to his right loin region in a form of a contusion (Bruising)

2) Such a bruising can be sustained due to a blow from a fist as well as hitting with a blunt

object.

3) That injury is compatible with the blow given to him as described by him in the history.

4) Such an injury can also be caused if his loin was hit against a blunt object too.

5) The injury was non grievous in nature.

6) It can heal without any further treatment.

7) As he is said to be a person with high blood pressure and diabetes, he has to continue his medications and has to take his diabetic foods.

8) If he develops any new complains, he has to be taken to a hospital without delay.

9) He has to be revived periodically by his doctor for his high blood pressure and diabetes.

We note that the JMO also made the following observations.

" Contusion, 3cmx 2 cm over the right loin area on lower ribs. There was no pain elicited while pressing the ribs away from the contusion. No other fresh injuries were found elsewhere in the body."

The said JMO had examined the Petitioner at 4.30 p.m. on 04.05.2012. The arrest was also on the same day around 11 a.m. Thereafter the Petitioner was produced before the learned Magistrate. On submissions made by his counsel, the learned Magistrate has made an order to obtain a medical report from the Prison Doctor of Negombo Prison. The Prison Doctor attached to Negombo Prison has submitted a report dated 07.05.2014 marked P4. The said Doctor had stated in the said report that there were no external injuries or visible contusion on the body of the Petitioner.

When we consider all the above matters, we are unable to conclude that the

Petitioner had been assaulted and tortured by the Police Officers. Petitioner's version stated in paragraph 10 of his affidavit is not supported by his own brothers' affidavits.

For the above reasons, we hold that there is no concrete evidence before this Court to conclude that the Petitioner had been assaulted by the 1st, 3rd and 5th Respondents as alleged by the Petitioner. We therefore hold that there is no merit in the petition of the Petitioner.

For the above reasons, we dismiss the Petition of the Petitioner. No 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

kpm/-

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.

Ajith P. Dharmasuriya,
No. 1, New Town,
Aluthwatta Road,
Rajawella.

Petitioner

SC FR Application No. 330/2015

Vs.

1. Mahaweli Authority of Sri Lanka,
   No. 500, T.B. Jayah Mawatha,
   Colombo 10..

2. Director General,
   Mahaweli Authority of Sri Lanka,
   No. 500, T.B. Jayah Mawatha,
   Colombo 10..

3. Resident Project Director –
   Victoria Project,
   Mahaweli Authority of Sri Lanka,
   Victoria Resident Project
   Manager's Office,
   Digana,
   Nilangama, Rajawella.

4. Secretary, Ministry of Mahaweli
   Development and Environment,
   No. 500, T.B. Jayah Mawatha,
   Colombo 10.

5. Divisional Secretary, Divisional
   Secretariat of Mede-Dumbara,
   Theldeniya.

6. Meda-Dumbara Pradeshiya Sabha,
   Theldeiya.

7. Kundasale Pradeshiya Sabha,
   Menikhinna.

8. Central Environment Authority,
   "Parisara Piyasa",
   No. 104,

Robert Gunawardene Mawatha,
Battaramulla.

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

10. E.M.M.W.D. Bandaranayake,
No. 77/2A, Kanda,
Karalliyadda, Theldeniya.

11. E.M. Wijeratne,
No. 250/06, Kandy Road,
Karaliyadda,
Theldeniya.

12. R.K. Abeykoon,
No. 6, Kolongahawatta,
Kengalle.

13. J.M.R. Bandara Jayasundara,
C/o. Mahaweli Authority of Sri Lanka,
Victoria Resident Project Manager's
Office, Nilangama, Rajawella.

14. W.M.M. Costa,
Rathmaloya Road,
Balagolla.

15. J.M.U.W. Barnes Rambukwelle,
Opposite Theldeniya
Magistrate's Court/District Court,
Theldeniya.

Respondents

BEFORE **:** K**.** Sripavan, C.J.
Nalin Perera, J.

COUNSEL Nilshantha Sirimanna for the Petitioner**.**
Rajitha Perera, Senior State Counsel for the 1st – 4th , 5th and 6th Respondents.
P. Ekanayake for the 6th Respondent**.**
Manohara de Silva, P.C. for the 10th , 11th , 12th ,13th , 14th and 15th Respondents.

ARGUED ON : 23.09.2016

WRITTEN SUBMISSIONS FILED ON **:** 11.03.2016 by the Petitioner

12.10.2016 by the 1st to 4th Respondents.

12.02.2016 by the 10th to 15th Respondents.

DECIDED ON : 09.01.2017

K. SRIPAVAN, C.J.,

When this Application was taken up for support, Learned the President's Counsel appearing for the 10th, 11th, 12th, 14th and 15th Respondents raised the following two Preliminary Objections to the maintainability of this Application.

(i) The Petitioner's Application and/or the reliefs sought are out of time in terms of Article 126 of the Constitution; and

(ii) The Petitioner has failed to comply with Rule 44(1)(b) of Part IV of the Supreme Court Rules of 1990.

The Petitioner by his Petition dated 16.08.2015 instituted this Application in the best interests of the public, having regard, inter alia, to Article 28(f) of the Constitution and in order to benefit the public and most significantly, **the environment.** (emphasis added). At paragraph 35 of the Petition, the Petitioner states as follows:-

"*The Petitioner was most shocked and surprised when he became aware on 17.07.2015 that the 1st Respondent had purportedly decided on or about 28.05.2015, to, inter alia,*

(a) issue annual permits to the **10th to 15th Respondents in respect of Victoria Reservoir reservation lands;** (emphasis added)

(b) introduce additional conditions in such permits issued to the 10th to 15th Respondents with regard to the effecting of additional constructions on the said lands;

(c) take action against all other persons who had effected constructions within the said 100 Metre reservation of the Victoria Reservoir,

(d) take action to cancel annual permits issued to 127 other persons who had (allegedly) not effected any constructions on the said reservation lands, ad provide them with alternate Mahaweli lands"

At Paragraph 36 of the Petition, the Petitioner claims that no lawful basis, grounds or reasons are contained in the said purported "Memo" in order for the Respondent Board to justify the alienation of such reservation lands to the 10th to 15th Respondents on permits. The Petitioner further alleges that the said six parcels of the land alienated to the 10th to 15th Respondents admittedly located within 100 Metres from the full supply level of the Victoria Reservoir.

The Directive Principles of State Policy emphasize the dignity of the individual and the worth of the human person by obliging the State to take various measures for the purpose of securing and protecting the environment. Preservation of the environment and keeping the ecological balance unaffected is a task which is not only an obligation of the successive Governments but also every citizen must undertake as a social obligation. The word "environment" is of broad spectrum which brings within its ambit " a hygienic atmosphere and ecological balance". It is therefore not only the duty of the State but also the duty of every citizen to maintain hygienic environment. Hygienic environment is an integral facet of a right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Therefore, there is a constitutional imperative on the State and its agencies not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve the natural environment.

I would like to emphasize the following observations made by Sathasivam, J. in *U.P. Pollution Control Board* Vs. *Bhupendra Kumar Mody* (2009) 2 SCC 147 -

> " ….. *Courts cannot afford to deal lightly with cases involving pollution of air and water. The message must go to all concerned persons whether small or big that the Courts will share the Parliamentary concern and legislative interest of the Act to check the escalating pollution level and restore the balance of our environment. Those who discharge noxious polluting effluents into streams, rivers or any other water bodies which inflicts detriment on the public health at large should be dealt with strictly* ***de hors to*** *the technical objections."*

The Fundamental Rights referred to in Chapter III of our Constitution should be interpreted in the light of the Directive Principles of State Policy and the fundamental duties referred to in Article 28. By defining the constitutional goals, the Directive Principles and fundamental duties set forth the standards or norms of reasonableness which must guide and animate governmental action.

If no one can maintain an action for redress of a public wrong or public injury, it would be disastrous to the rule of law 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. The strict rule of standing which insists that only a person who had suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule evolved which gives standing to any member of the public who is not a mere busy body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or its agencies by any citizen will induce the State or its agencies to act with greater responsibility and care thereby improving the administration of justice. In any event, the Court observes that the Petitioner has filed this application on 17.08.2015 which is within one month of his becoming aware of the document marked **P7** only on 17.07.2015 as averred in paragraph 35 of the Petition. Hence, the Court cannot conclude that this Petition has been filed outside the time limit prescribed by Article 126(2) of the Constitution.

Learned President's Counsel of the Petitioner strongly contended that the Petitioners own document marked **X,** namely, the case record in S.C. F.R. 495 /2008 shows that the annual permits marked **P22(a) and P22(b)** were issued on 08.11.2005, and the Petitioner instituted S.C. F.R. Application 495/2008 on 24.10.2008. Thus, at least, as at 24.10.2008 that the Petitioner was aware of the said permits that were issued to the 10th to 15th Respondents. Ratnayake, J. in the course of the judgment in S.C. F.R. 495/2008 (2010) 1 S.L.R. 1 at page 21 noted as follows:

> *"……..it is clear that the alienation of the lands and the granting of permission to construct houses in the lands which are the subject matter of this*

application have been done in violation of the applicable laws and regulations in an arbitrary manner by the 1st Respondent Authority thereby violating Article 12(1) of the Constitution.

Due to the above reasons, I hold the 1st Respondent Authority has violated Article 12(1) of the Constitution by (i) alienation and (ii) granting of permission to construct houses in respect of the lands which are the subject matter of this application."

The Judges of the apex Court cannot shut their eyes to injustice, otherwise, the apex Courts would not be able to perform the high and noble role which it was intended to perform according to the faith of the Constitution. The Court cannot permit a repetition of a wrong action by the 1st Respondent Authority after the judgment was delivered in 2010. For the reasons set forth above, I overrule the first Preliminary Objection.

The Second Preliminary Objection of the Learned President's Counsel for the 10th, 11th, 12, 13th, 14th and 15th Respondents was that the Petitioner has failed to comply with Rule 44(1)(b) of the Supreme Court Rules of 1990 as the Petitioner has failed to name the Respondents in compliance with the Rules.

Rule 44(1)(b) of the Supreme Court Rules of 1990 provides 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 and redress in respect of an infringement or imminent infringement, of any fundamental right or language right by executive or administrative action he shall :

(b) name as respondents the Attorney General and the person or persons who have infringed or are about to infringe, such right;

It must be noted that in terms of Article 126(4) of the Constitution, the Supreme Court has the power to grant such relief or make such directions as it may deemed just and equitable in respect of any Petition. This Court in *Jayanetti Vs. Land Reform*

Commission (1984) 2 S.L.R. 172 at 179 noted that "*Any procedural rules must be considered secondary to the constitutional guarantees"* and observed as follows:-

> *"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 is in no way widens the ambit of Article 126 but seeks to articulate its real scope and make the remedy more effective."*

Thus , the Court cannot dismiss the application merely because the Petitioner has failed to name the Respondents. The Court directs the Petitioner to include the names of the Officers who hold the Offices of the Second, Third, Fourth and Fifth Respondents within a period of two weeks from today in order to consider the application further.

The Registrar is directed to fix a date in consultation with all Counsel for consideration of Leave to Proceed, once the caption is amended as aforesaid.

CHIEF JUSTICE

NALIN PERERA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

1. B.M.Asiri Tharanga 21-5/1, Araluwagoda Road, Madawala Bazaar, Madawala.
2. **Thiyagarajah Mahendran, 143/124, Vihara Mawatha, Mulgampola, Kandy.**

Petitioners

SC FR APPLICATION No. 335/2016

Vs

1. The Principal,Kingswood College, Kandy.
2. The Director, National Schools, Ministry of Education, "Isurupaya", Battaramulla.
3. The Secretary, Ministry of Education, "Isurupaya", Battaramulla.
4. The Honourable Attorney General, Hulftsdorp, Colombo 12.

Respondents

BEFORE **S. EVA WANASUNDERA PCJ.,**
B. P. ALUWIHARE PCJ. &
H. N. J. PERERA J.

COUNSEL : Elmore Perera for the Petitioners.
Suren Gnanaraj SSC for the Respondents

ARGUED ON : 06.10.2017.

DECIDED ON : 30.10.2017.

S. EVA WANASUNDERA PCJ

In this matter this Court has granted leave to proceed on 19th October, 2016 only to the 2nd Petitioner, for the alleged violation of his fundamental rights enshrined in Article 12(1) of the Constitution.

Objections of the 1st to 4th Respondents have been filed by one Affidavit affirmed by the Deputy Principal of Kingswood College, Kandy. Counter Objections also have been filed. The primary relief sought by the 2nd Petitioner seeks that this Court directs the 1st Respondent, the Principal of the Kingswood College, Kandy to admit the 2nd Petitioner's son, namely M. Sherone Vimarshan to Grade 1 of the school for the year 2017.

The 2nd Petitioner (hereinafter referred to as the Petitioner) has based his Application on Clause 3.2 of the " Guidelines/ Instructions and Regulations regarding admission of children to Grade One in Government Schools for the Year 2017." , which was marked as P9 dated 27.05.2016 by the Petitioner and as R1 dated 16.05.2016 by the Respondents.

Clause 3.2 reads as follows:
" In filling vacancies in schools vested to the government under Assisted Schools and Training Schools (special provisions) Act. No. 5 of 1960 and Assisted Schools and Training Schools (Supplementary Provisions) Act No. 8 of 1961**, the proportion of children belonging to different religions at the time of vesting the school to the government will be taken into consideration and the number of vacancies in the said school shall be accordingly divided among different religions and categories.**

When the number of applications is less than the number of vacancies set apart for a given category of a religion, remaining vacancies shall be proportionately divided among other categories of the same religion. When there are no applicants from a religion or when the number of applications from a religion is less than the number of vacancies set apart for that religion, such vacancies set apart for the said religion , shall be proportionately divided among other religions."

Kingswood College, Kandy is a Government National School which was vested in the Government in terms of the aforementioned Act No. 5 of 1990 and Act No. 8 of 1961. That is an accepted fact. However paragraph 14 of the affidavit filed by the Deputy Principal on behalf of all the Respondents states that in the absence of confirmed statistics relating to the religious composition of students enrolled at Kingswood College in the year 1961, the school is unable to implement Clause 3.2 of the School Admission Circular marked R1.

Clause 6(a) describes **the categories** of children and the percentage of the number of children to be admitted to the school. The Petitioner had made the application to the school under Clause (a)(i), i.e. under ' children of residents in close proximity to the school'. Clause 3.2 heading states that the percentage under the particular religion category applies to **all categories**.

The Petitioner's application had been rejected in the first instance for failure to prove ownership claimed by the Petitioner by way of the deed which was produced with the application. The Petitioner's name in this Fundamental Rights Application is T.Mahendran. The number of the residence is 143/124, Vihara Mawatha, Mulgampala. The distance of the residence from the school is $1/8^{th}$ of a kilo meter.The Application form contains the name of the father as T.Mahendram written in Sinhalese,(which the Petitioner has affirmed that he got it handwritten by another Sinhalese friend due to his poor handwriting of Sinhalese language), but the Petitioner as the father had signed as " T.Mahendran"in Sinhalese. The electoral lists has his name as ' T. Mahendran' . The title deed of transfer indicates the vendee's name as T. Mahendran. The father of the Petitioner who transferred the property to T. Mahendran, had himself bought the house from some other person in 1997. All of them had lived in that house for over 19 years. It is only the form filled by the friend which has the name of the Applicant, the father of the child as T.Mahendra**m**.

Anyway there had been a problem with the assessment number of the house. The Deed of Transfer No. 4164 contains the assessment number as 145/14/B which was the assessment number as placed in the earlier deed 1169 dated 01.02.1997 and continued as the same in Deed 4164. By the time the said deed 4164 had been written in 2014, the assessment number had changed to 143/124 but it was not mentioned in the deed. However, the Grama Niladari had certified that earlier assessment number is the same as the later assessment number and that it refers to one actual house on that land of 7.5 Perches. The Petitioner had got a deed of rectification done on 08.08.2016. and sent a copy of the said rectification deed number 4682 done by the same Notary Public who attested Deed No. 4164 on 01.02.2014. The Petitioner's Application was rejected by the school, according to the letter informing the rejection to the Petitioner on 28.07.2016. Then, the Petitioner had got the Notary Public to attest the Deed of Rectification on 08.08.2016 , i.e. within 10 days. He had submitted the same for reconsideration by the authorities. Yet, he had not been accommodated.

I find that the document marked R2 on behalf of the Respondents indicate that the category under proximity of residence had **68 vacancies** meaning that it is 50% of the total number of vacancies for Grade 1 under all categories in the school. The Petitioner has applied under proximity of residence category. Going through R2, I can gather that 86 had been the cut off mark .

According to Clause 3.2 of the Circular, since the Respondents have confessed that there is no document to determine the percentage on admissions on religion, Court has to determine the calculation under the facts affirmed by the Petitioner on document **P 21**, the Summary of Reports of Schools Under the C.H.E. , from the "Agenda of the Synod 1961 of the Methodist Church, Sri Lanka held at Scott Hall, Kollupitiya, Colombo 3 - pages 85 and 86" which is certified as a true copy by the President , Methodist Church, Sri Lanka. Under the heading "Kingswood College, Kandy", the first paragraph of it reads thus: " There are 899 pupils of whom 186 are Christians. The Staff remains at 45 with 4 excess teachers and 33 Christians. 23 candidates passed S.S.C. and 6 entered the University ". The ratio of Christian students among other students in the year 1961 when the school turned into a Government National School can be calculated as 186/899 x 100 , which is approximately 20%. Therefore out of the 68 vacancies under proximity category, 13 or 14 vacancies should be filled by the religion category defined in Clause 3.2

of the Circular. Admittedly, the School has taken into Grade 1 only one Christian child, the category under which has not been divulged by the Respondents to this Court.

Anyhow, when a Christian child has applied to be admitted to Kingswood College, Kandy under any category , if the documents show that he is a Christian and if the number of Christian children already admitted are not above the allowed percentage of 20% intake under the religion category , then that child has a right to be admitted under Clause 3.2 of the Circular.

Nobody can ignore the law provided by two Statutes of Parliament, namely, Act No. 5 of 1960 and Act No. 9 of 1961. The School authorities and the Ministry of Education cannot turn a blind eye to the provisions of law already in force. The Respondents who are objecting to the fundamental rights application filed by a Christian parent who is trying hard to get the child admitted to such a school should have at least tried to find out from the documents available with the government in regard to this particular contention which has kept on coming up in this Apex Court in the Country regularly in the recent years. The People of this country have a right to canvass their fundamental right before the Supreme Court but the question which cannot be answered is 'how many of them can afford to come to the Supreme Court'? Moreover, when the authorities are ignoring what is laid down as the law of the country, how can the people be expected to get their rights?

I agree with the earlier judgments in this regard in similar matters in SC/FR 613/2004,614/2004, 615/2004, 616/2004 and 353/2016 which were referred to by the Petitioner. I hold that the 1st to 3rd Respondents have infringed the fundamental rights of the Petitioner (meaning the 2nd Petitioner in the Caption) contained in Article 12(1) of the Constitution.

I make order directing the 1st to 3rd Respondents to admit the Petitioner's son, **Mahendran Sherone Vimarshan** to **Grade 1** of Kingswood College, Kandy **forthwith** since this year will soon come to an end.

However, I do not want to make any order with regard to costs due to the only fact that the Petitioner's son would have to look up to his Alma Mater in the future of his life on earth as his second mother from whom he would not only get

educated and gain knowledge but also gain moral discipline with regard to doing the right but not the wrong in life.

Judge of the Supreme Court

B. P. Aluwihare 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 application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC /FR 353 / 2016

A. B. T. Rasanga,

No. 193/13, Uda Peradeniya,

Peradeniya.

Petitioner

Vs.

1. The Principal,
   Kingswood College,
   Kandy.
2. The Director - National Schools,
   Ministry of Education,
   "Isurupaya'
   Battaramulla.
3. The Secretary,
   Ministry of Education,
   "Isurupaya' , Battaramulla.
4. Hon. Attorney General,
   Attorney General's Department
   Colombo 12.

Respondents

BEFORE	:	PRIYASATH DEP, PC, CJ. PRIYANTHA JAYAWARDENA, PC, J. UPALY ABEYRATHNE, J.
COUNSEL	:	Elmore Perera for the Petitioner Suren Gnanaraj SC for the Respondents
ARGUED ON	:	01.06.2017
DECIDED ON	:	04.08.2017

UPALY ABEYRATHNE, J.

The Petitioner has complained to this court that his fundamental right to equality guaranteed by Article 12(1) of the Constitution of Sri Lanka has been infringed by the 1st Respondent, by refusing admission of his son, A. B. Abishek Anuhas to Grade 01 of Kingswood College, Kandy.

The Petitioner, in his application dated 6th October, 2016, has averred that he was baptised as a Cristian on 15th April 1979 and his wife Samanthika Swarnamali was baptised on 16th October 1994. Their son, A. B. Abishek Anuhas who was born on 17th April 2011, who was baptised on 12th June, 2011. Their place of residence placed within the limits of administrative district of Kandy. He had averred that his son A. B. Abishek Anuhas possesses the basic qualifications necessary to gain admission to Kingswood College, Kandy in accordance with Paragraphs 2.0 and 3.6 of the Instructions and Regulations regarding admission of Children to Grade 01, 2017. On 23.06.2016, the Petitioner had submitted a school admission application to the 1st Respondent, for admission of his son to Grade 01 in Kingswood College in 2017 under the quota allocated to Christian students.

After the interview, on 30.09.2016, a list of selection was posted on the school notice board indicating that his son had not been selected for admission but had been placed as No. 6 on a ''waiting list'.

The Petitioner contended that his son was entitled to gain admission to Grade 01, of Kingswood College in 2017 upon the document produced with the petition marked P 11. The Petitioner has produced P 11 in order to consider his application in terms of Regulation 3.2 of the Instructions related to the admission of children to Grade 01 in the Government Schools for the year 2017. Said Regulation 3.2 stipulates that "In filling vacancies in schools vested to government under Assisted Schools and Training Schools (Special Provisions) Act No 05 of 1960 and Assisted Schools and Training Schools (Supplementary Provisions) Act No 08 of 1961, the proportion of children belonging to different religions at the time of vesting the school to the government will be taken into consideration and the number of vacancies in the said school shall be accordingly divided among different religions and categories. …."

The 1st Respondent, in paragraph 10 of the statement of objection, answering the paragraph 13 of the petition which has been set out on P 11, has averred that there was no record or log entry available in the school which shows the number of Christian students who were studying at the Kingswood College in the year 1961. In the absence of confirmed statistics relating to the religious composition of students enrolled at Kingswood College in the year 1961, the school is unable to implement Clause 3.2 of the School Admission Circular marked R 1.

Accordingly, the 1st Respondent has admitted that he was unable to implement Clause 3.2 of the Instructions related to the admission of children to

Grade 01 in the Government Schools for the year 2017 due to the absence of confirmed statistics relating to the religious composition. This is not a justifiable answer. He has neither challenged nor denied the contents in P 11. In the circumstances, I have no option but to consider the Petitioner's application on the strength of the material provided by the Petitioner. According to P 11, the Petitioner should not have been denied admission to Grade 01 of Kingswood College because he was well within the percentage set out in P 11. The Respondents have failed to consider the said position in dealing with the application of the Petitioner.

Therefore, I am of the view that by not considering the said clause 3.2 in accordance with the relevant percentage, the 1st Respondent has acted arbitrarily and unreasonably and thereby infringed the Petitioner's fundamental rights. Accordingly, I hold that the Petitioner's fundamental rights guaranteed under Article 12(1) of the Constitution has been violated by the 1st Respondent. I therefore direct the 1st Respondent to admit the Petitioner's son A. B. Abishek Anuhas to Grade 01 of Kingswood College, Kandy. I make no order with regard to costs.

Judge of the Supreme Court

PRIYASATH DEP, PC, CJ.

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 under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR Application
No. SC/FR.361/2015

Rev. Watinapaha Somananda Thero
No.101, Sri Vajirasrama Buddhist Centre,
Ananda Rajakaruna Mw,
Colombo 10.

Petitioner

1. Hon. Akila Viraj Kariyawawam
   Minister of Education,
   Ministry of Education,
   "Isurupaya" Pelawatta,
   Battaramulla.
   Sri Lanka

2. Mr. W. M. Bandusena,
   Secretary, Ministry of Education,
   "Isurupaya", Pelawata, Bataramulla.
   Sri Lanka.

3. Mr. S.U. Wijerathna
   The Additional Secretary,
   "Isurupaya",Pelawatta, Bataramulla.

4. G.R.Chandana Kumara
Kadigamuwa
No.136 D,
Isuru Mawatha,
Ellakkla.

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

Respondents

BEFORE: BUWANEKA ALUWIHARE, PC, J.
ANIL GOONERATNE, J &
VIJITH K. MALALGODA, PC, J.

COUNSEL: Ruwantha Cooray for the Petitioner
Dr. Avanti Perera, SSC for the Respondents

ARGUED ON: 30.05.2017

DECIDED ON: 14.12.2017

ALUWIHARE, PC, J:

This court granted leave to proceed in this application on alleged violations under Articles 12(1) and 14(1) (g) of the Constitution and court also granted interim relief by suspending the operation of letter P18, by which the Petitioner was transferred from Colombo District to Ampara District.

The Petitioner held the substantive post of Assistant Director of Education (Piriven) since 2011 and had been appointed an Acting Deputy Director of Education (Piriven) in 2013; the functions of the latter position have to be performed from Colombo.

The Petitioner had averred that he has more than the requisite educational qualifications and having held numerous portfolios relating to Priven education, gained extensive experience in the sphere of administration and management in the relevant field. The Petitioner has also stated that he is responsible for making significant changes in management and the administration of the Piriven education system.

Petitioner says in view of the contribution he made towards Piriven education, he was appointed a Provincial Assistant Director of Education (Piriven) with effect from 1st September, 2010 (P5) and was appointed an Assistant Director (Piriven) with effect from 4th May, 2011 (P6) and was vested with duties relating to administration and management of the Piriven education, both in the Southern and Western Provinces.

The Petitioner asserts that the Additional Secretary (Planning) Ministry of Education, entrusted the Petitioner with the supervisory and planning duties, duties that were performed by the Director of Education (Piriven) who had retired in March 2013. In the same year the Petitioner has been appointed as Acting Deputy Director Education (Piriven) (Administration and Planning) by the Secretary Ministry of Education (P8). The Petitioner also had asserted that as a result of the positive contribution he made after assuming duties as Acting Deputy Director (Piriven), he was able to achieve tremendous progress in the sphere of Piriven education that some members of the staff of the Piriven education branch of the Ministry of Education, requested the then minister of Education Hon. Bandula Gunawardena to appoint the Petitioner to act in the post of Director Education (Piriven) (P12)

The Petitioner had contended that he obtained sick leave due to ill health from 26-2 2015 to 10th-03-2015 and on the 27th -02-2015 the Secretary to the Ministry of Education, the 2nd Respondent, had over the phone asked the Petitioner to request for a transfer to serve in a different district.

The Petitioner had responded by informing the 2nd Respondent that he is not inclined to request for a transfer.

It is the position of the Petitioner that when he reported back to work on 10.03-2015 the duties he performed in the capacity of Acting Deputy Director of Education (Piriven) had been entrusted to the 4th Respondent. It is alleged by the Petitioner that the appointment of the 4th Respondent to overlook the duties of Deputy Director is mala fide and had been done for political considerations. Furthermore, it was contended that the 4th Respondent is only an Acting Assistant Director of Education. (P16)

It was contended on behalf of the Petitioner that he had served in the capacity of Acting Deputy Director (Piriven) for a period of two years and performed his duties without any blemish whatsoever, and the removal of the duties he was performing as Acting Deputy Director, while his acting appointment was still in force, is demonstrative of the male feeds on the part of the Respondent.

The Petitioner thereafter had sought redress by bringing the attention of his predicament to both His Excellency the President and the Secretary to the Ministry of Education, but to no avail.

The Petitioner, however, had been transferred to Uva Province and Ampara District by letter P18 with effect from 17-09-2015. It is the position of the Petitioner that the holder of the post of Acting Deputy Director of Education is based in Colombo and accordingly, as long as the Petitioner holds that position he is entitled to be based in the Colombo district.

The Petitioner alleges that, although it is the Secretary to the Ministry of Education who is the competent authority to effect the transfers, the 4th Respondent acting in collusion with the 1st Respondent had taken steps to effect his transfer.

The Petitioner further alleges that his transfer to Uva Province is illegal and had been done at the instance and the instigation of the 4th Respondent to perpetuate his illegal appointment and complains that transferring him out of Colombo amounts to an unlawful constructive termination of the Petitioners' acting post of Deputy Director Education (Piriven).

The Petitioner states that he is the most senior officer attached to the Piriven branch of the Ministry of Education and removing him and appointing the 4th Respondent, who is not qualified to hold the said post, is due to his political affiliations.

The Petitioner has also averred that due to his present state of health, he is required to obtain medical treatment in Colombo and accordingly has informed the 2nd Respondent regarding his inability to assume duties at the place of work to which he had been transferred.

The 2nd Respondent in the objections filed, has taken up the position that way back in 2011, the then Minister of Education had sought cabinet approval to absorb 14 persons into the Sri Lanka Education Administrative Service (hereinafter referred to as SLEAS) and to make them permanent in the posts of Assistant Director Education (Piriven) (2R1). The said Cabinet memorandum (2R1) carries the names of 14 persons, 12 Bhikkhus and 2 lay persons. The Petitioner is one of the Bhikkhus whose name is among the 14 persons referred to, in 2R1. Consequent to the Cabinet memorandum, a decision had been taken by the Cabinet of Ministers and the decision is reflected in the memorandum issued by the Secretary to the Cabinet dated 12-05-2012 reference WUM 11/0482/530/016 (2R2). It appears that the Cabinet has granted approval to appoint the 12 Bhikkhus referred to in the Cabinet Memorandum referred to above, to the post of Assistant Director Education (Piriven) and the decision specifies in stating that these positions are outside the SLEAS cadre and are personal to the Bhikkhus so appointed.

Further, it also states that the said posts get rescinded whenever a post falls vacant and as such, these positions are to be considered as posts in the SLEAS (Special Cadre).

What is significant is that the approval sought by the said Cabinet memorandum to have the 14 persons "absorbed into the SLEAS (Special Cadre)" had not received the Cabinet approval (2R2).

Consequent to the Cabinet decision aforesaid, the Petitioner had been appointed as Assistant Director Education (Piriven) (2R3) along with the other 11 Bhikkhus, with effect from 4-05-2011.

The 2nd Respondent, however, states that the details with regard to these appointments were not conveyed to the Public Service Commission as the implementing authority happened to be the Ministry of Education.

The 2nd Respondent concedes that the Petitioner, in addition to his substantive post, was also appointed as Acting Deputy Director Education (Piriven) (Administration and planning) with effect from 15-08-2013 (P8). Subsequently a Cabinet memorandum dated 03-05-2014 had been submitted and by that memorandum, Cabinet approval was sought, inter alia, to have the Petitioner appointed to act in the post of Deputy Director Education (Piriven) which had fallen vacant by then.

Consequent to the Cabinet memorandum referred to above, the Cabinet of Ministers by its decision of 07-08-2014 granted approval (2R4), to appoint the Petitioner to act as Deputy Director Education (Piriven), upon obtaining the concurrence of the Public Service Commission (hereinafter also referred to as the PSC) (2R4). Accordingly, in compliance with the Cabinet decision, by letter dated 18-09-2014, the then Secretary to the Ministry of Education, had written to the PSC, seeking their concurrence to have the Petitioner appointed as Acting Deputy Director of Education (Piriven) (2R5).

The PSC, responding to the said communiqué, by letter dated 7th November 2014 had informed the Secretary, Ministry of Education that the PSC cannot grant concurrence to have the Petitioner appointed to the said post. The PSC in their letter had highlighted the fact that the post of Deputy Director Education (Piriven) is a SLEAS post and in terms of Rule IX:115 of the Code of Procedural Rules of the PSC, the Petitioner cannot be appointed as the Acting Deputy Director of Education (Piriven) (2R6)

The position of the 2nd Respondent is that the Petitioner has ceased to hold office of Acting Deputy Director of Education (Piriven), in view of the letter of the PSC (2R6).

It was contended on behalf of the 2nd Respondent that he sought the concurrence of the PSC as per the Cabinet decision (2R4) and his action is based on the response he received from the PSC (2R6).

The learned Senior State Counsel, at the hearing of this Application raised the issue that the Petitioner had failed to cite the parties necessary to prosecute this Application, namely the Public Service Commission, on whose decision, the Petitioner ceased to be the "Acting Deputy Director Education (Piriven)". The decision of the PSC is not challenged in these proceedings and I cannot fault the 2nd Respondent giving effect to the letter 2R6 of the PSC which he was required to comply, in terms of the Cabinet decision (2R4).

The learned Senior State Counsel drew our attention to the decision of this court in the case of *Farook V. Dharmaratne, Chairman, Provincial Public Service Commission, Uva and Others* 2005 (1) SLR 133. In the said case the Petitioner who was in Grade 1-1 of the Sri Lanka Principal's service

challenged his transfer to another school and alleged infringement of Article 12 (1) of the Constitution. Her Ladyship Justice Bandaranayke (as she then was) held:

> *"The petitioner's relief sought from this Court is to declare that his (Petitioner's) transfer as Principal of Pitarathmale No. 1 Tamil Vidyalaya, Haputale and the 6th respondent's transfer as Principal of Sri Razick Fareed Maha Vidyalaya, Bandarawela are null and void. In view of the foregoing analysis of the material placed before this Court the petitioner has no right to be the Principal of Razick Fareed Maha Vidyalaya as he has not got the requisite qualifications. However, the petitioner quite clearly has sought to obtain relief on the basis of unequal treatment. When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of a violation of his fundamental rights on the basis of unequal treatment? If the answer to this question is in the affirmative, it would mean that Article 12 (1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of Article 12(1) of the Constitution cannot be used for such situations as it provides to an aggrieved person only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines. Article 12 (1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12 (1) is for the performance of a lawful act and not to be directed to carry out an illegal function.*

In order to succeed the petitioner must be in a position to place material before this Court that there has been unequal treatment within the framework of a lawful act.

In the same case her ladyship referred to a passage in the case of *C. W. Mackie and Company Ltd. v Hugh Molagoda, Commissioner General of Inland Revenue and others* 1986 1 SLR 300 at page 309, with approval, wherein the court held:

"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."

In the instant case too, the acting appointment of the Petitioner could not be regularised due to the fetter referred to by the Public Service Commission in their letter (2R6) which is not challenged in these proceedings.

Although the Petitioner has complained about his transfer to the Uva Province, it appears from the documents 2R7 and 2R8 (i) to 2R 8 (xi) that the duty stations of all other Bhikkhus appointed along with the Petitioner has been simultaneously changed. As such I do not see any discriminatory treatment peculiar to the Petitioner.

For the aforesaid reasons I hold that the petitioner has failed to establish the alleged violations of Articles 12 (1) and 14 (1) (g) of the Constitution. This application is accordingly dismissed, but in all the circumstances of the case without costs.

Judge of the Supreme Court

Justice Anil Gooneratne

I agree

Judge of the Supreme Court

Justice Vijith Malalgoda P.C

I agree

Judge of the Supreme Court

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

S.C. FR No. 370/2011

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. Alawathupitiya Ratnayake
   Mudiyanselage Tikiribanda,
   No. 85, "Nishanthi", Kobbekaduwa,
   Yahalatenna.

2. Ganiha Arachchilage Wijeratne
   Marakkalamulla,
   Dummalasooriya.

PETITIONERS

Vs.

1 (A) Abdul Majeed
Secretary,
Ministry of Muslim Religious Affairs &
Posts, Postal Services Headquarters,
D.R. Wijewardena Mawatha,
Colombo 10.

1. M.K.B. Dissanayake
   Postmaster General
   Postal Services Headquarters,
   D.R. Wijewardena Mawatha,
   Colombo 10.

2 (a) D.L.P. Rohana Abeyratne
Postmaster General
Postal Services Headquarters,
D.R. Wijewardena Mawatha,
Colombo 10.

3 (b) Dharmasena Dissanayake - Chairmanr

4 (b) A. Salam Abdul Waid - Member

5 (b)Ms. D. Shirantha Wijeyathilaka - Member

6(b) Dr. Pradeep Ramanugam - Member

7 (b) Mrs V. Jegarasasingham - Member

8(b) Santi Nihal Seneviratne - Member

9 (b) S. Ranugge - Member

10(b) D.C. Mendis - Member

11(b) Sarath Jayathilaka - Member

All of Public Service Commission
No. 177, Nawala Road,
Narahenpita,
Colombo 5.

12. Ashoka Mampitiya Arachchi
Deputy Postmaster General
Postal Headquarters
Colombo 1.

13. Mrs. Theshani J. Abeyratne
Deputy Director of Customs
Sri Lanka Customs
Colombo 1.

14. Mrs. K.C.H. Randeniya
Director, Policy Planning
Ministry of Postal Services,
310, D.R. Wijewardena Mawahta,
Colombo 10.

15. Mrs. M.D.S. Jayasumana
    Assistant Director of Establishment
    Ministry of Public Administration & Home Affairs, Colombo 7.

16. K. Sunil Weerasekera
    'Premawasa'
    Baddegama

17. J.A. Kankanamge
    Ganegama South
    Baddegama.

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

RESPONDENTS

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

COUNSEL: Indra Ladduwahetti with Lilanthi de Silva
For Petitioners

J.C. Weliamuna with Pasindu Silva
For the 16th & 17th Respondents

Viraj Dayaratne D.S.G for the 1st – 15th & 18th Respondents

ARGUED ON: 21.11.2016

DECIDED ON: 19.01.2017

GOONERATNE J.

The two Petitioners, at all relevant times to this Fundamental Rights Application held the post of Regional Investigating, Officer and Chief Postmaster respectively in the Postal Department. It is pleaded that the two Petitioners applied for a post in the said department. (which is a promotional post) and is described in their petition as 'unified postal service Grade 'A' Group III Segment "A".' Interviews were held as pleaded in paragraph 11 of the petition. There were 18 vacancies (P1).

It is further pleaded in paragraph 12 of the petition that the Petitioners came to know that they had been promoted to the said grade on the recommendation of the Interview Board consisting of 12th to 15th Respondents. However main grievance of the two Petitioners were that the Interview Board after selection as above has again met on their own on 22.03.2011, purely for the purpose of promoting 16th & 17th Respondents who had not been selected as above for the 18 vacancies earlier. It is further stated in the petition that they came to know that there was an attempt to delete their names out of the earlier promotion list and accommodate the 16th & 17th Respondents.

Petitioners complain that the result of the interview was not made known or communicated. As such by P2 dated 08.08.2011, the Sri Lanka Postal Service Union requested for the result of the interview from the 1st Respondent.

Thereafter the Petitioners along with the Secretary of the Postal Service Union met the 1st Respondent on 17.08.2011 and inquired regarding the selection of candidates from the selection list prepared by the 12th to 15th Respondents for the above post. 1st Respondent then informed that the Petitioners had been selected for the 17th & 18th vacancies but their names were omitted by the 12th to 15th Respondents on 22.03.2011 and a new list had been made. In fact the 16th & 17th Respondents who were not selected in the first list had been included in the subsequent list prepared by the 12th to 15th Respondents on 22.11.2011. The 1st Respondent also informed that the 16th & 17th Respondents had also been issued letters of appointment. In this regard an affidavit marked P3 is submitted in support of above. The 1st Respondent also took steps to issue documents requested by the said union marked P4 to P8. P9 is a letter issued by the 1st Respondent and indicates that the said documents are issued. Petitioners plead in paragraph 22 of the petition that action of the 1st to 15th Respondents not to promote the Petitioners to the post for which they applied is arbitrary, capricious, unreasonable and illegal for the reasons set out in paragraph 22(a) to (k) of the petition. On 19.03.2012 this court granted Leave to Proceed for alleged violation of Article 12(1) of the Constitution.

Document P9 of course indicates that the 1st Respondent made available the required documents on request, made in this regard. Disclosure by

the 1st Respondent enabled the Petitioners to move court. The same interview panel had taken the liberty to alter the original selections list, and on their second attempt very unfortunately displaced the Petitioners being selected for the post they applied. It looks very unreasonable but this court needs to get to the truth of the matter to ascertain whether in fact there was a violation.

I have to ascertain the reasons for the interview panel to have met for the second time subsequent to selection of candidates. In this regard the position of the official Respondents need to be considered. The successor to the office of Postmaster General the 2nd Respondent has sworn an affidavit before this court, since the person named as 2nd Respondent was no longer holding office and the successor had sworn an affidavit. The main points as pleaded are as follows.

(1) Power of appointment/promotion is vested with the Public Service Commission and not the interview panel. Petitioners were never promoted to the 'Unified Postal Service Group A Grade III Segment 'A'

(2) It is emphasised that the Secretary to the Ministry of Posts had by letter of 21.02.2011 (2R2) requested to ascertain whether the interview panel had correctly given marks for "Performance Appraisals" of each candidate. The 16th Respondent had complained that marks for the above item had not been correctly assessed by the interview panel. As such the said Secretary had given a direction as pleaded to request the Interview Board to consider letter 2R1 and the appeal of the 16th Respondent, thereafter to submit the recommendation of the interview panel to him.

Accordingly the interview panel had met on 22.03.2011 for the said purpose (2R2).

(3) The 16th Respondent was involved in Trade Union activities and had been released on a full time basis as from 22.11.2000. He was an officer of the unified postal service and had been promoted on 18.10.2008 to the unified postal service Grade A, Group III Segment B. It is pleaded that at the time of the interview he was engaged in Trade Union activities and question arose as to how he had to be assessed on performance appraisal. The duties maintained in the appraisal forms were not the duties others in the same grade as the 16th Respondent had to perform. Uncertainty arose as to whether the 16th Respondent should be assessed by a Superior in the Colombo Head office as the 16th Respondent was full time Trade Union activist. As such Director Establishment had to be consulted, through the Secretary to the Ministry of Postal Services, by letter of 08.10.2010 (2R3) by the former Postmaster General. In response the Secretary, Ministry of Public Administration and Home Affairs by letter of November 2010 (2R4) gave directions to Secretary, Ministry of Postal Services as to the steps that need to be taken.

I find on a perusal of the relevant affidavit the interview panel in its first selection allocated marks for performance appraisal for only those who had supporting documents and obtained as performance as excellent, and not others who had not presented supporting documents. But as instructed above the interview panel who sat for the second time on 22.03.2011 revised the marks for performance appraisal even without supporting documents

provided performance as ‘excellent’, recommended by his superiors and interview panel gave 15 marks, for all.

According to the first selection by the interview panel, candidates were not given the full 15 marks unless he was able to support it with documents. On that basis only one candidate namely H.M.A.G. Thillekeratne (Serial No. 7) had been allocated 15 marks as he had been judged as excellent and also had supporting documents. This position was changed on 22.03.20111 by the interview panel as stated above and all those who had the remark as ‘excellent’ for performance appraisal were given 15 marks. Therefore revision of marks had taken place.

There is an annexure to the affidavit which is filed of record of the Postmaster General who had been holding the post at the relevant period. A chart marked and produced as 2R6 submitted with the affidavit demonstrate the position of allocating marks to each candidate and the variation that had taken place on the instructions of Secretary to the Ministry of Public Administration. The revision of marks resulted in the 1st Petitioner and the 2nd Petitioner who was within the selection list as Nos 17 and 18 being shifted to Nos 19 and 20, and the resulting position was that they were not finally selected. It is also observed that the marks allocated to the two Petitioners were not

changed, (serial Nos. 1 & 9 of 2R6) at the subsequent meeting of the interview panel.

In view of the matters stated above, it is necessary to consider the case of the two Petitioners and the 16th and 17th Respondents, as regards the revision of marks, due to directions given by the Secretary to Ministry of Public Administration. I note the following as pleaded in the affidavit of the Acting Postmaster General.

(a) At the interview held on 28.9.2010, the 1st Petitioner (Mr. Tikiribanda) had been allocated a total of 15 marks for his 'Performance' for the two years that were considered for the promotions i.e; 10 marks for the year 2008 on the basis that the 'Performance' was 'above average' and 05 marks for the year 2009, on the basis that the 'Performance' was 'satisfactory'. He had obtained a total of 35 marks and was placed 18th according to the original list prepared by the Interview Board.

(b) At the interview held on 28.09.2010, the 2nd Petitioner (Mr. Wijeratne) had been allocated a total of 10 marks for his 'Performance' for the two years that were considered for the promotions i.e; 05 marks for the year 2008 on the basis that the 'Performance' was 'satisfactory' and 05 marks for the year 2009 on the basis that the 'Performance' was 'satisfactory'. He had obtained a total of 36 marks and was placed 17th according to the original list prepared by the Interview Board.

(c) The marks allocated to the Petitioners as aforesaid, did not change at the meeting held by the Interview Board on 22.03.2011,

(d) At the interview held on 04.10.2010, the 16th Respondent (Mr. Weerasekera) had been allocated a total of 20 marks for his 'Performance'

for the two years that were considered for the promotions i.e; 10 marks for the year 2008 on the basis that the 'Performance' was 'above average' and 10 marks for the year 2009, on the basis that the 'Performance' was 'above average'. He had obtained a total of 34 marks and was jointly placed 19th according to the original list prepared by the Interview Board

(e) At the interview held on 21.10.2010, the 17th Respondent (Mr. Kankanamge) had been allocated a total of 15 marks for his 'Performance' for the two years that were considered for the promotions i.e; 10 marks for the year 2008 on the basis that the 'Performance' was 'above average' and 05 marks for the year 2009 on the basis that the 'Performance' was 'satisfactory'. He had obtained a total of 26 marks according to the original list prepared by the Interview Board.

(f) However, going by the advice obtained from the Director General of Establishments as aforesaid, the 16th Respondent had to be allocated 15 marks for each year (2008 and 2009) since his 'Performance' had to be considered as 'excellent' and as such the total marks obtained by him increased from 34 to 44.

(g) With regard to the 17th Respondent, it was found that there was a mistake in the allocation of marks to him for 'Performance' i.e; he had been given 10 marks for the year 2008 on the basis that his Performance was 'above average' when in fact it should have been 15 on the basis that that his Performance was 'excellent'. Further, it had also been found that his assessment for the year 2009 had also been 'excellent' although it had been taken mistakenly as 'satisfactory' and had to be allocated 15 marks instead of 05. Therefore, these mistakes had been corrected and the 17th Respondent has been allocated 30 marks for 'Performance' and his total marks had increased from 26 to 41.

It is also stated in the above affidavit that the Interview Board had to go through the marks allocated to all other candidates. The Board found discrepancies in the allocation of marks of K.A. Gamini Prasanna (serial No. 10), H.K. Kariyawasam (serial No. 12) and S.K. Meegama (serial No. 22). This position has been explained and demonstrated in detail in paragraph 14(i) to (l) of the above affidavit. The adjustment of marks are shown in the chart 2R6. It is also observed that the results of the interview panel are not made public. It is the Public Service Commission that ultimately make the appointments, having considered the results of the interview along with its recommendation. The Public Service Commission has approved the promotions in the manner stated above. Several appointment letters are issued by the Public Service Commission marked 2R7 (i) to (xviii).

The pleadings of the 16th and 17th Respondents stress on the point that the application of the Petitioners are time barred. It is also stated that the necessary parties are not before court. These Respondents are somewhat critical of the role of the 1st Respondent and blame the 1st Respondent for the issuance of documents P4 to P9, and that have acted in collusion with the Petitioners. It is further pleaded that both the 16th and 17th Respondents are entitled to be promoted in keeping with the scheme of promotion marked P2, to the post of Unified Postal Service Grade ‘A’ Group III Segment ‘A’. The 16th

and 17th Respondents were promoted Segment 'B' of the above post on 18.10.2008 and had been appraised as Excellent for the years 2008 and 2009.

It is further clarified by the 16th and 17th Respondents that the authorities concerned sought advice from the Director, Establishment and Secretary, Ministry of Public Administration as to how persons involved in Trade Union activities should be assessed. It was clarified that it should act upon the appraisals which are already made. Documents 16 R5 provides material in this regard and appraisals for the year 2008 and 2009 were considered.

I have also considered the points suggested in the counter affidavit of the two Petitioners. Though it is emphasised that the 16th & 17th Respondents have acted in collusion with the 2nd Respondent and the 3rd to 15th Respondents to obtain promotions in the postal service, I cannot find sufficient material to support that contention. The mere statements and remarks made as regards collusions with official Respondents is not acceptable to this court unless supported with cogent reasons. It is not established nor can I come to the conclusion that the 16th & 17th Respondents were able to influence the official Respondents as the authority to explain matters of this nature would be the Director Establishment and the Secretary to the Ministry of Public Administration. The persons in authority in this case were well aware of the procedure to be adopted.

The Public Service Commission by letter dated 20.09.2011 and marked 2R7 (i) to 2R7 (xviii) has promoted the persons named therein. This court no doubt granted leave to proceed on 19.03.2012 and by that time the candidate concerned were all promoted. This court did not think it fit to grant any interim relief, at that point of time. The position of this case had been adequately dealt in documents 2R1 to 2R6. The method adopted is spelt out more particularly in 2R1 & 2R2. The marks given for performance appraisals are considered in 2R1. It inter alia states that since doubts arose on marks to be allocated to the 16th Respondent by the interview panel on performance appraisal clarification was sought. 16th Respondent was involved in union activities (full time). He was supervised by Galle Regional Superintendent and Deputy Post Master General (South). Therefore Director, Establishment had to be consulted. A change took place as advised by Director, Establishment and any candidate who had been remarked as 'excellent for performance appraisal was given full marks (15 marks). This directive was applicable across the board to all candidates and the interview panel had to comply with such directive. What sort of changes that took place are discussed above.

A Government Servant is employed on terms which are offered to him. His stay in the public service and promotions are all matters which are regulated by the authorities concerned. That would not mean that his basic

fundamental rights are to be surrendered. A public servant is generally guided by the Establishment Code which has a statutory flavour. There are circulars issued by the Government which need to be carefully considered. State can impose restrictions and regulations which are not arbitrary. Whatever regulations, must conform to maintain the best standard for the public service. In the case in hand the interview panel and the authorities concerned had to verify the marks allocated on account of performance appraisals. As such the Director, Establishment had to be consulted. The Director's views and directions had to prevail in the circumstances and necessary instructions were given by the Secretary, Ministry of Public Administration. I cannot see anything serious to interfere with such directions. As such this application stands dismissed without costs.

Application dismissed.

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 Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. M.W. Leelawathie Hariot Perera,
2. W.W. Raj Lakmal Fernando
3. W.W. Roshini Shivanthi Fernando
   All of No 12, Kithalandaluwa Road,
   Willorawatte, Moratuwa.

Petitioners

SC /FR/ Application No 372/2015

Vs,

1. N.K. Illangakoon,
   Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

1A. P. Jayasundera,
   Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

2. Officer-in- Charge,
   Police Station,
   Moratuwa.

3. Officer-in- Charge,
   Police Station,
   Moratumulla.

4. Widanalage Amesh Asantha de Mel,
   No. 04/03, 1st lane, Kithalandaluwa Road,
   Willorawatte, Moratuwa.

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

Respondents

Before: **Eva Wanasundera PC J**
Priyantha Jayawardena PC J
Vijith K. Malalgoda PC J

Counsel: Chrishmal Warnasuriya with Anslam Kaluarachchi and Priyanka Thevendrean instructed by Induni Wijesinghe for the Petitioners
Thusith Mudalige Deputy Solicitor General for the 1st to 3rd and 5th Respondents

Argued on: 13.07.2017 and 04.09.2017

Judgment on: 17.11.2017

Vijith K. Malalgoda PC J

Petitioner to the present application namely, M.W. Leelawathie Hariot Perera, W.W. Raj Lakmal Fernando and W.W. Roshini Shivanthi Fernando who are the mother, brother and sister of one Rumesh Liroshan Fernando had filed the present application before this court alleging, that their Fundermental Rights guaranteed under Article 12 (1) and Article 11 had been infringed by the 1st, 2nd, 3rd and/or 5th Respondents and /or any person acting under their supervision, direction and/or command.

When this matter was supported on 29th October 2015, Court after considering the matters placed, had granted leave to proceed for alleged infringement of Articles 12 (1) and 11 of the Constitution.

As submitted on behalf of the Petitioners, one Rumesh Liroshan Fernando who was only 20 years at the time of his untimely demise, was a victim of a stabbing which took place on 24th October 2010. The victim had succumbed to his injuries at Kalubowila Hospital, and the Police Officers

who investigated into the death of the above named deceased, had reported the facts before the Hon. Magistrate of Moratuwa on 25.10.2010 under B Report No 1677/10. The 4th Respondent to the present application namely Widanalage Amesh Asantha de Mel who is said to have stabbed the deceased, was arrested by the police and produced before the Magistrate and remanded to the fiscal custody on 26. 10. 2010.

The complaint of the Petitioners before this court is based on the subsequent investigation carried out by the police, and the failure by them to expeditiously prosecute the case against the suspect before the Magistrate's Court of Moratuwa or in other words inaction by the police officers who investigated into the said offence to prosecute the offender.

In this regard, the Petitioners have placed the following material before this court.

a) Since 26.10.2010, the date in which the suspect was produced before the Magistrate Court of Moratuwa, the case was called from 04.11.2010 until 23.06.2011 for nearly 07 months for further investigation and for the Post Mortem Report
b) When the case was called before the Magistrate Court on 23.06.2011, police had informed the Learned Magistrate that they were filing the investigation reports and plaint and the Learned Magistrate had thereupon made order fixing the matter for inquiry on 07.07.2011
c) When the case was called before the Hon. Magistrate on 07.07.2011, the Learned Magistrate found that the police had not forwarded the reports and were not ready for the inquiry and therefore the matter was re-fixed for inquiry on 21.07.2011.
d) On 21.07.2011 the police once again moved for further time to obtain instructions from the Hon. Attorney General, and the Learned Magistrate made order allowing the said application

e) Since then, the case was called before the Magistrate Court of Moratuwa on several dates over a period of 4 ½ years, to obtain the instructions from the Attorney General, the 5th Respondent to the present application.

f) At the time the present application was filed before this court, i.e. on 25th September 2015, the matter before the Magistrate Court of Moratuwa, was still pending for Attorney General's Advice.

In addition to the sequence of events which took place from the untimely death of the deceased Rumesh Liroshan Fernando referred to above, the Petitioners have further submitted that, the said delay in prosecuting the offenders before the appropriate court had resulted,

a) The deceased's father W.W. Philip Ranjan Fernando, gradually losing faith in the System of Justice as the case was unduly being prolonged, become ill and prematurely passed away on 05.08.2012 at the age of 65 years

b) The three Petitioners before this court suffered severe mental stress, trauma due to the non-effective prosecution of the murder of their close relative for almost 6 years

When the notices were sent on the Respondents, the 1st Respondent who came before this court, had tendered his objection along with a document produced marked 1R1. By the said document 1R1 the Hon. Attorney General on 30th November 2015 had directed the Head Quarters Inspector of Moratuwa to commence a Non Summary Inquiry against the suspect Amesh Asantha de Mel under section 296 of the Penal Code for the murder of Rumesh Liroshan Fernando.

When the matter was taken up for argument before this court, the Learned Deputy Solicitor General who represented the 1st to the 3rd and the 5th Respondents had submitted that, the Non Summary Inquiry has now commenced before the Magistrate Court of Moratuwa, after receiving the instructions from the Attorney General. Learned Deputy Solicitor General, referring to the

journal entries filed before this court had further submitted that, the decision to refer the extracts for the advice of the Attorney General was taken by the Magistrate, and the said decision by the Magistrate cannot be questioned in the present proceedings since it amounts to a Judicial action.

In this regard the Learned Deputy Solicitor General, drew our attention to the journal entry dated 21.07.2011 to the effect "නීතිපති උපදෙස් සඳහා යොමු කරමි" and submitted that the said decision to refer the matter for Attorney General's advice was reached by the Magistrate, and therefore it amounts to a judicial decision, to which the Respondents cannot be held liable. It is further observed in the proceeding dated 06.02.2014 where Magistrate Moratuwa had made the following order,

"මෙම නඩුවේ සැකකරුට විරුද්ධව දැනටමත් ලඝු නොවන පරීක්ෂණයක් ආරම්භ කිරීම සඳහා පැමිණිල්ලක් ගොනුකර ඇත. ඒ අනුව 2011.07.21 දින නඩුව විමසීමට ගත් අවස්ථාවේ පූර්වගාමී විනිසුරුතුමන් විසින් නීතිපති උපදෙස් සඳහා නඩුව නීතිපති දෙපාර්තුමේන්තුවට යොමු කිරීමට තීරණය කර ඇත. ඒ අනුව නීතිපති උපදෙස් සඳහා මෙම නඩුව යොමු කොට ඇත. නීතිපති උපදෙස් ලැබීමට ප්‍රමාදවීම සම්බන්ධයෙන් අධිකරණයේ අවධානය යොමුවී ඒ පිලිබඳව නීතිපති දෙපාර්තුමේන්තුව වෙත දැනටමත් සිහිකැඳවීම යොමු කර ඇත. ඒ අනුව රජයේ අධිනීතිඥවරයා විසින් මෙම නඩුවේ වැඩිදුර සටහන් පිටපත් ලබාගැනීම සඳහා පසු දිනක ඉල්ලීමක් කර ඇත. ඒ අනුව දැනටමත් මෙම නඩුව සම්බන්ධයෙන් නීතිපති දෙපාර්තුමේන්තුවේ අවධානය යොමුවී ඇතිබවට නඩු වාර්ථා පරීක්ෂා කිරීමේදී පෙනී යයි.

අද දින ඉදිරිපත් කරන ලද ඉල්ලීමට අනුව අධිකරණය විසින් යම් තීරණයකට එළඹ පැමිණිල්ලක් ගොනු කිරීමට නියෝග කලහොත් යම්, හෙයකින් නීතිපති දෙපාර්තුමේන්තුව විසින් නුදුරේදී වෙනත් උපදෙසක් ලැබුනහාත් යම් ගැටලුකාරී තත්වයක් ඇතිවිය හැකිබැවින් අද දින කරන ලද ඉල්ලීම සම්බන්ධයෙන් නියෝගයක් නොකරමි. ඒ අනුව අද දින කරන ලද ඉල්ලීම පිලිබඳ නීතිපති දෙපාර්තුමේන්තුවට සිහිකැඳවීමක් යොමු කරමි"

With regard to the investigations carried out by the officers of the Moratuwa Police Station, the Learned Deputy Solicitor General submitted that,

a) Immediately after the receipt of the first complaint from one Malinda Harshana Fernando on 24th night, officers attached to Moratuwa Police Station had commenced the investigations into the said complaint, visited the scene of crime and steps were taken to

   i. record statements from the witnesses and

   ii. arrest the suspect

the said facts were reported before the Magistrate of Moratuwa on 2010.10.25.

b) The person who was suspected for the above crime, one Vidanalage Amesh Asanka de Mel was arrested immediately thereafter on 25.10.2010 and based on his statement, a knife too was recovered.

c) During the said investigations, statements of the following eye witnesses were also recorded

   i. Lankawarige Harsha Fernando

   ii. Hettiyakandage Sumudu Buddika Fernando

   iii. Muthuthanthrige Gayan Danushka Peiris

and the items recovered were sent to the Government Analyst to obtain his reports through courts.

d) The Learned Magistrate of Moratuwa decided to refer the matter for the Attorney General's Advice, since there was confusion with regard to the involvement of few others, whose statements had been recorded as witnesses, and in the circumstances, the said decision by the Magistrate of Moratuwa was taken with the intention of identifying the correct suspects before commencing the Non Summary Inquiry.

Having considered the material placed before this court by both parties, I will now proceed to analyze whether the above conduct of any one of the Respondents or their agents as alleged by the Petitioners, violated the Fundermental Rights guaranteed under Article 12 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Article 12 (1) of the Constitution reads thus,

> Article 12 (1) - All persons are equal before the law and are entitled to the equal protection of the law

Article 17 which refers to the remedy for the infringement of Fundermental Rights had restricted such remedies only to executive action as follows;

> Article 17- Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action of a Fundermental Right to which such person is entitled under the provisions of this chapter

Article 126 which deals with the Fundermental Rights jurisdiction of the Supreme Court, refers to the said jurisdiction as follows;

> Article 126 (1) - The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any Fundermenral Right or Language Right declared and recognized by chapter (iii) or chapter (iv)

When going through the above, it is clear that the alleged infringement of Fundermental Rights by Legislative Action or Judicial Action has been left out from the scope of Article 17 and therefore under 126 as well.

Wrongful exercise of Judicial Discretion under Article 17 was questioned in the case of ***Dayananda V. Weerasinghe (Fundermental Right Decision (2) 292)*** and in the said case the Supreme Court held that, "the judicial order in question was made in the exercise of the Magistrate's discretion and as such it was not the consequence of Executive Action."

As referred to above, the main contention of the Learned Deputy Solicitor General, who represented 1st to 3rd and the 5th Respondents was, that the action and/or inaction referred to by the petitioners before this court, comes within the Judicial Action and therefore it does not amount to executive action by the 1st to 3rd and the 5th Respondents and/or any one of them on the directives of the said respondents.

However as observed by me, the Petitioners before this court have not complained of any violation of their Fundermatal Rights guaranteed under Article 12 (1) by the Judicial Action, but it is the position taken by the Respondents, that the alleged violation was resulted due to "Executive Action" and not by the "Judicial Action".

When considering the above, I would now like to refer to the chronology of events that took place after the death of Rumesh Liroshan Fernando on 24th October 2010.

a) Rumesh Liroshan Fernando had received stab injuries and died at Kalubowila Hospital on 24th October 2010.
b) Facts were reported before the Magistrate, Moratuwa on 25.10.2010.

c) Suspect Widanelage Amesh Asanka de Mel was produced before the Magistrate and remanded for Fiscal Custody on 26.10.2010.

d) Inquest proceedings were commence before the Magistrate of Moratuwa on 26.10.2010 by Moratuwa Police and further inquest proceeding were held on 04.11 2010 and the Magistrate had called for a short medical report.

e) Matter was once again called on 18. 11.2010 for remand extension and for orders to the Judicial Medical Officer

f) When the matter was once again called on 02.12.2010 for remand extension, police filed a special report with regard to certain incidents which took place after the alleged murder, from Moratumulla Police and reported that the law and order in the area is maintained.

g) Since then the matter was called every 14 days for remand extension until 09.06.2011 and the Police too had filed further reports on those days informing that the investigations were in pregress.

h) On 23.06.2011 when the matter was once again called for the remand extension, court recorded that the plaint was filed and issued summons on witness 1, 2, 3, 19 and 20 for 07.07.2011.

i) On 07.07.2011 court re-issued summons on the above witnesses for 21.07.2011 and on 21.07.2011 being the 2nd date for inquiry, court made order referring the matter for Attorney General's Advice.

j) Since then the matter was called every 14 days until 27.10.2011 for remand extension of the accused and it was recorded every day that the court is awaiting Attorney General's Advice. In between, on 10.08.2011 court receives the Government Analyst's Report and

on 13.10.2011 directs the police to submit the Attorney General's Reference Number in order to send a reminder to the Attorney General

k) When the matter was called on 27.10.2011 the accused was enlarged on bail on the directives of the High Court of Panadura

l) The matter was once again called before the Magistrate on 24.11.2011, 19.01.2012 and 14.06.2012 for Attorney General's Advice.

However the court subsequently made order on 14.06.2012 to release the extracts filed in the case record to SI Kannangara to be delivered to the Attorney General and the matter was fixed for 30.08.2012 for the police to submit Attorney General's Reference Number.

m) Police failed to submit Attorney General's Reference Number on 30.08.2012 but on the next date i.e. on 18.10.2012 submits the Attorney General's Reference Number as NWP/S/42/2012

n) Since then the matter had gone down for several dates until the present application was filed before the Supreme Court on 25.09.2015

o) By letter dated 30.11.2015 (after the leave was granted by the Supreme Court on 29.10.2015) the Attorney General directs the police to commence a Non Summary Inquiry against the suspect

When considering the facts referred to above with the material placed before this court on behalf of the Respondents, it is revealed, that the alleged offence of murder, was based on direct evidence, and the said material was available with the police within few days from the incident. The rest of the investigation was limited to obtaining the Government Analyst's Report and the Post Mortem Report. However as referred to above, the police had taken over 08 months to conclude the said investigation and file the plaint before court.

After filling plaint and referring the matter by the Magistrate for Attorney General's Advice on 21.07.2011 the case has gone down until 14.06.2012, for nearly 11 months until the court realized that the police had not forwarded the extracts to the Attorney General, as directed by court on 21.07.2011. When the court directed the police to deliver the extracts, which were filed of record, police took nearly 4 months to submit the reference number before court.

When considering the provisions of chapter XV of the Code of Criminal Procedure Act No 15 of 1979 which deals with the procedure in conducting Non Summary Inquires, it is observed that the legislature had expected such inquiries to be concluded within one month from the date, the plaint is filed before court, and that clearly indicates the importance the legislature had imposed on Non Summary Inquiries. Even though there is no specific provision in the Code of Criminal Procedure Act restricting the period of investigation, it is observed by me that the legislature does not expect the investigating arm to act in lethargic manner taking months and months either to complete investigation or to submit extracts to the Attorney General, as taken in the present case.

This clearly indicates the inaction by the police, when considering the facts of the present case which were discussed above. In the said circumstance I observe that the inaction referred to above amounts to the violation of the equal protection guaranteed under Article 12.1 of the Constitution.

The Petitioners next complaint before this court is based on the violation of the Fundermental Rights guaranteed under Article 11 of the Constitution.

Article 11 of the Constitution read as follow;

Article 11; No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

As submitted by the Petitioners and revealed by the material placed before this court, the Petitioners are not complaining of any cruel or inhuman physical attack or punishment against the Petitioners but, the complaint was that, the severe mental suffering and trauma under gone by the Petitioners as well as the late father of the deceased, due to the undue delay in prosecuting the suspect, violated the rights guaranteed under the said Article.

In this regard the Petitioners heavily relied on the decision in ***Adhikary V. Amerasinghe reported in [2003] 1 Sri LR at 270***, where Shirani Bandaranayake J (as she then was) had gone in to the question of Psychological suffering of a victim when granting relief for violating the Fundermental Rights guaranteed under Article 11 of the Constitution.

In the said case Bandaranayake J when arriving at the decision stated that, "….. the protection in terms of Article 11 would not be restricted to the physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such action" she had discussed the circumstances under which she reached the said decision, whilst referring to a few other decisions where this court reached the same conclusion on different circumstances.

Before analyzing the circumstances under which the said decisions were reached, I would now proceed to analyze the complaint of the Petitioners before this court. As observed by me, the Petitioners' complaint before this court is twofold,

Firstly, they complained of the suffering the late father of the deceased Rumesh Liroshan Fernando namely W.W. Philip Ranjan Fernando had to undergo due to the delay in prosecuting the suspect, finally ended up with a premature death who died at the age of 65.

Secondly, they complained of the mental stress and trauma under gone by them, due to the non prosecution of their close relation's death.

As observed by me the first complaint of the Petitioners referred to above is unfounded. It may be true that the father of the deceased Rumesh Liroshan Fernando was interested is seeing justice being done to his deceased son, but in the absence of any material before us to say that his premature death was due to his mental suffering, I am reluctant to agree with the said submissions of the Petitioners.

In support of their second argument the Petitioners have produced marked X-15 a report issued by Professor Harischandra Gambheera Consultant Psychiatrist at National Institute of Mental Health with regard to his examination of the three Petitioners namely, M.W. Leelawathie Hariot Perera, W.W. Raj Lakmal Fernando and W.W. Roshini Shivanthi Fernando.

At the outset, it is important to note that, the report produced mark X-15 is dated 9th December 2015 and was not available at the time the papers were filed before this court on 5th September 2015. According to the said report, the three examinations were carried out on 24th November 2015 on the request of an Attorney at Law.

After his observations and findings, the Consultant Psychiatrist had submitted his conclusion as follows;

"The history and the mental state examination of all three members of the family of Liroshan Fernando revealed that they are suffering from Psychological distress following the

death of Mr. Fernando. Both his mother and the sister is suffering from depression and prolonged abnormal grief as a consequences of sudden unexpected death of their loved relative. Their depression and pathological grief remain unresolved due to non prosecution of the murder of Rumesh Liroshan Fernando five years ago. The current social circumstances where the murder suspect who lives in the same area and their unacceptable behaviour is also responsible for the maintaining of the distress and the grief."

When going through the said conclusions it is further observed by this court, that according to the Consultant Psychiatrist, the main reason for suffering is the unexpected death of their loved relative, but the depression and Pathological grief remain, due to two reasons, firstly due to non prosecution for five years and the unacceptable behaviors of the suspect who lives in the same area.

With regard to the second reason referred to above, I observe that, other than a complaint produced marked X-9, said to have made by a witness against the relatives of the suspect in the Magistrate's Court proceedings on 15.11.2015, there is no proof of any unacceptable behavior either by the suspect or the members of his family as referred to in the report X-15.

In the said circumstances it is clear that the depression and prolonged abnormal grief said to have suffered by the 1st and the 3rd Petitioners are due to 3 main factors, out of which there is no proof of any material with regard to the 3rd factor. The first factor being the unexpected death of the close relative, has no bearing on the present case.

With regard to the observations and findings of the Consultant Psychiatrist, I further observe, that some of the complaints of the 1st and 3rd Petitioners are unfounded as well. In addition to the document produced marked X-15, the report from the Consultant Psychiatrist, there is no material placed before us to establish whether the said Petitioners were subject to any treatment

during the period relevant to the present case. The Petitioners have failed to place any material to show, any reprimand and/or attendance sheets as referred to in the observation by the consultant with regard to the 3rd Petitioner.

Having considered the nature of the complaint before this court, I will once again proceed to analyze the legal basis under which Bandaranayake J (as she then was) declared the violation under Article 11 expanding to a situation where a person had suffered psychologically.

Whilst reaching the said decision Bandaranayake J was also mindful of the decision in ***W.M.K. de Silva V. Chairman Ceylon Fertilizer Corporation (1989) 2 Sri LR 393*** where Amarasinghe J had said in the said judgment,

> "I am of the opinion that the torture or cruel, inhuman or degrading treatment or punishment contemplated in Article 11 of the Constitution is not confined to the realm of physical violence. It would embrace the sphere of the soul or mind as well",

and the case of ***Kumarasena V. S.I. Sriyantha and Others*** (SC Application 257/93 Supreme Court minutes of 23.05.1994) where the Supreme Court held that the suffering occasioned was an aggravated kind and attained the level of severity to be taken cognizance of a violation of Article 11 of the Constitution, in the absence any physical impairment or disability with the victim.

When considering the decisions referred to above and the facts and circumstances of the case in hand, Bandaranayake J observed that the test which had been applied by our courts was that, "whether the attack on the victim is Physical or Psychological, a violation under Article 11 would depend on circumstances of each case.

The Petitioners main complaint before this court is the inaction which resulted long delay in prosecuting the suspect, who said to have killed their close relative. This court has already concluded that the said delay and/or the inaction by the 1st to the 3rd Respondents and/or their agents had violated the Fundermental Rights guaranteed under Article 12 (1) of the Constitution. However, from the material already discussed, it is also clear that the Petitioners have not being able to establish that the suffering and the trauma complained by them was in fact faced by them as a result of the inaction by the 1st to 3rd and 5th Respondents.

In the said circumstances I am not inclined to declare that the Fundermental Rights guaranteed under Article 11 had been violated by the inaction complained by the Petitioners.

I hold that the Fundermental Rights guaranteed under Article 12 (1) of the Constitution had been violated by the conduct of the 1st to the 3rd Respondents and/or by their agents. In the said circumstances I make order directing the state to pay Rs. 50,000/- as compensation to each Petitioner.

Judge of the Supreme Court

Eva Wanasundera 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

S.C (FR) 383/2008

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

1. W.J. Fernando
   77/1, Church Road
   Gampaha.

2. A.M.M. Aththanayake
   199/1, Borella Road,
   Godagama.

3. J. Wijesinghe
   LG-3, Maligawatta Flats,
   Colombo 10.

4. E.A.D. Weerasekera
   Bhathiya Mawatha,
   Kiribathgoda.

5. K.N. Perera
   65/1, Weli Amuna Road,
   Hendala,
   Wattala.

6. S. Hewavitharana
   89, Temple Lane,
   Colombo 10.

7. B.D.D. Kularatne
   89, Thelangapatha Road,
   Wattala.

8. W.C. Alwis
   217, J.N.H.S. Gogithota
   Wattala.

9. G.D.K. Rathnasekera
   51-4, Galudupita Road,
   Maththumagala,
   Ragama.

21. P.K. Dayananda
    Wikumpadma
    Hikkaduwa.

22. S.P. Guruge
    37, Pallewela Road,
    Katetiya.

23. K.I. Premadasa
    202, Thotupola Road,
    Bolgoda,
    Bandaragama.

PETITIONERS

Vs.

1. Priyantha Perera
   Former Chairman.

2. Gunapala Wickramaratne
   Former Member.

3. M. J. Mookiah
   Former Member.

4. Srima Wijeratne
   Former Member.

5. W.P.S. Wijewardena
   Former Member.

6. Mendis Rohanadheera
   Former Member.

7. Bernard Soyza
   Former Member.

8. Palitha Kumarasinghe
   Former Member.

9. Dayasiri Fernando
   Former Member & former Chairman .

   All of the Public Service Commission
   Presently of No. 177,
   Nawala Road, Narahenpita,
   Colombo 5.

10. R.M.K. Rathnayake
    Former Secretary, Ministry of Trade and Consumer Affairs and Acting Food Commissioner, Department of Food, 330, Union Place, Colombo 02.

10A. Lalith Rukman de Silva
    Former Secretary,
    Ministry of Trade Marketing
    Development Co-operative and
    Consumer Service,
    Union Place,
    Colombo 02.

10B. Sunil Sirisena
    Former Secretary,
    Ministry of Trade Marketing
    Development Co-operative and
    Consumer Service,
    Union Place,
    Colombo 02.

10C. G.K.D. Amarawardena
    Secretary,
    Ministry of Trade Marketing
    Development Co-operative and
    Consumer Service,
    Union Place,
    Colombo 02.

10D. P.S.J.B. Sugathadasa
Secretary,
Ministry of Food Security
Sathosa Building
Vauxhall Street, Colombo 02.

10E. T.M.K.P. Tennakoon
Secretary
Industrial & Trade Marketing
Affairs Ministry
No. 73/1, Galle Road,
Colombo 3.

11. Mrs. P. Siriwardena
Former Director of Establishments
Ministry of Public Administration and
Home Affairs,
Torrington Square,
Colombo 7.

11A. M.A. Dharmadasa
Former Director of Establishments
Ministry of Public Administration and
Home Affairs,
Torrington Square,
Colombo 7.

11B. W.S. Somadasa
Director of Establishments
Ministry of Public Administration and
Home Affairs,
Torrington Square,
Colombo 7.

12. Justice Nimal Dissanayke
Former Chairman
Administrative Appeals Tribunal
Colombo 8.

12A. Justice Imam
Chairman,
Administrative Appeals Tribunal
Horton Place,
Colombon7.

13. Attorney General
Attorney General's Department
Colombo 12.

14. S.C. Mannapperuma
Former Member

14. A A.A. Salam Abdul Waid
Member

15. Ananda Seneviratne
Former Member

15A. D. Shirantha Wijetilake
Member

16. N.H. Pathirana
Former Member

16A. Prathap Ramanujam
Member

17. S. Thillanadarajah
Former Member

17A. V. Jegarasasingam
Member

18. M.D.W. Ariyawansa
Former Member

18A. Shanthi Nihal Senevirathna
Member

19. A. Mohomed Nahiya
Former Member

19A. S. Ranugge
Member

20. Sathya Hettige
Former Chairman
Public Service Commission
No. 177, Nawala Road, Narahenpita.

20A. Dharmasena Dissanayake
Chairman

21. Kanthi Wijetunga
Former Member

21A. D.L. Mendis
Member

22. Sunil A. Sirisena
Former Member

22A. Sarath Jayatilake
Member

23. I.N. Soyza
Former Member

All of the Public Service Commission
No. 177, Nawala Road,
Narahenpita.

RESPONDENTS

BEFORE: S.E. Wanasundera P.C., J.
B. P. Aluwihare P.C., J. &
Anil Gooneratne J.

COUNSEL: Manohara de Silva P.C., for the Petitioners

Viraj Dayarathne D.S.G. for the Attorney General

ARGUED ON: 18.01.2017

DECIDED ON: 28.02.2017

GOONERATNE J.

The Petition dated 23.09.2008 states the Petitioners served as Wharf Field Officers of the Department of Food and are now retired. Thereafter caption had to be amended and the Petitioners have filed amended petition. It is averred that this application relates to the wilful failure of the Public Service Commission (1st to 9th Respondents) to implement the order of the Administrative Appeals Tribunal. It is pleaded that the Administrative Appeals Tribunal has been established by Article 59(2) of the Constitution which is final in terms of Section 8(2) of the Administrative Appeals Tribunal Act No. 4 of 2002. This case has a history and the facts need to be ascertained carefully firstly from the petitioners.

It is stated that the Petitioners joined the Department of Food as Casual Wharf Clerks and thereafter appointed as Wharf Clark. Letter of appointment is dated 08.02.1967 (P2). In 1975 Wharf Service of the department was re-structured and three classes were created. Scheme of recruitment is produced marked P3. In the manner pleaded in paragraph 7 of the petition, the Petitioners were absorbed to Class II (b) of the service and thereafter promoted to Class II (a). They also state that their promotions were back dated to 01.04.1975. Letter P4, P5 & P6 annexed to the petition seems to support this

position but some of these documents are not legible and back dating cannot be clearly ascertained. The next promotion was to the post of Field Officer–Class I (paragraph 5:5 & 5:6 of P3). The Wharf Field Officers in Class II (a) and who have passed the Efficiency Bar Examination and are placed in the Rs. 5880/= salary scale, are eligible to be promoted to Class I upon facing an interview. The Efficiency Bar Examination was scheduled to be held on 19.11.1977 but postponed on several occasions (P7A to P7D) for various reasons.

Petitioners allege that postponement of the Efficiency Bar Examination was done to enable 12 Wharf Field Officers who reached the age of 45 and who had not passed the Efficiency Bar Examination, to be promoted. By letter P8, Food Commissioner sought the approval of Director Establishments and the Director by letter P9 approved the promotions of 12 Wharf Field Officers on the conditions that such promotions should not be a precedent. However the Efficiency Bar Examination was ultimately held on or about 1982, but Petitioners were not promoted to Class I though there were vacancies. Several requests were made to the relevant authorities to promote the Petitioner to Class 1.

A letter that seems to help the Petitioners is produced marked P11. By P11 Food Commissioner informs the Petitioners that in respect of Wharf Field Officers Class II (a) who applied for Efficiency Bar, in 1977 and who sat the examination in 1982, the year of passing the examination will be considered as 1977. By letter

P12 of 12.03.1994 the 3rd Petitioner was promoted. In the same way 1st to 10th, 12th, 16th, 18th, 21st and 22nd Petitioners were promoted to Class I with effect from 15.01.1992. The rest of the Petitioners to this application were not promoted as they had retired by that time.

The Petitioners in view of letter P11 issued by the Food Commissioner, had requested the authorities concerned that their promotions to Class I be back dated to 1978 on a Supernumerary basis (vide P13A to P13 D). Petitioners get more support for their plea to back date the appointment, also from the Food Commissioner by letter P13 E of '05.11.1993. P11 & P13 E fortify the position of Petitioners'.

Petitioners aver that they made further requests to the authorities concerned as stated above that their promotions to Class I be back dated to 1978 on a supernumerary basis and state that the Director, Establishment by his letter of 29.08.1994 informed the Secretary to the Department of Food that such an approval cannot be granted to the Petitioners in the manner requested by them, as stated above (P13F). The Public Service Commission by its letter of 08.07.2002, (P13G) informs the Secretary, Ministry of Co-operatives that the requests as above by the Petitioners were considered and directed that those officers who passed the Efficiency Bar Examination in 1982, can be promoted to Class I on the basis they passed the Efficiency Bar Examination in 1977, if they

have 10 years' service and other necessary qualifications. Thereafter the Petitioners informed the relevant authorities that they have fulfilled all the requirements as per the scheme of recruitment and to back date their promotions to 1978. However the PSC by their decisions P14 & P15 refused to do so as the Petitioners have not fulfilled the necessary qualifications as per the scheme of recruitment.

Details of the employment of the Petitioners are produced marked P15A. It is also disclosed by the Petitioner in paragraph 22 of the petition that the 2nd Petitioner filed a Fundamental Rights Application bearing No. SC 299/2005 alleging that the PSC has violated the Fundamental Rights of the 2nd Petitioner by their aforesaid decisions. But the Supreme Court refused to grant leave to proceed. Thereafter 33 Wharf Field Officers including the Petitioners appealed to the Administrative Appeals Tribunal against the decision of the PSC on 22.08.2005 (P16). The Administrative Appeals Tribunal having heard the appeal held in favour of the Petitioners, and the tribunal made order rescinding the above decision of the PSC and made order that all 33 Appellants in Class I of the Wharf Field Service be promoted by antedating their appointment to 01.05.1978 and that they would be entitled to all consequential benefits (P17). In spite of the order P17 by the Administrative Appeals Tribunal, the Public Service Commission failed to give effect to the above order dated 19.07.2006

(P17) to date. Though numerous requests were made to the PSC, the PSC failed and rejected to take action as required by order P17 of the Administrative Appeals Tribunal.

It is also pleaded that the Petitioners informed the PSC to implement the order P17 and also at a meeting by some of the Petitioners with officers of the PSC, the Petitioners were informed that the matter has been referred to the Hon. Attorney General to whom the Petitioners made several requests. Hon. Attorney General by P20A, P20B & P20C referred the matter to the PSC for consideration and necessary action.

It is not incorrect to state that the Administrative Appeals Tribunal (AAT) is the Appellate Body and the PSC will be bound to abide by a decision of the AAT. The AAT which is established under Article 59(1) of the Constitution and in terms of Article 59(2), the AAT has the power to alter, vary or rescind any order or decision made by the commission. Article 59(3) states the Constitution, powers and procedure of the AAT is to be provided for by law and the Administrative Appeals Tribunal Act No. 4 of 2002 was enacted for that purpose. Section 3(a) of the said Act, AAT has the power to hear and determine any appeal preferred to it from any order or decision made by the PSC in the exercise of powers under Chapter IX of the Constitution. Further Section 8(2) provides

that a decision made by the tribunal (AAT) shall be final and conclusive and shall not be called in question in any suit or proceedings in a court of law.

The preclusive clause has been included in the said Act with regard to challenging the decision of the AAT and the legislature has done so to ensure that a decision of the AAT must have finality. As such PSC will be bound to abide by a decision of the AAT.

I have also perused the affidavit of the then Chairman (1st Respondent) of the PSC. It is pleaded that Wharf Field Officers in Class II (a), who have passed their Efficiency Bar Examination and placed in the Rs.5880/- salary scale are eligible to be promoted to Class I, upon facing an interview. On a perusal of the affidavit of the 1st Respondent I find that very many factual positions taken up by the Petitioner are admitted by the Respondents. It is admitted that the Petitioners on several occasions requested that their promotion to Class I be antedated to 01.05.1978, and such requests were made on the basis that on previous occasions, certain officers had been promoted to Class I though they did not satisfy the eligibility criteria for promotions. Such promotions were made on the basis that there should <u>not be a precedent</u>.

It is further pleaded by the 1st Respondent that requests made by the Petitioners have been turned down by the Director, Establishments by letters of 31.03.1992 & 29.08.1994 (P13F). Repeated requests of these officers

were submitted to the relevant Minister who submitted a Cabinet Memorandum and called for a report from Salaries and Cadre Committee. The resulting position was that the Cabinet as well as the Salaries and Cadre Committees pointed out that these officers are not entitled to be promoted and thus the Cabinet of Ministers had not approved such manner of promotions. In this regard letter 1R4, 1R5, 1R6 & 1R8 are produced. What is emphasised is that the eligibility criteria for promotions and that the promotions can only be granted if there were substantive vacancies at the relevant time. Petitioners sought appointments on a supernumerary basis very well knowing that there were no vacancies as at that date, and knowing that previously it was due to certain officers which were not to be relied upon as a precedent. All 17 officers promoted in 1978 were senior to the Petitioners. Thereafter there was only one (1) promotion to Class I in 1983 and four (4) promotions in 1986. As such there were no vacancies to promote the Petitioners though they passed the Efficiency Bar Examination in 1982.

The Director General of Establishment by letter of 31.03.1999 (1R7) stated that promotions to Class I, should be on seniority in service and availability of vacancies. 1st Respondent specifically aver that the Administrative

Appeals Tribunal had not considered the above matters in arriving at its finding. Finally the 1st Respondent, plead that it is not possible to implement the said decision of the AAT, taking into consideration the serious repercussions that would have followed if such decision of AAT was implemented.

This seems to be a long standing issue. The law on the point of constitutional provisions need not be disturbed by this court. There is finality attached to the AAT order P17. The Public Service Commission should have canvassed this order and placed the matters pleaded by the 1st Respondent in this application before a Court of Competent Jurisdiction. It was not done. It is stated that this court refused to grant Leave to Appeal to the 2nd Petitioner on the same issue. That was prior to the AAT order. Perhaps if the PSC took the step to canvass the AAT order the position may have been different. i.e this court should not disturb the regular procedure pertaining to appointments, promotions, transfer, dismissal etc. of the Public Service. In fundamental Rights Applications this court has wide powers to make just and equitable orders. Petitioners have with them a valid unchallenged order (P17). Thereby acquired

a right to enjoy the fruits of the order. As such I hold that the Petitioners are entitled to relief as per sub paragraphs (b) and (c) of the prayer to the last Amended Petition.

Application allowed, without 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

S.C. (FR) Application No. 394/2008

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

Oenone Saummiya Amalasontha Gunewardena
No. 285/12, Hokandara South
Hokandara

PETITIONER

Vs.

1. Sri Lankan Airlines Limited
   Level 22, East Tower,
   World Trade Centre,
   Echelon Square,
   Colombo 1.

2. Dr. P. B. Jayasundera
   Chairman
   Sri Lanka Airlines Limited,
   Level 22, East Tower,
   World Trade Centre,
   Echelon Square.
   Colombo 1.

2A. Ajith Dias
   Chairman
   Sri Lankan Airlines Limited
   Level 22, East Tower,
   World Trade Centre,
   Echelon Square,
   Colombo 1.

3. Manoj Gunewardena
Chief Executive Officer,
Sri Lankan Airlines Limited,
Level 22, East Tower,
World Trade Centre,
Echelon Square.
Colombo 1.

3A. Rakhitha Jayawardena
Chief Executive Officer,
Sri Lankan Airlines Limited
Level 22, East Tower,
World Trade Centre,
Echelon Square,
Colombo 1.

4. Capt/ Milinda Ratnayake
Sri Lankan Airlines Limited
Level 22, East Tower,
World Trade Centre,
Echelon Square,
Colombo 1.

5. Hon. Attorney General
Attorney General's Department,
Colombo 1.

RESPONDENTS

BEFORE: B. P. Aluwihare P.C., J.
Sisira J. de Abrew J. &
Anil Gooneratne J.

COUNSEL: M. A. Sumanthiran with Ermizo Tegal
Instructed by S. Sunderalingam and Balendra
For the Petitioner

Romesh de Silva P.C., with Sugath Caldera
For the 1st and 3rd Respondents

Anura Meddegoda with T. Nanayakkara
Instructed by Varners for the 2nd Respondent

Palitha Kumarasinghe P.C., with Chinthaka Mendis
For the 4th Respondent

Indika Demuni de Silva P.C., A.S.G. for the 5th Respondent

WRITTEN SUBMISSIONS TENDERED ON:

11.03.2009 – By the Petitioner
07.05.2009 – By the 2nd Respondent
11.05.2009 – By the 1st & 3rd Respondents

ARGUED ON: 14.12.2016

DECIDED ON: 15.02.2017

GOONERATNE J.

The Petitioner by her petition to this court states she is one of the pioneers of the 1st Respondent Company (Sri Lankan Airlines Limited) and inter alia states that the Petitioner was promoted to the management level in 1984 and Senior Manager Level in 1992. Petition filed of record gives details and positions held by the Petitioner during her tenue of office. It is also pleaded that at one point of time Petitioner was the largest shareholder of the 1st Respondent Company from among its employees. Petitioner describes, in her petition several wrongs caused to her by her superiors and to certain discriminatory acts.

Her main complaint is her non selection to the post of Head of Service Delivery for which she applied and faced an interview before an interview panel, and the selection of the 4th Respondent to the said post.

On a perusal of the entire petition, I find that very many paragraphs in same refer to mismanagement and lapses of the 4th Respondent, and further complains that the interview was not properly held and that the 4th Respondent is not a fit and proper person to be appointed as Head of Service Delivery. Qualifications required for the said post are contained in paragraph 24 of the petition. In paragraph 27 it is pleaded that format of the interview as communicated by the Human Resources Division was a 20 minute presentation followed by an interview. Special reference is made for a separate interview before the Chairman of the 1st Respondent for all candidates in the afternoon of the day of the interview. Presentation and interview would be for one hour as intimated by the Human Resources Division. The interview with the Chairman (2nd Respondent) was to be half an hour duration.

Petitioner complains that upon entering the room where the interview was held the 2nd Respondent had informed her that both the presentation and interview would have to be completed within 20 minutes. As a result of this sudden and unexpected change, the Petitioner was forced to skip certain slides in her presentation which was prepared for a 20 minutes time

allocation. Petitioner further complains that during the interview no questions had been asked by the 3rd Respondent or the Chief Financial Officer (as pleaded). The 2nd Respondent asked only a few questions and one question put to her by the Head of Human Resources. It is also the position of the petitioner that the 2nd and 3rd Respondents showed complete disinterest and a desire to complete the interview hastily. The other allegation was that the 2nd and 3rd Respondents had already decided that the Petitioner would not be appointed even prior to the commencement of the interview. A copy of the extract of the Annual Report for 2008 (P18) is produced and it is pleaded that the Chief Executive Officer and the Management Team had been already appointed, though the Management Agreement with Emirates expired on 30th March 2008.

The learned counsel for the Petitioner argued that the interview process was flawed. He referred to document R13 (appraisal of interview) and more particularly to documents 13(a) and 13(b) which are unsigned documents. His position as regards 13(c) was that subjective grades are given and the entirety was subjective. The learned counsel also invited court to documents P13A to P13C which demonstrate unprofessional conduct of the 4th Respondent. It was his position that his client had been discriminated and the interview had not been held properly for the reasons stated above.

The learned President's Counsel for 1st and 3rd Respondents raised a question of time bar and inter alia submitted that all necessary parties are not before court, as only three members of the panel are made parties. Interview held on 04.08.2008 and the petition is dated 03.10.2008. It was further submitted by learned President's Counsel that appointment of the 4th Respondent is not a violation contemplated by law. In any event he submitted there is no allegation of corruption, mala fides and fraud on the part of the interview panel. It was a unanimous decision of the interview panel to select the 4th Respondent. He also submitted that the 4th Respondent was serving in an acting capacity in the same post prior to being appointed in a permanent capacity. The Learned President's Counsel drew the attention of this court to documents R13(a) to R13(f) and R13(g). At the interview the 2nd and 3rd Respondents and the Head of Human Resources were requested to and did make in writing summary of their observations. The Chief Finance Officer and the Executive Directors were requested to give their appraisal which they did independently.

The Learned Counsel for the 2nd Respondent whilst associating himself with the submissions of learned President's Counsel informed court that the 2nd Respondent held the post of Chairman in the 1st Respondent Company for a period of six months and submitted that the 1st Respondent followed and

adopted the accepted criteria for selection and there was nothing unfair in the selection process. The learned President's Counsel for the 4th Respondent also associated himself with the submissions of all other counsel for the Respondents and submitted that the 4th Respondent was a Pilot of Air Lanka and that a Pilot is a fit and competent person to hold the post in question and drew the attention of this court to all documents filed of record along with the affidavit of the 4th Respondent.

The learned counsel for the Petitioner informed this court on or about 30.06.2011 that his client would only pursue the remedy as per paragraph (b) of the prayer to the petition which deals with a declaration in terms of Article 12 of the Constitution. This court as far back as 08.10.2008 granted Leave to Proceed for an alleged violation of Article 12(1) of the Constitution. Since then hearing of this case had been postponed for various reasons and on applications of parties on either side. The Petitioner seeks to blame the interview panel and at the same time argue that the 4th Respondent who was the successful candidate is not a fit and proper person to be appointed to the post in question.

The Supreme Court is vested with wide powers to grant relief or make such decision or give directions as it may deem just and equitable in the circumstances. But the matter of relief is in the discretion of the court. The relief granted must be in accordance with law, principles of equity, justice and the

jurisdiction of the Supreme Court entitles the court to subject the exercise of legal rights to equitable consideration, that is, of a personal character arising between one individual an another which makes it unjust or inequitable, to insist on legal rights to exercise them in a particular way: *Per Lord Wilberforce in Ibrahim Vs. Westbourne Galleries Ltd. (1972) 2 AER 4490 at 500*. However equal protection of the law would not mean that any violation by the executive and or Administrative action fall within the equality provisions under Article 12 of the Constitution. As such the question of non-selection of the Petitioner and the allegation levelled against the interview panel should be correctly and properly established. This is the main point to be considered.

If an allegation is made against the interview panel all the members should have been made parties. It is unfortunate that all of them are not before court. Only three out of five are made parties. As such learned President's Counsel who raised this point correctly directed the attention of this court to this aspect. Necessary parties are not before court. On one hand it would be unfair to fault the interview panel in the absence of some of them. (members of the panel).

Learned Counsel for the Petitioner urged before this court that upon the Petitioner entering the room in which the presentation and interviews were held, the 2nd Respondent informed the Petitioner that both the

presentation and interview had to be completed within 20 minutes. This was a sudden an unexpected change and the Petitioner was forced to skip certain slides in her presentation, which was prepared by her earlier.

The other complaint is that no questions were put to her by the 3rd Respondent or the Chief Financial Officer. 2nd Respondent asked only a few questions. One question was asked by the Head of Human Resources. Further the attitude of the 2nd and 3rd Respondents was one of complete disinterest and a desire to conclude the interview hastily. In reply to above it is the position of the 4th Respondent that he and all others were told that the presentation and interview would last only for 20 minutes. If that be so this court cannot fault the panel. This seems to be the yard stick applicable for all the candidates. Was there a total denial of the time limit or less time allocated to the Petitioner or were others given more time for their presentation and interview? If it was so Petitioner would have had a genuine grievance. This court cannot blame the interview panel on this aspect and consider this sort of change to be a violation of a right, notwithstanding prior intimation of longer time. No, doubt limiting of time could have affected all the candidates to a point. The 4th Respondent managed to adapt to the time limit suggested by the interview panel but not the Petitioner in the manner she complains to this court. Further the 4th Respondent argues that it is part of the profession as a Manager to manage time and handle

a crisis situation. This seems to be an acceptable argument especially in the Airline field. I am unable to accept the views expressed by the Petitioner on this aspect.

The material made available to this court indicates that the five member panel followed and adopted a certain method to interview candidates. A careful analysis had been undertaken by three members of the panel and they had written down required notes. The other two gave their appraisals independently (paragraph 17 of the statement of objection of 1st & 3rd Respondents and it's corresponding affidavit).

I cannot fault the panel for doing so since it is a matter for the panel to adopt their own criteria. This court cannot expect the panel to ask certain number of questions to fathom the suitability of candidates.

The 4th Respondent was Acting Head of Service Delivery for a short period prior to being appointed as Head of Service Delivery. Both the Petitioner and the 4th Respondent seems to have had a long standing career in the 1st Respondent Company. The 4th Respondent may have had the edge over the Petitioner since he was an experienced Pilot with long years of service. Nevertheless final selection would have to be based on a proper interview. I cannot conclude that the above matters influenced the interview panel. There is no material in regard to above for this court to arrive at such a conclusion i.e

improper interview. Mere allegations and comments that he or she is better experience or qualified are best left for the interview panel unless a serious flaw in the interview process, could be detected.

Documents R13(a) to R13(g) indicates a careful comprehensive analysis by the panel. Mere allegation of it being not signed cannot be a ground to reject same. Affidavits of Pradeep, Padmeshwari Dahanayake (Head of Human Resources 1st Respondent) who was in the interview panel and that of the 3rd Respondent explain the method adopted to allocate marks as in paragraphs 17 to 19 of the affidavit.

The bare assertions contained in the petition and affidavit would not suffice. Material projected by the Petitioner does not directly substantiate these allegations. In any event allegations must be established by the Petitioner to the satisfaction of court. Even a wrong decision bona fide made on a question of fact cannot constitute a breach of fundamental right of equality in the eyes of the law – Gunatilleke Vs. A.G and Sirimanna vs. A.G - S.C. Application No. 47/79 & 48/79 (Reported in Fundamental Rights decision of the Supreme Court Vol. I pg. 86). In the case in hand I do not think the interview panel came to a wrong decision.

That upon a consideration of all the material placed before court by either side, I am of the view that the Petitioner's fundamental rights are not violated by the Respondents. Therefore this application stand dismissed without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

B.P. 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

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

Anura Gonapinuwala,
180, S.H. Dahanayake Mawatha,
Galle.

Petitioner

SC FR 413/2013

Vs.

1. Sathya Hettige,
   Chairman, Public Service Commission.

1A. Dharmasena Dissanayaka,
Chairman, Public Service Commission.

2. S.C. Mannapperuma.

3. Ananda Seneviratne.

4. N.H. Pathirana.

5. S. Thillanadarajah.

6. A. Mohamed Nahiya.

7. Kanthi Wijethunga.

8. Sunil S. Sirisena.

9. I.M. Zoysa Gunasekara.

Members of the Public Service Commission,
177, Nawala Road,
Narahenpita,
Colombo 05.

2A. A. Salam Abdul Waid.

3A. D. Shirantha Wijayatilaka

4A. Dr. Prathap Ramanujam

5A. V. Jegarasasingam.

6A. Santi Nihal Seneviratne

7A. S. Ranugge

8A. D.L. Mendis

9A. Sarath Jayathilaka

Members of the Public Service Commission,
No. 177, Nawala Road,
Colombo 05.

10. T.H.L.C Senaratne,
Secretary,
Public Service Commission,
177, Nawala Road,
Narahenpita,
Colombo 05.

10A. H.M.G. Senevirathne,
Secretary,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita,

11. J. Dadallage
Secretary,
Ministry of Public Administration,
Provincial Council and Democratic Governance,
Independence Square,
Colombo 07.

11A. J.J. Rathnasiri,
Secretary,
Ministry of Public Administration and Management,
Independence Square,
Colombo 07.

12. R.P.P. Jayasingha,
Director Engineering Services,
Engineering Services Office,
Ministry of Public Administration,
Provincial Council and Democratic Governance,
Independence Square,
Colombo 07.

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

14. H.W. Wijayarathna,
Chairman of the Provincial Public Service Commission,
Southern Province.

15. K.K.G.J.K. Siriwardana.

16. D.W. Vitharana.

17. Munidasa Halpandeniya.

18. Shreemal Wijesekara.
Members of the Provincial Public Service Commission, Southern Province, 6th Floor,
District Secretariat Building,
Galle.

19. U.G. Vidura Kariyawasam,
Secretary,
Provincial Public Service Commission, Southern Province,
6th Floor, District Secretariat Building,
Galle.

20. W.K.K. Athukorala,
Chief Secretary – Southern Province, Chief Secretary Office,
S.H. Dahanayake Mawatha,
Galle.

20A. S.M.G.K. Perera,
Acting Chief Secretary - Southern Province,
Chief Secretary Office.

Respondents

Before : B.P. Aluwihare, PC, J
Priyantha Jayawardena, PC, J
Nalin Perera, J

Counsel : M.U.M. Ali Sabry, PC with Ms. Shehani Alwis for the Petitioner.
Yuresha de Silva, SSC for the Honourable Attorney General.

Argued on : 9th October 2017

Decided on : 15th December 2017

Priyantha Jayawardena, P.C. J.

The Petitioner filed his Petition on 10th December, 2013 under Article 126 of the Constitution and subsequently filed an Amended Petition on 2nd April, 2014. In his Amended Petition, the Petitioner sought, *inter alia*, the following reliefs:

(i) declare that the new Service Minute of the Sri Lanka Engineering Service published in the Gazette Extraordinary No. 1836/6 dated 11th November 2013 (marked as 'P4' and 'P5') is contrary to law and be declared null and void or no force or avail in law; and

(ii) make order to promote the Petitioner to Class II Grade II of the Sri Lanka Engineering Service under the previous circular of the Sri Lanka Engineering Service with effect from 22nd November, 2003.

On the 9th of August 2017, this Court had been informed that since the making of this Application, the Petitioner was appointed to Grade III of the Sri Lanka Engineering Service with effect from 24th February, 2015 by a letter dated 24th February, 2016 (marked as 'X2').

In his Amended Petition, the Petitioner stated that he joined the Department of Buildings on the 25th April, 1977 as an Administrative Overseer (Grade II) and was absorbed to the Grade III of Mid-Level Technical Service (hereinafter 'MLTS') with effect from 1st May, 1977.

The Petitioner was later absorbed into the Provincial Public Service with effect from 1st January, 1990.

The Petitioner stated that the Public Administration Service Circular 15/91 dated 18th May, 1991 (marked as 'P10') provided that MLTS officers should be granted all promotions and arrears of salary due to them, prior to them being released to the Provincial Service. Therefore, the Circular entitled him to be promoted to Grade II B and subsequently to Grade II A of the MLTS with effect from 25th April, 1982 and 25th April, 1985, respectively.

The Petitioner further stated that he fulfilled the requirements of the Circular as he had passed the necessary examinations and served at the Department of Buildings for nearly 13 years. Nevertheless, the Petitioner was not granted the said promotions due to him until 1995 when he was promoted to Grade II B and to Grade II A in 1997.

Public Administration Circular No. 27/94 dated 25th July, 1994 (hereinafter 'Circular No. 27/94') amended the Minutes of the MLTS to restructure the MLTS with effect from 1st July, 1994. Accordingly, the MLTS was re-designated as the Sri Lanka Technological Service (hereinafter 'SLTS') and other changes included the revision of grades and salary scales.

The Petitioner stated that the Minute of the SLTS was published in the Gazette Extraordinary No. 915/18 dated 22nd March, 1996 which was subsequently amended by Gazette Extraordinary No. 1094/2 dated 23rd August, 1999.

Due to the restructuring, the Petitioner was promoted to Grade II B of the MLTS with effect from 1st January, 1990 by letter dated 25th September, 1995.

The Petitioner stated that he was then promoted to Grade II A of the MLTS with effect from 1st January 1993 by a letter dated 26th June, 1997. By a letter dated 1st July 1997, the Petitioner was subsequently promoted to Grade I of the SLTS with effect from 1st July, 1994 in terms of the Circular No. 27/94.

Further, the Public Administration Circular No. 01/2000 dated 10th January, 2000 (hereinafter 'Circular No. 01/2000') set out the government decision to promote qualified officers of the MLTS who served from 1st May, 1977 to 1st July, 1994.

In terms of Circular No. 01/2000, the Petitioner's promotion to Grade II B was backdated to 1st January, 1983 by letter dated 29th August, 2000. Further under the aforesaid Circular, the Petitioner's promotion to Grade II A of the MLTS was also backdated to 1st January, 1986 by a letter dated 22nd December, 2000.

The Petitioner's promotion to Grade II B was further backdated with effect from 25th April, 1982 and his promotion to Grade II A too was backdated to 25th April, 1985 by two separate letters dated 2nd June, 2003.

After the Petitioner was promoted to Grade I of the SLTS with effect from 1st July 1994, he was promoted to the Special Grade of the SLTS with effect from 22nd November, 2003 on a supernumerary basis by a letter only dated September, 2007. He was later appointed to the Special Grade on a permanent basis with effect from 6th February, 2007 by a letter dated 28th February 2008.

In terms of Engineering Service Circular No. 31 dated 5th August 1997 (hereinafter 'Circular No. 31'), the officers in the Special Grade of the SLTS were eligible to be promoted to Class II Grade II of the Sri Lanka Engineering Service.

The Petitioner stated that he applied for the promotion to Class II Grade II of the Sri Lanka Engineering Service under Clause 3(3) of the said Circular and he was called for interview on the 25th of June, 2009 for the said post. However, he did not secure the said appointment as he had not completed the required five years of service, since he was promoted to the Special Grade on the 6th of February, 2007.

Later by a letter dated 18th July 2012, the Petitioner's appointment to the Special Grade of SLTS was backdated with effect from 22nd November, 2003 which was the date that he was promoted to the Special Grade on supernumerary basis.

Further, the Public Service Commission issued a new Service Minute No. 1836/6 dated 11th November, 2013 (hereinafter the 'New Service Minute') for the Engineering Service with effect from 1st January, 2006.

Thereafter, interviews were not held for appointment to Class II Grade II of the Sri Lanka Engineering Service until the Petitioner applied and was called for an interview for the post in the Engineering Service on 2nd March, 2015. Thus, the Petitioner complained that the belated backdating of his promotion to the Special Grade deprived him of his due appointment at the interview held on 25th June, 2009 and deprived him of several benefits.

Filing objections to the Application, the 1A Respondent stated that the Petitioner could not have been appointed to the Sri Lanka Engineering Service in 2009 because at the time of the interview, the Petitioner did not possess the required five years of experience in the Special Grade category.

The 1A Respondent further stated that the Petitioner was appointed to Grade III of the Sri Lanka Engineering Service with effect from 24th February, 2015 and it is not a 'promotion' as stated by the Petitioner but a fresh appointment.

The Respondent further stated that in terms of Section 1.9 of the Establishment Code (Chapter II) and Section 30 and 31 of Chapter II of the Procedural Rules promulgated by the Public Service Commission, an appointment cannot be antedated for any reason and the date of the letter of appointment or the date on which the officer assumes duties, whichever comes later, is deemed the effective date of appointment.

The Respondents contended that antedating the appointment to the Sri Lanka Engineering Service beyond the date of his appointment cannot be effected in light of the abovementioned provisions as per Sections 1:10:2 and 1:10:3 of the Establishment Code. Moreover, the antedating would place the Petitioner over officers appointed before him and disturb the seniority in the Sri Lanka Engineering Service.

The Petitioner in his counter affidavit stated that he had a legitimate expectation that promotions would be given to him on time and that he would be appointed to Class II Grade II of the Sri Lanka Engineering Service.

Can the Petitioner's Promotion/Appointment to Grade III of the Sri Lanka Engineering Service be Backdated?

Now I will consider whether it is possible to backdate the promotion/appointment given to the Petitioner.

The Petitioner was promoted to Grade II B of the MLTS with effect from 1st January, 1990. Later, in terms of Circular No. 01/2000, his promotion was backdated to 1st January, 1983. By the same Circular, his promotion to Grade II A with effect from 1st January, 1993 was also backdated to 1st January, 1986.

Thereafter, the Petitioner was promoted to the Special Grade of the MLTS on supernumerary basis with effect from 22nd November 2003 and later, his appointment to the Special Grade

was made permanent with effect from 6th February, 2007. This was subsequently backdated to 22nd November, 2003 by a letter dated 18th July 2012.

The Petitioner applied for the post of Class II Grade II of the Sri Lanka Engineering Services in terms of Circular No. 31 dated 5th August 1997 and the interview was held on 25th June, 2009. When the Petitioner faced the interview, he was serving in the Special Grade and at that time the date of his promotion to the said Grade was effective from 6th February, 2007. Thus, he did not possess the required criteria of 5 years of experience in the said post. Therefore, he did not satisfy the threshold criterion for the said post.

However, his promotion to the Special Grade was subsequently backdated to 22nd November, 2003 by letter dated 18th July, 2012. As it was backdated after the interviews were held and the appointments were made, the Petitioner could not place this material relating to the backdating of his appointment to the Special Grade before the panel of interviewers.

The said interviews for the post of Class II Grade II of the Engineering Services were not held again until 2nd March 2015. By that time, the New Service Minute was issued consequent to an order made by this Court and the Engineering Service Circular No. 31 dated 5th August 1997 was no longer in force.

The Petitioner applied for the said post as an internal candidate and he was interviewed on 2nd March, 2015. He was appointed to the post of Grade III of the Sri Lanka Engineering Service with effect from 24th February, 2015. The Petitioner's main claim is to have the said appointment backdated to 22nd November, 2003 which was the date he faced the first interview for the said post.

As stated above, the Petition did not possess the required number of years in the Special Grade when he faced the interview for the post of Class II Grade II on the 25th of June, 2009. Since his promotion to the Special Grade was backdated to 22nd November, 2003 by letter dated 18th July 2012, it could not have been considered by the panel of interviewers. Thus, the Petitioner was not considered for the said post due to the fact that he failed to meet the threshold criteria.

In that context, I am of the opinion this Court cannot substitute the decision of the said panel of interviewers not to grant the promotion to the Petitioner with the decision to appoint him to the said post.

There is no material before this Court that the Petitioner made a request to consider the period that he served in the said post on a supernumerary basis. Moreover, in *Dalpat Abasaheb*

Solunke v B S Mahajan AIR 1990 SC 435, the Court stated that it does not have the expertise to decide a candidate's suitability for a position.

In any event, at the time he went for the interview in 2009, he did not possess the required experience. Further, he did not contest the selection to the said post until he filed this case on the 10th of December, 2013 i.e. after 4 years. I am of the opinion that this Court cannot step into the shoes of an interview panel that was constituted in the year 2009 to appoint persons to the Sri Lanka Engineering Service and substitute their decision with a decision of this Court.

Can the New Service Minute be Declared Null and Void?

Now I will consider whether the New Service Minute should be declared as illegal, null and void.

The Petitioner filed this application on the 10th of December, 2013. While this Application was pending, the Petitioner had applied for the post of Grade III of the Sri Lanka Engineering Service in terms of the New Service Minute No. 1836/6 as stated above and faced the interview on 2nd March, 2015. Later, he was appointed to the said post with effect from the 24th of February, 2015.

By applying for the said post under the New Service Minute, the Petitioner has acquiesced to the New Service Minute, therefore he cannot now move the Court to quash the said New Service Minute and/or declare it as null and void. He is estopped from seeking such a relief.

In any event, if the said Minute is declared null and void and quashed by the Court, the appointment given to the Petitioner as an Grade III officer of the Sri Lanka Engineering Service with effect from the 24th of February, 2015 will also become invalid.

The said interview for his appointment to Grade III for the Engineering Service was held in terms of the New Service Minute No. 1836/6. Therefore, there are no grounds whatsoever to backdate the aforementioned promotion to 22nd November, 2003. Further, the other candidates who were appointed to the post of the Engineering Service (Grade III) are not parties to this application and it is not tenable in law to make such an order as such an order would affect their appointments too.

Moreover, I have considered the material placed before this Court and I am of the opinion that the post in the Engineering Service (Grade III) is not a promotion given to officers of the

Sri Lanka Technical Service but a fresh appointment provided to advance their career prospects. In this context, I agree with the aforementioned submissions made by the learned Senior State Counsel that it is not possible to backdate the appointment given to the Petitioner due to the restrictions imposed by the Establishments Code and the Procedural Rules promulgated by the Public Service Commission.

I am also of the opinion that the judgment of the Supreme Court in *Adam Bawa Issadeen v Director General of Customs* SC FR 248/2011, relied upon by both the Petitioners and the Respondents, has no applicability to this case as the principle discussed in the said case is quite different to the facts and circumstances of the instant Application.

In any event, as stated in the judgment of *W.K. Samarakoon and Others v National Water Supply and Drainage Board and Others* SC FR No. 284/2013, the Court cannot intervene where the relevant authority has not violated the circular. Therefore, since there was no violation of Circular No. 31 relating to appointments to the post of Class II Grade II of the Sri Lanka Engineering Service, there is no cause for the Court to intervene.

In the circumstances, I am of the opinion that the Petitioner failed to establish a case of violation of his Fundamental Rights guaranteed under Article 12(1) and 14(1) (g) of Constitution.

I order no costs.

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 SRI LANKA

SC (FR) 431/2005

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

Kandage Gamini de Silva
264, Bandaranayake Mawatha,
Katubedda, Moratuwa.

PETITIONER

Vs.

1. Nishan de Silva
   Officer in Charge
   Police Station
   Piliyandala.

2. Manjula
   Police Constable (38356)
   Police Station,
   Kohuwela.

3. P. S. Rajakaruna

4. K. M. Smarakoon Banda

   3rd & 4th Respondents both of
   Special Investigations Branch
   Ceylon Electricity Board
   540, Colombo.

5. U. M. C. Alahakoon
   Regional Engineer, CEB Depot,
   76/1, Attidiya Road,
   Rathmalana.

6. P. Nishantha Priyankara
   Assistant Superintendent
   CEB Depot
   Kesbewa.

7. Ceylon Electricity Board
   No. 50, Sir Chittampalam A. Gardiner
   Mawatha, Colombo 2.

8. Nalaka Udayanga Senanayaka
   "Dimuth",
   Iddagoda, Mathugama.

9. Ruhunu Wickramarachchi
   Manager Investigations,
   Ceylon Electricity Board
   No. 50, Sir Chittampalam A. Gardiner
   Mawatha, Colombo 2.

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

RESPONDENTS

BEFORE: Sisira J. de. Abrew J.
Anil Gooneratne J. &
Vijith K. Malalgoda P.C., J

COUNSEL: J.C. Weliamuna P.C. with Shantha Jayawardena
And Senura Abeywardena for the Petitioner

S. Herath S.S.C. for the 1st - 7th, 9th and 10th Respondents

8th Respondent is absent and unrepresented.

ARGUED ON: 30.08.2017

DECIDED ON: 27.09.2017

GOONERATNE J.

This is a Fundamental Rights Application pertaining to an electricity meter which had been tampered. (alleged to be tampered by the Petitioner).

The Petitioner's main complaint is that he was arrested by the police on false information. He also states that the Electricity Board officials (Respondents) falsely implicated and made very incorrect observations to merely put him in trouble. Petitioner also plead that the 8th Respondent closely associates the officers of the Piliyandala Police. Petitioner plead that the 9th Respondent had instigated the impugned arrest of the Petitioner, by making false complaints, and the arbitrary arrest of him by 1st to 9th Respondents. Supreme Court on 14.03.2012 granted leave to proceed for alleged violation of Article 12(1), 13(1) & 13(2) of the Constitution.

The material placed before court gives some indication that on 12.02.2005 the 5th Respondent converted the domestic connection to a commercial connection. The Respondent also takes up the position that the Electricity Board had no knowledge about the transfer of title of the hotel or the subsequent lease (paragraph 15 of the 3rd Respondent's affidavit).

Petitioner purchased by deed No. 1840 of 02.08.1999 premises in question where the disputed electric meter had been installed. The previous owner was one Mrs. S. Atygalle. Eelectricity supplied to his house by the CEB which bears No. 2194869514 (P6, P7) Petitioner also purchased the adjacent land by deed of transfer of May 2000. (A smaller house having an electricity meter bearing No. 2191577113 (P8 & P9)). In the petition it is pleaded that some renovations were done, and the small house later demolished and request was made to the Kesbewa branch of the CEB for

(1) Connection under A/c No. 2194869527
(2) Connection under A/c No. 2191577121

Permission obtained as per paragraph 11 of his petition. On or about 11.04.2003 Petitioner leased out one of the premises he constructed after demolition of the small house, to the 8th Respondent for three year. It was as described in the petition, for a holiday resort. By P11 lease agreement and Clause 13 of the lease agreement was entered between them to pay electricity and other utility bills by 8th Respondent. Thereafter at some point of time he came to know that the 8th Respondent handed over the keys through his employee and went away. It was on 07.08.2004, and gave the impression that 8th Respondent would return by 10.08.2004 to settle dues (P14 and paragraph 15) of petitioner. Electricity Supply and telephone connection (paragraph 17) had been disconnected and

the Petitioner complained immediately to the police. (P15) Petitioner pleads that 8th Respondent had been involved in fraudulent activities (paragraph 18). Complainant made promptly. Petitioner's Attorney by P24 sent a letter of demand to the 8th Respondent and from that point onwards Petitioner started his holiday business in the premises (November 2004). Petitioner discovered an electricity shortage from his 2nd connection in or about January 2005. Petitioner then informed the Kesbewa unit of CEB about it, over the telephone. It is also stated that the Petitioner inquired from one 'Nelka' who was an employee of 8th Respondent as to what took place earlier, and the said employee divulged that two of 8th Respondent's friends 'Gamini' and 'Priyantha' had on a particular day come to the premises in question and later came with another unknown person. They were meddling with the electricity meter. The Petitioner having learnt about this once again complained to the Piliyandala Police that the seals had been tampered with by 8th Respondent (P25 & P26). On the same day Petitioner handed over a written complaint to 6th Respondent on 12.02.2005. (P27 & P27A).

No action seems to have been taken by the authorities concerned, on Petitioner's complaints. As such the Petitioner inquired from the 6th Respondent who told him that Petitioner's complaint had been handed over to the 5th Respondent. By P28A of 28.02.2005 Petitioner was informed to deposit

Rs. 850/- each for the connection of meters (P28B). This request was made by the Petitioner some time ago, as stated in this judgment. Having paid so after correction and connection of meter the Petitioner was required to pay Rs. 57,484/- (P29 & P30). There is also material to the effect that on or about 25.07.2005 Petitioner sold the said hotel (P31).

In the submission of learned President's Counsel for Petitioner it was submitted inter alia that whilst the Petitioner was in the Hotel (Holiday Resort) on 26.09.2005, the 2nd to 4th Respondents and another police officer came to the Hotel (Holiday Resort) and the Petitioner inquired about their presence and was informed that they came to investigate the complaint made to the police. I would at this point, instead of making this judgment to prolex itemise the relevant facts:

(a) On 26.09.2005 electricity meter and second connection removed by the said Respondents and Petitioner was directed to accompany them to the police (Piliyandala) at 10.30 a.m.
(b) No finger prints obtained
(c) No valid reason disclosed at that point of time.
(d) Petitioner told the Respondents that meter is in his name
(e) As such Petitioner to be questioned and was arrested .
(f) Statement of Petitioner recorded.
(g) No valid reasons for the arrest
(h) 3rd Respondent states meter is in the name of the Petitioner

(i) Bills in the name of the Petitioner

(j) 3rd Respondent the 1st complainant.

(k) 1st and 3rd Respondent engaged in a discussion till 3.00 p.m.in the police

(l) Action to be taken against, the Person in whose name the electricity connection was provided.

(m) Petitioner inquires as to what action was taken regarding his complaint of 12.02.2005 to the police. 3rd Respondent is unaware. Petitioner requests the 1st Respondent to inquire into his complaint.

(n) At 2.00 p.m police brought Priyantha to the station. He admits that a former employee of the CEB was in the hotel with them.

(o) It was one 'Nimal', former CEB employee - petitioner disclaim responsibility. Nor was Petitioner produced before Magistrate as required by law. Petitioner suffers from gastritis.

The learned Senior State Counsel on behalf of 1st to 7th and 9th Respondents in her submissions maintained the position that the meter was in the name of the Petitioner and inter alia referred to Section 67 (c) of the Ceylon Electricity Act, and that there was no violation by the Respondents. Petitioner has not changed the tariff system to commercial and continued under the domestic tariff. It was submitted that the Petitioner continued with the original agreement with the CEB. Learned counsel submitted that it was an illegal connection and implicated the Petitioner.

Documents 3R1 and 5R2 were highlighted by State Counsel and that police detained the Petitioner for less than 24 hours. 3R1 is dated 09.02.2005. 3R2 is the notice of irregular use of electricity, an internal document.

The affidavit of the 1st Respondent in paragraph 10 of same reveals the following:

(a) On 26th September 2005 around 13.30 hrs., on the direction of the Deputy Inspector General of Police a team comprising of the 2nd Respondent, PC 33053 Pushpakumara and officers of the Ceylon Electricity Board arrested the Petitioner and produced him at the Piliyandala Police Station.

(b) He was arrested on the allegation that he pilfered Electricity by tampering with the Electricity meter. (The notes of the 2nd Respondent relating to the arrest is marked as 1R2 and pleaded part and parcel hereof).

(c) Answering further I state that the Petitioner was arrested at 12.20 noon and handed over to the police. I deny that he was handed over to the police around 10.30 a.m.

(d) I state further that the arrest had taken place lawfully and after having duly read the charge to the petitioner.

This court having considered the version of each party is more than satisfied that the Petitioner's fundamental rights are breached. The story of the Petitioner is more convincing than the Respondents. It is regrettable that the official Respondents conducted their usual business in the most unacceptable manner. It is no excuse for the police to state that the Petitioner was detained until the report of the CEB was forthcoming to the police. Is it the position that the police in this instant was unaware of the provisions of the Criminal

Procedure Code? Until the arrival of Petitioner's Attorney, at the police, kept the Petitioner in police custody? Why was that? The Respondents who held office in the CEB cannot take cover under the law and take pride for their acts done to the Petitioner. The law should never be flouted to such an extent. Though such unacceptable acts took place some years ago, I wonder whether the CEB has made an attempt to rectify their mistakes, thereafter. Consumers request should take precedent, and it should never be ignored or delayed. A Government Agency should serve the people, for which it was established by statute, and should not attempt to harm the consumer based on unacceptable proof.

Respondents rely on Section 67c. of the Electricity Act. It reads thus:

67 Whoever -

67c. (1) Where any person is convicted of any offence under section 65, section 66 or section 67, the Magistrate's Court shall, in addition to any penalty which it is required to impose under this Act, impose on such person a fine in a sum of money being the value of the loss or damage caused to the licensee as a result of the act or default constituting such offence and any sum recovered as such additional fine shall be paid to the licensee on application made to Court by such licensee.

(2) Where two or more persons are convicted of having committed the same offence whether as principal or abettor, the value of such damage or loss may be apportioned among such persons and the amount so apportioned shall be imposed on each of such persons as a fine.

(3) A certificate issued by the licensee shall be received as proof of the value of such loss or damage in the absence of evidence to the contrary'

shall be guilty of an offence punishable with a fine not exceeding five hundred rupees, and, in the case of a continuing offence, with a daily fine not exceeding twenty-five rupees.

There are so many aspects for the Respondents to establish in the above section. A high standard of proof is required to bring the Petitioner within the above section. One cannot in a haphazard way rely on the said section and bring the Petitioner within the said section in circumstances where material is placed by the Petitioner that others were involved. Due notice served by court on 8th Respondent, but 8th Respondent was absent and unrepresented. Officials of CEB and police should have done a proper investigation to bring the culprits to book. One cannot proceed to implicate, and police could not have arrested the Petitioner in the absence of cogent reasons and evidence. To interfere with any persons liberty without a valid cause is a greater violation. Court need to protect the Petitioner when violation of fundamental rights are apparent. Petitioner complained to the CEB promptly about the tampering of the meter and the consumption of electricity by 8th Respondent illegally. He also made a police complaint. There was no immediate response to either, of them by the authorities concerned. It is regrettable the way a consumer of Electricity was treated by CEB.

I find that the law does not merely penalise the person in whose name the electricity was provided. There is no strict liability attached to a consumer under the statute. The consumer could be held responsible only in a case where he is held liable for tampering with a meter, and only with sufficient proof of that fact. On a perusal of the Magistrate Court proceedings I find that the Petitioner was acquitted. This fact of course need to be only considered by this court but it would certainly add to his reputation to prove innocence. Arrest of a person could be done only according to procedure established by law. “The role of 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”. Menaka Gandhi Vs. India AIR 1978 SC 597 at 691-692.

I am also inclined to hold that the Petitioner was not produced before the Magistrate within the time required by law. These are basic rights available to a citizen, as per Article 13 of the Constitution. Considering all the above matters, I hold that the Petitioner’s fundamental rights guaranteed by Article 12(1), 13(1) and 13(2) of the Constitution have been violated by 1st and 7th Respondents.

In all the above circumstances I hold that the Petitioner is entitled for relief in terms of sub paragraph ‘b’ and ‘d’ of the prayer to the petition. 7th Respondent (CEB) is directed to pay as compensation a sum of Rs. 1 million to

the Petitioner. 1st Respondent is also directed to pay a sum of Rs. 100,000/- as compensation.

Application allowed with costs.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 126 of the constitution of the Democratic Socialist Republic of Sri Lanka

Major K.D.S. Weerasinghe,

No. 100/2, Wewatenna Road,

Ampitiya, Kandy

Petitioner

SC /FR/ Application No 444/2009

Vs,

1. Colonel G.K.B. Dissanayake,
   Colonel Coordinator (Volunteer)
   Volunteer Force Headquarters,
   Shalawa,
   Kosgama.

2. Major General Sumith Balasooriya,
   Commander of the Sri Lanka Army,
   Volunteer Force Headquarters,
   Akuregoda,
   Pelawatte,

2A. Major General H.C.P. Gunathilake,
   Commander of the Sri Lanka Army,
   Volunteer Force Headquarters,
   Akuregoda,
   Pelawatte,

3. Brigadier Padumadasa,
   Military Secretary,
   Army Headquarters,
   Colombo 02.

3A. Major General M.U.M.M.W. Senanayake,
   Military Secretary,
   Army Headquarters,
   Colombo 02.

4. General Sarath Fonseka,
Commander of the Ari Lanka Army,
Army Headquarters,
Colombo 02.

4A. Lt. General Jagath Jayasuriya,
Commander of the Ari Lanka Army,
Army Headquarters,
Colombo 02.

4B. Lt. General A.W.J.C. de Silva,
Commander of the Ari Lanka Army,
Army Headquarters,
Colombo 02.

5. Gotabhaya Rajapaksha,
Secretary of the Ministry of Defence,
Colombo 03.

5A.B.M.U.D Basnayake,
Secretary of the Ministry of Defence,
Colombo 03.

5B.Karunasena Hettiarachchi,
Secretary of the Ministry of Defence,
Colombo 03.

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

Respondents

Before: **Eva Wanasundera PC J**
B.P. Aluwihare PC J
Vijith K. Malalgoda PC J

Counsel: Saliya Peiris PC with Thanuka Nandasiri for the Petitioner

Suren Gnanaraj State Counsel for the Respondents

Argued on: 17.07.2017

Judgment on: 31.10.2017

Vijith K. Malalgoda PC J

Petitioner to the present application Keerthi Dilruk Somasiri Weerasinghe had filed this application alleging that his Fundermental Rights guaranteed under Articles 12 (1), 13 (3) and 13 (5) had been violated by the Acts committed by the 1st to the 5th Respondents. When this matter was supported, having heard the submissions made on behalf of the Petitioner, this court had granted leave to proceed for the alleged infringement of Articles 12 (1) and 13 (3) of the Constitution.

The Petitioner who had joined the Sri Lanka Volunteer Force as a "Cadet Officer" on 14.02.1986 was commissioned in the rank of 'Second Lieutenant' with effect from 27.06.1986. Thereafter he was promoted to the ranks Lieutenant, Captain and Major on 27.06.1989, 01.12.1992 and 12.01.1995 respectively.

At all times material to the present application the Petitioner was an officer in the rank of Major of the Sri Lanka Volunteer Force.

According to the Petitioner, he had faced a 'Summary Trial' on 30.08.2006 held against him on three charges punishable under sections 102 (1), 129 (1) and 115 (a) of the Army Act No 17 of 1949. The Petitioner had pleaded guilty to all three charges leveled against him and was punished with a reprimand and a forfeiture of pay. However, apart from the said punishment imposed on the Petitioner, the then Commander of the Army ordered the discharge of the Petitioner from service by a directive dated 29.08.2006. The Petitioner had gone before the Court of Appeal and a Writ Application was filed against the said decision of the then Commander of the Army seeking inter alia, a Writ of *Certiorari* quashing the said decision.

When the said application was taken up for argument on 21.01.2008 the court made the following order;

"Ms. Anusha Samaranayake Senior State Counsel appearing for the Respondents informs that the 1st Respondent is withdrawing the impugned document marked P-3 without prejudice to the rights of the 1st Respondent to take action, if any, under the provisions of Act No 17 of 1949 and the

regulations framed there under. Therefore, there is no purpose in proceeding with this application. The proceedings are terminated."

As further submitted by the Petitioner, he was summoned before a Court of Inquiry presided over by the 1st Respondent somewhere in October 2008 in order to record a statement. During the said Court of Inquiry a statement was recorded from the Petitioner with regard to five payments made by way of cheques signed by him and one payment made in cash during the period from 06.01.2002 to 30.04.2005 as the Officiating Commanding Officer of the 2nd Battalion Sri Lanka National Guard.

In this regard the Petitioner had further taken up the position that he was never treated as a suspect during the said Court of Inquiry and permitted him to cross examine the witnesses who testified at the said inquiry. However the Petitioner had further taken up the position that, at one stage the 1st Respondent summoned three witnesses before him and told the Petitioner to cross examine them but, the Petitioner could not cross examined any of the witnesses without knowing the nature of their evidence.

The Petitioner's complaint before this court is based on P-9 which is the decision of the 4th Respondent based on the findings of the Court of Inquiry referred to above. As referred to in P-9 the 4th Respondent had decided to take stern disciplinary action by forwarding charges and taking steps to recover the monies and to dismiss the Petitioner from the Sri Lanka Volunteer Force.

The present application is filed before the Supreme Court by the Petitioner Challenging the said decision of the 4th Respondent to dismiss him from the Sri Lanka Volunteer Force. As submitted by the Petitioner, steps had been taken to dismiss him from the Sri Lanka Volunteer Force and in support of his contention the Petitioner had produced marked P-13 a communication sent in order to obtain the name of a suitable replacement for the position held by the Petitioner.

As revealed before us, when the then Commander took a decision with regard to the findings of the summary trial, to discharge the Petitioner from the Sri Lanka Volunteer Force, the proceedings of the writ application filed against the said decision was abetted on the undertaking that "without prejudice to the rights of the 1st Respondent to take action, if any under the provisions of the Army Act No 17 of 1949 and the regulations framed there under." Thereafter a statement had been recorded from the Petitioner with regard to certain payments at the 2nd Battalion Sri Lanka

National Guard but no proper Court of Inquiry was held against the Petitioner under the provisions of the Court of Inquiry Regulations. However based on the findings of the said Court of Inquiry, steps are being taken to dismiss the Petitioner from the Sri Lanka Volunteer Force without following the proper disciplinary procedure.

In response to the above position taken by the Petitioner before us, the Respondents whilst denying that the Respondents have taken steps to dismiss the Petitioner without following proper disciplinary procedure with regard to the payments made at the 2nd Battalion, had further submitted before us, that,

a) The then Commander of the Sri Lanka Army acting under Regulations 2 of the Army Disciplinary Regulations 1950 submitted a letter to the secretary to the Ministry of Defence, Public Security, Law and Order on 27.12.2008 seeking a direction pertaining to the further retention of the Commission of the Petitioner. (4R3)
b) In the said letter the then Commander had explained the past disciplinary record of the Petitioner, including the action taken against him and the outcome of the Writ Application which was pending before the Court of Appeal filed by the Petitioner.
c) There were several communications between the Army Head Quarters and the Ministry of Defence prior to any decision was taken against the Petitioner.
d) By letter dated 29.04.2009 the Secretary to the Ministry of Defence, Public Security, Law and Order had informed the then Commander of the Army, that His Excellency the President has approved the withdrawal of the Commission of the Petitioner with effect from 31.03.2009. (4R4)
e) Findings of the Court of Inquiry with regard to Financial Transactions at the 2nd Battalion referred to by the Petitioner in the present application, does not have any bearing with the withdrawal of the Commission of the Petitioner.

It was further revealed during the arguments before us, that the 4th Respondent who is the Commander of the Army does not have any power or authority to withdraw the Commission of an Officer and it is only His Excellency the President is vested with power to approve the withdrawal of the Commission of an Officer of the Sri Lanka Army under section 10 of Army Act No 17 of 1949.

Regulation 2 of the Army Disciplinary Regulations 1950 provides that “the Commander of the Army shall be vested with the general responsibility for discipline in the Army” and in the case in hand

the Commander acting under the above provision had sought a direction from his Excellency the President regarding the further retention of Petitioner.

As revealed before us, the above conduct of the Commander of the Army when seeking a directive from his Excellency the President was an independent act and was done for the best interest of the Army, in order to maintain the discipline of the Army.

In the said circumstances it is clear that the decision to withdraw the Commission and to dismiss the Petitioner from the Sri Lanka Volunteer Force was taken by the then Commander of the Army by following the provision of the Army Act No 17 of 1949 and the Regulations framed there under and the said decision was not reached, as alleged by the Petitioner in violation of the provisions of the Army Act No 17 of 1949 and the Court of Inquiry Regulations promulgated under the said Act.

When considering the matters referred to above, I am reluctant to agree with the submissions placed on behalf of the Petitioner in support of his case. I see no reason to hold that the Fundermental Right of the Petitioner guaranteed under Article 12 (1) and 13 (3) had been infringed by the 1st to 5th Respondents or any one or more of them. I therefore make order dismissing this application but make no order with regard to costs.

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 126 of the Constitution of Sri Lanka.

SC. FR. Application No: 458/2010

Kandegedara Priyawansa, No. 42/28-B, Katumana, Nuwara-Eliya, (currently, detained at the Welikada Remand Prison)

PETITIONER

Vs.

1. GotabhayaRajapakse
   Secretary,
   Ministry of Defence,
   Public Security and Law & Order, No. 15/5,
   BaladakshaMawatha, Colombo 3.

2. C.N. Wakishta
   Deputy Inspector General of Police, Director,
   Terrorist Investigation Division, 2nd Floor, Secretariat,
   Colombo 01.

3. Officer-in-Charge
   Welikada Remand Prison,
   Welikada,
   Colombo 8.

4. S. Hettiarachchi
   Additional Secretary,

Ministry of Defence, Public Security and Law & Order, No. 15/5, BaladakshaMawatha, Colombo 3.

5. Bogamuwa
Inspector of Police,
Terrorist Investigation Division, 2nd Floor, Secretariat, Colombo 01.

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

RESPONDENTS

BEFORE : Sisira J. De Abrew, J.
Anil Gooneratne, J. &
Nalin Perera, J.

COUNSEL : J.C. Weliamuna with Pasindu Silva and Sulakshana Senanayake for the Petitioner.

NayomiWickramasekera, SSC for the Respondents.

ARGUED ON : 10.11.2016

DECIDED ON : 15.2.2017

Sisira J De Abrew J

The Petitioner in this case seeks a declaration that his fundamental rights guaranteed by Article 12(1), 13(1) and 13(2) of the Constitution have been violated

by the Respondents. This court by its order dated 10.2.2012 granted leave to proceed for alleged violation of Article 12(1) and 13(1) of the Constitution.

The Petitioner, in April 1975, joined the Sri Lanka Army as a soldier and in1985 was promoted to the 7th Military Intelligence Unit as a Lance Corporal. In 2003 he left the Sri Lanka Army without permission. In 2006 he was apprehended by the Sri Lanka Army and was sent to Singha Regiment in Nuwara Eliya. During the period commencing from 2003 to 2006 he worked as a lorry driver. On 27.2.2010, the officers of the Terrorist Investigations Division (TID) led by the 5th Respondent arrested the Petitioner informing him that they wanted to record a statement from him. The Petitioner states that he was not informed of the reasons for his arrest. At the Criminal Investigation Department (CID), he was asked whether he knew a person by the name of Pitchchai Jesudasan. As he could not recollect the name of such person, he was shown a photograph of a person said to be Pitchchai Jesudasan. The Petitioner then identified the person in the photograph as Das. Das was a motor mechanic in Nuwara Eliya. He (the Petitioner) explained to the officers of the TID when he was working as a lorry driver, he used to take his lorry to Das's garage for repairs and that on some occasions he had consumed liquor with Das. The Petitioner further states that he was questioned with regard to the murder of Lasantha Wickramatunga. On 26.5.2010 he was produced before the Magistrate's Court, Colombo and was transferred to the Remand Prison. He has produced a copy of the case record of the Magistrate's Court as P1 and a copy of the detention order as P2. On 10.11.2010 he was discharged from the proceedings in the Magistrate's Court (MC Colombo B 4855/8/2010) on the basis that no further legal action would be pursued against him. Pitchchai Jesudasan too was discharged on the same basis. The Petitioner states although he was discharged from the proceedings in the Magistrate's Court, Colombo, he was added as a suspect to the proceedings in the Magistrate's Court Mount Lavinia B 92/2009

regarding the murder of Lasantha Wickramatunga. The Petitioner states that his arrest and detention are illegal and that his arrest and detention constitute continuing infringement of his fundamental rights guaranteed Article 12(1) and 13(1) of the Constitution.

The 2nd Respondent who is in charge of the Terrorist Investigation Division of the CID in his affidavit states that the investigation which was conducted by Mirihana Police regarding the murder of Lasantha Wickramatunga was subsequently handed over to the CID on 17.12.2009; that Lasantha Wickramatunga had received telephone calls from five mobile numbers prior to his death; that the Sim Cards pertaining to the said mobile numbers had been purchased by a person holding National Identity Card (NIC) number 711713050V; that the investigation had revealed that said NIC belongs to one Pitchchai Jesudasan of Nuwara Eliya; that when Pitchchai Jesudasan was arrested it was revealed that he had lost his NIC in 2008; that the said Sim Cards had been purchased subsequent to the loosing of his NIC; that the investigation had revealed that Pitchchai Jesudasan had lost his wallet after he consumed liquor with the Petitioner in August 2008; that acting on this information the Petitioner was arrested on 27.2.2010; and that the said Sim Cards had been purchased from a communication centre which was situated opposite the Military Camp where the Petitioner was attached to. The officer who arrested the Petitioner has not filed an affidavit in this court. Arresting notes had not been produced by any Respondent. The 2nd Respondent is the only respondent who has filed an affidavit in this case.

One of the important questions that must be decided in this case is whether the above information furnished by the 2nd Respondent in his affidavit justifies the arrest of the Petitioner. There was no evidence or material to suggest that Pitchchai Jesudasan's NIC was in the possession of the Petitioner nor was there any material to suggest that the Petitioner had purchased the said Sim Cards. Merely because

Pitchchai Jesudasan lost his wallet after consuming liquor with the Petitioner, there is nothing to suggest that the Petitioner had stolen his wallet and the NIC. From the matters set out in the affidavit of the 2nd Respondent, there was no material, in my view, for the arresting officer to form the opinion that he had reasonable grounds or reasonable suspicion to arrest the Petitioner. In the case of Joseph alias Bruten Perera Vs. The Attorney General [1992] 1 SLR page 99 His Lordship Justice Wanasundera 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 the affidavit of the 2nd Respondent, I hold the view that the arresting officer (the 5th Respondent), at the time of arrest, did not have sufficient material to justify the above principle laid down in the above judgment.

For the above reasons, I hold that the arrest of the Petitioner is illegal.

The article 12(1) of the Constitution is as follows.

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

Article 13(1) of the Constitution is 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."

When I consider all the aforementioned matters, I hold that the 5th Respondent has violated the fundamental rights of the Petitioner guaranteed by Article 12(1) and 13(1) of the Constitution.

The next question that must be considered is whether the fundamental rights of the Petitioner had been violated when the Petitioner was detained after the arrest. The Detention order dated 27.2.2010 had been issued by the 4th Respondent. But the 4th Respondent has not filed any affidavit in this court. Did the 2nd Respondent forward any report to the 4th Respondent for the purpose of obtaining the detention order? The 2nd Respondent in his affidavit does not attach any such report. This shows that the 2nd Respondent had not forwarded any report to the 4th Respondent for the purpose of obtaining the detention order. The arrest of the Petitioner was on 27.2.2010. The detention order was also issued on the same day. I have earlier held that the 5th Respondent did not have reasonable grounds to arrest the Petitioner. If the 5th Respondent did not have reasonable grounds to arrest the Petitioner on 27.2.2010, there could not have been any material to issue a detention order on the same day. As I pointed out earlier there is nothing to indicate that a report had been forwarded to the 4th Respondent to sign a detention order. The 2nd Respondent states in his affidavit that the Petitioner was discharged on 22.8.2013 by the learned Magistrate on the advice of the Attorney General. In considering the case against the 4th respondent, two factors are possible. One is that the 2nd Respondent or the 5th Respondent verbally made incorrect representation to the 4th Respondent and persuaded him to sign the detention order or the other possibility is that the 4th Respondent signed the detention order knowingly that there was no material against the Petitioner. The 4th Respondent is not an investigator or a police officer. He is only an additional secretary attached to the Ministry of Defence. It is difficult to think that he, knowingly that there was no material against the Petitioner, signed the detention order. When I consider all these matters, I feel that it is not proper for me to find the 4th Respondent guilty for violating the fundamental rights of the Petitioner.

I have earlier held that the 5th Respondent has violated the fundamental rights of the Petitioner guaranteed by Article 12(1) and 13(1) of the Constitution. Considering all these matters, I make order that the 5th Respondent should pay Rs.100,000/- to the Petitioner for violating his fundamental rights. The 5th Respondent is directed to pay the above amount of money (Rs.100,000/-) to the petitioner within three months from the date of this judgment.

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.

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.

Jayaweerage Sumedha Jayaweera,
Deputy Principal's Residence,
Royal College,
Colombo 07

Petitioner

Vs.

S.C. F.R. Application No. 484/2011

1. Prof. Dayasiri Fernando,
   Former Chairman.
1A. Dharmasena Disanayake
Chairman

2. Sirima Wijeratne,
   Former Member.
2A. Salam Abdul Waid,
Member.

3. Palitha Kumarasinghe,
   Former Member
3A. **D. Shirantha Wijeyatilaka,**
Member.

4. S.C. Mannapperuma,
   Former Member
4A. Prathap Ramanujam
Member

5. Ananda Seneviratne,
   Former Member.
5A. Mr. E. Jegarasasingam,
Member
6. N.H., Pathirana,
   Former Member,
6A. Santi Nihal Seneviratne,

7. S. Thillanadarajh,
   Former Member,

7A. S. Ranugge,
Member
8. M.D.W. Ariyawansa,
   Former Member,

8A. D.L. Mendis,
Member

9. A. Mohamed Nahiya,
Member.

9A. Sarath Jayathilaka,
Member
All of the Public Service Commission,
No. 177,
Nawala Road,
Narahenpita,
Colombo 5.

10. H.M.Gunasekara,
The Secretary,
Ministry of Education,
Isurupaya,
Battaramulla

10A. Gotabaya Jayarathne,
The Secretary,
Isurupaya,
Battaramulla

10B. Upali Marasinghe,
The Secretary,
Ministry of Education,
Isurupaya,
Battaramulla

10C. Mr. B.W.M. Bandusena,
The Secretary,
Ministry of Education,
Isurupaya,
Battaramulla

10D. Sunil Hettiarachchi,
The Secretary, Ministry of Education,
Isurupaya, Battaramulla.

The Hon. Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents

BEFORE **:** K**.** Sripavan, C.J.
B.P. Aluwihare, P.C., J.
Priyantha Jayawardena, P.C., J.

COUNSEL Manohara De Silva, P.C. with Ms. Anusha Perusinghe

and Thrishana Potupitiya for the Petitioner.

Sanjay Rajaratnam, P.C., Additional Solicitor General for the Attorney General.

WRITTEN SUBMISSIONS : 20.12.2016 by the Petitioner
07.12.2016 by the Respondents

ARGUED ON : 30.11.2016

DECIDED ON : **16.01.2017**

K. SRIPAVAN, C.J.,

The Petitioner invoked the jurisdiction of this Court on the basis that her two transfers out of Royal College were effected by the 10th Respondent contrary to the transfer scheme approved by the Public Service Commission. Leave to proceed was granted on 02.12.2011 for the alleged violation of the Petitioner's fundamental right enshrined in Article 12(1) of the Constitution.

The Petitioner sought, inter alia, declarations

(a) that the decision of the 10th Respondent to transfer the Petitioner to Gampaha Bandaranayake Vidyalaya contained in the letter dated 27.09.2011 marked **P10** is null and void; and

(b) that the decision of the 10th Respondent to transfer the Petitioner to the Ministry of Education contained in the letter dated 28.09.2011 marked **P11** is null and void.

Though several parties filed Petitions to intervene in this application, all parties withdrew their applications for intervention on 13.05.2013 as the Court directed that the entire application be confined to the original Petition dated 18.10.2011.

The procedural Rules of the Public Service Commission published in the Government Gazette (Extraordinary) No. 1589/30 dated 20th February 2009 deals with the types of transfers that could be effected. Clause 196 of the said Rules reads thus :

"*Transfers are fourfold as indicated below*

(i) Transfers done annually;

(ii) Transfers done on exigencies of service;

(iii) Transfers done on disciplinary grounds;

(iv) Mutual Transfers on requests made by Officers."

It was not in dispute that the Petitioner was initially transferred by **P10** to Gampaha Bandaranayake Vidyalaya and the next day to the Ministry of Education by **P11.** None of the transfer orders convey any reasons to the Petitioner for such transfers as contemplated in Clauses 221 and 222 of the Procedural Rules. Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of a sound system of judicial review. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the administrative body itself.
Conveying reasons is calculated to prevent unconscious, unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimize the chances of unconscious infiltration of bias or unfairness in the conclusion. The duty to adduce reasons will be regarded as fair and legitimate by a reasonable man and will discard irrelevant and extraneous considerations. Therefore, conveying reasons is one of the essentials of justice (Vide *S. N. Mukherjee* Vs. *Union of India* (1990) 4 S.CC.C. 594; A.I.R. 1990 S.C. 1984)

When leave to proceed was granted on 02.12.2011, this Court made the following observations :

" *If the transfer is on "exigencies of service" or a "transfer on disciplinary grounds" in terms of Rules 221 and/or 222, the appointing authority is mandated to convey the reasons for such transfers in writing to the Officer concerned. The documents marked* ***P10*** *and* ***P11*** *do not give any reasons.*

They do not disclose the grounds upon which such transfers were made……

……

Since the Petitioner has now preferred an appeal to the Public Service Commission on the impugned transfer the Public Service Commission is free to take a decision on the appeal made by the Petitioner. …"

However, the Public Service Commission having considered the appeal made by the Petitioner, made the following determination as evidenced by the Document marked **10R3**

"Admittedly, the Secretary to the Ministry of Education has acted contrary to the Public Service Commission's Rules and failed to give reasons for the said transfer, which is not a transfer made on Annual Transfer Scheme. One of the complaints made by several Teachers of Royal College at Preliminary Investigation referred to below is that the Ministry of Education has failed to implement the transfer scheme in a meaningful manner.

In fact, the reasons for the transfer were given to the Public Service Commission very much later (after several reminders)

Taking all matters into consideration, we have no hesitation in coming to the conclusion that the transfer ordered by letters dated 27th September 2011 and 28th September 2011 is ex facie wrongful and contrary to the Public Service Commission Rules in respect of transfers of Public Officers."

The Petitioner's appeal to the Public Service Commission was decided in her favour in as much as the said Commission held that the said transfer orders were bad in law and pro forma set aside the said orders; however, the Public Service Commission refused to transfer the Petitioner back to Royal College. As a general rule, the rights of parties must be determined as at the commencement of the action. Thus, the Petitioner is entitled for the declarations sought in the prayer to the Petition.

Learned President's Counsel for the Petitioners submitted that the Petitioner is now functioning as the Acting Principal of St. Paul's College, Milagiriya and does not seek an

order of re-transfer to Royal College. The Court therefore holds that the decision of the 10th Respondent to transfer the Petitioner to Gampaha Bandaranayake Vidyalaya by letter dated 27.09.2011 marked **P10** and the subsequent decision of the 10th Respondent to transfer the Petitioner to the Ministry of Education by letter dated 28.09.2011 marked **P11** are null and void and has no force or avail.

The Court further declares that the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution was infringed by the 10th Respondent. At the hearing before us, learned President's Counsel for the Petitioner indicated to Court that the Petitioner is not seeking compensation against the Respondents. Accordingly, no compensation is awarded against the Respondents.

CHIEF JUSTICE.

B.ALUWIHARE, 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 under and in terms of Article 126 and 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

H.M.M. Fashan,
Karaitivu,
Ponparappi,
Puttalam.

Petitioner

SC/FR/487/2011

Vs.

1. S.D.A Borellessa,
   Secretary,
   Ministry of Home Affairs,
   Independence Square,
   Colombo 07.

1A. J.J. Rathnasiri,
   Secretary,
   Ministry of Home Affairs,
   Independence Square,
   Colombo 07

2. K.V.P.M.J. Gamage,
   Director General of Combined Services,
   Ministry of Public Administration and Home Affairs,
   Independence Square,
   Colombo 07.

3. Lathisha P. Liyanage,
   Director General of Combined Services,
   Ministry of Public Administration and Home Affairs,
   Independence Square,
   Colombo 07.

4. Jayantha Wijerathna,
Chief Secretary, North Western Province,
1st Floor,
Provincial Office Complex,
Kurunegala.

5. N.H.A. Chithrananda,
District Secretary,
District Secretariat,
Puttalam.

6. Ravindra Wikramasinghe,
Divisional Secretary,
Divisional Secretariat,
Wanathavilluwa.

6A. Sanjeevani Herath,
Divisional Secretary,
Divisional Secretariat,
Wanathavilluwa.

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

Respondents

Before: Priyasath Dep. P.C. J

B. P Aluwihare P.C. J

Priyantha Jayawardena P.C. J

Counsel: Faisz Musthapha PC with Faisar Marker and Oshada Rodrigo for the Petitioner

Suren Gnanaraj SC for the Respondents

Argued on : 25th April 2016

Decided on : 15th December 2017

Priyantha Jayawardena P.C. J

The Petitioner is a Grade II Watcher of the Office Employees' Service category. He was appointed as a substitute watcher and was attached to the Divisional Secretariat of Wanathavilluwa with effect from 16th February, 2001 by a letter issued by the then Divisional Secretary of Wanathavilluwa which was approved by the then Chief Secretary of the North Western Province. The said letter stated that the appointment would not entitle the Petitioner to be appointed to a casual, temporary or permanent post in the Public Service of the Central Government or in the Wayamba Provincial Public Service and that the Petitioner would be paid a daily wage of Rs. 140/-.

Whilst the Petitioner was serving in the capacity of a substitute watcher, the Director General of the Combined Services issued Circular No.02/2002 dated 02nd December, 2002 (hereinafter referred to as 'Circular No.02/2002') to absorb the employees of the Provincial Public Service attached to the Divisional Secretariats into the Combined Services of the Ministry of Public Administration and Home Affairs (hereinafter referred to as the 'Combined Services').

The said Circular No. 02/2002, *inter alia*, stated that the employees attached to the Divisional Secretariats, other than the following officers, were entitled to be absorbed into the Combined Service:

a. Field officers;
b. Officers who had not consented to be absorbed into the Combined Service;
c. Officers who were not issued formal letters of appointment;
d. Officers with pending disciplinary inquiries; and
e. Officers who did not have the required qualifications for the relevant post.

Accordingly, the employees who wished to be absorbed were directed to submit their written consent to the respective Divisional Secretaries before 16th December, 2002. The Petitioner submitted his written consent to be absorbed into the Combined Services by his application dated 17th December, 2002. Since he did not receive a response to his application, the Petitioner continued his service at the Divisional Secretariat of Wanathavilluwa.

Meanwhile, in terms of the Public Administration Circular No.13/2005 dated 28th July, 2005, the Petitioner was appointed to the post of Grade II Watcher of the Office Employees' Service category of the Wayamba Provincial Public Service with effect from 1st July, 2005, as he had completed 180 days of continuous service as a substitute watcher.

Thereafter, the 5th Respondent, the then District Secretary of Puttalam, by his letter dated 06th July, 2006, requested the 6th Respondent, the Divisional Secretary of Wanathavilluwa to take steps in terms of the Circular No. 02/2002 to absorb the Petitioner into the Combined Services. Further, the 6th Respondent sent several reminders to the Director General of Combined Services to absorb the Petitioner into the Combined Services.

In the meantime, a Gazette notification was published by the Director General of Combined Services on 14th May, 2010 calling for applications from junior employees in the Public Service of the Central Government who were interested in sitting for the Limited Competitive Examination to be promoted to Class III of the Management Assistants' Service category. The

Petitioner submitted his application for the said examination and passed the same with 82 marks and was ranked 214.

Thereafter, the Petitioner was called for an interview by the Director General of the Combined Services by the letter dated 27th July, 2011. However, as the applications for the said promotion were called exclusively from the employees in the Public Service of the Central Government and not from those in the Provincial Public Service, the Petitioner was not promoted to the said post.

The Petitioner further stated that it had come to his attention that one D.F.N. Wanigasekera, who was also a Grade II Watcher of the Office Assistants' Service attached to the Mundalama Divisional Secretariat in the same district had been confirmed as an officer of the Combined Service.

Being aggrieved by the decision not to absorb the Petitioner into the Combined Services and the failure to promote the Petitioner to the Class III of the Management Assistants' Service category, the Petitioner has filed the instant application seeking, *inter alia,* the following;

1. a declaration that the 1st to 6th Respondents have violated the Petitioner's Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution, and
2. a direction to absorb the Petitioner into the Combined Services and promote him to Class III of the Management Assistants' Service category with effect from 14th September, 2011.

In their Objections, the Respondents stated that the Petitioner was appointed as a substitute watcher and the Chief Secretary of the North Western Province only approved the contents of the said letter. Moreover, the Respondents submitted that because the Petitioner was engaged as a substitute at the time of the submission of his application for absorption, he was not holding a permanent post in order to qualify to apply under Circular No. 02/2002. Therefore, the Respondents stated that the Petitioner was ineligible to be considered for absorption into the Combined Services in terms of the said Circular.

They further averred that in any event as applications for absorption under Circular No. 02/2002 had to be submitted to the Divisional Secretary before 16th December, 2002, the deadline had lapsed when Petitioner submitted his application on 17th December, 2002.

The Respondents also submitted that by the time the Petitioner was appointed to the post of Grade II Watcher of the Office Employees' Service category of the Wayamba Provincial Public Service with effect from 1st July 2005, Circular No.02/2002 had ceased to operate. In the circumstances, the Petitioner could not have been considered for absorption into the Combined Services under the said Circular No.02/2002.

The Respondents further submitted that as the Petitioner was not absorbed to the Combined Services and thus continued as an employee of the Provincial Public Service, he was not eligible to apply or sit for the Limited Competitive Examination to be promoted to Class III of the Management Assistants' Service category which was solely for the employees of the Central Government.

In response to the Petitioner's allegation that the Director General of the Combined Services had given permanent appointment in the Combined Services to D. F. N. Wanigasekara, a worker who was similarly circumstanced, the Respondents stated that the said employee had opted to relinquish his post in the Wayamba Provincial Public Service and then joined the Combined Services as a Grade II Watcher of the Office Employees' Service category. Thus, he had not been absorbed into the Combined Services in terms of Circular No.02/2002.

Was the Petitioner entitled to be absorbed into the Combined Service in terms of Circular No. 02/2002?

The primary question that needs consideration in this application is whether the Petitioner, as a substitute watcher, was eligible to apply in terms of Circular No. 02/2002 to be absorbed into the Combined Services.

The Effect of the Public Administration Circular No. 02/2002

Circular No. 02/2002 provided for the absorption of officers of the Provincial Public Service into the Combined Services. Paragraph (1) of the said Circular stipulated that only employees falling under the following categories of services of the Provincial Public Service were eligible to be absorbed into the Combined Services:

i. Provincial Clerical Service;
ii. Provincial Typists' Service;
iii. Provincial Stenographers' Service;
iv. Provincial Shroffs' Service;
v. Provincial Translators' Service;
vi. Provincial Book-Keepers' Service;
vii. Provincial Store-Keepers' Service;
viii. Provincial Office Employees' Service; and
ix. Provincial Drivers' Service.

Paragraph (2) of the aforesaid Circular stipulated the persons who were not eligible to apply for absorption into the Combined Services. In particular, paragraph (2)(ii) stated that the Provincial Public Service personnel who had not received a formal letter of appointment from the Provincial Public Service at the time they submitted their applications for absorption to the Combined Services were not eligible to apply.

The Nature of the Petitioner's Appointment

The letter marked as 'P1' to the Petition issued by the Divisional Secretary of Wanathavilluwa stated, *inter alia*, that the Petitioner was appointed as a substitute watcher with effect from 16.02.2001. Moreover, Clause 02 of the said letter stated that the appointment was made under Financial Regulation 95.

The said letter also stipulated that the appointment would not entitle the Petitioner to be appointed to a casual, temporary or permanent post in the Public Service of the Central

Government or in the Wayamba Provincial Public Service. Furthermore, Clause 04 of the said letter provided that the Petitioner would be paid a daily wage of Rs. 140/-.

In this circumstance, it is necessary to consider the nature of the work performed by the Petitioner as a substitute watcher.

Section 2:1 of Chapter IV of Volume I of the Establishments Code defines the term "substitute" as follows:

> "A Substitute is a person employed to perform the duties of a post which is substantively filled but whose holder is absent from the post for a limited period e.g., a substitute watcher may be employed when the substantive watcher is on leave. His appointment must be on a purely casual basis and on daily pay". [Emphasis added]

Additionally, Financial Regulation 95(3)(a) stipulates the conditions of engagement of the employees engaged as substitutes:

> "General Conditions: they should be employed strictly on a casual basis, and on the understanding that they will not be eligible for or have claims to monthly pay or to temporary or permanent status, whatever their period of employment may be, and that they will be discontinued as soon as their services become unnecessary, or as soon as the work or project on which they are engaged is complete. In the case of substitutes they should vacate the post on the resumption of duties by the permanent holder of the post." [Emphasis added]

Further, Rule 26 of Chapter III of the Procedural Rules of the Public Service Commission states:

> "Appointment on a substitute basis shall be made solely on the basis of paying daily wages. The substitute service shall cease once the substantive holder of the post reports back for service. Only those who possess qualifications in terms of the Scheme of Recruitment shall be considered for such appointments."

It is evident that as the Petitioner was appointed as a substitute watcher, he did not hold a post in the Provincial Public Service. As mentioned above in terms of the Establishments Code, his role was to perform duties of a substantively filled post. Therefore, the letter dated 14th February, 2001 appointing him as a substitute watcher did not entitle him to a post within the Provincial Public Service.

Further, by the deadline for submission of applications under Circular No. 02/2002, the Petitioner did not have a formal letter of appointment appointing him to a permanent post in the Provincial Public Service; therefore, he was not eligible for absorption into the Combined Services.

The Period of Applicability of Circular No. 02/2002

Paragraph 5:1 of Circular No. 02/2002 states that the Provincial Public Service personnel who have been appointed to their posts should give their written consent to be absorbed into the Combined Services before 16th December, 2002. As the Petitioner was appointed to the post of Grade II Watcher on the 1st July, 2005 under Public Administration Circular No. 13/2005, he

could not be absorbed into the Combined Service under Circular No. 02/2002 which was not in operation by that time.

Further, the circumstances of D. F. N. Wanigasekara are not relevant to the instant Application as he had not had been absorbed into the Combined Services in terms of Circular No. 02/2002.

Was the Petitioner Eligible to sit for the Limited Competitive Examination?

Applications were called from junior employees in the Public Service of the Central Government for the Limited Competitive Examination for promotion to Grade III of the Management Assistants' Service by a Gazette notification dated 14th May, 2010.

In terms of paragraph 7.0 of the said Gazette, only junior employees of the Public Service of the Central Government were allowed to sit for the Limited Competitive Examination. Note 8 to the said paragraph further stated that any applicants who sat for the Limited Competitive Examination without complying with the conditions stipulated in the Gazette would not be eligible for promotion despite receiving the required number of marks.

As stated above, the Petitioner was not absorbed into the Combined Services of the Central Government. Therefore, he was not entitled to apply to sit for the Limited Competitive Examination to be promoted to Class III of the Management Assistants' Service category as it was an opportunity only offered to officers of the Public Service of the Central Government.

Moreover, in terms of note 8 to paragraph 7 of the said Gazette the Petitioner's results have no impact on eligibility for the said post, notwithstanding the fact that the Petitioner had passed the Limited Competitive Examination and received 82 marks.

In the circumstances, I am of the opinion that the Petitioner has not established his Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution were violated by the acts of the Respondents or by the State. Hence, I dismiss the application of the Petitioner.

I order no costs.

Judge of the Supreme Court

Priyasath Dep, P.C. 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 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Puwakketiyage Sajith Suranga

Bogahawatta, Lellkada, Ginimalgaha.

Petitioner

SC (FR) Application No. 527/2011

Vs

1.Prasad

Sub-Inspector of Police Station,

Thelikada.

2.Sunil

Sergeant

Thelikada Police Station

Thelikada.

3.Sugath Palitha

Sergeant

Thelikada Police Station,

Thelikada.

4.Samantha

Civil Defence Officer,

Thelikada Police Station,

Thelikada.

5.Inspector of Police Nalaka

Officer-in-Charge,

Thelikada Police Station,

Thelikada.

6.N.K.Illangakoon,

Inspector General of Police

Police Head Quarters,

Colombo 1.

7.Hon.Attorney General

Attorney General's Department,

Colombo 12.

Respondents

BEFORE:- SISIRA J.DE ABREW, J

M.H.M.U.ABEYRATHNE, J and

H.N.J.PERERA, J.

COUNSEL:-Shantha Jayawardene with Chamara Nanayakkarawasam

For the Pettioner

Hiran de Alwis with Chanaka Jayamaha for the 1st to 5th

Respondents

Madhawa Tennkoon SSC for the 6th and 7th Respondents

Argued On:-28.03.2016

Decided On:-22.07.2016

H.N.J.PERERA, J.

The Petitioner complained that the 1st to 5th Respondents had violated his fundamental rights guaranteed by Article 11 and/or 12(1), and/or 13(1) and/or 13(2) of the Constitution. Supreme Court granted leave to proceed for the alleged infringements of Article 11 and 13(1) of the Constitution.

The Petitioner who was 17 years and 10 months old at the time of the incident was following a full time 1 ½ year vocational training program in Gas Welding, Arc Welding, Flame/Gas cutting and related aspects, conducted by the Vocational Training Authority of Sri Lanka at the Vocational Training Centre at Vidyananda Vidyalaya, Ginimallagaha.

The Petitioner states that on 23.08.2011 he left his house at around 8.30 p.m. to go to the house of a friend of his named Ranga situated about 400 meters away from the Petitioner's house, with the aim of accompanying Ranga to go and view the procession (perahera)of the

Seenigama Devalaya. When the Petitioner arrived at the house of Ranga, he found that Ranga was not at home as he had gone to collect his motor-bicycle which had been lent by him to a person called Susantha alias Kalu mama lias Kalu Mahattaya. The Petitioner thereafter borrowed a motor-bicycle from a neighbour of Ranga named Ajith Jayasekera and proceeded to the house of Susantha with the hope of meeting Ranga. However, the inmates of Susantha's house informed the Petitioner that Susantha had gone to the house of one Pelis (the Petitioner's father's uncle) situated about one kilo meter away from the Petitioner's house and that Ranga had followed Susantha to Pelis's house.

Therefore the Petitioner proceeded to the house of Pelis and when he went there he came to know that Ranga was not there, but met susantha and the Petitioner engaged in conversation with Susantha and Pelis.

At that time around 10.p.m four police officers attached to the Thelikada police station namely 2nd to 4th Respondents and one other officer whose name is not known to the Petitioner arrived at the house of Pelis on two motor-bicycles and without informing him of any reason for acting so, slapped him thrice and arrested him and Susantha. The 2nd and the 3rd Respondents were in uniform and the other two dressed in civilian attire.

Hearing the commotion many gathered at Pelis's house and were witnesses to this incident. The two officers who were dressed in civilian clothing pointed out the Petitioner to the crowd and told them that the Grease Devil had been arrested and thereafter the Petitioner and Susantha were taken on the motor bicycles to the Thelikada police station.

The Petitioner states that at the Thelikada police station he was kept near the side door to the police station with another officer while Susantha was taken into the police station. Thereafter the 4th Respondent held the Petitioner's hands and the other police officer by

his neck. The 2nd and the 3rd Respondents thereafter started assaulting the Petitioner with batons on the Petitioner's chest, face and legs. The Petitioner states that thereafter, the 4th Respondent put the Petitioner's hands around a pillar and the 1st, 2nd and the 3rd Respondents assaulted him on various areas of his body for about one hour.

The Petitioner further states that due to the assault the Petitioner cried out in pain and that a neighbour of the Petitioner named Ajith Jayasekera who came to the police station saw the Petitioner being subjected to torture and he queried from the 1st to 4th Respondents and from the other police officer who were beating the Petitioner whether they intend to kill the small fellow and eat him. The 1st to 4th Respondent then scolded Ajith and chased him away. Thereafter another police officer brought a book and kept it on the Petitioner's head and the 1st to 4th Respondents and the other police officer repeatedly and forcefully hit the book with a baton causing severe physical pain to occur in the Petitioner's head and neck areas. The Petitioner states that he felt dizzy and requested for water but was not given any water to drink.

The Petitioner was thereafter taken inside the police station by the 1st Respondent who kicked the Petitioner forcefully on his lower back and he was thrown forward into the remand cell. The Petitioner found Susantha and another person inside the cell.

It is the Petitioner's position that he was lying postrate on the floor of the cell as he was in severe pain and his father came to see him around 12.p.m to the remand cell and he informed his father about the assault and stated that he was in severe pain and wanted to vomit. The petitioner's father thereafter informed about it to the reserve police officer who was there and he was asked to go and meet another police officer. The said Reserve police officer gave a bottle of 'Siddhalepa' balm to Susantha and told him to apply it on the Petitioner. Later the

Petitioner heard the other police officer abusing his father and ordering him to leave the police station.

The following day morning at about 6 a.m his mother N.P.A.Laxshmi and sister Priyanka Kumari came to the police station to see him and he informed them about the whole incident and he got to know from them that he had been arrested on suspicion based on a complaint made by one W.M.Nilanthi Priyadarshini that a suspicious individual had been seen near her house. It is the Petitioner's position that the said Priyadharshani's family members are well known to the Petitioner's family members and her husband Jayantha is a friend of the Petitioner's father.

Having learnt that the Petitioner had been arrested by the police pursuant to the complaint made by her, around 7.30 a.m the said Nilanthi Priyadharshani came to the police station and informed the 5th Respondent Officer-in-Charge that she did not name the Petitioner in her complaint and that the Petitioner was not involved in the incident regarding which she had made the complaint and that she wants to withdraw her complaint, if the police is trying to implicate the Petitioner. Thereafter the 5th Respondent took her near the cell and showed the Petitioner, Susantha and the other suspect who was inside the cell, and asked her to identify the 'grease devil'. Thereupon, the said Nilanthi Priyadharshani told the 5th Respondent that she cannot verify as to the other two but it was certainly not the Petitioner who was near the window of her house that night.

Thereafter the 5th Respondent told the Petitioner's mother and the sister that the Petitioner was going to be released on police bail and they left the police station to go home to bring their identity cards.

In the meantime many people arrived at the police station to see the purported 'grease yaka' and the 5th Respondent took the Petitioner out

of the remand cell and showed him to the assembled crowd stating that this is the 'grease yaka'. And when the petitioner sat down on a chair as he was in severe pain, the 5th Respondent ordered him to stand and assaulted him on his face and head in front of the crowd.

Thereafter around 12.00p.m he was handcuffed and taken along with Susantha to the Baddegama District Hospital by two police officers attached to the Thelikada police station and was produced before a Doctor who examined him. Petitioner states that he informed the Doctor that the police assaulted him. The Petitioner further states that one of the police officers who took them to the Hospital telephoned the 5th Respondent and informed him that the Petitioner had told the Doctor about the assault and that they were taken back in the three wheeler and it was stopped near the Baddegama Magistrates Court where his parents and relatives were gathered and he informed them that as he has told the Doctor about the assault he was being taken back to the police station and the policemen who accompanied them in the three wheeler kept on shouting that they were taking the 'grease yaka'. The three wheeler was stopped at various places and he was displayed to passers-by as the 'grease yaka' and when they arrived at the police station he noticed that a massive crowd had gathered at the police station to see the 'grease yaka ' and that he was displayed to the crowd as the 'grease yaka'.

The Petitioner further alleges that on the same day at about 3.30 p.m they were taken to the Magistrate's Court Baddegama and on their way to the Baddegama courts at Dodangoda Junction and Sandarawala Junction the jeep was stopped and he was shown to the people as the 'grease yaka'.

The petitioner was produced before the Magistrate Baddegama and remanded. An identification parade was held and the petitioner was not

identified. The B-report filed in court alleged that the Petitioner and Susantha had committed offences punishable under section 434 (House Trespass) and section 486 (Criminal intimidation) of the Penal Code. The Petitioner states that he was treated in Galle Prison Hospital on 25.08.2011 while in remand custody on the orders of the Magistrate.

The Petitioner was released on bail, on 08.09.2011 at about 7.p.m got himself admitted to Ward 10 of the Karapitiya Teaching Hospital. The Petitioner informed the doctors at the said Hospital about the assault on him by the Thelikada Police. On 09.09.2011 a statement was recorded from him by the police post of the Karapitiya Teaching Hospital. On 10.09.2011 the petitioner was examined by the Judicial Medical Officer and he complained about the assault by the Thelikada police to him and he was discharged from Karapitiya Teaching Hospital on 10.09.2011. The Petitioner states that when he was returning home with a friend at Dodangoda Junction the 5th Respondent and a few other police officers accosted the Petitioner and asked him whether he got himself admitted to hospital with the intention of creating trouble for the police and threatened the Petitioner saying that the Petitioner will be locked up for three months.

The Petitioner's father complained to the Human Rights Commission of Sri Lanka on 01.09.2011 regarding the arrest, assault, torture, and inhuman and degrading punishment meted out to the Petitioner by the Thelikada police.The Petitioner too made a written complaint to the Human Rights Commission of Sri Lanka on 09.09.2011. The Petitioner's father made a complaint to the 6th Respondent regarding the same on 01.09.2011. The Petitioner too has made a complaint to the 6th Respondent against the Thelikada Police on 19.09.2011.

The Petitioner states that on 21.09.2011 The Human Rights Commission of Sri Lanka referred the Peitioner to the Chief Judicial Medical Officer,

Colombo and Dr. Ananda Samarasekera examined him on 21.09.2011 at the National Hospital Colombo and referred him to Dr. Neil Fernando, Consultant Psychiatrist at the Forensic Psychiatry Unit of the Mental Hospital (Teaching) Angoda. The Petitioner states that Dr. Neil Fernando directed the Petitioner to attend the Psychiatric Clinic at the Psychiatric Unit of the Karapitiya Teaching Hospital for further treatment and is presently still undergoing treatment at the said Hospital.

The Petitioner states that he was held by the 1st to 5th Respondents as 'grease yaka' , the Petitioner has been subjected to severe humiliation in the eyes of the public, and in particular his colleagues at the Vocational Training Centre and as a result the Petitioner was compelled to abandon his vocational training program. The Petitioner states that whenever he came out in public, he was ridiculed and humiliated as 'grease yaka' and some went to the extent of hooting at him when they see him.

According to the Respondents the Petitioner had been taken into custody and produced before the Baddegama Magistrates Court on 24.08.2011 in case No 57044 based on a complaint by a Montessori Teacher. It is submitted that the Petitioner was arrested subsequent to the complaint made by a Montesori Teacher and that the Petitioner has been arrested according to the procedure established by Law and properly produced before the Magistrate and thereafter an identification parade was held. According to the B report marked R3(a) around 7.30 p.m on 23.08.2011 the Baddegama police had received a telephone message from the complainant that when she went to close the window around 7.30 she had seen some person near the window of the house and had screamed and the said person has run away. According to the complainant the said person was wearing an orange coloured T shirt and a Sarong. The said person was about 5-51/2 feet tall dark and could be identified if seen again. The neighbours had arrived

and searched the place and had found a Motor bicycle bearing No.YPWD 5677 parked on the road leading to her Uncle's house. According to the B report marked R3(a) on receipt of the said complaint a police team was sent to look into the matter and had found an abandoned Motor Bicycle bearing registration No. YPWD 5677 and has brought the same to the police station. Again the Baddegama police has received another telephone message around 11.45 p.m informing that the said suspect is around the place and had sent another team of police officers to search the area and has arrested a person wearing an orange coloured T shirt and a Brown coloured Sarong with another person who was with him on suspicion. On consideration of the aforementioned affidavits and documents it is apparent that the police officers attached to Baddegama police station have arrived at the scene in question on the information they had received by way of a telephone message that has been given by the complainant. According to the complainant the person whom she saw near the window that night was wearing an orange coloured T shirt and a Sarong. The police officers found the accused wearing an orange coloured T shirt and a Brown coloured Sarong and was arrested with the other person on suspicion. The other person who was found with the petitioner was also taken into custody along with the Petitioner as he could not establish his identity. As the complainant has described the person she saw near her window and has stated that she would be able to identify the said person if seen again, the petitioner was produced before the Magistrate for the purpose of holding an Identification parade. It is common ground that the Petitioner was arrested by the officers of the Baddegama police. It was contended on behalf of the Respondents that the petitioner was arrested on a complaint received that night on suspicion.

Section 32 of the Code of Criminal Procedure Act No.15 of 1979 describes the instances where peace officers could arrest persons without a warrant. According to section 32(1) (b)

" Any peace officer may without a warrant arrest a 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 exist of his having been so concerned."

It is common ground that the Petitioner was arrested by the officers of the Baddegama police on the night of 23.08.2011. Considering the circumstances of this matter, it is clear that the Respondents have arrested the Petitioner as he was apprehended near the area on reasonable suspicion on a complaint made to the police and had taken necessary steps against the Petitioner and criminal proceedings were instituted against him. In such a situation the arrest of the Petitioner cannot be regarded as an illegal arrest and therefore the Petitioner's claim with regard to Article 13(1) of the Constitution should fail.

The Petitioner has complained that the 1st to 5th Respondents had assaulted him at the Baddegama police station. The brutal assault on him by the 1st to 5th Respondents caused him severe physical pain and the public humiliation caused to him by being displayed to the general public as a 'grease yaka' by the 1st to 5th Respondents caused him severe mental pain and suffering and thereby he has alleged that the 1st to 5th Respondents had violated his fundamental rights guaranteed in terms of Article 11 of the Constitution.

Article 11 of the Constitution refers to freedom from torture and states as follows:-

"No person shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment."

According to the complaint made by the Petitioner, when he was at Palis's house, four police officers attached to the Thelikada police station, namely the 2nd to 4th Respondents and one other officer whose name is not known to the Petitioner, arrived at the house of Palis on two motor bicycles and without informing him of any reason for so acting, slapped him thrice and arrested him and Susantha. The petitioner has not named the officer who had slapped him. But he states that at the police station 1st to 4th Respondents assaulted him. After Susantha and he were taken to the Thelikada police station, the Petitioner was kept near the side door to the police station. The 4th Respondent held the Petitioner's hands while the other officer whose name is not known to the Petitioner held him by his neck. The 2nd and 3rd Respondents thereafter started assaulting the Petitioner with batons on the Petitioner's chest, face and legs. He states that thereafter, the 4th Respondent put the Petitioner's hands around a pillar and the 1st to 3rd Respondents assaulted him on various areas of his body for about one hour. The Petitioner further states that while the Petitioner was holding on to the pillar, another police officer brought a book and kept it on the Petitioner's head and that the 1st to 4th Respondents and the other officer repeatedly and forcefully hit the book with a baton causing severe physical pain to occur in the Petitioner's head and neck areas. The Petitioner has tendered affidavits from one Ajith Jayasekera, Lelkada Balage Chamika Manaranga and Getammanarchchi Wasantha marked P2A, P2B and P2C. Apart from his petition and affidavit, the Petitioner has produced the said affidavits marked P2A, P2B and P2C and medical

evidence to substantiate his allegations against the 1st to 4th Respondents.

The 2nd and the 4th Respondents have taken up the position that they were wrongfully named as Respondents to this application and that they were never present at the police station during the times alleged by the Petitioner. The 2nd Respondent has pleaded that he reported to work at 6.00a.m on the 20th of August and was on official duty at a Perahera and thereafter reported back to the police station on the 24th August 2011 at 5.35 p.m.

The 4th Respondent states that he reported to work at 3.05 p.m and thereafter left work at 8.22p.m.on the 23.08.2011. He thereafter reported to work as usual on 24.08.2011 morning. He states that he was not on night duty the previous night.(23.08.2011).

The 2nd and the 4th Respondents have annexed documents marked R1a to R1h to substantiate the same. But on perusal of the said documents it is clear that the said documents do not establish that the 2nd and the 4th Respondents could not have been at the police station at the time material to this incident. The Petitioner has clearly identified the 2nd and the 4th respondents among the four officers who arrived in two motor bicycles on 23.08.2011 around 10.00 p.m at Palisa's house and arrested him and Susantha.

Again the Petitioner has clearly identified the said 2nd and 4th Respondents as the two persons who assaulted him at the police station with batons. The Petitioner has very clearly identified the 4th Repondent as the officer who first held him by his hands and later as the person who put his hands around a pillar. The Petitioner has categorically stated that the 2nd and the 4th Respondent too hit him with batons on the book which was kept on top of his head. According to the Petitioner the 1st to 4th

Respondents assaulted him on the night of 23.08.2011. The following day morning the 5th Respondent who was the Officer–in-Charge of the police station Thelikada took him out of the remand cell and showed him to the assembled crowd saying 'this is the grease devil'. When the Petitioner sat down on a chair as he was in severe pain, the 5th Respondent ordered him to stand and assaulted him on his face and head in front of the crowd. This is the only time the Petitioner implicates the 5th Respondent to this incident. In addition to the assault the Petitioner alleges that it was the 5th Respondent who humiliated him by showing the Petitioner to the crowd saying 'this is the grease devil'. Thereafter the Petitioner was taken before the Medical Officer Baddegame District hospital before producing to the Magistrate, Baddegama.. According to the Petitioner he was taken in a three wheeler and he informed the Doctor that the police have assaulted him. This was brought to the notice of the 5th Respondent and he was taken back to the police station. And on their way to the police station the three wheeler was stopped at various places and he was displayed to passers-by as the 'grease yaka'. At the police station he noticed a massive crowd was gathered there and he was again shown to the crowd stating that he is the 'grease yaka'. On the same day (24.08.2011)at about 3.30 p.m he was taken to Baddegama Courts and again on their way to courts at Dodangoda and Sandarawala Juncions the police jeep was stopped and he was shown to the people as the 'grease yaka'.

The allegation against the 1st to 5th Respondents made by the Petitioner is based on the alleged infringement of Article 11 of the Constitution. The fundamental rights guaranteed in terms of article 11 are not restricted to mere physical injury. The words used in Article 11, viz., 'torture, cruel, inhuman or degrading treatment or punishment would take many forms of injuries which could be broadly categorized as physical and psychological and would embrace countless situations that could be

faced by the victims. Accordingly, the protection in terms of Article 11 would not be restricted to mere physical harm caused to a victim, but would certainly extend to a situation where a person had suffered psychologically due to such action.

In W.M.K. De Silva Vs Chairman, Ceylon Fertilizer Corporation (1989) 2 Sri.L.R 393, Amerasinghe J. ., said,

“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.”

In Kumarasena Vs SI Sriyantha and Others S.C Application No.257/93 SCM of 23.05 1994, it was held that the ‘suffering occasioned was of an aggravated kind and attained the level of severity to be taken cognizance of as a violation of Article 11 of the Constitution’.

In Adhikary V. Amerasinghe [2003} 1 Sri.L.R 270 Shirani Bandaranayake, J with Edussuriya and Yapa JJ agreeing, stated 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 has suffered psychologically due to such action. Therefore the test which has been applied by our courts is that whether the attack on the victim is physical or psychological, irrespective of the fact that, a violation of Article 11 would depend on the circumstances of each case. Accordingly, it would be necessary to consider the circumstances of this case and the nature of the acts complained of to decide whether there is a violation of Article 11 of the Constitution.

It is to be noted that the incident of showing the Petitioner to the other people as ‘grease yaka’ took place mainly at public places. Apart from

being assaulted the Petitioner was first shown or displayed to the crowd that was gathered at the police station by the 5th Respondent himself. The 5th Respondent was the Officer-in Charge of the police station Thelikada. When one considers the affidavit filed by the petitioner it gives the impression that the other officers were encouraged by the act of the 5th Respondent and the 5th Respondent has done nothing to prevent it. It is the Petitioner's position that when he was produced before the Doctor he complained about the assault to him. This was conveyed to the 5th Respondent by the other officers who brought the Petitioner to Doctor and they were instructed by the 5th Respondent to bring the Petitioner back to the police station without producing him before the Magistrate. Thereafter on the way back to the police station he was shown or displayed as 'grease yaka' to people at various places. Then again at the Thelikada police station and on the way from the police station to Courts the Petitioner was again displayed to the people at the Dodangoda Junction and Sandarawala Junctions as the 'grease devil'. The ordeal faced by the petitioner undoubtedly is of an aggravated nature. He was made to face the public as though he was a criminal. There is no evidence placed before this court as to who was referred to by the people of this particular area as 'grease yaka'. But the court was made to understand that the people in the said area especially the young girls and ladies were frightened by a man who came to their premises and peeped into their rooms and houses in the dark especially when they were alone in their houses. In short people in the area referred to a pervert who peeped into the rooms of the ladies at night when they were alone for sadistic pleasure. The very purpose of showing the petitioner as 'grease yaka' at such highly crowded places was to identify and label the Petitioner as the said pervert to the public and humiliate the petitioner. And this was done several times. The Petitioner has stated that the 1st to 4th Respondents showed him as 'grease yaka' to the people gathered

near the house of Pali's at the time of his arrest. The petitioner has very clearly identified the 5th Respondent as one of the officers who displayed him as the 'grease devil' to the public. The petitioner has not named or specifically identified the other police officers who displayed him to the public as 'grease yaka' at various other places. But he has very clearly stated that the fact that he complained to the Doctor about the police assault was conveyed by the said officers who took him to the Hospital to the 5th Respondent. And thereafter he was shown or displayed at various places as 'grease devil' by the said officers who took him back to the police station. The psychological trauma faced by the petitioner while in the custody of the 5th Respondent would add to the severity of the actions by the 1st to 5th Respondents. In my opinion the conduct of the 1st to 5th Respondents would certainly amount to cruel, inhuman or degrading treatment of the Petitioner.

In Channa Peiris and Others Vs Attorney General (1994) 1 SLR 1 Amerasinghe , J. held that there three general observations apply to in regard to violations of Article 11:-

(i)The acts or conduct complained 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 endeavoring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment.

Thus it is clear that though alleged infringements of fundamental rights have to be proved by the Petitioner on a balance of probability, the Court requires a high degree of proof within the standard, commensurate with the nature of the allegations made, while at the same time ensuring that no undue burden is placed upon a Petitioner.

The Respondents have produced the Medico-Legal Report dated 24th August 2011 marked R4. R4 very clearly establishes the fact that the petitioner has informed the Doctor who examined him that he was assaulted by the police. The Petitioner has tendered three affidavits from one Ajith Jayasekera, L.B.C.Manaanga, G.Wasantha marked P2a, P2B and P2C to substantiate the same. These three persons had witnessed the ordeal faced by the Petitioner at the hands of the police. Petitioner has tendered an affidavit from his father marked P3 to substantiate the fact that he informed his father about the police assaulting him when he came to the police station to see the Petitioner. The father of the petitioner P Sumanasiri has confirmed the fact that he saw the Petitioner inside the cell lying on the ground and in severe pain. It is stated in P3 that the Petitioner complained about the assault by the police officers and that he was in severe pain and feeling vomitish and pleaded that he be taken before a Doctor. It was contended by the Counsel for the Petitioner that the said Medical Report marked R4 is false and that an attempt has been made by the medical officer to protect the Respondents.

In the B report marked P6 the police have not stated anywhere that the Petitioner had injuries in his person or has moved court that he be produced before a medical officer. It is clearly stated that the Petitioner with another person was arrested by the police on information received by the police that there are suspicious persons in the vicinity where the incident took place. The petitioner has stated that he was slapped three

times by the police officers at the time of arrest. Thereafter he was assaulted by the respondents again at the police station. The B report marked p6 does not state anywhere that the petitioner was handed over to the police by the villagers or that the villagers had manhandled the petitioner. It is very clear from the said B report marked P6 that the police have arrested the petitioner and another on suspicion and were taken to the police station thereafter. But the Respondents in their Objections have stated that the petitioner was accosted by the villagers that night and that he was manhandled by the villagers before the petitioner was handed over to the police.

According to the document marked R3b the 3rd respondent has very clearly recorded the fact that he arrested the petitioner and brought him to the police station. He has handed over the suspects to the P.C 88153 Abeykoon. He has recorded that he found nothing in the possession of the two suspects and that they had no injuries. Even the P.C 88153 Abeykoon has recorded the fact that the two suspects including the petitioner was handed over to him by the 3rd respondent and that the suspects had no injuries to be seen.

But the respondents in their objections have taken up the position that the petitioner was handed over to them by the villagers. According to the objections filed by them there was a big crowd gathered at the time of the arrest of the petitioner. According to para 13 of the objections it is stated that the petitioner was accosted by several villages upon the scream of a female inhabitant of a house which he was trespassing and thereafter had been manhandled by some villagers. According to affidavit marked R2b, the affirmant one K.H.Chandana has stated that about 40 villages were gathered and they assaulted a person with hands and poles shouting 'grease yaka' and after informing the police on 119 and on arrival of the police he was handed over to the police by them.

He has come to know that it was the petitioner and one Arabage vithange Susantha that was handed over to the police. Ambagahaduwage Dinesh Chinthaka too has stated in his affidavit marked R2c that the villages assaulted the petitioner and the person called Susantha and the police tried to protect the suspects from being assaulted.G.K.Ruwan Kumara in his affidavit marked R2d has also stated that the villagers assaulted the petitioner and Susantha and the police with some difficulty was able to protect them from the crowd. Balagamage Nimal too has stated the same in his affidavit marked 2Rf.

All these affidavits had been marked and produced by the Respondent s to show that the petitioner had been severally assaulted by the villages before he was handed over to the police by the villages. These affidavits clearly contradicts the position stated by the 1st respondent in his B report to the Magistrate marked P6 dated 24.08.2011. Nowhere in the said B report the 1st respondent has stated that the petitioner was handed over to the police by the villagers and that the said villagers have assaulted the petitioner. It doesn't speak of any injuries caused to the petitioner. No application has been made to produce the petitioner to the J.M.O. And the document marked R3b clearly establish the fact that the petitioner with another was arrested by the police and that they were not handed over to the police by the villages. The document R3b clearly establishes the fact that the petitioner did not have any injuries when he was brought and handed over to the other officer PC 88163 Abeykoon in the early hours of the 24.08 2011 by the 3rd Respondent. In the B report marked P6 the 1st Respondent has not informed the Magistrate that the Petitioner had been produced before a Doctor. The Respondents had admitted the fact the Petitioner was taken before the Doctor on 14.08.2011. According to the Petitioner he has informed the doctor that he was assaulted by the police whilst in police custody. In fact the Medical Report R4 shows that the doctor has recorded the said

fact in the history given by the Petitioner. This clearly supports the story of the Petitioner that he was assaulted and produced before a doctor prior to being produced before the Magistrate.

It is clear from these documents that the Respondents had made an attempt to show that the petitioner had been assaulted by some villages on the night of the day he was arrested by the police and that it is possible that the said injuries to the Petitioner would have been caused by the public at the time of his arrest. When one considers the conflicting versions placed before court by the Respondents, there is considerable doubt as to the truth of the Respondents version.

On a perusal of R4 it is clearly seen that the petitioner has very clearly informed the doctor about the police assaulting the petitioner whilst he was in the police custody. The report of the Medical Officer Baddegama is, in my view, valueless and unworthy of acceptance. I therefore reject the report of the Doctor Piyaratne as unacceptable.

In Ansalin Fernando V. Sarath Perera (1992) 1 Sri L.R 411, it was held that "…depending on the circumstances, an allegation of a violation of Article 11 could be proved even in the absence of medically supported injuries".

It was the Petitioner's position that after he was released on bail on 08.09.2011 at around 7.p.m he got himself admitted to Ward 10 of the Karapitiya Teaching Hospital. The Medico-Legal Report 12.12.2011 has been issued by the Assistant JMO Karapitiya Dr.Nisansala lakmali Gamage states that the petitioner has been examined on 10.09.2011 at 10.15 am. In the short history given by the patient it is stated that:-

"On 23.08.201, time I am not sure; five police men came by motor bikes while I was going with a friend .They caught me by my neck at Palis Seeya's house. Two police men were in uniforms and three in civil. They

did not assault me on arrest. They brought me by a motorbike to police. At police I was assaulted by hand and feet and by batton poles. I was asked to grab a pillar by both hands and they assaulted my back by batten poles. Then they kept a book on my head and hit it by batten poles. I lost my consciousness and got throat bleeding following that. When I fell down one of them hit my knee by foot and kicked my abdomen.----------"

In the colomn C it is stated that an averagely built teenager. Conscious and rational. Not in depressive mood. No abnormalities found in systemic examination.

1) Abrasion over the right knee 0.5 cm in size over the lateral aspect of the joint.

Skull X-ray, Chest X-ray, X-ray right knee –no fractures.

Dr. Nisansala Lakmali Gamage who examined the Petitioner on 10.09.2011 has stated that the said injury is compatible with applying blunt force trauma. The given history of allegation cannot be excluded.

This opinion of the AJMO Teaching Hospital Karapitiya dated 12.12.2011 materially supports the Petitioners position that the injuries on him were inflicted on him at a time when he was being held in police custody.

While the petitioner was held in remand custody, the petitioner's father has complained to the Human Rights Commission of Sri Lanka on 01.09.2011 regarding the arrest, detention, assault, torture and inhuman and degrading punishment meted out to the petitioner by the Thelikada Police Reference No HRC/2790/11/G P7. The petitioner himself made a written complaint to the Human Rights Commission on 19.09.2011 regarding the arrest, detention, assault, torture and inhuman and degrading punishment meted out to him. (P8). The Petitioner and his

father had also complained about the treatment meted out to him by the Thelikada Police to the 6th Respondent the Inspector General of Police. (P9, P10). On 21.09.2011 the Human Rights Commission of Sri Lanka referred the Petitioner to the Chief Judicial Medical Officer, Colombo (P11), who thereafter referred the Petitioner to Dr. Neil Fernando of the Forensic Psychiatry Unit of the Mental Hospital (Teaching) Angoda. Dr.Neil Fernando has examined the Petitioner on 26.09.2011. In his report submitted to the Human Rights Commission he has stated that the Petitioner showed many psychological consequences of trauma.

1. Reliving experiencing of aspects of the stress events and intrusive memories;
2. Recurrent distressing dreams;
3. Behaviors to avoid reminders of the incident;
4. Difficulties in falling to sleep;
5. Difficulties in concentration ;
6. Hyper vigilance;
7. Exaggerated startled response;
8. Social withdrawal;
9. Depressed mood and suicidal ideas;
10. Loss of self esteem;
11. Has lost the faith about the goodness of man kind;
12. Emotional numbness;
13. Depressive recognitions like worthlessness, helplessness,

    Hopelessness

Dr.Fernando has very clearly stated that the Petitioner is experiencing distress, disability and dysfunction. Clinical information indicates that the Petitioner has a mental disorder which fall in to the category of reaction to severe stress and adjustment disorders (according to the ICD-10 Classification of Mental and Behavioral Disorders) cannot be ruled out Post Traumatic Stress Disorder, Need to be followed up to detect features of Post Traumatic Stress Disorder and depressive disorder. In his opinion the Petitioner needs psychological support in the form of traumatic counselling needs to be followed up as an outpatient at psychiatric clinic Teaching Hospital Karapitiya. The Petitioner has accordingly attended the Psychiatric Clinic at the Psyhiatric Unit of the Karpitiya Teaching Hospital for further treatment as directed by Dr.Neil Fernando. It is his position that he is still undergoing treatment at the said Psychiatric Unit at the Karapitiya Teaching Hospital. The Petitioner has annexed the relevant pages of the clinic book marked as P12 to substantiate the same.

The Petitioner as he was held out by the Respondents as a 'grease yaka', has been subjected to severe humiliation in the eyes of the public and in particular his colleagues at the Vocational Training Centre and as a result he was compelled to abandon his vocational training program. He has further stated that whenever he came out in public he was ridiculed and humiliated as a 'grease devil' and some went into the extent of hooting at him when they saw him.

The Petitioner has clearly identified the 1st to 4rd Respondent as the persons who assaulted him at the Thelikada police station. The Petitioner has submitted affidavits from one Ajith Jayasekera marked P2(A), L.B.Chamika Manaranga marked P2(B), G.A.Wasantha marked P2(C) who have stated that they saw the 1st to 3rd Respondents assaulting the Petitioner when he was in police custody. The Petitioner and the said

above witnesses had clearly identified the 4th Respondent as the person who held the Petitioners hands around the pillar and states that the 4th Respondent too who was in civil joined the 1st, 2nd and the 3rd Respondents and assaulted the Petitioner thereafter.

The Petitioner's father too has given an affidavit stating that he saw the Petitioner lying in the floor of the police station in pain and has stated that the petitioner complained to him that the police officers has assaulted him severely and that he complained of having a stomach pain and was feeling vomitish. (P3) He has further stated in the affidavit that he retained a lawyer for his son and was waiting for the police to arrive near Baddegama Courts and saw the Petitioner being taken towards Baddegama at about 12 pm by some police officers in a three wheeler and they came back in a three wheeler and the Petitioner put his head out and informed him that as he had informed the Doctor that he was assaulted by the police and as such he was being taken back to the police station.

P.Priyanka kumara the sister of the Petitioner too has given an affidavit stating that people came to the police station to see the Petitioner who was shown to the public as 'grease yaka'. (P4).Rathnasiri Wickrema Gunaratne in his affidavit marked P5 has stated that 0n the 24.08.2011 morning when he went to the town he came to know that the 'grease yaka' has been caught and went to the police station to see what was happening. He has stated that he knew the 5th Respondent who was the officer-in charge of the Thelikada police station and saw that a big crowd had gathered at the police station to see the 'grease yaka' and he requested the 5th Respondent to show the 'grease yaka' to him. The 5th Respondent has thereafter stated that he will show the 'grease yaka' to all the people who had gathered at the police station to see, and has brought the Petitioner out the Petitioner who was inside the cell and

showed him to all the people gathered there as 'grease yaka". This witness clearly corroborate the version given by the Petitioner that he was taken out from the cell and shown to the people gathered at the police station again by the 5th Respondent on the morning of 24.08.2011.

The Petitioner has very clearly stated that the 5th Respondent showed him as 'grease yaka' to the people gathered at the police station on 24.08.2011. It is very clear from the evidence placed before this court by the Petitioner that the 5th Respondent was clearly responsible for showing or displaying the Petitioner as 'grease yaka' to the people of the area and the other officers of the said police station who took the Petitioner in a three wheeler and displayed him as the 'grease yaka' did so with the clear encouragement and approval of the 5th Respondent who was the Officer-in Charge of the police station at the time of the incident. There is nothing to show that the 5th Respondent did anything to prevent the Petitioner being assaulted or been shown or displayed as 'grease yaka' to the public.

The public humiliation caused to the Petitioner by being displayed to the general public no doubt has caused him severe mental pain and suffering. The report issued by Dr.Neil Fernando Consultant Psychiatrist at the Forensic Psychiatry Unit of the Mental Hospital (Teaching) Angoda clearly establish the same. The Petitioner has been subject to severe humiliation in the eyes of the public, and in particular his colleagues at the Vocational Training Centre and as a result the Petitioner has been compelled to abandon his vocational training program.

The Respondents in their objections in paragraph 19 has stated that they have been involved in several raids in relation to the brewing and sale of illicit liquor in the said police division. The Petitioners parents have been caught in several such raids brewing and/or selling illicit liquor and that

the Petitioner's parents have been produced before the Magistrate's Court on several occasions and have been fined and/or sentenced accordingly. The Respondents also have stated that the brothers of the Petitioner have been involved in several brawls subsequent to the 23rd of August 2011 wherein they have assaulted several villagers. The Respondents have annexed documents marked R5a to R5d substantiate the same.

The Petitioner was only a young boy of 17 years and 10 months old at the time of the incident. He was a student at the Vocational Training Authority of Sri Lanka. The documents marked by the Respondents does not show that the Petitioner was involved with the activities of his parents. The documents annexed marked R5a to R5d do not indicate any involvement of the Petitioner in brewing or selling illicit liquor. In any case the conduct of the parents or their previous convictions does not in any manner permit the Respondents to subject the Petitioner to torture or to cruel, inhuman or degrading treatment or punishment. The allegation of the Respondents that the Petitioner has been instigated by such persons involved in such illicit activities and sponsors of such unauthorized liquor outlets to impede the performance of the duties of the Respondents cannot be believed and is unacceptable.

In Amal Sudath Silva V. Kodituwakku, Inspector of Police and Others [1987] 2 Sri.L.R. 119 Atukorale,J observed:-

"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 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. ……..

The petitioner may be a hard-core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution."

The fundamental rights guaranteed in terms of Article of the Constitution are not restricted to mere physical injury. As held in W.M.K.de Silva V. Chairman Fertilizer Corporation by Amerasinghe ,J. it would embrace the sphere of the soul or mind as well. Apart from been assaulted at the Thelikada police station, it is to be noted that the Petitioner was shown or was displayed to the public as 'grease yaka' at the Thelikada police station, and at various other places including Dodangoda and Sandarawala Junctions. The ordeal faced by the Petitioner was undoubtedly of an aggravated nature. The conduct of the 5th Respondent and later with his blessings by the other police officers attached to the Thelikada police station at the times and places would certainly amount to degrading treatment of the Petitioner. The psychological trauma faced by the Petitioner can be understood.

The Petitioner has in this case led sufficient evidence to prove his allegations against the Respondents to the satisfaction of court.

For the foregoing reasons I hold that the 1st to 5th Respondents had violated the Petitioner's fundamental rights guaranteed under Article 11 of the Constitution. I therefore direct the 5th Respondent personally to pay Rs.100,000/= and also the 1st to 4th Respondents each to personally pay a sum of Rs.50,000/- to the Petitioner as compensation and costs. All payments to be made within three months of today.

I direct the Inspector General of Police to investigate into the allegation levelled against the 1st to 5th Respondents by the Petitioner and forward

the investigation report to the Attorney General. Hon. Attorney General is directed to take necessary action.

The Registrar of this court is directed to send a copy of this brief to the Inspector General of Police.

JUDGE OF THE SUPREME COURT

SISIRA J.DE ABREW,J.

I agree.

JUDGE OF THE SUPREME COURT

M.H.M.UPALI ABEYRATNE, J.

I agree.

JUDGE OF THE SUPREME COURT

Relief granted.

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S.C(FR) No. 599/2011

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALSIT 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

S.C(FR) No. 599/2011

1. Kanahipadi Kankanamge Nalin.

2. Wickrema Kankanamge Nadeeka Lakmali

Both of

No. 204 C, Arachchigoda,
Dodangoda.

Petitioners

-Vs-

1. Kamalsiri,
Sergeant of Police 59558,
Dodangoda Police Station.

2. Wickramasinghe,
Civil Defence Officer 5330,
Dodangoda Police Station.

3. Mahinda Banda,
Sub-Inspector of Police,
Dodangoda Police Station.

4. Nishantha,
Police Constable P 1474,
Dodangoda Police Station.

5. Manjula,
Police Constable No. 38671,
Dodangoda Police Station.

6. Bimal Perera,
Chief Inspector of Polcie,
Officer in Charge,
Dodangoda Police Station.

7. N.K.Illangakoon
Inspector General of Police,
Police Head Quarters,
Colombo-01.

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

Respondents

Before: **Sisira J.de Abrew, J**

Anil Gooneratne, J &

Nalin Perera, J

Counsel: Shantha Jayawardena with Niranjan Arulpragasam for the Petitioners.

Upul Kumarapperuma for the 1st to 4th and 6th Respondents.

Ms. Nayomi Wickramasekera SSC for the 7th and 8th Respondents.

Argued &

Decided on: 08.12.2017

Sisira J de Abrew, J

Heard Counsel for both parties in support of their respective cases. The two Petitioners in their petition filed in this Court alleged that their fundamental rights guaranteed by Articles 11, 12(1) and 13(1) of the Constitution have been violated by the Respondents. This Court by its order dated 09.08.2012 granted leave to proceed for alleged violation of Articles 11 and 12(1) of the Constitution with respect to the both Petitioners by the 1st to 6th Respondents. This Court also granted leave to proceed for alleged violation of Article 13(1) with respect to the 1st Petitioner by the 1st to 6th Respondents. The 1st Petitioner alleged that his lorry driven by his driver was parked near Thudugala Junction in Dodangoda police area. The 1st and 2nd Respondents who arrived at this place requested the Petitioner to take away the lorry as it was blocking traffic. Thereafter the Petitioner took the lorry away and the 1st to 4th Respondents started assaulting him. According to the 1st Petitioner, he was dragged on the road by the 1st and 2nd Respondents. The Petitioners alleged that the 1st Petitioner sustained injuries as a result of the said assault in his hands and legs. The 2nd Petitioner who is the wife of the 1st Petitioner in his affidavit filed in this Court whose name is K.K.Wickrama Kankanamge Nadeeka Lakmali states that she was assaulted by the 2nd and 3rd Respondents. As a result of the assault launched by the said Police Officers she suffered unbearable pain in the abdomen. She says that as a result of the assault she was thrown against a three wheeler. After the assault, the 1st Petitioner was examined by Dr. Jayamalee on 20.11.2011. The incident took place on 20.11.2011. According to

Dr. Jayamalee's report the Petitioner had sustained an abrasion in the left elbow joint and left ankle. Dr. Ruhul Haq the Judicial Medical Officer who examined the 1st Petitioner on 03.10.2011 had observed two healing wounds on the left elbow and on the left ankle. The 1st Petitioner had admitted to the J.M.O. that he had had a fall and sustained injuries. Dr. Jayamalee who examined the 1st Petitioner made the following observations. "Suggestive of a fall on the ground". Dr. who examined the 1st Petitioner has also made an observation in the Medico Legal Examination Form that the 1st Petitioner was smelling of liquor. The 1st Petitioner had admitted to Dr. Jayamalee that he had consumed a bottle of toddy. Petitioner's story was that the Police Officers assaulted him when he was dragged on the ground. It appears that he has only sustained one injury on the left elbow and one injury on the left ankle. When we examine his story and the medical evidence, we are of the opinion his story is not supported by the medical evidence. We note that the 1st Petitioner had admitted to the J.M.O that he had had a fall and sustained injuries. We therefore hold that his complaint made to this Court has not been presented with high degree of certainty.

His wife's complaint is that she was assaulted by the 2nd and 3rd Respondents. Although she says in her affidavit that she suffered unbearable pain in the abdomen. Dr. who examined her on the day of the alleged incident has made the following observations. "No head injuries, no E.N.T. bleedings, no vomiting and no abdomen pain". Therefore we feel that her complaint of assault has also not been supported by medical evidence. Both stories narrated by the 1st Petitioner and the 2nd Petitioner have not been presented with high degree of certainty. In this connection, I would like to rely on the judicial decision in

Channa Peiris Vs The Attorney General 1994(1) SLR, Page 01, by His Lordship Justice Dr. A.R.B.Amarasinghe wherein His Lordship held as follows:-

"(i) The acts or conduct complained of must be qualitatively of a kind that a Court may take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated.

(ii) Torture , cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical.

(iii) Having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a Petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment."

In the above case one of the allegations was that the Petitioner's fundamental rights guaranteed by Article 11 of the Constitution had been violated.

Applying the principles laid down in the above judicial decision, I hold that allegation of violation of Article 11 of the Constitution must be presented with high degree of certainty.

As observed by us both stories narrated by both Petitioners have not been supported by medical evidence. Further the 1st Petitioner had admitted to the J.M.O. that he had had a fall. He had also admitted to the Dr. Jayamalee that he had consumed a

bottle of toddy on the day of the incident. When I consider all the above matters, it is difficult to place reliance on the story narrated by the Petitioners.

Considering all these things, we hold that the Petitioners have not presented their case to the satisfaction of this Court. We therefore can't rely on the complaint of both Petitioners. For the above reasons, we dismiss the Petition of the Petitioner.

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 FR Application No. 608/2008

In the matter of an Application under and in terms of Article 126 read with Article 17 of the Constitution

Sarath Kumara Naidos
312/51, Moragodawatte
Kesbewa, Piliyandala
Presently at Remand Prison, Welikada.

PETITIONER

Vs.

1. Inspector Damith
   Police Station
   Moratuwa.

2. Police Constable Kavinda
   Police Station
   Moratuwa.

3. Officer In Charge
   Police Station
   Moratuwa.

4. Superintendent of Police
   Moratuwa Division
   Office of the Superintendent of Police,
   Moratuwa.

5. The Inspector General of Police
   Police Headquarters
   Colombo 1.

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

RESPONDENTS

BEFORE: K. Sripavan C.J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: Ermizar Tegal for the Petitioner

Asthika Devendra with Kameel Maddumage
For the 1st to 3rd Respondents

Madhawa Tennakoon S.S.C for the 4th to 6th Respondents

ARGUED ON: 01.11.2016

DECIDED ON: 19.01.2017

GOONERATNE J.

This is an application filed on or about December 2008 under Article 126 read with Article 17 of the Constitution. Petitioner was a 'Mason' and a married person with young children at the time this application was filed in this court. In his petition, he admits that 3 to 4 years ago he was charged and convicted of possession of 'ganja' to which charge he pleaded guilty. He also

asserts that he had no pending criminal cases, prior to the incidents described in his petition. In the prayer to the petition, relief sought as per sub paragraphs 'e' & 'd' of the prayer, against 1st to 5th Respondents in terms of Articles 11, 12(1), 13(1) and 13(2) of the Constitution. Petitioner's complaint is more particularly focused on assault, torture, cruel and inhuman degrading treatment, by the above Respondents. This court on or about 10.06.2010 granted leave to proceed on alleged violations of Articles 11 and 13(2) of the Constitution.

The Petitioner in his petition filed in this court, refer to several acts of assault on him by the 1st and 2nd Respondents along with some other police officers (not named). It is pleaded that a woman who worked at a house where the Petitioner had worked for about three to four months had met him and inquired about house breaking and whether the Petitioner was involved. This had led to a heated argument. On 5th July 2008 at about 2.00 p.m the Petitioner was working at a site at Samagi Mawatha, Koralawella, 1st and 2nd Respondents arrived in a three-wheeler with two other police officers, and directed the Petitioner to accompany the police officers to the police station. When the Petitioner asked the police as to why he is taken to the police the 2nd Respondent assaulted him. Paragraph 4 of the petition describes several acts of assault on the Petitioner. The several acts of assault by the police as pleaded and other acts of the police are as follows:

(a) Petitioner was taken to the Crimes Division of the Moratuwa police and he was beaten. Before moving him to a cell the 2nd Respondent along with some other police officers lifted him and put him on the ground twice, at about 7.30 p.m.

Petitioner's sister and brother-in-law came to see him at the police. Sister's affidavit is annexed marked P1A.

(b) At 9.00 p.m Petitioner taken out of the cell and his fingers tied with a lace, hung with the finger, while a chair was kept below his body. He was kept in that position for about half an hour in the presence of the 1st and 2nd Respondents.

(c) On 06.07.2008 (as pleaded) Petitioner's wife and sister came to the police to see him. Petitioner informed both of them about the assault. At 9.00 p.m. Petitioner was taken out of the cell and taken to the Crimes Division. Petitioners hands were tied and put through the legs and hung by a wicket which was kept between two tables (kept in this position for 20 minutes by the 1st Respondent). The 2nd Respondent and some other police officers had beaten the Petitioner on the legs and feet whilst questioning of house breaking incident. Petitioner denied such a house break-in incident. Petitioner's brother-in-law also came to see him and Petitioner informed his brother-in-law of the above assault. Affidavit of brother-in-law marked and produced as P1B.

(d) On 07.07.2008 Petitioner was again taken out of his cell by the 1st Respondent and other police officers who took the Petitioner into custody, threatened the Petitioner of assault. He was then beaten on the hands and feet with clubs. On being beaten police asked about

some jewellery stolen from a house where the Petitioner had worked previously.

(e) 1st Respondent also threatened the Petitioner and informed him that a bomb would be introduced in order to keep the Petitioner in prison for a longer period. Petitioner was unable to bear he being assaulted, and informed the police he could return a gold chain. Petitioner told his wife who visited him to hand over a gold chain which belongs to his son, in order to obtain his release. On the same day Attorney-at-Law, M/s. Shamila along with Petitioner's sister, mother and a neighbour visited him at the police station. Attorney-at-Law Shamila was consulted by Petitioner's party over his arrest. It is pleaded that due to such assault Petitioner's hands and legs were all swollen.

(f) On 8th or 9th July 2008 at 10.00 a.m the Superintendent of Police of the area visited the Moratuwa Police Station. The Petitioner was hidden inside the police mess. Petitioner verily believes that Superintendent's visit was as a result of a complaint lodged at the Superintendent's office, by his sister.

(g) On 10.07.2008 the house owner whose house was, alleged to be broken-in visited the police. Petitioner was taken to Crimes Division and was shown to them. Petitioner denied any involvement. Thereafter the 1st Respondent on the same night assaulted the petitioner with a cricket bat on his face, buttocks and legs.

(h) On 11th and 12th July Petitioner detained in the police station.

(i) On 12.07.2008 another Attorney-at-Law and Petitioner's wife visited the police. The 1st Respondent informed them that the Petitioner would be produced before the Magistrate. Affidavit of Attorney Niluka and wife produced marked P1C & P1D.

(j) On 13.07.2008 Petitioner was taken to the Lunawa Hospital as he complained of a chest pain. But the Doctor did not examine his injuries caused as a result of assault. Later Petitioner was produced before the learned Magistrate. At that point Petitioner became aware that the police had filed two cases against the Petitioner bearing Nos. 89984 (theft) and 90215 (possession of 2300 mg. of heroin) on 12.07.2008. Petitioner was remanded by learned Magistrate. Court proceedings annexed marked P2A & P2B. I also note the contents of the application made to the Human Rights Commission by the Petitioner's party.

On a perusal of the record I find that extensive written submissions have been filed by parties on time bar. However on 29.07.2016, the Journal Entry indicates that the learned counsel who appeared for the 1st to 3rd Respondents informed court that the preliminary objections on time bar would not be pursued.

The 1st to 3rd Respondents have filed objections, on 15th October 2010. The affidavits filed of record of each of the three Respondents appear to be on the same lines. Allegations of assault and torture by the said Respondents are denied. These police officers also maintain that the suspect Petitioner was produced before the Magistrate within 24 hours of his arrest. The 1st Respondent was an Inspector of Police and Officer-In-Charge of the Crimes Bureau of the Moratuwa police at the relevant time and period. It is also denied by these Respondents that the Petitioner has no pending cases. It is pleaded that

the Petitioner was charged for theft and possession of 30 mg. of heroin and convicted by the Magistrate's Court of Maligakanda and Colombo respectively. Copies of the relevant M.C records are not produced since same had been destroyed but certified copies of criminal records from the police station are produced.

Moratuwa Police Station received a complaint of house breaking and death threat on 11.06.2008. On 30.08.2008 facts were reported to the Magistrate. 'B' Report No. 899 84 is produced as 1R5.

The 1st Respondent aver that he was on 12.07.2008 he was on a tour duty in Moratuwa, Koralawella area with two police officers named in his affidavit. He received information from an informant of transporting of heroin, in the area. This was at about 20.00 hours. At 20.30 hours he arrested the Petitioner at Koralawella having explained the reason for arrest. Petitioner was thereafter handed over to the Moratuwa Police, Reserved Officer, and he left for further petrol rounds. At the time of arrest the Petitioner had with him a quantity of heroin, a gold chain and a pawning receipt.

It is the position of the 1st Respondent that having handed over the Petitioner to the Reserved Officer he is unaware as to what happened thereafter. It is further pleaded that the Reserved Officer, Gamini has testified by an affidavit that there was no assault, torture or any harassment caused to

the Petitioner. On 13.07.2008 Petitioner was examined by District Medical Officer, Moratuwa Hospital. Medico Legal Report does not indicate any injuries. On the same day Petitioner was produced before the Magistrate, Moratuwa on two charges. One was on theft and the other for possession of heroin. The 1st Respondent produced marked 1R – 11 his investigation notes of arrest, etc. He further pleads that the Petitioner never complained of any assault to the learned Magistrate when he was produced in court on 13.07.2008.

The 2nd and 3rd Respondents by their affidavit support the position of the 1st Respondent as stated above. The 2nd Respondent, was according his affidavit on petrol duty along with the 1st Respondent at all relevant material times.

The material furnished to this court, and submissions both oral and documentary made by learned counsel on either side no doubt, are initiated on two Magistrate's Court cases bearing Nos. 89984 and 90215. The Judgments delivered by the learned Magistrate in the said cases are also filed of record. (no indication of an appeal). The said orders of the learned Magistrate throw more light to the case in hand and assist the Apex Court to arrive at a decision concerning Petitioner's basic rights. On the side of the Petitioner the allegation of assault, torture and degrading treatment are based and supported by documents/affidavits marked and produced as P3, P1A, P1B, P1C and P1D. It

indicates that the Petitioner was very badly treated by the police from the point of taking him to custody by the police up to the point of being produced before the Magistrate. Police on the other hand seems to have been overenthusiastic to fault the Petitioner at any cost.

The Judgments delivered by the learned Magistrate fortify the position of the Petitioner. Medico Legal Report tendered to court on 10.03.2010 and the prisons hospital treatment sheets dated 13.07.2008 had been submitted to court on 21.05.2009, they describe injuries consistent with the physical acts of assault or torture complained by the Petitioner. I note the following points considered by the learned Magistrate as follows.

Case No. 89984 (charged under Section 440 & 369 of the Penal Code)

Witness No. 1, in Examination-in-Chief describe the incident of a person being found inside the house and causing her certain injuries to her mouth which damaged her teeth in the lower jaw. Omission marked in this witness' statement to police regarding injuries caused to her teeth which has not been stated in the original statement to police. Trial Judge disbelieve the witness and also observes that the witness could not answer several questions posed by the defence, and arrives at a conclusion that this witness never saw an incident of theft, and at a certain point as admitted by the witness himself.

Occupier of the house also gave evidence, but the trial Judge concludes that she was not able to identify any lost items. This witness admits to making a belated statement to the police and deliberately conceal the correct date of incident, and was unable to answer several questions in cross-examination. This witness was shown the suspect at the police station, though she could not identify the lost items. (This is a flaw for continuation of any identification parade).

Trial Judge reject the evidence of the 1st Respondent (Police Officer) who gave evidence before the Magistrate's Court. Trial Judge holds that the 1st Respondent has given false evidence before the Magistrate's Court and express the view that 1st Respondent be tried in terms of Section 188 of the Penal Code, for giving false evidence. Trial Judge more particularly disbelieves the evidence of this witness on the question of recovery of stolen items/goods, and the date of arrest. Magistrate also refer to the contradictory nature of reports filed in court and the evidence of the 1st Respondent which does not establish that Petitioner was in possession of heroin. (particularly on 1st Respondent)

I would for purposes of clarity incorporate in my Judgment some very relevant observations of the learned Magistrate, as follows.

පොලිස් පරීක්ෂක දමිත පෙරේරාගේ සාක්ෂිය, මෙම නඩුවේ දී චුදිතට එරෙහිව ඇති චෝදනා සම්බන්ධයෙන් සලකා බැලිය යුතුව තිබුණාද ඔහුගේ බලය අයුතු ලෙස පාවිච්චි කරමින් කටයුතු කර ඇති බව ඉතා පැහැදිලිය. එසේම ඔහු අධිකරණය ඉදිරියේ අසත්‍ය සාක්ෂි දි ඇති බව ඔහු විසින්ම පිළිගෙන ඇත. එසේම ඔහු හරස් ප්‍රශ්ණ වලට උත්තර දෙමින් මෙම විත්තිකරුගේ සාක්කුවේ තිබී හෙරොයින් මත්ද්‍රව්‍ය පැකට් 23 ක් සොයා ගත් බවට අසත්‍ය සාක්ෂියක් දී ඇත. ඒ ආකාරයට අසත්‍ය සාක්ෂි දී ඇති බව නිගමනය කළ හැක්කේ ඒ බව මෙම නඩුවට අදාළ අපරාධය සම්බන්ධයෙන් දෙවන අවස්ථාවේ දී තොරතුරු ඉදිරිපත් කල බී වාර්ථාවේ ඒ බව සඳහන් නොවීම තුලින්ය. එසේම එම චෝදනා ප්‍රතික්ෂේප කරමින් විත්තිකරු ඉතා පැහැදිලි සාක්ෂි දී ඇත. ඔහු අධිකරණය ඉදිරියේ හරස් ප්‍රශ්ණ වලට භාජනය වෙමින් දිවුරුම් පිට පැහැදිලිව පවසා ඇත්තේ දමිත් පෙරේරා යන පොලිස් නිළධාරියා ද්වේශ සහගතව ඔහුට එරෙහිව නඩු පවරා ඇති බවය. එහෙත් සාක්කුවි තිබී කිසිදු නඩු භාණ්ඩයක් සොයා නොගත් බවත් හෙරොයින් පැකට් 23 ම ඔහු සන්තකයේ නොතිබුන බව ඔහු සාක්ෂි දී ඇත. එසේම විත්තිකරු අත් අඩංගුවට ගත්තේ 2008.07.05 වන දින බවත් 2008.07.13 වන දින එනම් ඉරිදා දිනක විත්තිකරුව විනිසුරුතුමා වෙත ඉදිරිපත් කල බවත් ඔහු අධිකරණයේ දී ඇති සාක්ෂි සත්‍ය සාක්ෂි ලෙස සැලකිය හැකිය. එය තහවුරු වන්නේ පොලිසිය විසින් තොරතුරු වාර්තා කිරීමේ දි විත්තිකරු අත්අඩංගුවට ගත්තේ කුමන ස්ථානයේ දී හෝ කුමන දිනයේ දී යන්න අධිකරණයට වාර්ථා නොකිරීම තුලින්ය. එයින් නිගමනය කළ හැක්කේ මෙම නඩුවේ පැමිණිල්ල වෙනුවෙන් සාක්ෂි දුන් මෙම නඩුවේ අපරාධ සම්බන්ධයේ පරීක්ෂණය සිදු කළ යැයි කියන දමිත පෙරේරා යන පොලිස් නිලධාරියා නීතිවිරෝධී ලෙස විත්තිකරු

2008.07.05 වන දින සිට 2008.07.13 වන දින දක්වා පොලිස් සිර මැදිරියේ රඳවා ගෙන ඒදින පුර්වගාමී විනිසුරුතුමා වෙත ඉදිරිපත් කර ඇති බවය.

The learned Magistrate inter alia in his concluding remarks states that the Petitioner was kept in illegal custody in the police station from 05.07.2008 to 13.07.2008 and had been during that period assaulted and treated inhumanly. Magistrate also conclude that having considered the evidence of the Medical Officer who gave evidence for the Petitioner from the prison hospital, it is well established that injuries were caused to the Petitioner and he was treated for same as an indoor patient at the prison hospital. The learned trial Judge emphasize that during the period 05.07.2008 to 13.07.2008 the Petitioner was in police custody and within that period the Petitioner was beaten and assaulted by the police.

Case No. 90215 (charge of possession of heroin)

It is not necessary to go into details in this case. Learned Magistrate reject the prosecution case, and made observations detrimental to the police, just like the case above (89984). Trial Judge refer to the 1st Respondent's conduct and fault him.

The learned Magistrate in no uncertain terms make it very clear that the 1st Respondent's evidence was false and it was a deliberate attempt by him to conceal the truth. The police party seems to have made use of the court

to fabricate false charges against the Petitioner and bring the Administration of Justice to disrepute, merely to achieve their purpose. Even a criminal and a prisoner would be entitled to basic constitutional safe guards provided by the Constitution. In *Sudath Silva Vs. Kodituwakku (1987) 2 SLR 119 per Atukorala J.* " Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment .... It is an absolute fundamental right. ... Every person in this country, be he a criminal or not is entitled to this right to the fullest content of its guarantee".

I wish to observe that usually obtaining proof in this type of case is no easy task due to reluctance on the part of witness to testify against law enforcement authority. In *Velmurugu Vs. A.G (1981) 1 SLR 406, Sharvananda J.* refer to the *'Greek Case'* as described by the European Commission on Human Rights. "There are certain inherent difficulties in the proof of allegations of torture or ill-treatment. A victim or a witness able to corroborate his story might hesitate to describe all what really happened. ..."However as regards the case in hand there was no such difficulty due to good monitoring of all events by the Petitioner's party, notwithstanding the fact that the Petitioner himself had a criminal record. A prisoner may be an outcast of society but he remains entitled to all his civil rights in so far as they are not taken away by legislation. *Raymond*

Vs. Honey (1983) AC 1-10: Prisoner has a right of access to courts. *Johnson vs. Avery 393 US 483 (1969).*

Evidence led before the learned Magistrate, reveal that the Petitioner was not produced before court within the time frame permitted by law. The Police made every effort to hide the truth. It is time for the law enforcement authority to realise that a court of law cannot be misled so easily.

The material placed before this court by the Petitioner, establish without any doubt that the police subjected the Petitioner to torture and cruel, inhuman degrading treatment. I wish to observe, more particularly that the 1st Respondent was responsible for such inhuman acts, but he alone cannot be held responsible as there were other police officers who assisted and took part to cause injuries to the Petitioner. Nor was the Petitioner produced before the Magistrate according to law. As such I hold that both 1st and 2nd Respondents have infringed the Petitioner's fundamental rights guaranteed under Articles 11 and 13(2) of the Constitution. I am also of the view that the state should be held strictly liable as all inhuman acts of assault on the Petitioner occurred during the period the Petitioner was in police custody. I direct and Order both the 1st and 2nd Respondents to pay personally a sum of Rs. 100,000/- each to the

Petitioner as compensation. I also Order the State to pay a sum of Rs. 100,000/- as compensation, to the Petitioner. Thus the Petitioner will receive a total sum of Rs. 300,000/- as compensation. All payments to be made within four weeks from today.

Application allowed with costs.

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 application under Articles 17 and 126 of the Constitution of the Democratic of Sri Lanka.

C. A. Piyadasa
Mithurugama Road, Malaboda,
Dodangoda

PETITIONER

S.C. (FR) No.629/2010

Vs.

1. Mahinda Balasooriya
Inspector General of Police,
Police Headquarters, Colombo 01.

2. Udayakumara
Headquarters Inspector of Police
Matugama

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

RESPONDENTS

BEFORE: **Buwaneka Aluwihare, PC, J,**
Anil Gooneratne, J, &
K.T.Chitrasiri, J.

COUNSEL: Shantha Jayawardena with Chamara Nanayakkarawasam for Petitioner
Upul Kumarapperuma with Lahiru Galappaththige for 2nd Respondent instructed by K.V.Gunasekara.
Ms. Anoopa de Silva, SSC for 1st and 3rd Respondents.

ARGUED ON: 13.06.2016

DECIDED ON: 06.12.2017

ALUWIHARE, PC, J:

Leave to proceed was granted in this matter, on the alleged infringement of Articles 11, 13(1) and 13(2) of the Constitution.

The Petitioner alleges that in the early hours of 15th October, 2010 he opened the door of his residence in response to a sound of someone knocking at the door and had seen three persons outside his door and one had inquired whether he is "Podiputha Mudalali". When he answered in the affirmative they had introduced themselves as officers from the Matugama Police. Having ordered the Petitioner to get into a three-wheeler, he had been driven some distance and ordered that he get off the vehicle. The Petitioner alleges that no sooner he got off the three-wheeler; he was kicked and assaulted by the 2nd Respondent, who had demanded the Petitioner to surrender a firearm, that the 2nd Respondent alleged, was in the possession of the Petitioner. Thereafter the Petitioner had been again driven in the three-wheeler to another location where he saw Muniandi Shankar, a person known to the Petitioner, in the

company of several others whom the Petitioner later came to know as Police Officers. Upon being questioned, Shankar had acknowledged that he knows the Petitioner. At this point the 2nd Respondent, again had assaulted the Petitioner with a club, whilst repeating the same demand with regard to the firearm.

Some of the officers had accompanied Shankar into the thicket whilst the Petitioner remained near the three-wheeler. A while later, the officers and Shankar had come out of the thicket carrying with them, a few barrels and plastic cans. Petitioner says that a photographer arrived at the scene and after arranging the utensils in a way, presumably to create a scene of brewing alcohol, pictures were taken by the photographer.

Thereafter the 2nd respondent had stopped a passing tractor, ironically driven by the Petitioner's own son Thilakaratne. The Petitioner, Shankar and the utensils referred to, were then transported to the Mathugama Police in the said tractor and the petitioner and Shankar had been kept overnight at the Police Station.

On the following day, 16th October, 2010 both the Petitioner and Shankar had been taken to "Weththewa" hospital. As the Petitioner alleges that neither he nor Sankar was examined by a doctor at the said hospital.

On the 16th October, 2010, he had been produced before the learned Magistrate of Mathugama and had been granted bail.

After obtaining his release, the Petitioner states that he got himself admitted to the General Hospital Kalutara on the same day. The Petitioner had been discharged from the hospital on 20th October, 2010.

According to the Medico-Legal Report pertaining to the Petitioner, the Assistant Judicial Medical Officer, Kalutara had observed two contusions and a grazed abrasion on the buttocks as external injuries and an x-ray had revealed a un-displaced fracture of the ulna bone of his left forearm. The Petitioner has given a history of assault by the H.Q.I. Udayakumara of Mathugama Police station with fists and a club on 15th October, 2010 at 5.30 a.m. The reference undoubtedly is to the 2nd Respondent. The Petitioner had complained to the Human Rights Commission and subsequently had invoked the fundamental rights jurisdiction of this Court.

The 2nd Respondent in his objection had referred to the version of the Police. Before I consider the objections, it is pertinent to note that there are a number of common grounds. According to both the parties, the arrest had taken place on the 15th of October 2010, and the Petitioner had been produced before the Magistrate on the following day, i.e. 16th October 2010 and the Petitioner had furnished bail only on the 18th October 2015, according to the journal entries of the relevant Magistrate's Court proceedings. This date synchronizes with the date on which the Petitioner had admitted himself to the Kalutara Hospital.

The 2nd Respondent admits the arrest of the Petitioner on 15th October 2010. His version is that, on a tip off, that the Petitioner is engaged in brewing and selling illicit liquor, a police party having arrived at the location, waited in ambush and around 7.40 a.m. on 15-10-2015, arrested Muniyandi Shankar when he was seen him coming out of the thicket carrying a container which had contained illicit liquor. Upon questioning Shankar, the 2nd respondent had extracted information that the Petitioner is in the jungle, brewing illicit liquor. On the directions given by Shankar, they had walked through the jungle, and had seen the Petitioner engaged in brewing illicit liquor. It is the position of the 2nd Respondent that when he attempted to arrest the Petitioner,

he had resisted and as a result the Petitioner fell on a couple of occasions and the 2nd Respondent states that he observed injuries on the Petitioner. The 2nd Respondent had taken an unusual step of summoning a private photographer to the location where the detection was made to photograph the scene, the photographs of which have been filed along with the 2nd Respondent's affidavit.

As averred by the Petitioner, the 2nd Respondent admits having produced both the Petitioner and Shankar before the Medical Officer of Weththewa hospital, but copies of the medical reports have not been produced.

It appears that two separate cases had been filed in respect of the Petitioner and Shankar before the learned magistrate. Shankar had pleaded guilty to the charges preferred against him, whilst the case against the Petitioner was pending even at the point of time this matter was argued.

The 2nd Respondent had averred that both the Petitioner and Shankar are persons habitually engaged in the trade of brewing illicit liquor. The 2nd Respondent has referred to a similar detection made in February 2011 and where again Shankar had pleaded guilty to the charges. It is pertinent to note that the incident relating to this application is anterior to the alleged other detection of illicit liquor referred to by the 2nd Respondent. There is no material furnished before this court, connecting the Petitioner to any similar violations prior to the instance referred to in these proceedings.

The position taken up by the 2nd Respondent is that he had been falsely implicated to discourage him from taking action against the Petitioner in order to deter the petitioner from engaging in illegal activities. It is further asserted that there had been a failure on the part of the Petitioner to disclose the

injuries the Petitioner had alleged to have sustained due to assault to the Magistrate, when he was produced before him; thus demonstrates that the allegation is not genuine.

Undoubtedly the 2nd Respondent has every right to apprehend and prosecute anyone who acts in breach of the law and he cannot be found fault with for arresting the Petitioner and Shankar if they were engaged in brewing and trafficking alcohol. Shankar had pleaded guilty to the charges preferred against him and the Petitioner's case is proceeding before the Magistrate's Court. Whether the Petitioner had had any complicity in the alleged breach is a matter for the learned Magistrate to decide. Thus, the consideration of violations under articles 13 (1) and 13 (2) of the constitution does not arise.

This Court at this point, is only called upon to decide as to whether any of the fundamental rights which every citizen of this country irrespective of his strata in life is entitled to enjoy by virtue of a constitutional guarantees had been violated or not.

As far as the detection is concerned, there is material placed on behalf of the 2nd Respondent to some extent buttressed by Shankar. In the affidavit filed by Shankar (P3 (a) in support of the Petitioner, he had admitted that he was arrested around 5.30 a.m. on the day in question when the police came to the location where he was brewing the substance and that he was arrested. He also admits that he showed the locations where the barrels of the brew were kept inside the thicket. Shankar also had admitted that he is engaged in brewing the stuff. Thus, there is no dispute as to the detection.

According to Shankar after he was arrested, he had seen the Petitioner in the company of the Police Officers and he alleges both he and the Petitioner were assaulted by the 2nd Respondent with a club. Shankar had denied any

involvement of the Petitioner as far as his brewing operation is concerned and says Petitioner had had no complicity whatsoever in his illegal activity.

Although the 2nd Respondent had asserted that he took steps to produce both the Petitioner and Shankar before the Medical Officer at Weththewa hospital, the medical reports have not been made available to this court. The only medical report filed in these proceedings is the Medico Legal Report of the Assistant Judicial Medical Officer of Government Hospital, Kalutara, who had referred to the contusions and the fracture sustained by the Petitioner and had expressed the opinion that the injury pattern is compatible with the history given by the Petitioner.

With regard to contemporaneity, the Petitioner had furnished bail on 18th October, 2010 and he had got himself admitted to hospital on the same day. I am mindful of the decisions of this court which had consistently held that to establish a violation under Article 11, the Petitioner has a heavy burden. When one considers the facts and circumstances of this case, I am of the opinion that the Petitioner had succeeded in establishing the violation alleged.

This court has held in innumerable number of cases where its fundamental rights jurisdiction has been invoked, that the freedom against torture or cruel, inhuman or degrading treatment, is a non-derogable right and that even the worst criminal is entitled to freedom against violation of Article 11.

For the foregoing reasons, I hold that the 2nd Respondent has violated the fundamental right guaranteed under Article 11 of the Constitution.

I direct the State to pay the Petitioner a sum of Rs.15, 000/- as compensation and a sum of Rs.10, 000/- as costs. I further direct the 2nd Respondent to pay a sum of Rs.20, 000/- as compensation to the Petitioner.

JUDGE OF THE SUPREME COURT

ANIL GOONERATNE, 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 (FR) No. 880/2009

In the matter of an Application under Article 17 read with Article 126 of the Constitution

Chief Inspector C.V. Weerasena
No. 8A,
87, Jayawadana Gama
Battaramulla.

PETITIONER

Vs.

1. Officer-In-Charge/Personnel
   2nd Floor
   New Secretariat Building
   Colombo 1.

2. Deputy Inspector General/Personnel
   Range Police Headquarters,
   Colombo 1.

3. The Inspector General of Police
   Police Headquarters,
   Colombo 1.

4. Secretary,
   Ministry of Defence,
   Colombo 1.

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

RESPONDENTS

BEFORE: Priyantha Jayawardena P.C., J.
Anil Gooneratne J. &
Nalin Perera J.

COUNSEL: J. C. Weliamuna P.C. with Pulasthi Hewamanne
for the Petitioner

Ms. Barrie S.S.C for the Respondents

ARGUED ON: 14.11.2017

DECIDED ON: 08.12.2017

GOONERATNE J.

It is the position of the Petitioner that he has 25 years' service and is a Chief Inspector of Police, in the Sri Lanka Police. Petitioner initially joined the service as a Reserved Sub-Inspector of Police in 1991, in the Technical Service. He was promoted as Inspector (Technical Service) on 01.09.1998, and as Chief Inspector (Technical Service) on 01.08.2002. Respondents take up the position that in the reserve service the Petitioner was not engaged in regular police functions but was employed in the Motor Mechanical Division, or the Works Unit. The Supreme Court on 25.03.2010 granted Leave to Proceed under Article 12(1) of the Constitution. The main relief sought is in terms of sub-paragraph (e) of the prayer to the petition and it reads thus:

(e) Direct the 1st to the 4th Respondents to entertain the application for the Petitioner for promotion to the rank of ASP and call for interviews forthwith and/or promote the Petitioner to the rank of ASP on the same date as those who would be promoted in terms of the document marked P10 read with P12.

The Petitioner was later on absorbed into the permanent cadre of the police force in or about 2006. (P1a & 3R6) It is urged that the petitioner was harassed as stated in paragraph 6 of the petition (vide P3 (a) to P9). As such in that backdrop the Petitioner complains that an application form to apply to the rank Assistant Superintendent of Police was not given to him (2009). Application was called by internal notice marked P10. Petitioner as pleaded was refused promotion as an A.S.P in the year 2008 for the reason that he lacks seniority. (Vide P15 (b)). The Petitioner argue that the failure to give the Petitioner an application form to apply for the post of A.S.P and subsequent failure to promote the Petitioner and promoting officers junior to him is a violation of the Petitioner's fundamental rights. Petitioner claims that he has a legitimate expectations to be nominated and appointed as an Assistant Superintendent of Police.

Respondents argue that the Petitioner whilst being in the reserve service, was not engaged in regular police activities but employed as a Motor Mechanic – Work Unit. By Cabinet decision of 01.02.2006 the Reserve Police

Force was absorbed into the Regular Force but such absorption did not extend to officers of the Special categories, had been absorbed separately, on the Cabinet Decision of 28.06.2006. The officers of the Special Category was initially absorbed not to the regular force but specialised category of work. However the Cabinet Decision of 06.07.2006, all officers in the Special Categories were given the option of joining the regular cadre, subject to fulfilling the necessary prerequisites. Such decision was communicated to all specialised categories. However the Petitioner erroneously submitted his name for absorption though not entitled to do so. Inadvertently, Petitioner was issued a letter of absorption due to an administrative lapse but remained in the correct list in the computer system. (name reflects in the system)

Thereafter Petitioner due to his own negligence failed to submit an application. Thus the Petitioner was not entitled to apply for a post in the regular force. The Petitioner was therefore, subsequently absorbed into the special category in the regular force. As such he cannot complain that he was victimised by the Police Department in the manner learned President's Counsel submitted to us.

I agree with the submissions of learned Senior State Counsel that the Petitioner was not entitled to be promoted as A.S.P in the regular service (subsequent to his failure to apply to be included in the regular service). No

doubt there was an administrative lapse. In *Mohideen Vs. Jayatilleke – SC Appeal 118A/2009* S.C. Minute 01.04.2013. .... where legal boundaries have been traversed the courts must exercise their powers after careful consideration of the legality in fearlessly exercising a check and balance on arbitrary or capricious exercise of their power within the parameters of the law. The above dicta could be utilised not only by the Petitioner's party but more particularly by the Respondents in the context of the case in hand. In these circumstances I do not think that the Petitioner could entertain a legitimate expectation. Even if he had an 'expectation' he cannot in my view entertain a legitimate expectation.

In view of the facts submitted by either side, it is for the Petitioner to obtain necessary clarification. If he thinks the other way about, whom should the authorities blame?

The failure on the part of the Petitioner to protect his own rights cannot give rise to an action in court. Administrative lapse cannot be used to support a legitimate expectation. This court is not inclined to grant prayer (e) of the prayer to the Petition. It is the National Police Commission that should look into this matter,

This is a fit case to consider the decision in, *Dalpat Abasaheb Solunke Vs. B S Mahajan AIR 1990 SC 435*.

It will thus appear that apart from the fact that the High Court has rolled the cases of the two appointees in one, though their appointments are not assailable on the same grounds, the

Court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize 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. The 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 proved mala fides affection the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its jurisdiction.

The Police Department must decide as to what should be done. In the case the court will not interfere. If the Petitioner has the requisite qualifications and satisfied the criteria for selection the authorities concerned could consider the case of the Petitioner. As such I proceed to dismiss this application.

Application dismissed without costs.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena 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 Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR Application No. 50/2015

1. Kirahandi Yeshin Nanduja De Silva
   No. 142, Main Street,
   Ambalangoda.

2. Tikiriyardura Indu Amalka De Zoysa
   No. 142, Main Street,
   Ambalangoda.

Petitioners

Vs.

1. Sumith Parakramawansha
   Principal & Chairman - Interview Board
   Dharmashoka Vidyalaya
   Ambalangoda.

2. Rekha Nayani Mallawarachchi
   Secretary – Interview Board

3. Mr. Diyagubaduge Dayaratne
   Member – Interview Board

4. Malliyawadu Sheryl Chandrasiri
   Member – Interview Board

5. Nilenthi Santhaka Thaksala De Silva
   Member – Interview Board

6. W.T.B. Sarath
   Chairman – Appeals and Objections Board

7. Rekha Nayani Mallawarachchi

Secretary – Appeals and Objections Board

8. P.D. Pathirana
   Member – Appeals and Objections Board

9. K.P. Ranjith
   Member – Appeals and Objections Board

10. Jagath Wellage
    Member – Appeals and Objections Board

All c/o Dharmashoka Vidyalaya,
Ambalangoda

11. Director National Schools,
    Isurupaya, Battaramulla.

12. Secretary,
    Ministry of Education,
    Isurupaya, Battaramulla.

13. Honourable Attorney General,
    Attorney General's Department,
    Colombo 12.

Respondents

Before : Eva Wanasundera PC, J
Priyantha Jayawardena PC, J
Upaly Abeyrathne, J

Counsel : Saliya Pieris with Varuna de Saram for the Petitioners.
Dr. Avanti Perera, SSC for all the Respondents.

Argued on : 15th March, 2017

Decided on : 2nd August, 2017

Priyantha Jayawardena PC, J

The Petitioners stated that the 1st Petitioner is a minor, aged five years, and the 2nd Petitioner is his mother. The 1st Respondent is the former Principal of Dharmashoka Vidyalaya located in Ambalangoda (hereinafter 'Dharmashoka Vidyalaya') and the Chairman of the Interview Board. The 2nd Respondent is the Vice Principal of the said school and the Secretary of the Interview Board. The 3rd to 5th Respondents are the members of the Interview Board. The 6th to 10th Respondents are the members of the Appeals Board (hereinafter the 'Appeals Board'). The 11th Respondent is the Director of National Schools while the 12th Respondent is the Secretary of the Ministry of Education.

It was further averred that applications were called for the admission of students to Grade One of National Schools for the year 2015 under the "Guidelines/Instructions and Regulations regarding admission of Children to Grade I" (hereinafter referred to as 'Guidelines and Instructions') issued by the Secretary of the Ministry of Education. The Guidelines and Instructions marked as 'P2' stipulate the basic qualifications and procedure to be followed with regard to the admission of students to Grade One.

The 2nd Petitioner had submitted an application to Dharmashoka Vidyalaya under the Chief Occupant (Distance) Category to admit the 1st Petitioner to the school. At the time of application, the Petitioners resided at No. 142, Main Street, Ambalangoda which was owned by the 2nd Petitioner.

The Petitioners stated that the 2nd Petitioner is the sole proprietor of the land and two storied building thereon, situated at No. 142, Main Street, Ambalangoda by virtue of the Deed of Transfer No. 3014 dated 23rd June, 2011. The ground floor of the said premises had been leased by 2nd Petitioner to her brother, Tikiadura Neil de Zoysa (hereinafter called 'Neil de Zoysa') by Deed of Lease No. 3193 dated 29th June, 2012 for a period of one year commencing on 29th June, 2012 and ending on 28th June, 2013. However, after the expiry of the Deed of Lease, Neil de Zoysa failed to hand over vacant possession of the property.

Sometime after the application for admission was submitted, conflicts arose between Neil de Zoysa and the 2nd Petitioner and her husband as the 2nd Petitioner's brother refused to leave the premises after the lease had expired. Consequently, on or about 29th August 2014, the 2nd Petitioner's entire family temporarily shifted from the said premises to Ahungalla in order to avoid any conflict with Neil de Zoysa.

As a result of the conflict, the 2nd Petitioner had filed an action in the District Court of Balapitiya bearing No. 3572/L dated 14th October, 2014 seeking a declaration of title to the aforementioned property and an order to eject Neil de Zoysa from the ground floor of the said premises.

In the Plaint filed in the said District Court action, it was averred by the 2nd Petitioner that the aforementioned property was transferred to Newile Susantha De Zoysa by Deed bearing No.

1128. Thereafter, Newile Susantha De Zoysa transferred the same to the 2nd Petitioner by Deed bearing No. 3014 dated 23rd June, 2011. The 2nd Petitioner by the Lease Agreement bearing No. 3193 dated 29th June, 2012 leased out the ground floor of the aforementioned property to Neil de Zoysa for a period of 1 year from 29th June, 2012 to 28th June, 2012.

The Petitioners stated that on or around 28th August, 2014, the 2nd Petitioner's elder brother, Newile Susantha De Zoysa, decided to vacate the premises at No. 142, Main Street, Ambalangoda and hand over vacant and peaceful possession to the 2nd Petitioner.

By letter dated 26th September 2014, the Petitioners were called for an interview held on 21st October, 2014 at Dharmashoka Vidyalaya and were requested to bring the required documents to prove residence as mentioned in the application for admission and the Petitioners produced the said documents to prove their residence was No. 142, Main Street, Ambalangoda. The Petitioners also informed the Interview Board that since submission of the application, they had temporarily changed their residence.

The Petitioners stated that at the interview the 1st Petitioner was awarded 96.5 marks out of a total of 100 marks on the following basis:

(a) 35 out of 35 marks for being registered on the electoral list;

(b) 7.5 out of 10 marks for the documents proving residency;

(c) 04 out of 05 marks for additional documents to prove residency; and

(d) 50 out of 50 marks for distance between residence of the applicant and the school.

The Petitioners further stated that the initial cut off mark for admission to Dharmashoka Vidyalaya for the year commencing 2015 was 95 marks; nevertheless, the first list put up at Dharmashoka Vidyalaya on 20th December, 2014 did not include the name of the 1st Petitioner. Therefore, the Petitioners lodged an appeal accompanied by all the originals of the documents with the Appeals Board to reconsider their application.

The Petitioners stated that they were subsequently called by the Secretary of the Appeals and Objections Board for an interview on 15th January, 2015. They further contended that the Appeals Board awarded 96.5 marks to the 1st Petitioner which were the same as the original Interview Board decision. Moreover, the Petitioner stated that the 6th, 8th, 9th and 10th Respondents informed the Petitioners that based on the marks awarded and in consideration of the residence issue, the 1st Petitioner should be legally enrolled in school and the 7th Respondent indicated the 1st Petitioner should be admitted on a sympathetic basis.

The Petitioners were informed that the 1st Petitioner was not included on the list posted on 20th December, 2014 because of a petition sent by Neil de Zoysa, alleging that the Petitioners did not reside at the declared residence. Despite requests, the Petitioners were not provided with a copy of the objection and were informed that the matter should be resolved through the

Courts for the 1st Petitioner to be enrolled at Dharmashoka Vidyalaya. The Respondents contested the Petitioners' claim that they were awarded the same marks by the Appeals Board as being highly implausible because the Board would not have then asked the Petitioners to resort to litigation to resolve the issue.

On 11th February 2015, the Appeals Board put up a second list for Dharmashoka Vidyalaya with a cut off mark of 94.25. Despite the lower cut off, the list did not include the 1st Petitioner's name. Due to this denial of admission, the Petitioners have filed the instant Application praying, *inter alia*, for a declaration that the Petitioners' Fundamental Rights guaranteed under Article 12(1) of the Constitution have been infringed and to direct the Respondents to admit the 1st Petitioner to Grade One of the Dharmashoka Vidyalaya for the year 2015. The Supreme Court has granted leave to proceed in terms of Article 12 (1) of the Constitution.

Thereafter, the 1st and 12th Respondents filed their respective affidavits. The 1st Respondent, the former Principal, in his affidavit stated, *inter alia*, that the cut off mark for Grade 1 admission was 95 marks and the 1st Petitioner was initially awarded 96.5 marks. Moreover, Section 9.2 of 'P2' stipulated that prior to publication of provisional and waiting lists, site inspections must be carried out to verify residence and if they are not occupants, the child's name must be removed. Neil De Zoysa made a formal objection to the 1st Petitioner's admission application on the basis that the Petitioners were not resident at the No. 142, Main Street Ambalangoda and a subsequent site inspection by the Board on 3rd December, 2014 revealed that the Petitioners were not residing at the said address.

Moreover, the Petitioners admitted that they were no longer residents by the date of the site inspection and had moved to a residence in Ahungalla. The 1st Respondent further stated that the Petitioners had not satisfied the relevant criteria for admission under the Chief Occupants (Distance) Category. Thus, the 1st Petitioner's name was not included on the admission lists published on 20th December, 2014 and 11th February, 2015.

The 12th Respondent filed an affidavit and confirmed the said position of the 1st Respondent. Both the 1st and 12th Respondents stated that the requirement under Section 6.0(e) of residence verifying documents is to ensure that information is up to date. Moreover, Section 6.0(e) must be construed in a such way that if there is any change to the said information between submission of the application and a decision being made, such as change will have an effect on the outcome of the application. They stated that such an interpretation is logical considering the context of Section 9.2 of the Guidelines and Instructions marked as 'P2' and if Section 6.0(e) was read in isolation, Section 9.2 would be rendered redundant.

Furthermore, admission of students whose residences have changed during the period between application submission and the final decision on admission would defeat the purpose of having the Chief Occupants (Distance) Category for admissions. They further contended that admission of the 1st Petitioner on this basis would amount to a violation of Article 12(1)

as the Guidelines and Instructions marked as 'P2' are applied by all State schools and the Petitioners are seeking a deviation from the applicable rules.

In their written submissions, the Respondents also contended that granting relief to the Petitioners has the potential to open the floodgates of litigation and cited *R.P.P.N Sujeewa Sampath and Another v Principal Visakha Vidyalaya and Others* SC (FR) Application No.31/2014; wherein the Court did not grant relief in a FR application filed regarding a denial to admit a student who only provided a valid deed to prove residency after the selection process was concluded. The Court observed that the grievances of the Petitioners were not the outcome of the infringement of the fundamental right of equal protection of the laws or the fundamental right against discrimination.

Thereafter, the 2nd Petitioner filed a Counter Affidavit and stated, *inter alia*, that the application should be considered in light of all the circumstances of the case and that the 1st to 10th Respondents and the Appeals Board had been duly informed about the change in residence. Moreover, the Deed of Lease No. 3193 dated 29th June, 2012 marked as 'P8' ended on 28th June, 2013 and the District Court Case No. 3572/L is pending to eject the Defendant in that case.

Does the Change of Residence after the Submission of an Application for Admission to a School Deprive a Student from Gaining Admission?

The matter to be addressed in this Application is whether the change of residence after the submission of an application for admission to a school and before the selection is finalised under the 'Chief Occupants' (Distance) Category would deprive a student of admission to a school.

The Respondents contended that for an applicant to be eligible to be admitted under the 'Chief Occupants' (Distance) category, the applicant must remain at the same address as disclosed in the application until the selection process is concluded.

Guidelines/Instructions and Regulations regarding Admission of Children to Grade 1

Section 6.0 titled 'Method of Selection' provides as follows:

> "(e) The forwarded documents to prove the residency should be relevant to the place of living <u>at the time of submitting the application.</u>" [Emphasis added]

Section 9.0 bearing the title 'Interim List' states:

> "9.1 Selections will be made separately for each category according to the marks Priority and thereafter the interim list and waiting list will be prepared.

> 9.2 Before the publication of the interim list and the waiting list the residence of the children under the category of residents in the close proximity to the school will be confirmed by a spot inspection. If the residence is not confirmed by such spot inspection the name of the child will be deleted from the list. If it is found to be necessary other categories too may be subjected to a spot inspection." [Emphasis added]

I am of the opinion that the instant Application requires consideration of the applicability of Sections 6.0(e) and 9.2 of the said Guidelines/Instructions and Regulations regarding Admission of Children to Grade 1. Thus, it is paramount to consider the relevant Articles of the Constitution and history of Sri Lanka's education system in order to arrive at a fair reasoning of the application of the rules and guidelines governing school admissions.

The Right to Free Education

Education has long been acknowledged as an essential building block for the development of countries. In ancient Sri Lankan society, education was initially associated with Buddhist temples. Buddhist Monastic Colleges, also known as Pirivenas, were primarily intended to teach clergy but also gave the opportunity for male lay students to be educated. With the invasion of the Portuguese, missionary schools were established in the island. During the Dutch period, steps were taken to expand education opportunities by increasing the number of schools.

In the early 19th Century, the British introduced mass education with a dual system of schools split into English and Sinhala and the Pirivena system existed alongside these. Following the implementation of Donoughmore Commission's recommendations, Executive Committees were created for various subjects of the government.

The Executive Committee on Education was placed under the chairmanship of Dr. C.W.W. Kannangara, who became the first minister of education in Sri Lanka. During his tenure as the Minister of Education, he laid the foundation for a national system of education which opened the doors for the free education. The draft bill took a long period to be finalized and the Education Ordinance No. 31 of 1939, which was enacted after a long deliberation, remains the basic law of Education in Sri Lanka. The purpose of the law was to ensure that children of school going age attended school as a preliminary step to address the disparity between the haves and the have-nots.

Since then all successive governments have facilitated school education by providing various facilities to students; such as free meals, uniforms and books. Moreover, it is important to note that the emphasis on education is such that even university education is free and scholarships are awarded to needy students to complete their graduate studies. Further, free education has given the underprivileged access to opportunities that had previously been

reserved for the privileged. Hence, I am of the opinion that any matter relating to education shall be considered in light of the aforementioned government policy, constitutional provisions and socio-economic background.

The Right to Education under the Constitution

Though the right to education has not been recognized as a fundamental right in the Sri Lankan Constitution, the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels have been recognized as a directive principle in the Constitution. Thus, the Government is obliged take into consideration the Directive Principles of State Policy when enacting laws and taking action regarding governance. In this context, I am of the view that it is paramount to give equal access to education in order to establish a free and just society.

The Effect of the Directive Principles of State Policy Enshrined in the Constitution

Article 27(2) (h) of the Constitution states:

> "The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include –
>
> …the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels."

Article 27(1) states that the Directive Principles of State Policy (hereinafter referred to as the 'Directive Principles') serve to guide the Government when enacting laws and indicate the level of governance required to establish a free and just society. The effect of Article 27(1) is constrained by Article 29 of the Constitution, which explicitly states that Article 27 does not impose legal rights or obligations and they are not enforceable.

The effect and the applicability of Directive Principles have been considered by Justice S. Sharvananda in his book titled Fundamental Rights in Sri Lanka (A Commentary) at page 55 where it states;

> "Although [Directive] principles are expressly made unenforceable, that does not affect their importance and relevance. They are as important as the fundamental rights of an individual. They are relevant considerations in the enactment of laws. They represent the aspirations of the people in Sri Lanka. There is no disharmony between directive principles and the fundamental rights as they complement each other in aiming at the same goal of bringing about a social revolution and the establishment of a welfare state. These principles are constitutionally binding on the State,

> even though they are not enforceable but are only to be taken into account in determining the validity of a law. Hence, to determine the ambit and dimension of fundamental rights and what kind of restrictions that can be legitimately imposed on them by law, the directive principles set out in Article 27 are relevant."

In the case of *Seneviratne v. U.G.C.* (1978-79-80) 1 SLR 182, the court held;

> "It is a settled principle of construction that when construing a legal document the whole of the document must be considered. Accordingly, all relevant provisions of the Constitution must be given effect to when a constitutional provision is under consideration and, when relevant; this must necessarily include the Directive Principles… [T]hese provisions are part and parcel of the Constitution and that the courts must take due recognition of them and make proper allowance for their operation and function."

Further, in *Watte Gedera Wijebanda vs. Conservator General of Forests and Other* (2009) 1 SLR 337, it was held that although Directive Principles are not specifically enforceable against the state, they provide important guidance and direction to the various organs of state in the enactment of laws and in carrying out the functions of good governance.

Hence, it is apparent that although the Constitution states that Directive Principles do not impose legal rights or obligations and they are not justiciable, our courts have given effect to Directive Principles as long as they do not conflict with other Articles of the Constitution. Therefore, as this Application relates to education, Article 27(2)(h) is applicable to the instant Application.

Article 12 (1) of the Constitution

Article 12(1) of Sri Lanka's Constitution states "All persons are equal before the law and are entitled to the equal protection of the law". Matters relating to education have been the commonly used as grounds for invoking Article 12(1) of the Constitution.

The right to equality which is recognized in our Constitution is inherent to human dignity. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America bears resemblance to the aforementioned Article 12. This Clause has been interpreted by the American Supreme Court to include equal opportunity without racial discrimination regarding education. In *Brown v Board of Education Topeka* 347 US 483 (1954), Chief Justice Warren stated at 493:

> "Today, education is perhaps the most important function of State and to provide it, is a right which must be made available to all on equal terms."

Applicability of the Guidelines and Instructions regarding Admission of Children to Grade I

Section 6.0(e) clearly states that the documents must prove the residence at the time of submitting the application and makes no reference to the impact of a change of residence. Section 9.2 states that a child's name will be deleted if a spot inspection of the residence does not confirm residency. Therefore, it is necessary to consider whether Section 9.2 requires applicants to remain at the same premises until the site inspection is completed or carried out to ascertain residency.

I am of the opinion that Section 6.0(e) and Section 9.2 should be interpreted in such a way that the two sections do not conflict with each other. They need to be considered in a reasonable manner with particular emphasis on the Directive Principles and the safeguards enshrined in the Constitution regarding the right to education. In order to ascertain if a decision is reasonable, a court has to find out if the administrator had left out relevant factors or taken irrelevant factors into account. In *Dissanayake v Kaleel* [1993] 2 SLR 135 at 184, Mark Fernando J stated that "fairness lies at the root of equality and equal protection".

Discretionary powers shall never be treated as absolute and unfettered. Article 12 provides safeguards based on the rule of law against the arbitrary and unreasonable exercise of discretionary powers. It is important to keep in mind that children are the future of a country and educating children not only secures the country's future but that of the whole world. Moreover, persons who are in authority have a duty to protect the rights of the children to have access to education by giving effect to Directive Principles. In such a scenario, I am of the opinion that no rules or regulations shall hamper the right of a child to have access to education.

I am also of the view that the criteria for school admission should be construed in light of government policy and the Directive Principles enshrined in the Constitution. Thus, Section 6.0(e) and Section 9.2 of 'P2' should not be given a narrow interpretation to compel applicants to remain at the same residence after submission of the application. If such an interpretation is given, what will be the predicament of persons who may have to vacate their dwellings due to natural disasters? The aforementioned Guidelines and Instructions serve to regulate equal access to education for all school going children and should not be used to deprive them of an education due to a mere technicality.

The purpose of the Section 9.2 site inspection is to prevent applicants from moving into the catchment area of more desirable schools for the sole purpose of gaining admission to a school or forging documentation in order to enable admission to such schools. I am of the view that a reasonable interpretation of Section 9.2 does not include a *bona fide* applicant who was ousted from his residency due to reasons beyond their control. In light of this

interpretation, Section 9.2 would not be rendered redundant as it still serves to prevent fraudulent applications.

Therefore, if a change of residence occurs after application submission and before admission, the change shall not have an impact on the outcome of the application if the applicants are displaced due to reasons beyond their control. In the case at hand, the 2nd Petitioner holds title to the property and there is an ongoing dispute. Further, there is no dispute with regard to the residence of the Petitioners at the time they submitted their application for admission to Dharmashoka Vidyalaya. Thus, *R.P.P.N Sujeewa Sampath and Another v Principal Visakha Vidyalaya and Others* cited by the Respondents has no applicability to the instant Application.

I hold that in terms of Articles 27(2)(h) and 12(1) of the Constitution, every child has a right to have equal access to education at all levels and thus, a child cannot be deprived of the said right because he or she was displaced from his residence due to unforeseen circumstances.

I further hold that Section 6.0 and Section 9.2 should be considered together and not in isolation. Therefore, I am of the view that if an applicant is displaced due to unforeseen circumstances, it is not a ground to deprive a child from gaining admission to the school where he or she had applied to.

In the instant Application, the applicant had been displaced due to reasons beyond his control. In such a scenario, Section 9.2 shall not stand as an obstacle to admission to the school. Thus, denying the 1st Petitioner admission to school on the basis that the applicant was not residing at the address declared on the application at the time of the site inspection is a violation of his fundamental right to equal protection guaranteed by Article 12(1) of the Constitution.

Hence, I direct the Principal of Dharmashoka Vidyalaya and the 2nd to 12th Respondents to take immediate steps to admit the 1st Petitioner to Dharmashoka Vidyalaya and place him in an appropriate grade.

I order no costs.

Judge of the Supreme Court

Eva Wanasundera PC, J — Judge of the Supreme Court
I agree

Upaly Abeyrathne, J — Judge of the Supreme Court
I agree

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

S.C (FR) Application No.92/2016

In the matter of an Application under and in terms of Article 126 of the Constitution of the Republic

1. M. J. M. Faril
   President of the Board of Trustees
   Wekada Jumma Mosque,
   Horana Road, Eluwila,
   Panadura.

2. Moulavi M.B.M. Haris
   Principal
   Anas Ibnu Malik Hiflul Quran
   Madrasa (Dhamma School)
   147, Wella Road, Pinwala,
   Eluwila, Panadura.

PETITIONERS

Vs.

1. Bandaragama Pradeshiya Sabha
   Panadura Raod,
   Bandaragama.

2. N.D.I. Swarna K. Perera
   Secretary,
   Bandaragama Pradeshiya Sabha
   Panadura Road,
   Bandaragama.

3. Menaka Priyantha Abeyratne
   Divisional Secretary,
   Bandaragama.
   Divisional Secretariat,
   Bandaragamna.

4. Urban Development Authority
   6th & 7th Floor,
   Sethsiripaya, Battaramulla.

5. The Director,
   Department of Muslim Religious and Cultural Affairs,
   No. 180, T. B. Jaya Mawatha,
   Colombo 10.

6. Ven. Bolgoda Seelarathana Thero
   Patalirukkaramaya,
   Pinwala, Panadura.

7. The Hon. Attorney General
   Attorney General's Department
   Colombo 12.

RESPONDENTS

AND NOW BETWEEN

Ven. Pinwala Chandarathana Thero
Patalirukkaramaya Pinwala,
Panadura.

PARTY SEEKING SUBSTITUTION IN THE ROOM OF THE DECEASED 6TH RESPONDENT

Vs.

3. M. J. M. Faril
   President of the Board of Trustees
   Wekada Jumma Mosque,
   Horana Road, Eluwila,
   Panadura.

4. Moulavi M.B.M. Haris
   Principal
   Anas Ibnu Malik Hiflul Quran
   Madrasa (Dhamma School)
   147, Wella Road, Pinwala,
   Eluwila, Panadura.

1ST & 2ND PETITIONERS-RESPONDENTS

AND

Vs.

1. Bandaragama Pradeshiya Sabha
   Panadura Raod,
   Bandaragama.

2. N.D.I. Swarna K. Perera
   Secretary,
   Bandaragama Pradeshiya Sabha
   Panadura Raod,
   Bandaragama.

3. Menaka Priyantha Aebyratne
   Divisional Secretary,
   Bandaragama.
   Divisional Secretariat,
   Bandaragamna .

4. Urban Development Authority
   6th & 7th Floor,
   Sethsiripaya, Battaramulla.

5. The Director,
   Department of Muslim Religious and
   Cultural Affairs,
   No. 180, T. B. Jaya Mawatha,
   Colombo 10.

6. Ven. Bolgoda Seelarathana Thero
   Patalirukkaramaya,
   Pinwala, Panadura.

7. The Hon. Attorney General
Attorney General's Department
Colombo 12.

1ST TO 7TH RESPONDENT-RESPONDENTS

BEFORE: Sisira J. de. Abrew J.
Anil Gooneratne J. &
Vijith K. Malalgoda P.C. J

COUNSEL: Faiz Musthapha P.C. for Petitioners

Upul Kumarapperuma for 1st & 2nd Respondents

Manohara de Silva P.C. with Rajitha Hettiarachchi for 6A Respondent
Rajitha Perera S.S.C for 3rd to 5th & 7th Respondents

ARGUED ON: 31.05.2017

DECIDED ON: 28.06.2017

WRITTEN SUBMISSIONS OF THE 3A, 4th, 5th & 7th RESPONDENTS FILED ON:
15.06.2017
WRITTEN SUBMISSIONS OF THE PETITIONERS FILED ON:
23.06.2017
WRITTEN SUBMISSIONS OF THE 1st & 2nd RESPONDENTS FILED ON:
27.06.2017

GOONERATNE J.

The two Petitioners to this Fundamental Rights Application are the President of the Board of Trustees of the Wekada, Jumma Mosque and the Principal of a Dhamma School respectively, as described in paragraph 2 of the Petition. The Petitioners state that by a deed of gift, (P1) became the owner of the land depicted as Lot B2 in plan 3084 of 01.11.2002. Thereafter an application

was made to the 1st Respondent, Pradheshiya Sabhawa for a development plan to put up a two storeyed school building on the said land on 21.01.2008. The 1st Respondent approved the said application to construct a two storeyed building for a school and issued a development permit dated 21.04.2008 (P2 & P3). Only the ground floor was completed and the construction work of the 1st floor was delayed due to financial constraints. On completion of the ground floor, the Petitioner commenced the school and 30 students were enrolled who are boarded. Name of the school is “Anas Bin Malih Quaran Madrasa” (P4).

The Petitioners aver in their petition that on or about 2015 Petitioners commenced the construction of the 1st floor. Thereafter the 2nd Respondent by her letter of 01.06.2015 (P5) informed the 1st Petitioner that development permit given earlier had lapsed and as such a fresh permit should be obtained. Letter marked P5 also refer to the fact that the Petitioners are constructing a slab instead of a roof, which is objectionable, and contrary to the building plan. The Petitioners plead by letter P6 of 18.09.2015 sent by the 2nd Respondent, that complaints were received from residents in the area. As such 2nd Respondent requested the Petitioners to attend a meeting at 2.30 p.m on 25.09.2015. On the said day of the meeting residents in the area were not present and as such the meeting was postponed for 14.10.2015. On that date Petitioners and a few other participants of the Jumma Mosque participated at

the discussion and two Priests were also present as stated in paragraphs 15 and 16 of the petition.

The main concern of the residents and the Priest was that the Petitioners were constructing a Mosque, instead of a school to be used as a Dhamma School. Petitioner's position was that the building would be used only for the school and not for a Mosque. The 2nd Respondent based on the discussion requested the Petitioner to address a letter to 2nd Respondent signed, stating that the purpose of construction was for the school only and to obtain approval for same. Petitioner's position was that the Petitioners had no alternative but to sign the said letter (P7). Petitioners as pleaded complain that the purported undertaking written letter also included certain clauses and thus take away the Petitioner's fundamental rights guaranteed under Articles 10 and 14(1)(e) of the constitution. The minutes of the meeting on 14.10.2015 was recorded by letters of 14.10.2015 (P8) & (P9). On 25.01.2016 amended plan (P16) was submitted to the 1st Respondent and on 25.01.2016 same was approved by 1st & 2nd Respondents (development plan).

On or about 12.02.2016 the concrete slab was to be laid, and the 2nd Respondent through Senior Police Officer served letter of 12.02.2016 on the 1st Petitioner directing the Petitioner to suspend the construction as the residents and Buddhists monks protested (P13). Thereafter on the request of

Petitioners a discussion was held at the office of the Headquarter Inspector of Police, Panadura, where the Petitioner and few others represented the Moseque and Buddhist Monks also participated at the discussion. The Senior Superintendent of Police of the area informed the participants that facts would have to be reported to the Magistrate to prevent a breach of peace.

In these circumstances proceedings in the Magistrate's Court, however, was not instituted as the residents were not present. The police on 12.02.2016 handed over to the 1st Petitioner letter P14 of 12.02.2016 to the effect that the construction was for the purpose of a place of worship and not for a school and it cannot be done without proper approval, and requested the Petitioner to stop construction works. (vide P14). Attempts were made by the Petitioners to go ahead with the construction works by having discussions with the authorities concerned but without success. The effect of P14 is considered in this Judgment at a subsequent point.

The learned President's Counsel argued inter alia that

(1) In the above circumstances the direction to stop construction work is a violation of articles 10, 12(1) & 12(2), 14(1) (e) of the Constitution, and the decision to stop work is arbitrary, unreasonable or contrary to law.
(2) Irreparable loss and damage caused to the Petitioners in view of stoppage of construction work.

(3) Notwithstanding P14, as aforesaid the Petitioners had a permit, to continue the construction works for a Dhamma School for Muslims in the Panadura area.

(4) There was no proper reasons adduced by those concerned Respondents to stop work.

(5) Learned President's Counsel also submitted that necessary approvals were obtained from 1st - 2nd Respondents and that it was a matter for the 1st – 3rd Respondents to obtain necessary approval from the 4th Respondent UDA. As such clear violation of Article 12 had been established, and he would rely on pursuing the case to obtain relief.

(6) That the Respondents failed to act or acted contrary to any law recognised by the Constitution and the direction to stop construction is contrary to law. No hearing given to Petitioner.

(7) Further there is no law to prevent the construction works by the police party, since the Petitioners have obtained necessary approvals from the 1st and 2nd Respondents.

On 16.05.2016 the Supreme Court granted Leave under Article 12(1) of the Constitution for an alleged violation of Article 12(1) of the Constitution.

The learned counsel for the 1st and 2nd Respondents submitted to court.

(a) Although approval was granted to construct a school, there were protests from the residents in the area and from Buddhist Monks. As such several

meetings had to be held with both parties. Vide 2R6 (a) to 2R6 (e), 2R 7(a) to 2R7 (f) and letter P13 had to be served on the Petitioners due to massive protests.

(b) That the 1st and 2nd Respondents had to take steps directing the Petitioners to stop the construction works due to massive protest as aforesaid and to avoid a breach of peace. Even the villagers had participated in the protest.

(c) All attempts made to avoid a breach of peace and bring about peace and harmony between the parties, If not in a way it could spread to other areas.

(d) As such encouraged discussions between parties to ultimately resolve the dispute.

(e) 1st and 2nd Respondents acted in terms of the relevant regulations prevalent at that point of time.

The learned President's Counsel for the intervenient party inter alia Submitted that:

1. There is ample provisions in the law to take the steps taken by the Respondents.
2. Even during the colonial era laws were enacted with a view of maintaining peace in the community as even during that period the British Government enacted laws to maintain peace, being aware of tension between communities in the country, this being a pluralistic society.
3. Laws enacted then still prevails and steps were not taken by successive Governments to repeal same.

4. Our Constitution more particularly caters to the dispute in hand and the definition to the term ‘law’ as contemplated under Article 170 of the Constitution is wide enough and does not contemplate to repeal laws enacted in the yester years more particularly the colonial era as the then Government had to consider recurrent tension, dissensions etc. between communities.
5. He submitted to court the interpretation Article 170, which reads thus :

> “law” means any Act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council;

The definition to ‘law’ does not cause any confusion and it could be easily understood. It is very simple and clear. The main question is whether the Respondents are responsible and liable as pleaded to deprive the Petitioners equal protection of the law. Facts presented by either party does not cause any confusion. Petitioners attempt to demonstrate their right to continue with the construction had been violated. Initially the Petitioners were given a permit to construct for a purpose. The material placed before court indicate that the real purpose of the Petitioners, seems to be to have a Mosque, instead of a school.

This seems to be the starting point for the dispute. The villagers, residents and Buddhist Monks vehemently protested for any further construction for a

different purpose. Our country had suffered over the years as a result of communal violence. History repeats and if one were to analyse as to what happened in the 1915 riots, though it was meaningless for the two communities to clash, lessons have not been learnt by a certain section of the community. Riots at that point of time resulted in loss of valuable life and property. Time and again incidents of such nature took place in our country. As such the official respondents had to take steps to avoid and avert any breach of peace.

In the context of the case in hand I cannot conclude that the Petitioners were denied equal protection of the law. Certainly I cannot fathom as to whether there was a violation of the Petitioner's fundamental rights. What is necessary should be done to avoid a crisis situation which could spread to other arears of our country. No further reasons need to be adduced in the circumstances of the case in hand by the Respondents.

The guarantee of equal protection of the law must mean protection of equal laws. Judicial decisions must of necessity depend on the facts and circumstances of each particular case, and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination.

Budhan Chowdhary V. State of Bihar 1955 AIR (SC) 191 per Das, CJ referring to American decisions.

I wish also to emphasise the fact that the Respondents acts do not suggest any form of discrimination based on race. On an examination of the material before court, I observe that Respondents have not violated Article 12(1) of the Constitution.

I have considered the documents 1R5 to 1R9 and the Agreement 1R10 between both parties whereby they agreed to have only a Dhamma School for Muslim children and not to have a place of worship. 1R13 confirms the contents of 1R10. The other important document 1R19(b) relates to setting up of place of worship. Material as aforesaid indicates a continuous protest, which the authorities considered and gave due consideration in arriving at a decision to suspend the construction works. Petitioners' party seems to have deliberately violated the agreement to put up a school. The prayer to the petition does not call upon the Buddha Sasana Ministry to quash the relevant circulars issued by the Ministry. Therefore I cannot conclude that the Respondents acted contrary to circulars.

One of the prayers of the Petition is to declare document marked P14 null and void.

The 3rd Respondent, by letter marked P14, directed the 1st Petitioner to stop constructions of the new building as he has not obtained approval of the Religious Affairs Ministry. The 3rd Respondent had, in the letter marked P14, referred to the Circular No. MBRA/2-SAD/10/Con.Gen/2013. The 3rd Respondent has produced this Circular as 3A R4 (e). According to this Circular (3A R4 (e) any person who constructs a Dharmma School has to obtain the approval of the Ministry of Religious Affairs. The Petitioners had not obtained the approval of the Ministry of Religious Affairs. Learned President's Counsel for the Petitioner tried to contend that this Circular does not come within the interpretation of law. I now advert to this contention. In *Wickrematunga Vs. Anuruddha Ratwatte (1998) 1 SLR 201*

> "Law" in Article 12 of the Constitution includes regulations, rules, directions, principles, guidelines and schemes that are designed to regulate public authorities in their conduct. In the context, whilst Article 12 erects no shield against merely private conduct, public authorities must conform to constitutional requirements, in particular to those set out in Article 12 even in the sphere of contract; and where there is a breach of contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances, the aggrieved party cannot be confined to his remedy under the law of contract.

When I consider the above judicial decision I cannot agree with the above contention. I therefore reject it.

As the Petitioners have not obtained the approval of the Ministry of Religious Affairs to construct the proposed Dhamma School, the stand taken

by the 3rd Respondent in P14 is correct. Therefore the application to declare P14 null and void should be rejected.

In all the above circumstances I hold that there is no merit in the application of the petitioners. This application stands dismissed with costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Leave to Appeal in terms of Sec: 5 (c) (1) of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006

Walpola Mudalige Janenona
No.87/1, Walpolawatta
Kelanimulla, Angoda.

SC/HC/CALA306/2013
WP/HCCA/AV/603/08 (F)

PLAINTIFF

Vs.

D. C. Homagama Case No.1095/L

Manamala Gamage Nandawathie
337, Kothlawala,
Kaduwela

DEFENDANT

AND BETWEEN

Manamala Gamage Nandawathie
337, Kothlawala,
Kaduwela

DEFENDANT-APPELLANT

Vs.

Walpola Mudalige Janenona(deceased)
No.87/1, Walpolawatta
Kelanimulla, Angoda

PLAINTIFF-RESPONDENT

Malwi Pathirannehelage Walter Dickson Perera
No.145, Siridamma Mawatha
Colombo 10.

SUBSTITUTED PLAINTIFF RESPONDENT

AND

Malwi Pathirannehelage Walter Dickson Perera
No.145. Siridamma Mawatha
Colombo 10.

SUBSTITUTED PLAINTIFF RESPONDENT PETITIONER

Vs.

Manamala Gamage Nandawathie
337, Kothlawala,
Kaduwela

DEFENDANT APPELLANT RESPONDENT

BEFORE: B.P.ALUWIHARE, PC, J
SISIRA J. DE ABREW, J &
H. N. J PERERA, J.

COUNSEL: Ranjan Suwandaratne for the substituted Plantiff-Respopndent-Petitioner.
Nilshantha Sirimanne for the Defendant-Appellant-Respondent.

ARGUED ON: 06.06.2016

DECIDED ON: 23.03.2017

ALUWIHARE, P.C. J,

When this matter came up for support, the following preliminary objections were raised on behalf of the Defendant-Appellant-Respondent (hereinafter referred to as the Defendant)

(i) The Petitioner does not have the necessary *locus standi* to have and maintain this Application, especially given the particular subject matter of the Petitioner's Application and the substantive reliefs sought in the Plaint; and

(ii) The Petitioner has failed to come before Your Lordship's' Court with clean hands, and he wilfully suppressed and/or misrepresented vital and material facts, which clearly render the Petitioner's Application and final reliefs futile.

Original Plaintiff, Walpola Mudalige Jane Nona had brought this action before the District Court against the Defendant, Nandawathie seeking a declaration of title to the land described in the schedule to the plaint and to have the Defendant ejected from the said property.

The Plaintiff had succeeded in her action and aggrieved by the judgment of the District Court, the Defendant had appealed to the High Court of Civil Appeals. The High Court of Civil Appeals, by its judgment dated 27th June, 2013 set aside the judgment of the learned District Judge dated 29th May, 2002 and directed the Defendant to pay a sum of Rs.150, 000/- with legal interest (to the Plaintiff), and upon the payment the Plaintiff was directed to re-transfer the property in question, to the Defendant.

Aggrieved by the said judgment of the High Court of Civil Appeals, the Plaintiff (Substituted-Plaintiff-Respondent-Petitioner) had come by way of leave to appeal to this court.

Counsel for the Defendant submitted, that the original Plaintiff Jane Nona died on or about 6th December, 2007 while this matter was pending before the High Court of Civil Appeals. Thereafter, the Petitioner to the present application, her son, had been substituted in room of the original Plaintiff, on 13th November, 2008.

Counsel further stated, that on 18th March, 2005, the property which is the subject matter of this case had been gifted to one Malawi Pathirannehelge Eranda Perera (hereinafter referred to as Eranda Perera) by the original Plaintiff Jane Nona.

Further, the Defendant had also produced a copy of the deed bearing No.3153 attested by Notary Public Handunneththi. Perusal of the same reveals that Deed No.3153 is a deed of gift by which original Plaintiff, Jane Nona had gifted a property retaining a life interest of the same, to one Malawi Pathirennehelage Eranda Perera.

The learned counsel for the Plaintiff, submitted that the said donee, Eranda Perera was a grandchild of Jane Nona, the original Plaintiff: The transfer of the property had taken place 2 years and 08 months prior to the death of Jane Nona: that Jane Nona, continued to be represented as the owner of the property before the High Court of Civil Appeals: and did not disclose the fact that the title of the property had been passed on to the donee Eranda Perera.

After the demise of Jane Nona, the present substituted-Plaintiff-Respondent-Petitioner (hereinafter referred to as the substituted plaintiff) was substituted in room of Jane Nona, by application for substitution, dated 30th October, 2008.

In the affidavit filed by the substituted-Plaintiff, he had moved for substitution on the basis that he is one of the heirs of Jane Nona, and the necessity had arisen for the heirs of Jane Nona to be substituted.

It was submitted on behalf of the Defendant that nowhere in the affidavit filed by him, had he disclosed the fact that the subject matter of the case stands transferred to the donee Eranda Perera.

A comparison of the schedule to the Plaint with the schedule to the deed of gift, makes it abundantly clear that both schedules refer to one and the same property. Thus, there is no doubt what has been conveyed to Eranda Perera by the original Plaintiff Jane None is the subject matter of this case.

If that be the case, the issue before this court is whether the present Substituted-Plaintiff-Respondent-Petitioner has the locus standi to prosecute this application as he does not appear to have any rights over the subject matter of this case now.

Furthermore, it was the contention of the learned counsel for the Defendant that the Substituted-Plaintiff, ought not to have sought him to be substituted in room of Jane Nona when the property in question had been conveyed to Eranda Perera by way of a deed of gift sometime before Jane Nona passed away.

It was contended on behalf of the Defendant that, as matters stand now, Substituted-Plaintiff has no Locus standi whatsoever to prosecute or maintain this application.

As referred to earlier, this is a *rei-vindicatio* action filed by the original Plaintiff Jane Nona, who sought a declaration of title, for the property and an order for eviction of the Defendant from the said property (prayers "ඌ" and " ඍ" to the plaint).

It was the contention of the learned Counsel for the Defendant that, a Plaintiff who institutes a *rei Vindicatio* action is required to maintain title to the said land throughout the cae and relied on the decision of this court in *Ekanayake and others Vs. Ratranhamy* – SC Appeal 5/2010, SC minutes of 6th February,2012 where the court held that *"in a vindicatory action, it is necessary for the title to be present with the Plaintiff not only at the beginning of the action, but until the conclusion of the case".*

The contention of the Defendant was that, in the present case, not only the original Plaintiff lost title to the property (save for life interest) by her own action, but the substituted plaintiff also never enjoyed title to the property.

In the case of *De Silva Vs. Goonatilake 32 NLR 217,* Chief Justice Macdonell held that: *"One who seeks to dispossess another in possession must show paramount title….. In order to sue by way of rei vindication the plaintiff must have the right of ownership vested in him….."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".*

It was argued on behalf of the Defendant that in the instant case, the substituted Plaintiff had failed to demonstrate that he has title to the property in the face of the alleged conveyance: deed of gift No.3153 to Eranda Perera. If that be the case the question arises as to how can this court declare the title vest in the substituted-Plaintiff, whereas the title vest in another, holding adversely to him?

In the case of Silva v. Jayawardena 43 N.L.R 551, Justice Keuneman, referred to the principle set out by Voet (Voet 6:1:4) on the very issue:
"But again, if he who brought this action was the Dominus at the time of institution of the suit, but 'lite pendente' has lost the Dominium, reason dictates that the defendant should be absolved….. both because the suit has fallen into

that case, from which an action could not have a beginning, and in which it could not continue….. and because the interest of the Plaintiff in the subject of the suit has ceased to exist,…… and in short because that (right of dominion) has action". (Voet's Title on Vindications and interdicta by Casie Chitty, Bk VI TITLE I pg.14)

In the case referred to above, the Plaintiff admitted that after the institution of the action, before the adjudication of the rights of the parties by the District Judge, she transferred some of the blocks of land which were the subject matter of the case.

In the case before us, Jane Nona was alive when the learned District Judge adjudicated that Jane Nona was the title holder of the land in question. Thereafter, she was cited as the Plaintiff-Respondent before the High Court of Civil Appeals. The need for substitution arose with the demise Jane Nona in 2008 when the matter was still pending before the High Court of Civil Appeals. It is to be noted that there was no change in the status of the parties up to the point, the issues raised before the District Court were adjudicated upon by the learned District Judge. In my view, sitting in appeal, all what the High Court of Civil Appeals called upon to consider was, whether the said adjudication was legally sound. If the cause of action survives after the death of a party, as in the instant case, the substitution is effected purely for the purpose of prosecuting the appeal and not for the adjudication of fresh matters or to decide the rights of the parties.

In this context terms of Section 760A of the Civil Procedure Code stipulates that "*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 Court of Appeal may in the manner provided*

in the rules made by the Supreme Court for that purpose, 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 has died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered of record as aforesaid".

In the case of *Careem V Subramanium and others 2003 2 SLR 197* Justice Udalagama expressed the view that the inquiry to determine a " proper person" under the provisions of section 760A (of the Civil Procedure Code) is one to ensure the continuation of the appeal after the change of status in the action and not to decide the rights of the parties. Interestingly enough, the opposite was argued in the case of *Lawana Gunesekera v. Hemawathie Sahabandu C. A 476/95 (F)* which was decided by the Court of Appeal on 11.09.2002. Although the decision is not binding on this court it has in my view, to an extent, of persuasive value.

In the case referred to, the plaintiff succeeded in a declaratory action and the defendant appealed. While the appeal was pending, the plaintiff died. An application was made in terms of section 760A to effect substitution on the basis that the deceased plaintiff had by a deed, donated the premises to the petitioner who moved that he be substituted in room of the Plaintiff.

The Defendant resisted on the basis that there was no proper donation of the premises to the petitioner and he is not a "proper person" to be substituted even for the limited purpose of prosecuting the action.It was also argued that the plaintiff in that case died intestate leaving the plaintif's siblings as intestate heirs and the petitioner was not a heir. It was further argued, that without considering the authenticity of the deed of gift to determine whether or not the said deed

gives the petitioner "lawful title" to the premises, the petitioner cannot be considered as a "proper person" in terms of section 760A of the Code.

His lordship held that *"It is my considered view that what the provision 760A requires is, that the court determine a "proper person" to be substituted.In determining a proper person I would venture to hold that what the section envisages is a proper person necessary to prosecute the appeal.Such apponintments are made by court for a limited purpose of prosecuting an appeal and ones made such appointee could not in any manner claim rights to the property of the deceased merely on the basis of being appointed to be so substituted in place of the deceased.*

His Lordship went on to state that *"the subsequent appointment of a person to prosecute the appeal in place of the deceased could not in any way prejudice the rights of other parties as at the date of the institution of the action.*

In the case of Paramasivam and another v. Piyadasa and others CA 135/99 (F), Justice H.N.J Perera was called upon to decide this very issue. His Lordship held that Section 760A of the Code gives the discretion to the court to decide, who in the opinion of the court is a the proper person to be substituted and the inquiry to determine a "proper person" under Section 360A is one to ensure continuation of the appeal after the change of status in the action and not to decide the rights of the parties.

I have already referred to the fact that, throughout the period this matter was under adjudication before the learned District Judge, Jane Nona remained a party and no alienation of the property took place.

The High Court of Civil Appeals also considered the property rights of Jane Nona and the Defendant based on the evidence led before the District Court, and this court would be called upon to do the same if this court finds sufficient merit in this matter to grant leave to appeal. There is nothing before it for this court to hold the view, that the substituted - Plaintiff -Respondent has any infirmity that makes him "unfit" to be substituted in place of the original plaintiff Jane Nona, to prosecute the appeal,
Considering the above, I am of the view that the Substituted-Plaintiff-Respondent does have *locus standi* to prosecute and maintain this application.

The second preliminary objection raised by the Respondent was that the he wilfully suppressed and/or misrepresented vital and material facts, which clearly render the Petitioner's Application and final reliefs futile.
It was argued on behalf of the Respondent that the failure of the original Plaintiff to disclose the vital and material facts that the original plaintiff had, during the pendency of the appeal before the High Court of Civil Appeals, transferred her title in the subject matter of the case to a third party and suppressed and or failed to disclose this fact to the High Court of Civil Appeals and this amounts to misleading of the said court. At the hearing it was further argued that this failure was intentional on the part of the original plaintiff, to prevent the Respondent from availing herself of the substantive relief granted by the High Court of Civil Appeals.

As referred to earlier the substitution will not prejudice the rights of the other parties of the case, as at the date of the institution of the action. On the other hand, there is no material before this court to conclude that the non-disclosure of the conveyance of the property in question to Eranda Perera by a deed of gift was done with the intention of misleading the court. Although the original plaintiff, who had retained life interest of the property, had suppressed the fact that she

had gifted the property, while the appeal was pending before the High Court of Civil Appeals, such suppression in my view is not fatal to the maintainability of the present action.

For the reasons set out above, I overrule both preliminary objections raised on behalf of the Defendant-Respondent and dismiss the preliminary objections.
I make no order as to costs.

JUDGE OF THE SUPREME COURT

JUSTICE SISIRA J DE ABREW

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

In the matter of an application for leave to Appeal

M.J.Marikkar

Plaintiff

SC (LA) Appeal 165/14
SC HCCA LA No. 230/2012
CP HCCA KAN 69/2011 (FA)
D.C. Kandy No.16773/L

~vs~

Jayatunga

Defendant

Between

Jayatunga

Defendant-Appellant

Vs.

Sithy Zarooha Zuhair

Substituted Plaintiff-Respondent

Now between

Sithy Zarooha Zuhair
No.98/1, Pieris Mawatha,
Kalubowila,
Dehiwala.

Substituted Plaintiff-Respondent-Petitioner

B.H.R.Jayatunga,
No.172/1/1, Madawala Road,
Katugastota.

Defendant-Appellant-Respondent.

BEFORE: **Eva Wanasundera, PC, J**
B.P.Aluwihare, PC, J &
Upaly Abeyrathne, J.

COUNSEL: Rohan Sahabandu, PC for the Substituted-Plaintiff-Respondent-Appellant.
Harsha Soza, PC with Upendra Walgampaya for the Defendant-Appellant-Respondent

ARGUED ON: 21.09.2015

DECIDED ON: 04.08.2017

ALUWIHARE, PC, J:

On or around 29th June, 1991, a fire broke out in the city of Kandy and as a result number of business premises along Yatinuwara Veediya had sustained damage. Two of these premises were Nos. 4 and 6, Yatinuwara Veediya which were owned by the original Plaintiff Mohammed Javad Marrikkar. Both these

premises had been given out on rent, and at the time of the fire the defendant who was engaged in business was the tenant.

The position of the original Plaintif's was that the building had been so extensively damaged that it could not be used without effecting repairs and the tenancy had come to an end. On that basis the Plaintiff filed an action in the District Court seeking a declaration that the tenancy of the Defendant had come to an end and also sought an order for the ejectment of the Defendant from the rented premises. After trial, the learned District Judge held with the Plaintiff and granted the relief sought in the plaint.

Aggrieved by the said judgment, the Defendant appealed to the High Court of Civil Appeals, Kandy and the learned judges of the High Court of Civil Appeals, by their judgement dated 17th May, 2012, allowed the appeal of the Defendant. While the matter was pending before the District Court the Plaintiff had died and the daughter of the Plaintiff had been substituted in room and place of her father.

Aggrieved by the judgment of the High Court of Civil Appeals, the substituted-Plaintiff-Respondent (hereinafter referred to as the Substituted-Plaintiff) sought leave to appeal from this Court and leave was granted on the following questions of law.

(i) Did the learned High Court Judges err in holding that for the contract of tenancy to come to an end, the entire building had to be completely destroyed by the fire?

(ii) In the circumstances of the case has the contract of tenancy come to an end, due to the premises being gutted?

The respective positions that were taken up by the disputing parties are quite straightforward. The Plaintiff's position was that the premises were destroyed by the fire and as a result the tenancy had come to an end. The Defendant's position was that although part of the premises had sustained some damage due to the fire, the contract of tenancy remained intact, and prayed for dismissal of the Plaintiff's action.

It was argued on behalf of the Substituted-Plaintiff that, the issue as to whether the premises were completely destroyed by the fire or not is a question of fact, and the learned District Judge who had the benefit of judging the credibility of the witnesses, had come to a finding of fact in favour of the Plaintiff, that the building was destroyed and the tenancy had come to an end.

At the trial before the District Court the Plaintiff had given evidence. A few other witnesses also had testified on behalf of the plaintiff. Defendant did not testify nor did he offer any evidence on his behalf, but had challenged the evidence placed by the Plaintiff to show that the premises in question was in fact in a usable state and that he had continued to run his business from the premises after effecting some repairs.

I find that the extent of damage caused to the building is pivotal to the question of law this court is called upon to decide.

I wish, however, to address on the applicable law before I deal with the facts. A somewhat similar issue came up for adjudication in the case of *Giffrry vs. De Silva 69N.L.R 281.* In the case referred to, the defendant gave a premises, he owned at Main Street Panadura on rent to the plaintiff. A fire broke out in these premises and the plaintiff vacated them in consequence of the damage caused by the fire. The defendant put up a new building there and the plaintiff

moved in and took possession of the building. It was clear from the evidence that the damage was so extensive that the plaintiff could not remain in occupation of the building. Chief Justice Sansoni observing that, it had been proved by evidence that after the fire the plaintiff vacated the premises and had given up possession to the defendant, stated that "the law is clear that where a building which is the subject of a lease is burnt down, without the fault of the landlord or the tenant, the contract is at an end."

In the case of *Samuel V. Mohideen 71N.L.R 451*, the court held that where a fire breaks out in the leased urban tenement and the damage is so extensive, that the tenement can no longer be regarded as still in existence for the tenancy to continue. In the case of Samuel V. Mohideen, the evidence led at the trial had shown the leased premises could no longer be used as a building. The court held in such a case, where the leased tenement is so extensively damaged that it can no longer be used, for the purpose for which it was leased, it is impossible to say that the premises are still in existence for the tenancy to continue.

Justice Ranaraja in the case of *Abeysinghe vs. Abeysekera* 1995 2 S.L.R followed the decision in Samuel v. Mohideen (supra) and held that when the building is extensively damaged and cannot be used for the purpose for which it was leased, one cannot say the tenancy continues. On this point Wille (Landlord and Tenanat 4th Edition page 249) states that "in a contract of tenancy, the tenant is entitled to the use and occupation of the building and if there is no building to use and occupy there is no contract. If the building is completely destroyed the contract comes to an end, even though the land remains"

H.W Tambiah (Landlord and Tenanat 1st Edition 158) holds the view that "under the Roman Dutch law if the thing leased out is destroyed by unforeseen

misfortune the lease is terminated. But where the property is not completely destroyed the lease is not at an end if the tenant can still exercise many of his rights, despite the partial destruction of the property. A similar view had been expressed by Dr Wijeydasa Rajapaksa in his book the law of property Vol IV Landlord and Tenant at pg. 204. He says "in the case of a house being let, if that is completely burnt, the lease comes to an end, but not where the tenant is able to exercise many of his rights under the lease notwithstanding the complete destruction of the building.

Thus the issue that needs to be addressed is whether after the fire the defendant was able to exercise many of his rights as a tenant. This fact can only be decided, in my opinion, upon analysing the evidence placed at the trial.

The original plaintiff who testified had said that both premises, No 4 and No.6 were destroyed.He admitted, however, that the walls remained intact and what was destroyed was the roof, upper floor windows and the doors. He had also admitted that the building was not damaged beyond repair. The plaintiff also had admitted that the defendant resumed his business activities after the fire from the same premises. His evidence was that after two days the defendant commenced his business. He also admitted whatever repairs that were needed to be effected were repairs that could be done within two days.

The plaintiff also called Mohammed Anzar Omar a chartered engineer who had visited the premises more than two years after the fire for an inspection and for a report. His evidence was that the tile roof had been replaced with zinc sheets and in addition he had further testified that the rear windows and a door had been boarded up. He had also observed that new doors had been fixed inside the building. Under cross examination, the witness had admitted that from its

appearance, the ground floor did not seem to have been affected by the fire. He also admitted that he presumed that the entire roof had been destroyed by the fire. He had also stated that he was told that the building had a tiled roof and at the time of inspection it was covered with zinc sheets.With regard to the condition of the wooden floor, of the upper floor, the evidence of the witness appears to be infirm.At one point the witness had said that the wooden floor had got completely destroyed due to the fire and under cross examination the witness had said that at the time he went to inspect the building, the wooden floor had been repaired.

The pivotal issue that needs to be decided is whether the Defendant was able to exercise many of his rights under the lease notwithstanding the destruction caused to the building.

The evidence is that the Defendant had never surrendered the possession of the premises and on the Plaintif's own admission , he (the Defendant) commenced his business activities after two days of the occurance. There is also evidence that the ground floor of the building was not affected due to the fire.
When one consideres the totality of the evidence, I am of the view that the Plaintiff had not established that the building was destroyed to an extent where the Defendant was unable to exercise his rights, as a tenant.

Considering the above, the Judges of the High Court of Civil Appeals cannot be faulted for concluding, in the light of the evidence, that the tenancy had not come to an end as a result of the fire.
Accordingly I answer the questions of law in the negative and dismiss the appeal

In the circumstances of this case I order no costs

Appeal dismissed

JUDGE OF THE SUPREME COURET

JUSTICE EVA WANASUDERA P.C

JUDGE OF THE SUPREME COURET

JUSTICE UPALY ABEYRATHNE

JUDGE OF THE SUPREME COURET

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

Declaration under and in terms of Article 157A(4) of the Constitution (As amended by the Sixth Amendment to the Constitution) of the Democratic Socialist Republic of Sri Lanka.

Hikkadu Koralalage Don Chandrasoma

G -16, National Housing Scheme,

Polhena, Kelaniya.

Petitioner

SC SPL No. 03/2014

Vs.

1. Mawai S. Senathirajah
   Secretary,

   Illankai Thamil Arasu Kadchi,

   30, Martin Road, Jaffna.

1(a) K. Thurairasasingham

Secretary,Illankai Thamil Arasu Kadchi,

30, Martin Road, Jaffna.

(Substituted 1st Respondent)

1. Mahinda Deshapriya
   Commissioner of Elections,

   Elections Secretariat,

   Sarana Mawatha,

   Rajagiriya.

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

   Colombo 12.

Respondent

Before : Priyasath Dep, PC.CJ

Upaly Abeyrathne, J

Anil Gooneratne J.

Counsel : Dharshan Weerasekera with Madhubashini Rajapaksha for Petitioner.

K. Kanag-Iswaran, PC with M.A. Sumanthiran, Viran Corea and Niran Ankertel for 1A Respondent.

Nerin Pulle, DSG with Suren Gnanaraj, SC for AG.

Argued on : 18.02.2016

Written Submissions

filed on : 18.04.2016 & 03.05.2016

Decided on : 04.08.2017

Priyasath Dep, PC,CJ.

The Petitioner filed this action under and in terms of Article 157A (4) of the Constitution (as amended by the Sixth Amendment to the Constitution), seeking a declaration that the Illankai Thamil Arasu Kachchi (hereinafter referred to as "ITAK") is a political party which has as its "aims" and "objects" the establishment of a separate State within the territory of Sri Lanka.

The Petitioner by his Petition dated 27th March 2014, prayed for following reliefs:

i) A declaration that ITAK is a political party which has as one of its "aims" and "objects" the establishment of a separate State within the territory of Sri Lanka.

ii) An order that the ITAK and its members, in consequence of the declaration issued under Article 4 of the Sixth Amendment to the Constitution [157A (4)] are subject to the provisions of Article 5 of the Sixth Amendment to the Constitution of Sri Lanka. [157A (5)]

The Petitioner stated that the Constitution of ITAK which is in Tamil marked P1 and the subsequent amendment effected to the Constitution in 2008 which is in Tamil marked P2, were filed at the Elections Commissioner's office'. English translations of P1 and P2 are marked as P3 and P4.

In Rule 2 of the Constitution of ITAK P3 (English translation) which refers to the objective of ITAK reads as follows:

The objective of this party is to establish political, economic and cultural liberation among Tamil speaking people by way of forming autonomous Tamil Government and autonomous Muslim Government as part of united federal Sri Lanka in accordance with the principles of self –determination.

Note: There will be a full guarantee in regards to Religion, language rights and fundamental rights for the minorities residing in the states which will be connected.

The Petitioner submitted that the amendment marked P2 replaced the word 'Federal' with the word 'Confederation'. The translation which is P4 provided by the Petitioner replaced the word 'Federal' and inserted the word 'Confederation'.

The Petitioner stated that the replacement of words in Rule 2 by the said amendment to the ITAK Constitution indicates a shift in the "aims" and "objectives" of ITAK. It is further stated by the Petitioner that the full statement of the present "aims" and "objectives" of the ITAK, subsequent, to the above amendments, is to establish a separate State within Sri Lanka. The English translations of said documents were marked P3 and P4.

The Substituted 1st Respondent submitted that P2 did not substitute the word 'Confederacy' in place of 'federal'. In view of the contrasting positions taken by the Petitioner and the Substituted 1st Respondent, the Court called upon the learned Deputy Solicitor General to assist Court and an order was made for the translation of P1 and P2 by the Official Languages Department. The translation which is filed of record in February 2015, marked as X1.

At this stage it is relevant to refer to Article 157 A of the Constitution which was introduced by the Sixth Amendment to the Constitution which reads as follows:

> (1) - "No person shall, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka."

(2) - "No political party or other association or organization shall have as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka."

(3) Any person who acts in contravention of the provisions of paragraph (1) shall, on conviction by the Court of Appeal, after trial on indictment and according to such procedure as may be prescribed by law, -

(a) be subject to civic disability for such period not exceeding seven years as may be determined by such Court;

(b) forfeit his movable and immovable property other than such property as is determined by an order of such Court as being necessary for the sustenance of such person and his family;

(c) not be entitled to civic rights for such period not exceeding seven years as may be determined by such Court; and

(d) if he is a Member of Parliament or a person in such service or holding such office as is referred to in paragraph (1) of Article 165, cease to be such Member or to be in such service or to hold such office.

(4) - "Where any political party or other association or organization has as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka, any person may make an application to the Supreme Court for a declaration that such political party or other association or organization has as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka. The Secretary or other officer of such political party or other association or organization shall be made a respondent to such application."

The Petitioner also relied on the Political Resolution unanimously adopted at the 1St National Convention of The Tamil Liberation Front held at Pannakam (Vaddukoddai Constituency) in 1976 known as Vaddukoddai Resolution which was marked as X2 and the translation of Manifesto of the Tamil United Liberation Front (TULF) at the General Elections of 1977 marked as X5.The Vaddukoddai Resolution and the TULF Manifesto advocated the establishment of a separate state of Tamil Eelam. The ITAK associated with the Vaddukoddai Resolution and a constituent party of the TULF. The other parties are All Ceylon Tamil Congress and Ceylon Workers Congress. The Petitioner's contention therefore is that the explicit statements made in documents marked P1, P2 and X2, X5 and the reasonable inferences drawn from them indicate that the Respondent harbours an intention of creating a separate State within the territory of Sri Lanka.

The main contention of the Petitioner in this case is that on consideration of the totality of the definition of "objectives" contained in Rule 2 of the ITAK Constitution marked P1 and the subsequent amendment contained in document marked P2, indicates that the arrangement of government ITAK seeks is not a "federal" government but a "confederation" form of government which connotes the unity of two separate States and thereby ITAK is in fact advancing a separate sovereign State. It was further submitted that the fact that ITAK advocates an arrangement of government for Sri Lanka where Provincial Governments rather than the Central Government will guarantee the fundamental rights of the residents of those provinces, coupled with the statements in the Vaddukkottai Resolution is suggestive of a "confederation" rather than a "federal" form of government.

As Article 157A (4) refers to' Where any political party or other association or organization has as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka….'., It is relevant to consider the meaning of aims and objects.

In the Oxford Advanced Learner's Dictionary (9th edition, 2015) the words "aims" and "objects" are defined as follows"

- "aim" noun : the purpose of doing; what is trying to achieve
- "object" noun : an aim or a purpose

On an examination of records it is noted that document marked P2 contains a series of amendments made to the ITAK Constitution in 2008 where the following words with Sanskrit origin were deleted and replaced by appropriate pure Tamil approximation of such words:

	Sanskritized	**Pure Tamil Alternative Word**
Article 2 -	"samashtiyin"	"innaipaatchiyin"
Article 3 -	"angaththuvam"	"uruppurimai"
Article 4-	"podhu kaariya sabhai"	"podhuchchabai"
Article 5 -	"kaariyatharisi"	"seyalaalar"
Article 5-	"thanaathikari"	"porulaalar"
Article 11 -	"visheda"	"sirappu"

The Substituted 1st Respondent submitted that that the Petitioner's initial claim was based on an erroneous translation of the 2008 amendments to the ITAK Constitution marked P4. The said amendment to Rule 2 as appearing in document marked P4 is reproduced below:

"Rule – 2

a) Objective – by the substitution, for the word ***"federal"***, with the word ***"confederation"***. (Emphasis added)

Insert a sentence

"Full guarantee to Religious and language rights to the minority Ethnic Nationalities residing in the autonomous government which is to be established in the homeland of Tamils".

b) Insert a sentence as Policy 5

"Establish a good relationship with Sinhala people and the Country on the basis of co-existence and collaboration".

The Substituted 1st Respondent submitted that the Petitioner has erroneously translated the amendment to Rule 2 in ITAK Constitution where the word "samashti" was replaced with the words "inaipaatchchi" as "confederation". This is further demonstrated through the official translation provided by the Official Languages Department marked X1.

The official translation provided by the Official Language Department is as follows:

"Rule 02 Objective: in (a) repealing the word *"Samashdi (federation)"* and substitution of the word *"inaippadchi (federation)"*. (Emphasis added)

The Substituted 1st Respondent drew attention of this Court to Rule 2 of the ITAK Constitution as Amended in 2008, which begins with the phrase "aikkiya Illangai inaipaatchchiyin angamaaga…" which means "….as a part of a federation of a United Sri Lanka (as appearing in X1). "

This Court is therefore of the view that the amendment effected to Rule 2 in the ITAK Constitution in 2008 by deleting the word ""samashti" and replacing same with the word ""inaipaatchchi" does not connote a change in the meaning.

The Petitioner in paragraph 32 of Petition states that, "in the absence of an explicit statement in the ITAK's Constitution that ITAK does not and will not support or endorse the "autonomous governments" it intends to form, exercising their right to secession,

the only inference to be drawn is that if the ITAK has as its "objectives" the forming of a "confederation" of such autonomous governments, it intends that the separate units of that confederacy remain Independent States, and hence, has the "objective" of forming such States."

When this Application was taken up for hearing, the learned Counsel for the Petitioner conceded that the official translation before this court does read "federation" and not "confederation". It was also the contention of the Counsel for the Petitioner that "federation" and "confederation" mean the same thing though the Counsel for the Petitioner did not pursue this line of argument at the initial stage. The Black's Law Dictionary (page 611, 6th Edition) defines "Federal Government" as follows –

> "'"The system of government administered in a nation formed by the union or confederation of several independent states.
>
> In strict usage, there is a distinction between a *confederation* and a *federal government*. The former term denotes a league or permanent alliance between several states, each of which is fully sovereign and independent, and each of which retains its full dignity, organization, and sovereignty, though yielding to the central authority a controlling power for a few limited purposes, such as external and diplomatic relations. In this case, the component states are the units, with respect to the confederation, and the central government acts upon them, not upon the individual citizens. In a *federal government,* on the other hand, the allied states form a union (*e.g.* United States), not, indeed, to such an extent as to destroy their separate organization or deprive them of *quasi* sovereignty with respect to the administration of their purely local concerns, but so that the central power is erected into a true national government, possessing sovereignty both external and internal, - while the administration of national affairs in directed, and its effect felt, not by the separate states deliberating as units, but by the people of all, in their collective capacity, as citizens of the nation. The distinction is expressed, by the German writers, by the use of the

two words *"Staatenbund"* and *"Bundesstaat";* the former denoting a league or confederation of states, and the latter a federal government, or state formed by means of a league or confederation."

In the determination *In Re the Thirteenth Amendment to the Constitution (1987 2 SLR 319)* following view was expressed by Sharvananda, C.J. , with reference to the concept of federalism: "The term "Unitary" in Article 2 is used in contradistinction to the term "Federal" which means an association of semi-autonomous units with a distribution of sovereign powers between the units and the center. In a Unitary State the national government is legally supreme over all other levels. The essence of a Unitary State is that the sovereignty is undivided – in other words, that the powers of the central government are unrestricted. The two essential qualities of a Unitary State are (1) the supremacy of the central Parliament and (2) the absence of subsidiary sovereign bodies. It does not mean the absence of subsidiary law-making bodies, but it does mean that they may exist and can be abolished at the discretion of the central authority. It does therefore, mean that by no stretch of meaning of words can those subsidiary bodies be called subsidiary sovereign bodies and finally, it means that there is no possibility of the central and the other authorities coming into conflicts with which the central government, has not the legal power to cope……..".

The Substituted 1st Responded submitted that advocacy for sharing sovereignty along federal lines does not tantamount to demanding a separate State. Instead, as per the interpretation of federalism in the judgment given by Chief Justice Sharvananda, in the Thirteenth Amendment Determination, it is merely a "distribution of sovereign powers between the units and the centre" unlike in a unitary State where sovereignty is undivided.

The Learned Counsel for the Petitioner at the hearing and in the written submissions based his argument on Vaddukkottai Resolution which advocated establishment of a separate State. The contention of the Learned Counsel for the Petitioner was that the

ITAK has unconditionally and unambiguously endorsed all resolutions of the TULF going back to 14 May 1976.

In regard to this submission the Substituted 1st Respondent in his written submissions took up the position that the claims to territorial statehood made in the Vaddukkottai Resolution adopted over forty (40) years ago in 1976, at the 1st National Convention of the Tamil United Liberation Front (hereinafter referred to as "TULF") presided by Mr. Chelvanayakam, Q.C., and Member of the TULF and not by ITAK. It is further observed that the TULF is not a party to the proceedings in the instant case. Thus, the Vaddukkottai Resolution is irrelevant to the present case.

This is an appropriate stage to refer to the policies of Tamil political parties during the pre and post independence era. G.G.Ponnambalam, the then leader of the All Ceylon Tamil Congress submitted before Soulbury Commissioners equal representation proposal which came to be known as " fifty- fifty demand". According to this proposal the Majority and the minorities should have equal representation. Soulbury Commissioners rejected this proposal and introduced section 29 to the Constitution to safeguard the interest of the minorities. In the first Cabinet of Independent Ceylon, G.G. Ponnambalam and C.Sunderalingam of the Tamil Congress held cabinet portfolios under D.S.Senanayake, the 1st Prime Minister of Ceylon. During this period two significant acts were enacted in Parliament. The Citizenships Act of 1948 deprived citizenship rights of a large number of estate workers of Indian origin. They became stateless persons overnight. Thereafter Parliamentary Election (amendment) Act was passed in 1950 which gave voting rights only to citizens. As a result a large number of estate Tamils of Indian origin lost their citizenship and franchise. Tamil leadership felt that section 29 of the Constitution is not an adequate safeguard to protect the rights of the minorities. This led to the formation of the Federal Party (ITAK) under the leader ship of S.J.V. Chelvanayagam which advocated the establishment of a federal state.

The Federal Party had negotiations with the Sinhala parties and in 1957 then Prime Minister and Chelvanayagam entered into an agreement which came to be known as

Bandaranayake- Chelvanayakam Pact wherein the prime minister agreed to establish regional councils subject to the approval of the Parliament . Due to the strong opposition from the Sinhala majority, the prime minister was forced to abrogate the pact. Similarly in 1965 Chelvanayagam entered into an agreement with then prime minister Dudley Senanayake which came to be known as Dudley Senanayake-Chelvanayagam Pact wherein the prime minister agreed to establish district councils. This pact was also abrogated due to the strong opposition of the Sinhala majority.

The ITAK supported the Vaddukodai Resolution and became a member of the TULF which in 1977 Election Manifesto advocated the establishment of a separate state known as Eelam. The TULF did not accept the 1972 and 1978 Republican Constitutions.

In late 1970s witnessed the emergence of Tamil youth militant groups engaged in an armed struggle to established a separate state . The militant group Liberation Tigers of Tamil Eelam(LTTE) after liquidating the rival militant groups claimed to be the sole representative of the Tamils. The other militant groups and political parties were neutralized or marginalized. In order to end the conflict and establish a lasting peace the Government of Sri Lanka was compelled to have talks with LTTE (eg. Thimpu Talks in 1985) and enter into a Ceased Fire Agreement in 2002. The war ended in 2009 with the defeat of the LTTE. The question that arises for consideration is whether the political party ITAK had abandoned the separatist movement and advocate the establishment of a federal state within a united Sri Lanka or not .

The Learned Counsel for the Substituted 1st Respondent had conceded that it is an undisputed fact that the course of Tamil politics underwent an episode during which the call for a separate State was taken up and that Members of the ITAK also adopted a similar position and that some members had refused to take oath under the Sixth Amendment to the Constitution and as a result lost their seats in Parliament. From 1983-1988 there were no Tamil representatives from North and Eastern Province in Parliament, District Councils and local bodies.

It was further submitted on behalf of the Substituted 1st Respondents that this situation however changed with the enactment of the Thirteenth Amendment to the Constitution and that several Members who lost their seats in Parliament returned to Parliament after subscribing to the oath prescribed by the Sixth Amendment to the Constitution and that every single sixteen (16) Members belonging to ITAK in the current Parliament have subscribed to the oath prescribed by the Sixth Amendment and also that several who were Members of Parliament on previous occasions have also subscribed to the oath several times.

The Seventh Schedule refers to Oath/ affirmation to be taken or subscribed under Article 157A and article 161(d) (iii) of the Sixth Amendment to the Constitution. It reads thus:

" I .....do solemnly declare and affirm/swear that I will uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka and that I will not, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka.

The 1st Respondent Mavai Somasunderam Senathiraja, then General Secretary and current President of the ITAK in his affidavit dated 16th September 2014 tendered in this case stated under oath that "it is axiomatic that neither the ITAK nor the Tamil National Alliance can be said to have as its aims and/or objects the establishment of a separate State within the territory of Sri Lanka". This indicates that the ITAK no longer supporting or advocating the establishment of a separate state.

Further, it is stated in the 2013 Election Statement released in advance of the Northern Provincial Council Elections by ITAK which contested elections under the banner of the Tamil National Alliance (hereinafter referred to as "TNA") in alliance with several other parties but under the ITAK name and symbol, under the heading "Tamil People and the Present Constitutional Arrangements" as follows:

> " We are as a People are thus concerned about our historical habitats, our Collective Rights that accrue to us as a People and as a National and our entitlement to exercise our right to determine our destiny to ensure self-government in the Tamil Speaking North-East of the country *within a united and undivided Sri Lanka."(Emphasis added)*

Thereafter, after delineating the party's position on "Our Stand on a Political Solution", it is stated as follows:

> "All that has been stated above shall be enacted and implemented *within the framework of a united and undivided Sri Lanka."(Emphasis added)*

It is also noted that identical statements as cited above was also included in the 2015 Election Manifesto of Tamil National Alliance.

The Substituted 1st Respondent submitted that Election Statements and manifestos it is manifestly clear that the ITAK is a seeking a solution "within the framework of a united and undivided Sri Lanka."

On the other hand, the Petitioner alleged that "self-determination involves attaining an Independent State, or, reciprocally, if the people asserting self-determination freely choose to remain as part of another State, they retain the right to secede at their will, because the only reliable way for a people to fully control their political status, as well as their economic, social and cultural development, is in an Independent State. Therefore the right to secede is an integral component of the right to self-determination, even though, at any given point in time, the people who have acquired the right to self-determination might not assert their right to secession."

The Learned Counsel for the Petitioner referred to two covenants on human rights adopted by the United Nations in 1966.They are International Covenant on Civil and Political rights and the International Covenant on Economic, Social and Cultural rights, and both these Covenants proclaimed the right of self-determination in the Common Article 1 which reads as follows:

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The Learned Counsel for the Substituted 1st Respondent underscores the fact that it is "peoples" who are repositories under international law for the right to self-determination and thus the ITAK hold that the Tamil people are a "people" in terms of the above international covenants, and therefore, it is axiomatic that the Tamil people are also entitled to the right to self-determination.

The Petitioner and the Substituted 1st Respondent both referred to Canadian Supreme Court Judgment in 'Reference re Secession of Quebec' (1998) 161 DLR(4th)(385). In that reference the main question that has to be determine is whether under the Constitution or under international law can the National State assembly, legislature or the Government of Quebec effect the secession of Canada unilaterally? The following passage in the Judgement is relevant to the application before this Court.

'The Court was also required to consider whether a right to unilateral secession exist under international law. Some supporting the affirmative answer did so on the basis of recognized right to self determination that belongs to " all peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the " people" issue because , whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises the principle of self-determination of people at international law where " a people" is governed as apart of colonial empire; where " a people" is subject to alien subjugation, domination or exploitation; and possibly where " a people" is denied any meaningful exercise its rights of self-determination within the state of which it forms a part. In other circumstances , peoples are expected to achieve self- determination within the framework of their existing state. A state whose government represent whole of the people or peoples resident within its territory, on the basis of equality and without discrimination and respects the principle of self-determination in its internal

arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states".

In Federalism and Diversity in Canada by Ronald L. Watts published in Autonomy and Ethnicity – Negotiating Competing Claims in Multi-ethnic States" Edited by Yash Ghai, at page 48) it was stated:

"where all the evidence points to the fact that, if there had not already been provincial autonomy, the movement for secession would have been much stronger, not weaker. It is not insignificant that referendum results and repeated recent public opinion surveys have persistently pointed to the fact that a large majority of Quebeckers want greater autonomy, but combined with continued association with the rest of Canada"

In the 2010 *Kosovo Advisory Opinion* delivered by the International Court of Justice, Judge Cancado Trindade in a separate opinion in page 184 held as follows:

> "Recent developments in contemporary international law were to disclose both the external and internal dimensions of the right of self-determination of peoples: the former meant the right of every people to be free from any form of foreign domination, and the latter referred to the right of every people to choose their destiny in accordance with their own will, if necessary – in case of systematic oppression and subjugation – against their own government. This distinction challenges the purely inter-state paradigm of classic international law. In the current evolution of international law, international practice (of States and of international organizations) provides support for the exercise of self-determination by peoples under permanent adversity or systematic repression, beyond the traditional confines of the historical process of decolonization. Contemporary international law is no longer insensitive to patterns of systematic oppression and subjugation."

Based on the above opinion the Substituted 1st Respondent submitted that it is clear that the right to self-determination has an internal dimension, in that it could be

exercised within the country to the benefit of a "people" inside the country. Thus, the invocation of self-determination does not amount to a demand for a separate State, as the right is sometimes to be used internally within the territory of an existing State.

It is established that there is a clear distinction between words 'federation' and 'confederation'. The main issue in this case is whether advocating the establishment of a federal state tantamount to establishment of a separate state. It is relevant to consider the manner the federal states were formed in various parts of the world. United States of America, Australia and Switzerland are federal states. Thirteen States which were former colonies of the Great Britain joined to establish United States of America. The reason for uniting under one state is to promote trade and to ensure the security of the States. Six States in Australia in fear of pacific powers united to establish a federal state. In order to remove linguistic and regional differences Swiss federation was formed. Great Britain, France and Italy are examples of unitary states.

The labelling of states as unitary and federal sometimes may be misleading. There could be unitary states with features or attributes of a federal state and vice versa. In a unitary state if more powers are given to the units it could be considered as a federal state. Similarly in a federal state if the centre is powerful and the power is concentrated in the centre it could be considered as a unitary state. Therefore sharing of sovereignty, devolution of power and decentralization will pave the way for a federal form of government within a unitary state. The Thirteen Amendment to the Constitution devolved powers on the provinces. The ITAK is advocating for a federalist form of government by devolving more powers to the provinces within the framework of a unitary state. Advocating for a federal form of government within the existing state could not be considered as advocating separatism.

It is established that the ITAK support or advocate the establishment of a federal State within united Sri Lanka. It does not , support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka as envisaged under Article 157A of the Constitution. Therefore Petitioner is not entitle to a declaration under Article 157A (4) of the Constitution.

Application dismissed. No Costs.

Chief Justice

Upali Abeyrathne 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

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Repulic of Sri Lanka

SC (FR) Application
No.SC/Special/04/2014

Ms. P. Thavarajanie,
Nursing Tutor – Grade 1,
No.154, Thambimuthu Road,
Thambiluvil – 2,
Thirukkovil.

Petitioner

Vs.

1. Kanaganayagam
   Acting Principal
   College of Nursing
   Ampara.

2. Sriwardena (Mrs.)
   Director, Nursing Education,
   Ministry of Health,
   "Suwasiripaya"
   Colombo 10.

3. Indranee (Mrs.)
   Acting Warden,
   College of Nursing,
   Ampara.

4. Anil. (Mr.)
Management Assistant
College of Nursing,
Ampara.

5. Anjan (Mr.)
College of Nursing,
Ampara

6. Honourable Attorney General,
Attorney General's Chambers,
Colombo 12.

Respondents

BEFORE: **B.P.ALUWIHARE, PC, J,**
SISIRA J. DE ABREW, J, &
UPALY ABEYRATHNE, J.

COUNSEL: A.Mohamed Farook with S.Manasudeen for the Petitioner

Dr. Avanti Perera, SSC for the Respondents.

ARGUED ON: 18.11.2016

DECIDED ON: 04.08.2017

ALUWIHARE, PC, J:

A preliminary objection was raised on behalf of the Hon. Attorney General when this matter was taken up for support,

It was pointed out that the Petition was not in compliance with Rule 44 (i) (d) of the Supreme Court Rules in that the prayer did not specify the relief (sought by the Petitioner) for granting of leave to proceed in the first instance.

Petitioner herself had invoked the epistolary jurisdiction of this court by filing a complaint dated 7th April, 2014, addressed to the Hon. Chief Justice. When this matter was mentioned on 4th August, 2014, the Petitioner was represented by her counsel of choice. The court directed the learned counsel to file formal papers, that is the Petition and an Affidavit. Thereafter, this court granted the learned Counsel several dates to file papers and the matter was fixed for support on 20th January, 2015. Even on the 20th January, 2015 no petition was available to the court and the learned counsel had made submissions based on the original complaint dated 7th April, 2014.

The Hon. Attorney General had not been cited as a Respondent in the original complaint, the Hon. Attorney General appeared as amicus. On that date, the court made certain observations with regard to resolving this matter and the Senior State Counsel undertook to convey the observations of the court to the Ministry of Health. On the 1st December, 2015 both, the counsel for the Petitioner and the learned Senior State Counsel informed the court that the

matter cannot be resolved and accordingly was fixed for support for the 11th February, 2016 and thereafter on 26th April, 2016.

It appears that a fresh Petition dated 9th September 2014 and an Affidavit had been filed by the Attorney-at-Law for the Petitioner. The said documents, however had not been available to the judges and as a result the Attorney-at-Law for the Petitioner by his letter dated 10th August, 2015 to the Registrar had requested that the Petition and Affidavit filed on behalf of the Petitioner be included in the briefs and the docket.

When the matter came up on 26th April, 2016, the learned counsel for the Petitioner sought to support the Petition and affidavit filed on 9th September, 2014 and the preliminary objection was raised in relation to the same.

It was argued on behalf of the Respondents that, the directive of this court of 4th August, 2014 was to afford an opportunity to the Petitioner to regularise her application by filing the requisite documents in conformity with Rule 44 (1) of the Supreme Court Rules.

The Petitioner availing herself of the opportunity afforded, had filed a petition and affidavit through her Attorney-at-Law. Further, she was represented by her counsel at the hearings of this case.

The learned Senior State Counsel pointed out that, in this backdrop, the regular Application which had been filed under and in terms of Articles 17 and 126 of the Constitution should be in compliance with all applicable laws, rules and procedures and should bear no irregularities and drew the attention of this court to Rule 44 (1) of the Supreme Court Rules.

The Rule 44 (1) (d) stipulates:

> "Shall specify in such Petition the relief or redress prayed for, including the grant of leave to proceed in the first instance."

In the prayer to the petition, it is prayed for certain reliefs, but had failed to advert to the alleged violations under the Chapter III of the Constitution.

It was the submission of the learned Senior State counsel that this court cannot consider granting of leave to proceed as the Petitioner had failed to specify the fundamental right or the rights the Respondents alleged to have infringed and to that extent Rule 44 (1) (d) is a mandatory provision. As referred to earlier, the Attorney-at-Law for the Petitioner had been afforded more than one occasion to have a regular application filed.

The learned Senior State Counsel further pointed out that the Supreme Court Rules provides for invoking epistolary jurisdiction. Rule 44 (7) (a) specifically provides for entertaining such complaints if it appears to the Judge to whom it is referred for consideration, that the complaint discloses an infringement of the fundamental right and in such event the judge can direct such complaint be treated as a Petition in writing under and in terms of Article 126 (2), notwithstanding non-compliance with any of the applicable Rules.

In terms of the same Rule, a further direction can be given by the Judge who considers the complaint to refer the matter to the Legal Aid Commission or to any Attorney-at-Law who is a member of any panel or organization established for

such purpose, for the purpose of enabling the preparation and submission of an amended Petition, Affidavit, documents, written submissions and other material in clarification and support of such complaint.

It is significant to note that the said Rule further states that "**the complaint thereupon be deemed to be the Petition filed in the Supreme Court** on the date on which the complaint was received". (Emphasis added)

In the present case the counsel for the Petitioner was permitted to avail himself of the above Rule and the Attorney-at-Law for the Petitioner had filed a Petition and an affidavit.

In response to the preliminary objection raised by the Respondents, it was submitted on behalf of the Petitioner, that the present application is not subject to the ordinary rules as the application originated through a complaint to this Court and should be considered as a special matter and differ from regular applications. The Petitioner had submitted further that Rule 44 (1) of S.C. Rules is not mandatory, but only directory and had referred to the decision in *SC Appeal 172/2011 Leelawathie Manike Vs. Dharmasinghe Bandara and another,* where this court remarked that "Rules should not obstruct the path of justice."

I wish however to rely on the pronouncement made by Justice Dr. Amarasinghe in the case of *Fernando v Sybil Fernando 1997 (3) S.L.R* page1, wherein Justice Amarasinghe, signifying the importance of procedural law, stated:

> *"There is the substantive law and there is the procedural law. Procedural law is not secondary: The two branches are complementary. The maxim ubi ius, 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."

It was the submission of the learned Senior State Counsel that when the fresh Petition was filed by the Attorney-at-law for the Petitioner, it no longer can be treated as an informal complaint which attracts the first part of Rule 44 (7).

It was further submitted that when such permission was granted to file a fresh Petition, he was expected to act with due diligence and was required to comply with the applicable Rules and therefore the prayer to the Petition should have specified the threshold relief or redress including the grant of leave to proceed in the first instance, in terms of Rule 44(1)(d) of the Supreme Court Rules.

I am of the view that, the compliance with the Rule referred to is mandatory and the Petition filed on behalf of the Petitioner dated 9th September, 2014 is defective for the reasons set out above. The Petitioner had failed to offer any explanation nor has the Petitioner averred any reasons for the default.

I am of the view that even in instances where the epistolary jurisdiction of this Court is invoked, once the court grants permission to formalize the documents, parties are required to comply with the applicable rules and procedure.

I hold that there is no valid Petition before this Court and I uphold the preliminary objection raised on behalf of the Respondents.

Accordingly, I dismiss the application *in limine*.

JUDGE OF THE SUPREME COURT

JUSTICE SISIRA J. DE ABREW

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE UPALY ABEYTRATHNE

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 Special Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. Spl. LA Application No :66/2017

CA Appeal No: 104/2012

HC(Kandy) No: 248/2004

1. Billingahawattegedara Karunaratne alias Raja
   Presently at Welikada Prisons
   1ST ACCUSED- APPELLANT – PETITIONER

-Vs-

Hon. Attorney General
Attorney General's Department
Colombo 12.
COMPLAINANT-RESPONDENT-RESPONDENT

BEFORE : Sisira J. de Abrew, J.
Priyantha Jayawardena, PC, J. and
Nalin Perera, J.

COUNSEL : Barana Gayan Perera for the 1st Accused-Appellant-Petitioner.

Harippriya Jayasundera, DSG, for the Attorney General.

ARGUED&
DECIDED ON : 05.12.2017

Sisira J. de Abrew, J.

Heard both Counsel in support of their respective cases.

Learned Counsel appearing for the Accused-Appellant-Petitioner raises a following question of law:-

Has the Court of Appeal failed to consider the defence case?

We have perused the judgment of the Court of Appeal and we find that the written submissions filed by the Attorney General have been reproduced from word to word in the judgment. Thereafter Her Ladyship has written two sentences affirming the conviction and the sentence. We therefore, hold that the Court of Appeal has failed to consider the Appellant's case and severe prejudice has been caused to the Accused-Appellant in this case.

In our view, when the Appellate Court considers an appeal it becomes the sacred duty of that Court to consider arguments for both sides. When the Appellate Court reproduces the written submissions filed by the Attorney General and writes a few sentences affirming the conviction, (the Appellate Court) fails to perform its sacred duty.

It is not the duty of the Court of Appeal to reproduce the written submissions filed by one party in the judgment and give the judgment in favour of the party who filed written submissions. The Court

of Appeal in this case after reproducing the written submissions filed by the Attorney General in its judgment, has dismissed the appeal.

In these circumstances, we answer the above questions of law in the affirmative.

In our view the judgment of the Court of Appeal cannot be permitted to stand. We therefore set aside the judgment of the Court of Appeal and direct the Court of Appeal to re-hear the case by a different Bench.

Registrar of this Court is directed to send a copy of the judgment to both Judges who wrote the judgment and also to the Registrar of the Court of Appeal for their information.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, 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

In the matter of an Application made under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka for Special Leave to Appeal against Judgment dated 19th June of 2015 of the Honourable Court of Appeal.

SC SPL LA No: 133/2015
Application No. CA(Writ) 603/2008

1. **A.A. Gunawardane**
   B 1/1, Jathika Mahal Niwasa
   Pamankada Road,
   Kirulapone,
   Colombo 06

2. **M.P. Perera**
   B 2/2 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

3. **R.E.D Amarasena**
   B 1/2 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

4. **P.H. Wimalasiri**
   B 3/1 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

5. **N.A. Illukpitiya**
   B 2/1 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

Complainants

Vs.

S.J. Sirisena
BG 1 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,

Colombo 06

Respondent

AND THEN

In the matter of an application for a mandate or a writ in the nature of a writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.J. Sirisena
BG 1 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,
Colombo 06

Respondent-Petitioner

Vs.

1. **A.A. Gunawardane**
   B 1/1, Jathika Mahal Niwasa
   Pamankada Road,
   Kirulapone,
   Colombo 06

1st Complainant-Respondent

2. **Mrs. Dombagahawattage Nandwathie Perera**
   B 2/2 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

2nd Respondent

3. **R.E.D Amarasena**
   B 1/2 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

3rd Complainant-Respondent

4. **P.H. Wimalasiri**
   B 3/1 Jathika Mahal Niwasa,
   Pamankada Road,

Kirulapone,
Colombo 06

4th Complainant-Respondent

5. **N.A. Illukpitiya**
   B 2/1 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

5th Complainant-Respondent

6. **Condominium Management Authority**
   First Floor, National Housing Department Building,
   Sir Chittampalam A. Gardiner Mawatha,
   Colombo 02

6th Respondent

AND NOW BETWEEN

S.J. Sirisena
BG 1 Jathika Mahal Niwasa,
Pamankada Road,
Kirulapone,
Colombo 06

Respondent – Petitioner-Petitioner

Vs.

1. **A.A. Gunawardane**
   B 1/1, Jathika Mahal Niwasa
   Pamankada Road,
   Kirulapone,
   Colombo 06

1st Complainant-Respondent-Respondent

2. **Mrs. Dombagahawattage Nandwathie Perera**
   B 2/2 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

2nd Respondent-Respondent

3. **R.E.D Amarasena**
   B 1/2 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

3rd Complainant-Respondent-Respondent

4. **P.H. Wimalasiri**
   B 3/1 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

4th Complainant-Respondent-Respondent

5. **N.A. Illukpitiya**
   B 2/1 Jathika Mahal Niwasa,
   Pamankada Road,
   Kirulapone,
   Colombo 06

5th Complainant-Respondent-Respondent

6. **Condominium Management Authority**
   First Floor, National Housing Department Building,
   Sir Chittampalam A. Gardiner Mawatha,
   Colombo 02

6th Respondent – Respondent

BEFORE: Priyasath Dep PC, CJ
Priyantha Jayawardena PC, J
Upaly Abeyrathne, J

COUNSEL: Ikram Mohamed, PC with Roshan Hettiarachchi and Nilanga Udalagama for the Respondent-Petitioner-Petitioner

Rajeev Amarasuriya for the 1st and 3rd Complainants-Respondents-Respondents

ARGUED ON: 29th May, 2017

DECIDED ON: 2nd August, 2017

Priyantha Jayawardena PC, J

The Respondent-Petitioner-Petitioner (hereinafter referred to as 'the Petitioner') filed an Application in the Court of Appeal seeking a Writ of Certiorari to quash an Order made by the Condominium Management Authority stating inter-alia that the actions of the Condominium Authority were ultra vires and that the said Order was arbitrary, unjust and in violation of the principles of natural justice.

The Court of Appeal delivered its Judgment, dismissing the application of the Petitioner. The Petitioner being aggrieved by the Judgment preferred an application for Leave to Appeal to this Court. When the matter was taken up for support, the following preliminary objections were raised by the 1st and 3rd Complainant-Respondent-Respondents (hereinafter referred to as 'the Respondents') and moved for the dismissal of the Application in limine:

(i) the Petitioner had not complied with Rules 8(3) and 40 of the Supreme Court Rules of 1990 (hereinafter referred to as the 'Supreme Court Rules'); and

(ii) the jurat of the supporting affidavit was defective thus there was no proper Leave to Appeal Application before Court.

Non-compliance with Rules 8(3) and 40 of the Supreme Court Rules

Raising the first preliminary objection, the Respondents submitted that the Court of Appeal delivered its judgment on 19th June, 2015. The last date to file the Special Leave to Appeal Application was on 31st July, 2015. On 30th July 2015, the Petitioner filed his Petition, affidavit and annexed documents but failed to file the required number of notices as mandated by Rules 8(3) and 40 of the Supreme Court Rules. Therefore, the Leave to Appeal Application should be dismissed in limine due to non-compliance with the said Rules.

In support of their argument, the Respondents cited the case of *Hon. A.H.M Fowzie and 2 Others v Vehicles Lanka (Private) Limited* (2008) BLR 127; where the Petitioners had tendered the notices to the Registry of the Supreme Court seven working days after filing the Leave to Appeal Application. The Court held that non-compliance with Rule 8(3) was fatal and did not amount to a technical objection.

The Respondents further submitted that in *Kumarapatti Pathrannehelage Namal Rohitha Peiris and One Other v Kumarapatti Pathiranalage Freeda Doreen Peiris (after marriage Gunathilaka*) (2015) BLR 101; the required notices were tendered 24 days after the filing of the Petition and the affidavit. As the appeal period had expired by the time the required notices were filed, the Court held that the Defendant had failed to invoke the jurisdiction of the Court during the appealable period.

In response to the said objections, the Petitioner submitted that the Petition was filed on 30th July, 2015 and the notices were filed on 7th August, 2015. As the 31st of July was the Esala Full Moon Poya Day and the 1st and 2nd of August, 2015 fell on a Saturday and Sunday, the delay in filing was minimal.

Further, the 1st and 3rd Respondents filed Proxy, Caveat and motions dated 22nd August, 2015 without raising any objections to the maintainability of the Leave to Appeal Application and the objection regarding non-compliance was only raised on 15th June, 2016. Consequently, it was contended that an inordinate delay did not occur in filing the notices and all Respondents had adequate time and notice to prepare to object to the application by the Petitioner. The Petitioner further submitted that there was substantial compliance with the Supreme Court Rules and in any event, raising the objection on the date of support amounted to acquiescence.

Moreover, the Respondents had not been prejudiced in any way by the failure to file the required number of notices along with the Petition and the smooth functioning of the Court had not been interrupted. It was further contended that the non-compliance was of a mere technical nature and the Courts can exercise discretion to entertain the said Leave to Appeal Application. The Petitioner supported his contention by referring to Abraham CJ in *Velupille v Chairman Urban Council Jaffna* 39 NLR 434 who observed, "This is a Court of Law. Not an academy of law".

It was also submitted that in *Dissanayake Mudiyanselage Senarath Bandara Dissanayaka v Muthukuda Wijesuriya Arachchige Jayantha Nishantha Wijesuriya* SC (LA) Application No 74/2016 (SC Minutes dated 01/04/2016), the question of whether service of the notice on the Respondent's earlier address amounted to non-compliance with Rule 8 of the Supreme Court Rules. The Court held that such a preliminary objection amounted to a technical objection. The Court followed the reasoning of His Lordship G.P.S. De Silva, CJ's observation in *Colgan and Others v Udeshi and Others* (1996) 2 SLR 220 wherein his Lordship stated, "[the] Court should not be fettered with technical objections."

Was Non-Compliance with Rules 8(3) and 40 of the Supreme Court Rules Fatal to the Leave to Appeal Application?

Article 136 of the Constitution states:

"(1) Subject to the provisions of the Constitution and of any law the Chief Justice with any three judges of the Supreme Court nominated by him, may, from to time, make rules regulating generally the practice and procedure of the Court including –

(a) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of such appeals for non-compliance with such rules;
(b) rules as to the proceedings in the Supreme Court and the Court of Appeal in the exercise of several jurisdictions conferred on such Courts by the Constitution or by any law, including the time within which such matters may be instituted or brought before such courts and the dismissal of such matters for non-compliance with such rules;
(c) rules as to the granting of bail…"

Rule 8(3) of the Supreme Court Rules states as follows:

> "The Petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and address of the parties…., and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars." [Emphasis added]

Further, Rule 40 of the Supreme Court Rules provides the following:

> "An application for variation or an extension of time in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single judge, nominated by the Chief Justice, in Chambers:
>
> (a) tendering notices as required by rules 8(3) and 25(2);
> (b) deposit of brief fees as required by rules 16(5) or 27(5);
> (c) filing written submissions as required by rule 30;
> (d) furnishing the address of a respondent as required by rules 8(5) and 27(3);
> (e) filing counter-affidavits and submissions as required by rule 45;
> (f) furnishing material as required by rule 38."

A careful consideration of these Rules shows that a failure to comply with Rule 8(3) does not automatically debar a litigant from presenting his case in court. Rule 40 has conferred a discretion on the Court to allow a litigant to present his case upon considering the circumstances of individual cases. I am of the opinion that if there is substantial compliance with the Supreme Court Rules, an application shall be entertained by Court.

In this regard, I am also of the opinion that the Supreme Court Rules should be considered as a whole and each Rule should not be considered in isolation. The Supreme Court Rules stipulate the procedure for hearing appeals, other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of appeals if non-compliant with the Rules.

It is clear that the primary purpose of the Rules is to ensure the smooth functioning of the administration of justice. In this context, it is necessary to consider whether non-compliance with the Rules has adversely affected the functioning of justice and also whether any party to a case had been adversely affected by non-compliance with Rules.

I will now consider how the discretion of Court should be exercised in the instant Application. The last date to file the application for Leave to Appeal was on 31st July, 2015 and the Application for Leave had been filed on Thursday, 30th July, 2015 without the required number of notices. However, the notices were filed at the Registry on 7th August, 2015 and thus outside the six week time limit granted to file a Leave Application. Consideration must be given to the length of the delay in this instance. Since the 31st of July was the Esala Full Moon Poya Day

and the 1st and 2nd of August were Saturday and Sunday, the delay in filing the required notices was only 5 working days.

Access to Justice

The Magna Carta has long been considered the foundation stone of civil liberties. Its influence has been far ranging and has even extended to the Universal Declaration of Human Rights. Clause 40 of the Magna Carta, as extracted from the British Library's English translation, states;

> "To no one will we sell, to no one deny or delay right or justice."

Evidently, the principle of access to justice has been recognised since 1215. As litigants are the most important element in the court system, access to justice should not be denied due to mere technicalities. Since the role of the Court is to administer justice, technicalities should not obstruct the Court from fulfilling its role and resolving disputes between litigants.

In the case of *Mackinnon Mackenzie & Co v Grindlays Bank* (1986) 2 SLR 272, Chief Justice Sharvananda held:

> "All rules of court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and subordinate to that purpose."

N S Bindra's Interpretation of Statutes, Ninth Edition, distinguishes between the rules of construction applying to laws relating to substantive rights and laws relating to procedure. It provides:

> "Rules of procedure are not by themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve justice and are not hurdles to obstruct the pathway to justice. … The reason is obvious: procedure is a means to subserve and not rule the cause of justice."

It is also important to note that the Court is entitled to act *ex mero motu*, in terms of Rule 40, to reject an application for non-compliance with Rules. However, in this instance, the Court had not taken such a course of action.

As the final date granted to file the Petition i.e. the 31st of July, fell on a Poya day the Petitioner had filed on Thursday, 30th July 2015. 1st and 2nd of August had been Saturday and Sunday. The Petitioner had filed the required number of notices on the 5th working day. I am of the opinion that the cases cited by the Respondent in support of their objection have no application to the instant Application.

Following due consideration of all the facts and circumstances of the instant Application and the intervening public holidays between the filing of the Petition and the filing of the required notices, I am of the opinion that there was substantial compliance by the Petitioners with Rule 8(3) of the Supreme Court Rules.

In the interest of justice, I will also consider whether the Respondents have followed the procedure set out in the Supreme Court Rules in raising the said objection.

Have the Respondents Followed Proper Procedure for Raising the Aforementioned Preliminary Objection?

Rule 10(1) of the Supreme Court Rules states as follows:

> "A single Judge of the Supreme Court, sitting in Chambers, may refuse to entertain any application for special leave to appeal on the ground that it discloses no reasonable cause of appeal, or is frivolous or vexatious, or contains scandalous matter, or is preferred merely for the purpose of causing delay, or that such application does not comply with these rules." [Emphasis added]

Rule 10(1) stipulates the consequences of non-compliance with the Supreme Court Rules. I am of the view that the correct procedure for raising an objection of non-compliance of the Supreme Court Rules is to move the Court by filing a motion seeking for the rejection of the application. However, in this instance, the Respondents had failed to invoke the Rule 10(1) prior to raising the preliminary objection. Thus, the Respondents are not entitled to raise the said preliminary objection at a later stage.

For the reasons enumerated above, I overrule the aforementioned preliminary objection.

Validity of the Affidavit

The Respondent submitted that the Judgement of the Court of Appeal had been delivered on 19th June, 2015. The jurat of the affidavit filed along with the Petition on 30th July, 2015 stated that it was signed on 29th April, 2015. Thus, the Petition was not accompanied with a valid affidavit.

As per Rule 6, if an application contains allegations of fact that cannot be verified by reference to the Court of Appeal Judgment, an affidavit is mandatory. The failure to file a valid affidavit means that the application was not properly constituted and the Application should be dismissed in limine.

Responding to the above objection, the Petitioner submitted that the date of the impugned judgment i.e. 19th June, 2015 was correctly identified in the body of the affidavit although the date of affirmation in the jurat had been typed as 29th April, 2015. It was also submitted that the incorrect date in the affidavit was a typographic error and that Section 12(3) of Oaths and Affirmations Ordinance, places the duty on the Justice of the Peace to ensure that the jurat was correct.

It was further submitted that in terms of Rule 6, the present application may still proceed without an affidavit as the Leave to Appeal Application can be supported by reference to the Court of Appeal Judgment annexed to the Petition.

Is the Affidavit Not Valid Under the Law?

Rule 2 of the Supreme Court Rules states:

> "Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the Registry, together with affidavits and documents in support thereof as prescribed by Rule 6, and a

certified copy, or uncertified photocopy, of the judgment or order in respect of which leave to appeal is sought…"

Rule 6 further provides as follows:

"Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special 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 recognised agent, or by any other person having personal knowledge of such fact. …"

The Petition states, "On this 29th day of July, 2015" whereas the jurat of the accompanying affidavit states:

"Having read over and explained to the above Affirmant, affirmed to and signed in Colombo on this 29th day of April, 2015".

Paragraph 7 of the affidavit further states:

"I state that the Honourable Court of Appeal delivered its Judgment on 19th June, 2015 dismissing my application with costs fixed at Rs. 25,000, a Certified copy of which is filed herewith marked 'X9' and pleaded part and parcel of the Petition and Affidavit."

The objection in respect of the error in the jurat shall be considered in light of the relevant provisions of the Oaths and Affirmations Ordinance No. 09 of 1985. Section 9 of the Oaths and Affirmations Ordinance stipulates as follows:

"No omission to take any oath or make any affirmation, no substitution of anyone for any other of them and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

Furthermore, Section 12(3) of the Oaths and Affirmations Ordinance provides as follows:

"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 or taken."

It is clear that Sections 9 and 12(3) of the Oaths and Affirmations Ordinance when read together stipulate how to consider the contents of an affidavit, including the errors and omissions made by a Justice of the Peace.

In the case of *Kanagasabai v Kirupamoorthy* 62 NLR 54 it was held that it is the duty of Judges, Justices of the Peace and Proctors to ensure that affidavits are in compliance with the relevant provisions of the Civil Procedure Code. The Court further held that the duty rests upon the Justice of The Peace before whom an affidavit is sworn to ensure that the jurat is correct.

Further, in *M. Tudor Danister Anthony Fernando v Rankiri Hettiarachchige Fredie Perera* (2017) 1 Hulftsdorp Law Journal issued by the Colombo Law Society 243, the facts involved a mistake in the jurat where a Christian had affirmed the contents of the affidavit. The Court observed the following:

> "What is essential in an affidavit is to state that the person who is stating the facts therein does so after taking an oath or affirmation as an affidavit is considered as evidence in law. Therefore, it is necessary to show that the person who swears or affirms the facts stated in the affidavit did so before a competent authority or a person. For this reason the place of swearing or affirmation, the date on which the affidavit was signed are essential parts of the jurat."

I am of the opinion that a jurat is an integral part of the affidavit and it cannot be considered in isolation. An affidavit should be considered in its totality. The Petitioner's submission that the date referred to in the jurat is a typographical error is evidenced by the correct reference to the date of the judgment in the body of the affidavit and the date of the Petition filed in Court and its averments. It is quite evident from a comparison of the date of the Petition and the jurat. The Petition is dated 25th of July, 2015 and the jurat states 25th of April, 2015.

Considering the totality of the pleadings filed in Court, I am of the opinion that the error pertaining to the month in the jurat is a typographical error. Therefore, although the date on which an affidavit was signed is an integral part of the affidavit, a mere typographical error should not render an affidavit invalid.

Upon consideration of the totality of the pleadings filed in Court, I am of the opinion that there is a valid affidavit in terms of the Oaths and Affirmations Ordinance.

For the aforesaid reasons, I overrule the Respondents' objections.

I order no costs.

Judge of the Supreme Court

Priyasath Dep PC, CJ — Chief Justice of the Supreme Court

I agree

Upaly Abeyrathne, J — Judge of the Supreme Court

I agree

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

SC/Spl/LA 188/2015

In the matter of an application for Special Leave to Appeal or Revision against the order dated 13.08.2015 of the Provincial High Court of Panadura arising from S.18A of the Rent Act No.7 of 1972 as amended.

L. S. Weerakone
of No.178, Batadobatuduwa Road,
Alubomulla.

Applicant-Owner

Vs.

P.T.Weerakoon
of No.308, "Florance"
Batadobaguduwa Road,
Alubomulla.

Tenant-Respondent

AND BETWEEN

P. T. Weerakoon
of No.308, "Florence"
Batadobatuduwa Road,
Alubomulla.

Tenant-Respondent-Petitioner

Vs.

1. L. S. Weerakoon
No.178, Batadobatuduwa
Road, Alubomulla

Applicant-Owner-respondent

2.Mrs.G.Lekha Geethanjali Perera
of No.89, Kaduwela Road,
Battaramulla.

Former Western Province Housing Commissioner-Respondent

3.Mrs. P. H. Colombage
Of dNo.89, Kaduwela Road
Battaramulla.

Substituted Former Western Province Housing Comissioner-Respondent-Respondent

AND NOW BETWEEN

P. T. Weerakoon
of No.308, "Florance"
Batadombaguduwa Road,
Alubomulla.
Tenant-Respondent-Petitioner-Petitioner
Vs.

1 .L. S. Weerakoon
of No.178
Batadobatuduwa Road,
Alubomulla.

Applicant-Owner-Respondent-Respondent

2. Mrs.G.Lekha Geethanjali Perera
of No.89, Kaduwela Road,
Battaramulla.

Former Western Province Housing Commissioner-Respondent

3.Mrs. P. H. Colombage
Of dNo.89, Kaduwela Road
Battaramulla.

Present Western Province Housing Commissioner-Respondent-Respondent

BEFORE: **B.P.ALUWIHARE, PC., J**
UPALY ABEYRATHNE, J &
ANIL GOONARATNE, j

COUNSEL: Rohana Jayawardana for the Respondent-Petitioner-Petitioner
C. J. Ladduwahetty with Keerthi Gunawardena instructed by Lakini Silva for the Owner-Respondent-Respondent.
Rajitha Perera SSC for the 3rd Commissioner Respondent-Respondent.

ARGUED ON: 18.07.2016

DECIDED ON: 03.08.2017

ALUWIHARE P.C, J:

When this matter came up for support on 18th July,2016, the learned Counsel for the Applicant-owner-Respondent-Respondent (hereinafter referred to as the Respondent) raised the following preliminary objection.

(a) The Tenant-Respondent-Petitioner-Petitioner (hereinafter referred as the Petitioner) has filed this application for special Leave to Appeal or Revision in the Supreme Court without availing himself of the right of appeal provided in section 11(1) of the Court of Appeal (Procedure for Appeals from High Court) Rules 1988.
In the circumstances the Petitioner cannot come to the Supreme Court without first availing himself of the right of appeal given in section 11 (1) of the said Rules.

(b) The Petitioner is seeking Special Leave to Appeal or Revision to the Supreme Court from an order made in a Writ application by the Learned High Court of Panadura established under article 154P(4) of the Constitution.

Tenant-Respondent-Petitioner-Petitioner (hereinafter referred to as the Petitioner) has filed an application for Special Leave to Appeal or Revision against an order of the Provincial High Court of Panadura (hereinafter referred to as the High Court).

The Petitioner sought from the High Court a writ of certiorari, invoking the jurisdiction of the High Court under Article 140 of the Constitution read with Section 7 of the High Court of the Provinces (Special Provision) Act no. 19 of 1990 as amended.

The learned High Court Judge having considered the material furnished and after hearing the submissions of the Counsel for Petitioner, by his considered order dated 13th August, 2015 refused to have notices issued on the Respondents cited.

Aggrieved by the said order of the Learned High Court Judge, the Petitioner has filed the present application before this Court.

In supporting the preliminary objection, the learned Counsel for the Respondent drew the attention of Court to Section 11 (1) of the High Court of Provinces (Special Provisions) Act No.19 of 1990.

The said Section reads thus:-

"The Court of Appeal shall have and exercise, subject to the provisions of this Act or any other law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any High Court established by Article 154P of the Constitution in the exercise of its jurisdiction under paragraph (3)(a), or (4) of Article 154P of the Constitution 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 may have taken cognizance;
Provided that, no judgment, decree or order of any such High Court, shall be reversed or varied on account of any error, defect, or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

It is clear that in terms of Section 11 of the said Act, the Court of Appeal is vested with appellate jurisdiction for correction of all errors in fact and the law which are committed by any High Court in the exercise of its jurisdiction under paragraph 4 of Article 154 (P) of the Constitution.

Paragraph (4) of Article 154 (P) states:

Every such High Court shall have jurisdiction to issue, according to law-

(a) orders in the nature of *habeas corpus,* in respect of persons illegally detained within the Province; and

(b) order in the nature of writs of *certiorari, prohibition, procedendo, mandamus* and *quo warranto* against any person exercising, within the Province, any power under –

(i) any law; or

(ii) any statutes made by the Provincial Council established for that Province.

in respects of any matter set out in the Provincial Council List.

Further, complimenting the statutory provisions referred to above, Supreme Court Rules applicable to the Court of Appeal {(Procedure for Appeals from High Court) Rules 1988} spells out the mode of preferring appeals to the Court of Appeal.

"PART II" of the said Rules states:-
"Appeals from an order made by a High Court in the exercise of its jurisdiction under Article 154 (4) of the Constitution, **may prefer an appeal to the Court of Appeal against such order for any error in fact or in law."**

Thus the Petitioner cannot invoke the jurisdiction of this court not having first exercised his right of appeal to the Court of Appeal.

Considering the above, I am of the view that this application is misconceived in law and cannot be maintained. Accordingly, I uphold the preliminary objections raised on behalf of the Respondent and dismiss the application in limine.

In the circumstances of the case I make no order with regard to costs.

Application dismissed

JUDGE OF THE SUPREME COURT.

UPALY ABEYRATHNE, 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 under the provisions of section 5 of the Industrial Disputes Act No. 32 of 1990.

D.S.Aaron Senarath
P.O.Box 02, Maskeliya

Applicant-Appellant-Petitioner

SC. SPL/LA No. 231/2015

Vs.

H.C.Case No. 10/94/2009
LT HCNE 06/2014

1. The Manager
   Moray Estate, Maskeliya.

2. Maskeliya Plantations Limited,
   No. 310, High Level Road
   Nawinna, Maraharagama.

Respondents-Respondents-Respondents

Before	:	Priyasath Dep, PC, J Upaly Abeyrathne, J K.T. Chitrasiri, J
Counsel	:	J.C. Boange for the Applicant-Appellant-Petitioner Suren Fernando for the Respondent-Respondent-Respondent
Argued on	:	01.04.2016
Decided on	:	19.01.2017

Priyasath Dep P.C., J.

The Applicant-Appellant-Petitioner (hereinafter referred to as the "Petitioner") filed this Application dated 12th November 2015 seeking Leave to Appeal to set aside the judgment dated 6th October 2015 of the Provincial High Court of Central Province held in Nuwara Eliya in Case No. LT HCNE 06/2014 and the Order dated 3rd April 2015 of the Labour Tribunal of Hatton in Case No.10/94/2014

The Applicant-Appellant- Petitioner filed an Application in the Labour Tribunal alleging that the termination of his services by the Respondent –Respondent –Respondent (hereinafter referred to as "Respondent") was unlawful and unjust. The Labour Tribunal after an inquiry held that the Applicant was guilty of misconduct and the termination of his services both lawful and just. The Applicant appealed against the order to the High Court and the High Court dismissed the appeal and affirmed the order of the Labour Tribunal. The present leave to appeal application was filed against the judgment of the High Court.

When this matter was taken up for support on 10th February 2016, the learned Counsel for the Respondent raised two preliminary objections on the basis that the Petition has not been filed in compliance with the Supreme Court Rules 1990, in particular, Rule 2 read with Rules 6 and 34 (relating to the failure to file material documents) and that the purported application was futile as no substantive relief had been sought from the Supreme Court. The learned Counsel for the Respondent moved that the Application be dismissed in limine for failure to comply with the mandatory Rules of the Supreme Court.

The learned Counsel for the Petitioner sought time to consider the said objections. The Petitioner subsequently by a motion dated 29th February 2016 filed proceedings of the Provincial High Court which included proceedings/evidence of the Labour Tribunal. The motion dated 29th February 2016 acknowledged the fact that the Respondent had already raised a preliminary objection.

When this Application was taken up for support on 1st of April 2016 the learned Counsel for the Respondent raised the following preliminary objections:

1) The Petitioner has failed to comply with the Rule Nos. 2, 6 and 34 of the Supreme Court Rules 1990, as he failed to tender along with the Petition any of the proceedings before the Labour Tribunal with the relevant material and failed to seek permission of the Supreme Court to tender the proceedings subsequently.

2) The Application to the Supreme Court is futile as the prayer only seeks to set aside the Order of the Labour Tribunal and the Judgment of the High Court and does not seek any substantial relief from the Supreme Court.

The learned Counsel for the Petitioner submitted that the 'material documents including the record of the lower court which had not been tendered with the Petition , were not required for him to support the application, since he is now seeking leave only on the question of law set out in paragraph 11(b) of the Petition. In other words he has abandoned the question of law set out in paragraph 11(a).

The Court directed the parties to file written submissions and both parties had tendered comprehensive written submissions.

The Petitioner sought leave to appeal from the Provincial High Court to the Supreme Court, as provided by section 31DD (1) and (2) of the Industrial Disputes Act as amended.

Section 31DD (1) of the Industrial Disputes Act states:

"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"

The learned Counsel for the Respondent submitted that in practice, the Supreme Court apply the Supreme Court Rules of 1990 to applications for Leave to Appeal from the High Court to the Supreme Court. He further submitted that when filing a Petition of Appeal in the Supreme Court, there is an obligation on the part of the Petitioner to comply with the Supreme Court Rules of 1990.

It is the contention of the learned Counsel for the Respondent that in paragraph 5 (a), (b), (c),(d),(e), (g), (h), (i),(j), (l), (m), (n), (o), (p), (q), (r) and paragraph 8,7 and 9 of the Petition, the Petitioner is challenging the order of the Learned President of the Labour Tribunal based on the proceedings/evidence led before the Labour Tribunal. The errors of law alleged by the Petitioner are in respect of errors of law in assessing and evaluating the evidence. Therefore, it is imperative that the Petitioner should have annexed the record/proceedings of the Labour Tribunal.

It is the position of the Respondent that without examining and analyzing the evidence the Supreme Court will not be in a position to answer the questions of law set out in paragraph 11 of the Petition, or even to determine whether a prima facie case warranting the grant of leave to appeal, has been made out.

The Respondent moved for the dismissal of the leave to appeal application for non-compliance with Rules 2 and 6 of the Supreme Court Rules 1990, which makes mandatory the filing of material relevant to the case.

Rule 2 of the Supreme Court Rules of 1990 reads thus:

"Every Application for Special Leave to Appeal to the Supreme Court shall be made by a petition in that behalf lodged at the Registry together with affidavits and documents in

support thereof as prescribed by rule 6, and a certified copy, or certified photocopy, of the judgment or order in respect of which leave to appeal is sought. Three additional copies of such petition, affidavits, documents and judgment or order shall also be filed; Provided that if the petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this rule to be tendered with his petition, he shall set out the circumstances in his petition and shall pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same. If the Court is satisfied that the Petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstance beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this rule."

The learned Counsel for the Respondent submitted that in terms of Rule 2 of the Supreme Court Rules 1990 if it is proved that a default was due to circumstances beyond the Petitioner's control, but not otherwise that he shall be deemed to have complied with the provisions of this rule.

The learned Counsel for the Respondent cited the cases of Ceylon Electricity Board and others v. Ranjith Fonseka (2008) 1 Sri.L.R.337 and Annamalai Chettiar Muthapan Chettiar vs Karunanayake and another (S.C. Appeal 69/2003, SC Minutes of 06.06.2005) where the Supreme Court insisted on strict compliance of the rules and dismissed the said applications for non compliance of the Supreme Court Rules.

In Kiriwantha Vs.Navaratna 1990(2) Sri. L.R. 393 a Judgment-dealing with the Court of Appeal Rules 1990, Fernando J. held that:

"The weight of authority thus favors the view that while these Rules (Rules 46, 47, 49, 35) must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non- compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation therefore in the context of the object of the particular Rule"

.

The learned Counsel for the Respondent submitted that the Petitioner has failed to annex material documents, he has failed to give any reason for his default and also he has failed to seek permission in the Petition to obtain and file them later.

The learned Counsel for the Respondent further submitted that the application filed by the Petitioner is a futile application. The Petitioner though prayed for the setting aside of the judgments in the Labour Tribunal and the High Court did not seek the relief prayed for in the Labour Tribunal to award him compensation. Therefore, even if the Supreme Court sets aside the judgment of the Provincial High Court and the order of the Labour Tribunal, the Petitioner will not be entitled to compensation as he had not prayed for in the Petition. The Respondent submitted that the Petition must be dismissed on the ground of futility.

The learned Counsel for the Petitioner in his written submissions filed on 30th May 2016 stated that the Supreme Court Rules 1990 relates to applications for special leave to appeal from judgments of the Court of Appeal and has no application to Leave to Appeal applications filed under section 5 of the Industrial Disputes (Amendment) Act No 32 of 1990. Under that Act there is no reference made to Supreme Court Rules 1990.

It should be observed that the High Court (Special Provisions) Act No. 19 of 1990 and Industrial Disputes (Amendment) Act No 32 of 1990 conferred on the High Court of Provinces concurrent Jurisdiction with the Court of Appeal to hear and determine appeals and revision applications in relation to orders from the Labour Tribunals. There was a shift of the forum jurisdiction and the High Court of Provinces exercise the appellate and revisionary jurisdiction hitherto exercised by the Court of Appeal. In the absence of specific rules formulated in respect of leave to Appeal applications, the Supreme Courts Rules of 1990 which is applicable for leave to Appeal Application from the Court of Appeal to the Supreme Court was adopted as a matter of practice. In any event to invoke the jurisdiction of the Supreme Court to obtain leave the party seeking leave should place necessary material for the consideration of the Supreme Court. If not the Supreme Court could refuse to entertain the Application.

The learned Counsel for the Petitioner submitted that the Petitioner had filed the relevant documents to establish his grounds for leave to appeal to the Supreme Court the Petitioner had filed the following documents:

P1. Copy of the Application to the Labour Tribunal
P2. Answer of the Respondent
P3. Replication of the Petitioner
P4.Order of the Labour Tribunal.
P5.Written Submissions of the Petitioner
P6. Written Submissions of the Respondent
P7 Judgment of the Provincial High Court.

It is at this stage relevant to refer to the questions of law set out in paragraphs 11 (a) and (b) of the Petition to ascertain whether documents submitted by the Petitioner is sufficient to consider the questions of law set out in the Petition. The relevant paragraphs read as follows:

11 (a) Did the learned High Court Judge err in law in his assessment of the evidence in arriving at the conclusion that the alleged misconduct justified termination of services of an employee on the verge of retirement.

11(b) did the learned High Court Judge fail to consider whether the Petitioner should have been compensated in the event of termination of services in recognition of his long period of service.

The learned President of the Labour Tribunal having considered the evidence led at the inquiry held that the Applicant who was a field officer abused and threatened the superintendent of the estate and assaulted the chief clerk and thereby guilty of

misconduct which justified the termination of his services. The High Court affirmed the order of the Labour Tribunal and dismissed the Appeal.

In the Petition in relation to the questions of law it was alleged that the order of the Labour Tribunal and the judgment of the High Court is contrary to the evidence, not supported by evidence and also perverse. The Petitioner alleged that the learned President of the Labour Tribunal and the Learned High Court Judge had failed to assess and evaluate the evidence. In the circumstances the proceedings in the Labour Tribunal is material and without it this Court is unable to consider the application.

The learned Counsel for the Petitioner in his written submissions stated that the material submitted by the Petitioner is sufficient to establish the ground set out in paragraph 11B of the Petition which relates only to the question of compensation which was the main ground urged at the Provincial High Court.

I am of the view that the question of law set out in paragraph 11 (b) is linked to the question of law set out in paragraph 11(a) of the petition and cannot be considered in isolation.

As regards to the second objection raised by the Respondent that the Petitioner's application is a futile Application as the relief prayed for does not seek compensation. The learned Counsel for the Petitioner submitted that if the answer is in the affirmative as regards to the questions of law set out in the Petition, the Supreme Court has a wide discretion to refer the case back to the Provincial High Court for the assessment of compensation, or to grant relief in terms of limb (iv) of the prayer to the Petition.

The Petitioner submitted that in view of section 5 of the Industrial Disputes (Amendment) Act No 33 of 1990 which enacted section 31DD (2) the Supreme Court has wide powers to grant relief in the instance application. The Petitioner moves that the preliminary objection to be overruled and the application to be fixed for support.

The learned Counsel for the Respondent submitted that the conduct of the workman is of utmost importance in determining whether or not to award compensation. Where the termination was caused by the fault of the workman, he cannot be awarded compensation. He further submitted that to support either of the question of law the record of the Labour Tribunal is essential as the workman is entitle to compensation only if the workman was not guilty of misconduct.

I am of the view that the Petitioner has failed to comply with the Rules of the Supreme Court when he failed to annex the material documents required by Rule 2 and Rule 6. The Petitioner in his Petition did not seek permission of the Court to file the documents subsequently. He had failed to give reasons for noncompliance.

In terms of Rule 2 of the Supreme Court Rules 1990 the Petitioner could be excused only if it is proved that he had exercised due diligence to obtain the documents and the default was due to circumstances beyond his control, but not otherwise, that he shall be deemed to have complied with the provisions of this rule.

I uphold the first preliminary objection raised by the Respondent that the Petitioner had failed to file material documents and violated Rules 2 and 6 of the Supreme Court Rules 1990. In view of this finding it is not necessary to consider the second preliminary objection raised by the Respondent.

The Application dismissed. No costs.

Judge of the Supreme Court

Upali 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 under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR Application No. 35/2016

1. Mohamed Hussain Hajiar Muhammad
   5/4, Meda Mawatha
   Weligama.

2. M.H.T. Indrajith Priyadarshana Krishali
   Hiriketiya Road,
   Dikwella.

3. Bandula Wijesekera
   Sirimeda Medura
   Lelwala
   Neluwa.

4. Miyanawathura Ihala Gamage Sunil,
   Morawaka Road,
   Lelwala
   Neluwa

5. Daya Pushpakumara Hewa Battige
   Gunasandana
   Kamburugamuwa.

6. Lakshman Nirmal Samarasinghe
   Samaragiri
   Komangoda
   Thihagoda.

7. Sanath Hettiarachchi
   'Nirmala' Kamburupitiya Road,
   Kirinda Puhulwella.

8. Abeywickrema Pahuruthotage
   Dayananda,
   Hanferd
   Rakwana Road
   Deniyaya.

9. Sunil Alladeniya
   'Suhanda' Kaddugewatta,
   Deiyandara.

10. Ishwarage Mahinda,
    No. 3, Mananketiya
    Urubokka.

11. Sujeewa Wedage
    'Gayana'
    Kapugama North
    Devinuwara.

12. Weerasuriya Mudiyanselage Sanjeewa
    Priyantha,
    'Ranmini' Gathara
    Kamburupitiya.

13. Walliwala Gamage Nihal de Silva
    'Siri Niwasa', Ihala Athuraliya,
    Akuressa.

14. Somasiri Weeraman
    Kadduwa Road,
    Malimbada
    Palatuwa.

15. I.D. Indunil Prasanga Jayaweera,
    75, Yasabedda Road,
    Akuressa.

16. Hewa Halpage Charles Gunadasa,
    Pelagawawatte,
    Udupillagoda
    Hakmana.

17. Hewa KankanamgeWimal Priyajanaka
    No. 37, Ritrickpark,
    Kekanadura.

18. Rubasinghe Siriwardena Mahinda,
    'Samanala'
    Alapaladeniya.

Petitioners

Vs.

1. Election Commission of Sri Lanka,
   Election Secretariat,
   Sarana Road,
   Rajagiriya.

2. Mahinda Deshapriya
   Chairman,
   Election Commission of Sri Lanka,
   Election Secretariat,
   Sarana Road,
   Rajagiriya.

3. N.J. Abeysekera PC,.
   Member

4. S. Ratnajeevan H. Hoole,
   Member,

   3rd to 4th Respondents all at
   Election Commission of Sri Lanka,
   Election Secretariat,
   Sarana Road,
   Rajagiriya.

5. Faizer Mustapha,
   Minister of Local Government &
   Provincial Councils,
   Ministry of Local Government &
   Provincial Councils,
   330, Dr. Colvin R. De. Silva Mawatha,
   Colombo 02.

6. Chandra Abeygunawardana
   Secretary,
   Weligama Urban Council;
   Weligama.

7. Mangalika Somakanthi Ratnaweera,
   Secretary,
   Dickwella Pradeshiya Sabha
   Dikwella.

8. Wanniarachchi Kankanamge Chandana
   Secretary,
   Thawalama Pradeshiya Sabha
   Thawalama.

9. Liyanage Premasiri
   Secretary,
   Neluwa Pradeshiya Sabha
   Neluwa.

10. Ranjani Lokuliyanage
    Secretary,
    Weligama Pradeshiya Sabha
    Weligama.

11. Hakmana Hewage Asanka Kumari
    Secretary,
    C/O: L. Thomson
    Secretary (covering up)
    ThihagodaPradeshiya Sabha
    Thihagoda.

12. Dikkumburage Dayaseeli
    Secretary,
    Kirinda Puhulwella Pradeshiya Sabha
    Kirinda Puhulwella

13. Mallika Dahanayake
    Secretary,
    Kotapola Pradeshiya Sabha
    Kotapola.

14. Agnes Christina Nirmala Jayawardana
    Secretary,
    Mulatiyana Pradeshiya Sabha
    Mulatiyana.

15. Liyanage Indra Premalatha
    Secretary,
    Pasgoda Pradeshiya Sabha
    Pasgoda.

16. Samaratunga Vidhanarachichige
    Karunasiri
    Secretary,
    Devinuwara Pradeshiya Sabha
    Devinuwara

17. Wimala Abeykone
    Secretary,
    Kamburupitiya Pradeshiya Sabha
    Kamburupitiya.

18. Kankanam Pathiranage Premawathie
    Secretary,
    Athuraliya Pradeshiya Sabha
    Athuraliya,

19. J.P.W.V.M.W.G.G. Almeida
    Secretary,
    Malimbada Sabha
    Malimbada

20. M.A. Gamini Jayaratne
    Secretary,
    Akuressa Pradeshiya Sabha
    Akuessa.

21. N.M.G.H.G. Abeywicrema
    Secretary,
    Hakmana Pradeshiya Sabha
    Hakmana

22. Polwatte Gallage Piyal Ranadeva,
    Secretary,
    Matara Pradeshiya Sabha
    Matara.

23. Mudalige Jinadasa
    Secretary,
    Pitabeddera Pradeshiya Sabha
    Pitabeddera

24. The Attorney General
    Attorney General's Dept
    Colombo 12.

25. Indika Sri Mangala Abeykoon
    Delwattagoda
    Welihinda
    Delpitiya

26. Ranasinghe Arachchige Shantha
    Medagedera
    Aandaluwa
    Gomila
    Mawarala.

27. Eiriwarandawe Ranasinghe Hewage Priyantha
    No. 11 Rajawatta
    Wehelgoda
    Matara

28. Rajitha Saranga Edirisinghe
    "Sampatha"
    Thalalla South
    Gandara

29. Anura Wijesinghe
    Maramba
    Akuressa

30. Koswatta Gamage Amaradasa
    Bogahawila
    Thalahagama
    Makandura

31. Pathmasiri Kularathna Sooriyarachchi
"Prabodani"
Akurugoda
Kamburupitiya.

Respondents

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Before	:	Priyasath Dep, PC. J Anil Goonerathne J, Nalin Pereara J.
Counsel	:	Manohara de Silva , PC for the Petitioners
		Romesh de Silva, PC with Sugath Caldera for the 5th Respondent.
		J.C. Welianuma for the 25th Respondent.
		Kuwera de Zoysa, PC for the 26th Respondent
		Pulasthi Rupasinghe for the 27th, 29th and 31st Respondents.
		Chandaka Jayasundera with Rukmal Cooray for the 28th Respondent.
		Charaka Jayaratne for the 30th Respondent.
		S. Rajaratnam, PC ASG with Sureka Ahamed, SC for the AG.
Argued on	:	30-09-2006,13-09-2006,02-11-2006, 09.05.2017 (mentioned)
Written Submissions	:	Not filed
Decided on	:	15-12-2017

Priyasath Dep,PC, CJ

The Petitioners in their Petition stated that they are citizens of Sri Lanka, duly registered electors, and are all former Chairman and/or Deputy Chairman of several local authorities in the Districts of Galle and Matara as described in the Petition. The Petitioners further state that they intend to contest, and vote, at the forthcoming Local Authority elections which ought to have been held but so far not held.

The 1st Respondent is the Elections Commission of Sri Lanka and the 2nd to 4th Respondents are the Chairman and members of the Elections Commission of Sri Lanka, who presently exercise the powers of the Election Commission of Sri Lanka established by Article 103 of the Constitution. The Respondents are required to hold Local Authority Elections including the elections for the Districts of Galle and Matara in terms of Articles 103(2), 104(B)(1) and 104 B(2) of the Constitution read with provisions of the Local Authorities Elections Ordinance as amended, Urban Councils Ordinance as amended and the Pradeshiya Sabhas Act No. 15 of 1987 as amended.

The Petitioners state that the 1st Petitioner contested the election for an Urban Council and the others contested the elections held for Pradeshiya Sabha. The election was held on 17.03.2011. The 1st Petitioner was nominated as Chairman of an Urban Council and the 2nd -17th Petitioners were nominated as Chairman of Pradeshiya Sabha and the 18th Respondent was nominated as Vice Chairman of a Pradeshiya Sabha.

The Petitioners state that Minister of Local Government and Provincial Councils at that time, appointed 01st April 2011 as the date on which the term of office of members of each of the Urban Council and Pradeshiya Sabhas shall commence in terms of section 10(1) (B) of Urban Councils Ordinance and section 5(1)(b) and 6 of the Pradeshiya Sabhas Act No. 15 of 1987 respectively. In proof thereof Petitioners attached a copy of Extra Ordinary Gazette No. 1699/47 dated 01.04.2011 and marked P2.

The Petitioners states that in terms of section 10(1)(b) of the Urban Council Ordinance as amended, and section 5(1)(b) of the Pradeshiya Sabha Act, the term of members of an Urban Council and/or Pradeshiya Sabha shall be 48 months. Accordingly, the Petitioner's term of office was due to end on 01.04.2015.

The Petitioners state that the term of office of the local authorities expired on 01-04.2015.Therefore the next election should be held before the expiry of the terms of the present

councilors. which was due to expire on 01.04.2015, the next election should have been held before this date.

The Petitioners state that in terms of Section 25 of Local Authorities Elections Ordinance as amended by Act No. 24 of 1987, the election of members of Urban Councils and Pradeshiya Sabhas shall be held within six months preceding the date on which the term of office of the members who are to be elected is due to commence. Therefore the election should be held between 01.10.2014 and 01.04.2015.

The Petitioners further state that in terms of section 26 of the Local Authorities Elections Ordinance, when an election is due to be held, the election officer shall publish a notice of his intention to hold the election, appoint a returning Officer and call for nominations.

The Petitioners state that no election officer has been appointed by the 1st Respondent Commission and/or by the 2nd Respondent Chairman prior to constituting the 1st Respondent Commission as required by section 27(1)of the Local Authorities Elections Ordinance as amended read with Section 5(2) of the same law, and in the circumstances no notice have been published for holding of elections and consequently no nominations have been called for.

The Petitioners state that;

a) Prior to and until constituting the 1st Respondent Commission on or about 16.11.2015, the 2nd Respondent, and

b) Subsequent to constituting the 1st Respondent Commission to-date, the first Respondent Commission and/or 2nd to 4th Respondents

have acted ultra vires the provisions of the Urban Council Ordinance and/or the Pradeshiya Sabha Act and/or Local Authorities Election Ordinance read with Article 103(2), 104 B(1) and 104 B(2) of the Constitution and the Petitioners state that the said conduct and /or inaction is arbitrary, unreasonable, illegal, unlawful and is a continuing violation of the Petitioner's rights guaranteed under Article 12(1) of the Constitution.

Further , the 1st Respondent Commission and/or 2nd to 4th Respondents, by their conduct and /or inaction have deprived the electors, including the Petitioners, an opportunity of electing their representatives to the several Local Authorities. The Petitioners further state that the 1st Respondent and/or 2nd to 4th Respondents have a legal duty to take all necessary steps under the aforementioned provisions of the law and in the circumstances, a cause of action has arisen in favour of the Petitioners seeking the intervention of the Supreme Court to compel the 1st Respondent and/or 2nd to 4th Respondents to perform their duties as required by law.

The Petitioners state that subsequent to the expiry of the terms of office of the Petitioners, the Secretaries of the several Urban Councils and Pradeshiya Sabhas the Petitioners were elected to, now exercise, perform and discharge the rights, privileges, powers, duties and functions of the Council, Chairman and Deputy Chairman illegally.

Petitioner prayed for following reliefs:

a) Declare that the 1st Respondent Commission and/or the 2nd to 4th Respondents and/or the State have violated or infringed the fundamental rights of the Petitioners as guaranteed by Articles 12(1) of the Constitution.

b) Declare that the Petitioners fundamental rights guaranteed by Article 12(1) of the Constitution have been infringed and/or continue to be infringed by the failure and/or refusal of the 1st Respondent Commission and/or the 2nd to 4th Respondents and/or the State to take all necessary steps to hold elections for local authorities as required by law;

c) Make order to direct the 1st Respondent Commission and/or 2nd to 4th Respondents and/or the State to take all necessary steps to hold elections for the Urban Councils and Pradeshiya Sabhas as required by law;

d) Declare the Petitioners fundamental rights guaranteed by Article 12(1) of the Constitution have been infringed and/or continue to be infringed by the 1st Respondent Commission and/or 1st to 4th Respondent and /or the State by permitting the 6th to 23rd Respondents (Secretaries of the Urban Councils and Pradeshiya Sabhas) from having exercising, performing and discharging rights, privileges , powers, duties and functions of the Chairman and Deputy Chairman of Urban Councils and Pradeshiya Sabhas.

This Application was supported for leave to proceed on 29-04-2016 and the Court granted leave to proceed against the 1st Respondent (Election Commission of Sri Lanka) for the alleged violation of the Petitioners fundamental rights enshrined in Article 12 (1) of the Constitution.

The Court granted time to the Respondents to file objections within four weeks and for the Petitioners to file counter objections if any within two weeks thereafter and the case was fixed for hearing on 08-07-2016.

On 08-07-2016 the case was not taken up for hearing as the Respondent had failed to file objections and also due to the fact that Hon. Priyantha Jayawardena PC. J. declined to hear this case. This case was re fixed for hearing on 28-07-2016.

On 12-07-2016 a motion was filed on behalf of the 2nd, 3rd, 4th (Chairman and members of the Election Commission) and 24th Respondent (Attorney General). Along with the motion the 2nd Respondent by way of an affidavit filed a statement of objections with annexures marked 2R-2R6.

On 15- 07-2016 seven Petitioners who are electors of local authorities of the Southern Province filed papers to intervene. They opposed the application filed by the Petitioners. On 20-08-2016 the Court allowed the applications for intervention and the Petitioners of the applications for intervention were cited as 25th-31st Respondents.

The Application was taken up for hearing 13-09-2015 and on 02-11-2016. The Court heard the submissions of the learned Presidents Counsel for the Petitioners, Learned Additional Solicitor General for the 1st-4th, Respondents and Counsel for the Intervenient Parties. In view of the objections filed on behalf of the 1st-4th Respondents and the submissions made by the learned Additional Solicitor General, the Court was of the view that the 5th Respondent , the Minister of Local Government and Provincial Councils who was discharged from the proceedings at an earlier stage, is an important party for the determination of the Application. The Court issued notice on him and directed him to file objections. Several dates were given to the 5th Respondent to file objections but on 09-05-2017, the Counsel who appeared for the 5th Respondent informed Court that the 5th Respondent will not be filing objections. Thereafter Court reserved the judgment. Although parties had the opportunity to file written submissions none of the parties availed itself the opportunity to file written submissions.

The Respondents had taken up the position that the Petitioners Application is based on repealed sections of the Local Government Elections Ordinance and therefore the Application should be rejected. The Petitioners in their applications failed to refer to Local Authorities Elections (Amendment)Act. No 22 of 2012 . This Amending Act repealed several sections and introduced new amendments and brought about significant changes to the Local Authorities Election Ordinance. Petitioners did not claim relief against the Minister of Local Government and Provincial Councils who plays a vital role in implementing the Local Authorities Elections (Amendment)Act. No 22 of 2012. The learned President Counsel for the Petitioner consented to the discharge of the 5th Respondent from the proceedings. As the Application is not properly constituted and no relief is claimed against the 5th Respondent we considered whether the Application should be rejected or not. However we find that the main allegation is for failure to hold elections which affects the franchise of the people which is a fundamental right. Therefore we proceed to hear and determine this application.

The section 3A of the Local Authorities Elections (Amendment)Act. No 22 of 2012,.requires the Minister with the coming into operation of this section, by order published in the Gazette, establish a National Delimitation Committee (in this part referred to as the "National Committee") which shall consist of five persons to be appointed by the Minister, one of whom shall be nominated by him to be the Chairman of the National Committee.

Section 3B gives a Mandate to the National Committee to make recommendations to the Minister for the division of each local authority area into wards, taking into consideration the requirements set out in subsection (3), and to determine the boundaries of each ward and assign a name and a number to each such ward. "

Section 3B5 requires the National Committee after fulfilling its mandate to submit a report to the Minister with recommendations by such date determined by the Minister.

The section 3C which requires the Minister by notification in the gazette, publish the number of wards and boundaries, names and the numbers assigned to each ward so created on the recommendation by the National Committee in respect of each respective local authority. Where the National Committee has recommended the creation of multi member wards, the name and number of each such multi member ward, the name of the local authority concerned and the number of members to be returned in respect of each such multi-member ward shall also be specified."

Section 3D the Minister has the power to alter the of any ward. Section 3D reads as follows:

(1) The Minister may, where any alteration is made to the limits of any local authority, cause an alteration to be made to the boundaries of the wards of that local authority as published in the notification made under section 3C. Further the alteration shall be made on the recommendation of a Committee consisting of five persons appointed by the Minister and the requirements specified in section 3B shall apply to and in respect of any such alterations being made.

(2) The new boundaries of each ward whose boundaries are altered by the Minister under subsection (1) , shall be published in the gazette and shall take effect in respect of an election held under this ordinance in such local authority, immediately after such alterations are effected.

The 2nd Respondent in his affidavit stated that the Minister under Section 3A of Act No. 22 of 2012 a National Delimitation Committee was appointed with effect form 07.12.2012 by Gazette No. 1788/15 of 12.12.2012 which was marked as 2R2.

The National Delamination Committee submitted a report giving its recommendations to the Minister concerned and the Minister submitted the report to the President. The President has published the report in Gazette (Extraordinary)No. 1928/26 dated 21.08.2015 which was marked as 2R3.

The Minister under section 3D of the Act No. 22 of 2012 caused an alteration to the boundaries of the wards. Accordingly a committee was appointed to make a recommendation on alterations of boundaries. The committee commenced their duties on 01.11.2015 and recommendation of the committee is pending. The process concerned is still not completed.(at the time of filing objections on 05-07-2016.)

It is the position of the Elections Commission that the Commission could hold elections only on completion of the delimitation process.

The 2nd Respondent stated that he informed the Minister of Provincial Council and Local Government that there are technical errors in Act No. 22 of 2013 and it has to be amended to hold an election. (2R5)

The 2nd Respondent had taken up the position that the next election has to be held according to the provisions of the Local Authorities Elections (Amendment) Act No 22 of 2012 which is in force at the time of expiry of the term of office of the present councilors.

We have also considered the position of the intervenient parties and intervention was permitted by this court. It is supportive of the position of the 1st Respondent Commission. However the Minister concerned who had a pivotal role to play had not filed an affidavit explaining the delay. Therefore we have to take it for granted that the Minister has no excuse or justification to offer to explain the delay. According to the material placed before this court by the 2nd Respondent there is a further delay in holding the elections. (Affidavit was filed on 05-07-2016) There is no

justification in delaying the holding of elections. There is no provision in law to keep on extending the period indefinitely. Franchise would mean right to vote and citizens should not be denied of such right or privilege. Local authorities are elected for fixed terms (4 years). Citizens expect to elect new members at the end of such period. That right should not be denied. In the case in hand as observed above there could be impediments to hold elections and this court is mindful of same but there cannot be an inordinate delay, to hold elections. There is a legitimate expectations of the people to elect members of local authorities of their choice.

Though Local Government (Amendment) Act 22 of 2012 was enacted in 2012 even up to now local government elections could not be held under the amending Act as the authorities had failed to implement the provisions of the Act. The long delay is inexcusable. The terms of the local authorities expired in 1st of April 2015. Local authorities elections were not held for past two and a half years which had deprived not only the Petitioners right to franchise but all the eligible voters of this country. In 1987 by Act No 24 of 1987 Parliament introduced an amendment to section 25 of the Local Authorities Ordinance to hold elections within the period of six months preceding the date on which the term of office of the members who are to be elected will commence. This is to ensure that people will continue to have representatives in the Local Authorities without a break. When terms of the Local Authorities due to expire in 1st of April 2015 it was obvious to the legislature and to the executive that it is not possible in the near future to hold elections under Act No. 12 of 2012. The Parliament did not take legislative measures to remedy this situation. As a result for a period of two and a half years the voters were deprived of their right to appoint representatives of their choice and the authorities are managed by Secretaries of the Councils who are public servants.

Franchise is a fundamental right enjoyed by people. According to Article 3 of the Constitution "In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of the government, fundamental rights and the franchise". Franchise is a fundamental right recognized under Article 10 and 14(1) of the Constitution. The failure to hold elections on the due date or postponing is a violation of a fundamental rights of the people . Under Article 4(d) of the Constitution the fundamental rights which are by Constitution declared and recognized shall be respected, secured and advanced by all organs

of the Government and shall not be abridged, restricted or denied save in the manner and to the extent hereinafter provided. In the present case the legislature as well as the executive had violated this Article.

Local authorities has a long history and it plays an important role at the grassroot level. Its functions are regulation, control and administration of all matters relating to the public health, public utility services and public thoroughfares and generally with the protection and promotion of comfort, convenience and welfare of the people and the amenities of the town/village. It is stated that its activities covers from the cradle to the grave. Some local authorities have maternity clinics and burial grounds/ cemeteries are controlled and administered by the Local Authorities. By delay in holding elections people are deprived of representatives who could have addressed their grievances and attend to their welfare needs.

According to the Local Authorities Ordinance, the Election Commissioner/Commission is duty to bound to hold elections and it is his or its statutory duty. Although Local Authorities (Amendment) Act No. 22 of 2012 was enacted in 2012 up to now it is not possible to hold elections under that as the necessary requirement to hold elections are not fulfilled. Therefore it is an empty shell and devoid of power and not operative/operable as far as elections are concerned and it is not possible to hold elections until and unless the delimitation process is concluded. I find that the legislature by its inaction and the executive including the Minister and others involved in discharging the duties/functions under the Local Authorities (Amendment) Act No. 22 of 2012 have contributed to the delay in holding the elections. The fundamental rights jurisdiction under Article 126 does not extend to the Legislature. The Petitioners fundamental rights are violated by the state.

The Petitioners alleged that the 1st Respondent (Election Commission) and its Chairman and members (2nd-4th Respondents) violated their fundamental rights. The Petitioners did not make any allegation against the 5th Respondent who is the Minister of Local Government and Provincial Councils.

The Court granted leave to proceed only against the 1st Respondent (Election Commission of Sri Lanka) for the alleged violation of the Petitioners fundamental rights enshrined in Article 12 (1) of the Constitution. The scope of this application is therefore restricted to the conduct of the

Election Commission.(1st Respondent.) The 2nd Respondent who is Chairman of the Commission (1st Respondent) in his affidavit explained the delay in holding the elections. We accept the explanation given by him and hold that there is no violation of the fundamental rights of the Petitioner committed by the 1st Respondent and its Chairman and members (2nd-4th Respondents)

Upon a consideration of all the material placed before court this court is of the view that the state should take steps to hold elections. As such this court only allow sub paragraph 'd' of the prayer to the petition. We direct Respondents to take necessary steps to ensure that the elections are held without further delay.

Chief Justice

Anil Gooneratne, 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 Republic

1. Sawunda Marikkala Damith de Silva,
   No.1/129, Polwaththa Road,
   Kaluwadumulla,
   Ambalangoda

2. Sawunda Marikkala Thenuk Sanmitha de Silva (minor),
   No. 1/129, Polwattha Road,
   Kaluwadumulla,
   Ambalangoda.

SC Application No. SCFR 58/15

Petitioners

Vs.

1. Akila Viraj Kariyawawsam (M.P.)
   Hon. Minister of Education,
   Ministry of Education,
   "Isurupaya", Battaramulla.

2. Upali Marasinghe,
   Secretary – Ministry of Education,
   "Isurupaya", Bataramulla.

3. Sumith Parakramawansha,
   Former Principal – Dharmashoka Vidyalaya
   Galle Road, Ambalangoda.

3A. Ravindra Pushpakumara,
   Principal – Dharmashoka Vidyalaye,
   Galle Road, Ambalangoda.

4. R. N. mallawarachchi
5. Diyagubaduge Dayarathne
6. Mr. Shirley Chandrasiri
7. NS.T.de Silva

4th to 7th Above All:
Members of the Interview Board,
(Admissions to Year 1)
C/o Dharmashoka /Vidyalaya,
Galle Road, Ambalangoda.

8. W. T. B. Sarath
9. P. D. Pathirathne
10. K. P. Ranjith
11. Jagath Wellage

4th and 8th to 11th above All:
Members of the Appeal Board,
(Admission to Year 1)
C/o Dharmashoka /Vidyalaya,
Galle Road, Ambalangoda.

12. Ranjith Chandrasekara,
Director-National Schools,
Isurupaya, Battaramulla.

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

Respondents

BEFORE: S.E.WANASUNDERA, PC, J,
B.P. ALUWIHARE, PC, J &
UPALY ABEYRATHNE, J

COUNSEL: Crishmal Warnasuriya with Udani Galappathi and J. Wickramasuriya for the Petitioners.
Rajitha Perera, SSC for the1st , 2nd , 3rd, 8th and 13th Respondents.

ARGUED ON: 21.01.2016

DECIDED ON: 14.07.2017

B.P.ALUWIHARE, PC, J:

The 1st and the 2nd Petitioners, who are the father and son respectively, have alleged, that by the failure on the part of the Respondents to admit the 2nd Petitioner to Grade 1 of Dharmashoka Vidyalaya, Ambalangoda for the year 2015, the Respondents have violated their fundamental rights guaranteed under Article 12 (1) of the Constitution.

Leave to proceed was granted by this court under the said Article on the 15th of June 2015.

The facts of the case as submitted by the Petitioners are as follows:-

It is common ground that admissions of students to government schools for the year 2015 was governed by a circular issued by the Ministry of Education bearing No. 23/2013 dated 23.05.2013. It was also not in dispute that the cut off mark for the admission of students to grade 1 of the said school for 2015 was 94.25.

The 2nd Petitioner sought admission to the school under the Residency (Proximity/feeder area) category. In terms of the circular P3, the applicant is required to produce proof of residency and marks are allotted for the proximity category based on the criteria laid down in clause 6.1 of the circular P3.

The Petitioners had attended an interview on 20th October, 2014, held to evaluate the eligibility of the 2nd Petitioner to be admitted to the school concerned. The Petitioners state that the Board of Interview comprising of 3rd to 7th Respondents awarded the 2nd Petitioner 90 marks under the category applied for.

The Petitioners state that, when the temporary list containing those who were selected was displayed on the notice board the 2nd Petitioner's name was not among the applicants selected for admission.

Aggrieved by the exclusion of the 2nd Petitioner, an appeal had been lodged with the 3rd Respondent, the Principal of Dharmasoka Vidyalaya as provided for, in clause 9.1 of the circular P3.

The main contention on behalf of the Petitioners was the deduction of 10 marks due to the fact that there are two schools more proximate to the Petitioner's residence. This deduction was made at the initial interview Petitioner faced on 20th October, 2014 and the Appeal Board (which comprised of 4th, 8th and 9th to 11th Respondents) also had been of the view that the deduction of 10 marks referred to above was justified, in view of the fact that the petitioners' residence is more proximate to Kularatne Vidyalaya and Buddhadatta Vidyalaya.

Further, the 2nd Petitioner's name had not appeared on the list, when the final list of the students selected, was released. The Petitioners thereafter had sought administrative relief from various quarters, but those details are of no relevance to decide the issues of this case.

The gravamen of the Petitioners' complaint is that another applicant, namely M.J.V.De Soyza who lives further away from Dharmasoka College, than the Petitioners had been selected and this action amounts to discrimination and Petitioners should also be treated equally as the applicant M.J.V.De Zoysa.

The admission to Grade1 of government schools is a competitive process and the cut off mark is set accordingly.

For the admission to Dharmasoka College for the academic year 2015, the cut off mark had been set at 94.25. As such all applicants who secured the cut off mark or marks above that, were required to be taken in.

Hence, what is pivotal to the decision in the instant application is to consider whether the 2nd Petitioner had been deprived of any marks that should have been allotted to him.

As far as allocation of marks is concerned the 2nd Petitioner had obtained 90 marks at the initial interview and that had been confirmed when his case was heard by the Appeal Board, ten marks being deductedfor the reason stated above.

The Petitioners do not deny the fact that the said schools are more proximate to their residence, but contends that Buddhadatta Vidyalaya is a primary model school affiliated to two other schools namely Kularatne Vidyalaya, Galle and Prajapathi Gothami Vidyalaya, Galle.

It was contended on behalf of the Respondents that the schools referred to above are not affiliated schools but are two separate schools, and to substantiate that position had placed the document 3AR5 before this court.

3AR5 is a letter addressed to the Provincial Director of Education Southern Province, by the Secretary, Provincial Ministry of Education sent in April, 2012.

The said letter states that Buddhadatta Vidyalaya is to remain as a feeder school and has rescinded part of a letter sent in the year 2003. The requirement initially placed, of admitting students who successfully complete year 5 of the Buddadatta Vidyalaya to Prajapathi Balika Vidyalaya and Kularatne Vidyalaya had been rescinded by the letter 3AR5.

It was contended on behalf of the Respondents, that the position taken up by the Petitioners that Buddadata College is a primary model school affiliated to two other schools is incorrect in view of 3AR5.

It was further argued on behalf of the Respondents that the Petitioners had not challenged the letter 3AR5 and the said document stands uncontradicted.

Having considered the submissions of the parties and the documents filed I am of the view, the deduction of marks in respect of schools closer to the Petitioner's residence than Dharmasoka Vidyalaya thus seem justified.

As far as computation and allocation of marks are concerned, this is the only aspect raised by the Petitioners and I hold that the Respondents had not deprived the Petitioners the marks due.

The Petitioners have also pointed out that the Respondents have acted in contravention of the express guidelines with regard to the admission criteria.

It was contended on behalf of the Petitioners that only four members of the Appeal Board have signed the final list, whereas clause 11.4 (a) of the circular

requires all members of the Appeal Board to sign the list (P13). In addition, it had been alleged that as per clause 11.6 of the circular which requires the applicant to be informed in writing of the specific reason for the rejection of the application, had been violated by not informing the Petitioners the reason for the rejection of their application.

In response to the breaches alleged by the Petitioners, it is the position of the 3A Respondent that the 5th member of the Appeal Board did sign the list subsequently and had produced the copy of the impugned document marked 3AR12. The position of the 3A Respondent is that Clause 11.6 of the circular was complied with by informing the Petitioner with regard to the outcome of the application for admission to the school, which the Petitioners have admitted in their counter affidavits.

I have considered the breaches of the circular alleged by the Petitioners and have not caused any prejudice to the Petitioner and when the responses to the same by the 3A Respondent, at best they are technical in nature, and even if this court is to hold that the alleged breaches have taken place, still it will not have any impact on the marks allotted to the 2nd Petitioner.

In the case of *Rathnayke vs. Attoerney General 1997 2 SLR pg. 98* Chief Justice G.P.S De Silva held that every wrongful act is not enough ground to complaint of infringement of fundamental rights. The Petitioner must establish unequal or discriminatory treatment.

The main thrust of the Petitioner's case is unequal treatment of the 2nd Petitioner vis a vis another applicant for the admission to school namely selection of M. J. V. De Soyza for admission, whose residence is further away from that of the Petitioners vis a vis Dharmasoka College, Ambalangoda.

I shall now consider the aspect of discrimination alleged by the Petitioners.

In paragraph 21 of the Petition, it is alleged that the student M.J.V.De Soyza who also received same marks as the 2nd Petitioner (90) at the 1st interview had been wrongfully brought into the final list with 95 marks.

The Petitioners specifically averred that they are not seeking any specific relief against the "wrongfully selected applicant" and had further averred that the Respondents have discriminated against the Petitioners and had arbitrarily selected candidates who are unqualified and/or unsuitable for admission.

Before I consider the alleged discrimination it must be reiterated that what is required for admission to the school applied for, is to gain a minimum of 94.25 marks, by establishing the residency under the "occupancy category".

As referred to earlier, as far as allocation of marks are concerned, based on the documents and other relevant factors are concerned, there is nothing to indicate that the 2nd Petitioner had been deprived of any marks that he was entitled to.

Thus, what is left with is for this court to consider whether the selection of the applicant M.J.V.De Soyza amounts to discrimination of the 2nd Petitioner and for that reason the said Petitioner's fundamental right to equal protection of the law had been infringed.

In the case of *C.W.Mackie and Company Ltd. Vs. Hugh Molagoda, Commissioner General of Inland Revenue and others (1986) 1 SLR 300*, Chief Justice Sharvananda observed that *"the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act via Article 12, one cannot seek execution of any illegal or invalid act……Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, formulated in law in contradistinction to an illegal right wich is invalid in law".*

The decision referred to above had been consistently followed by the Supreme Court and with approval I wish to refer to the statement made by Justice M.D.H.Fernando in the case of *Gamaethige Vs. Siriwardane (1988) 1 SLR 384*, wherein His Lordship said *'Two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong.*

Justice Dr. Shirani Bandaranayake following the decision in case C.W.Mackie and Company Ltd, referred to above held in the case of *Dissanayake Vs. Piyal de Silva (2007) 2 SLR 134*, that Article `12(1) of the Constitution provides only for the equal protection of the law and not for the equal violation of the law.

Considering the above I hold that the Petitioners have failed to establish that the Respondents have violated the fundamental right enshrined in Article 12(1) of the Constitution as far as the 2nd Petitioner is concerned.

Accordingly the application is dismissed, but in all the circumstances, without costs.

JUDGE OF THE SUPREME COURT

Hon. Justice Eva Wanasundera PC

I agree

JUDGE OF THE CUPREME COURT

Hon. Justice Upaly Abeyrathne

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 & 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Ishantha Kalansooriya
"Jayanthi"
Narawala, Poddala
And also at
No. 267, School Lane
Borrelesgamuwa

Petitioner

SC FR Application No. 112/2010

Vs.

1. Karunaratne
   Inspector of Police
   Officer In charge of Police Station
   Poddala.

2. Indika
   Sub Inspector of Police
   Police Station,
   Poddala.

3. Saminda
   Police Constable
   Poddala Police Station
   Poddala.

4. Mahinda Balasuriya (Now retired)
   Pujith Jayasundera
   Inspector General of Police of Sri Lanka
   Police Headquarters.

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

Respondents

Before	:	Priyasath Dep, PC. J Sisira J. de Abrew, J. Nalin Perera J.
Counsel	:	Anil Silva PC for the Petitioner. C. Paranagama for 1st – 3rd Respondents. M. Tennakoon, SSC for Hon. Attorney General.
Argued on	:	27.06.2016
Decided on	:	04.08.2017

Priyasath Dep, PC. CJ

The Petitioner filed this Application alleging that his fundamental rights guaranteed under Articles 11, 12, 13(1) and 13(2) of the Constitution were violated by the Respondents. The Petitioner in this case is a former member of Bope-Poddala Pradeshiya Sabha during the years 1991 to 2002 and also an owner of footwear manufacturing business at Borelesgamuwa named "Elegant". The Petitioner stated that prior to the 2010 Presidential Election he went to his native place at Poddala and he was assisting Dr Romesh Pathirana, the organizer of SLFP for Akmeemana electorate supporting the candidature of the incumbent President at the forthcoming Presidential Election.

On 24.01.2010 at or about 10.30 pm, the Petitioner was travelling on a pillion of a motor bike ridden by his friend Nanayakkara Masachchige Nalin Dayanga (Nalin) and were travelling

along Galle-Baddegama road. While he was travelling in front of Meepawala Karunanyake's house Sarath Kalansooriya ("Sarath")gave a call to him to inquire about a matter involving one of his friends.

The Petitioner stated that he had a friendly conversation with Sarath to resolve a minor dispute regarding a verbal abuse which had taken place between Somasiri Madanayake and Sarath. The Petitioner states that within few minutes the 1st Respondent came in a police jeep bearing registration number WP LE 9080 along with the 2nd and the 3rd Respondents and few other police constables and without making any inquiry slammed and punched his face whilst the other constables hit him with their weapons.

Thereafter the Petitioner was dragged and pushed towards the police jeep by 1st to 3rd Respondents with the help of other police constables and took him inside the jeep and drew away. Petitioner states that the 1st Respondent was smelling of liquor. He was given no reasons for his arrest.

The Petitioner in para 12 of the petition states that :

i. "Once inside the Police station he was asked to kneel down by the said 1st Respondent while using abusive Language such as "Danagahapan Paraya" and was forced to do so, while other police officers such as the 2nd and 3rd Respondents looked on together with other police officers and constables and the Petitioner was shoved to the floor, punched and kicked on the head, face, chest, shoulders, stomach, back and legs etc. by the 1st Respondent.

ii. Thereafter he was forcefully asked to stand and dragged from the legs and assaulted with a club by the said 1st Respondent who was easily identified as drunk and violent under the influence of liquor and otherwise, saying in Sinhala and in an abusive manner "Umbata mama sathiyak avidinna thiyanne ne" (I will not allow you to walk for one week) while the said 2nd and 3rd Respondents and the other officers and constable were holding the Petitioner tightly to facilitate such inhumane treatment.

iii. The Petitioner who was threatened with life and limb pleaded with the said 1st and 2nd Respondents not to treat him like that by saying in Sinhala "Policiyen mehemath thirisan widiyata gahanawada" and however the said 1st Respondent did not stop such assault till the said club was broken.

iv. Thereafter the said 1st Respondent directed one such police constable or an officer who was in civvies to handcuff him and then he was dragged to the police cell".

The Petitioner was taken to Baddegama Hospital and produced before the Judicial Medical Officer on the same night but however he was not sent to the hospital police post to record a

statement. According to the Petitioner at that time he was suffering from severe pain all over his body and had aberrations on and around the collar bone and swelling of the lower part of the lower limb on both legs. He was taken back to Poddala police station and he was handcuffed again and put to the police cell.

An Assistant Superintendent of Police came to the Police Station later in the night and the Petitioner was taken out from the cell and was taken to the 1st Respondent's room where the ASP was seated. The ASP instructed the 1st Respondent to record a statement from the Petitioner and it was recorded accordingly. Thereafter he was released from the police custody on police bail.

The Petitioner got himself admitted to the Karapitiya Teaching Hospital on 25. 01 2016 as he was suffering from a severe body pain. Petitioner in para 22 of the Petition stated that:

"The Petitioner was warded at ward 6 which is a surgical unit and was investigated for head injury by taking x-rays of the skull and the chest was examined with chest x-ray, and x-rays of the spine and knee joint were also taken, which were found out to be normal. The Petitioner was managed for head injury observations for about twenty four hours and was treated with captopril 12.5 mg. three times a day as his pressure was more than the normal rate due to the above mentioned inhumane treatment etc."

The Petitioner was discharged on 26th January 2010 and he has been attending clinics as instructed and was treated further as required by the medical officer. The Petitioner annexed to the Petition the health white card marked as X1 and the book where such entries were recorded was marked as X2).

The Petitioner in paragraph 27 of the Petition stated that the abovementioned treatment meted out on the Petitioner on 24th January 2010 is illegal and amounts to torture and/or cruel, inhumane and degrading treatment by the 1st, 2nd and 3rd Respondents and /or anyone or more of the 1st to the 3rd Respondents in as much as,

a. The Petitioner was abducted against his will and /or arrested not in accordance of the procedure established by law by anyone or more of the 2nd to 3rd Respondents under the command of the 1st Respondent.

b. No reasons were given nor existent at the time of arrest,

c. Treating the Petitioner in an inhumane manner as described above,

d. Causing severe pain, both physically and psychologically and causing near fatal injury to him,

e. Wrongly kept the Petitioner in detention and unlawful treatment.

The Petitioner alleged that the Respondents had violated the Fundamental Rights guaranteed under articles 11,12,13 (1) and 13 (2) of the Constitution.

The Supreme Court has granted leave to proceed for the alleged violation of Articles 11 and 13(1) of the Constitution.

The 1st Respondent in his objections stated that on 24th January 2010 he was on mobile petrol to prevent acts of violence related to the forthcoming Presidential Election. At or about 10.00 pm Poddala police station received an information from one Sarath that the Petitioner is verbally abusing him and trying to assault him. At this time the 2nd respondent was on duty at Poddala police station and did not join the patrolling group.

1st Respondent stated that at about 11.00pm he reached Meepawala Junction where the incident was taking place and there were 3 or 4 persons present at the scene and except for the Petitioner all others ran away. The Petitioner was acting violently and shouting in abusive language. The 1st Respondent and the 3 constables tried to control the situation and as the Petitioner resisted they had to use reasonable force and hand cuffed him to control the violent behavior. The Petitioner fell down near the police jeep due to the resistant offered by him.

The 2nd Respondent took the Petitioner to the District Medical Officer of Baddegama District Hospital as he was smelling of liquor. The Respondents had annexed certified extracts of paragraphs 2473-2478 of the daily information book marked as R1. According to the medical examination form submitted by the District Medical Officer marked R2 the Petitioner was suffering from non-grievous injuries and he was not drunk.

The complaint made against the Petitioner by the virtual complainant Sarath was recorded by Poddala police station and an extract of the complaint recorded in the minor complaints information book is marked as R3. According to the statement of Sarath, the Petitioner, Indrajith and Nalin reminded him of a previous incident and threatened to kill him and tried to assault him. He escaped from them and went to Karunanayake's house and gave a call to the police. The police came and arrested the Petitioner and took him away. He further stated that previously the Petitioner came to his house at about 2.00 am and knocked at the door and asked him to come out. The police recorded the statement of the Petitioner marked as R4.Thereafter Petitioner was given police bail.

The 1st Respondent investigated into the said matter and Poddala Police filed a B report in the Magistrate Court of Galle bearing No bearing No 46749 which is marked as R5. The

Respondent stated that the Petitioner after he was released on police bail went and got admitted to Karapitiya hospital and fraudulently changed his minor non-grievous injury to grievous hurt with the help of the local Member of Parliament Dr Ramesh Pathirana in order to file this application.

In this application leave to proceed was granted under articles 11 and 13 (1) of the Constitution. Having considered the material placed before this Court, this court has to consider whether or not the Petitioner has established his case on balance of probability. As there is an allegation of torture, cruel and inhuman and degrading against the Respondents if a finding is made against them it will affect their employment and expose them to a prosecution under Convention Against Torture Act No.22 of 1994. Therefore in cases of this nature high degree of proof is required to establish the case though the required standard of proof is not beyond reasonable doubt.

There are two versions to this incident. Therefore this court has to first ascertain which version is the probable version. If the Petitioner's version is probable the next question whether case was established on balance of probability.

The facts revealed that the 1st Respondent was on mobile petrol when he received information from one Sarath .that the Petitioner was engaged in an act of violence and he proceeded to the scene and arrested the Petitioner. Sarath confirmed the information given by him when he made a statement to the police to the effect that the Petitioner and two others threatened to kill him and tried to assault him. Therefore the 1st Respondent had reasonable ground and also had credible information to arrest the Petitioner. As the arrest of the Petitioner is lawful there is no violation of Article 13 (1) of the Constitution. .

The next question is whether the Respondent after the arrest of the Petitioner subjected him to torture, cruel, inhumane and degrading treatment as alleged by the Petitioner. The Petitioner in his petition at para 12 described how he was assaulted and was subject to cruel treatment. According to the description given by him he would have sustained more serious injuries than what was revealed in the medical legal reports . According to the medical legal report he had a non -grievous injury. A medical report does not support his version. He had given an exaggerated version of the events.

The Respondents in their affidavits have stated that at the time of the arrest, the Petitioner resisted arrest and they were compelled to use force to arrest him and put him to the police jeep and bring him to the police station. There is a likelihood that he would have sustained injuries in the process.

The 1st Respondent and the other Respondents did not have any animosity nor a motive to cause harm to the Petitioner. In the course of his duties 1st Respondent visited the scene and arrested the Petitioner who was behaving in an unruly manner and produced him at the police station.

For the above reasons, I am of the view that the version given by the Respondents is more probable than the version given by the Petitioner. The Petitioner had failed to establish his case on balance of probability.

The Application is dismissed. No costs.

Chief Justice

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

S.C (FR) No. 121/2011

In the matter of an Application filed under Article 126 of the Constitution of the Republic of Sri Lanka

Jayanetti Koralalage Rajitha Prasanna Jayanetti
Of No. 237, Thimbirigasyaya Road,
Colombo 5.

PETITIONER

Vs.

1. H.H. Harischandra (PS 28312)
   Police Sergeant
   Police Station,
   Matugama.

2. Anura Samaraweera
   Sub Inspector of Police,
   Special Criminal Investigation Unit
   Police Station,
   Matugama

3. Neville Priyantha (PS 10967)
   Sub Inspector of Police
   Special Criminal Investigation Unit
   Police Station,
   Matugama.

4. K. Udaya Kumara
   Chief Inspector of Police
   Head Quarter Inspector
   Police Station, Matugama.

5. Dr. M. Balasooriya
   Inspector General of Police
   Police Headquarters,
   Colombo.

6. Pinnawalage Chandrasena
   Pahala Uragala
   Ingiriya.

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

RESPONDENTS

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

COUNSEL: Shantha Jayawardena with Chamara Nanayakkarawasam
For the Petitioner

Madhawa Thennakoon S.S.C. for the 1st – 5th and 7th Respondents

6th Respondent absent and unrepresented

ARGUED ON: 17.02.2017

DECIDED ON: 06.06.2017

GOONERATNE J.

The Petitioner is a businessman who allege that his fundamental rights have been infringed under Articles 12(1) and 13(1) of the Constitution.

The 6th Respondent is a supplier of scrap rubber with whom the Petitioner had certain business dealings. It is submitted by the learned counsel for the Petitioner that the 6th Respondent maliciously aided and abetted and or instigated the 1st to 4th Respondents, all of whom have acted together maliciously and violated the Petitioner's fundamental rights.

On or about 19.01.2011 the 6th Respondent delivered a quantity of about 5379 kg of scrap rubber to the factory of the Petitioner. Thereafter the 6th Respondent informed the Petitioner and in fact met him regarding the quantity of scrap rubber delivered to the Petitioner at his factory and informed that a total sum of Rs. 1,522,257/- is due for same from the Petitioner. The Petitioner paid the 6th Respondent a sum of Rs. 600,000/- in cash and having agreed to deduct the same of Rs. 42,528/- as against the part of excess money paid as advance, issued a cash cheque in a sum of Rs. 879,729/- dated 20.01.2011. Thereafter 6th Respondent left the Petitioner's premises. After the 6th Respondent left the premises, an employee of the Petitioner informed him that part of the scrap rubber delivered by the 6th Respondent was not satisfactory and the proper rubber content could be 57% and that the balance rubber contained a lot of extraneous contents. As such the Petitioner promptly telephone the 6th Respondent and informed the 6th Respondent of the unsuitability of the supplied scrap rubber, and requested him to see the

Petitioner. The 6th Respondent informed the Petitioner that he is unable to come and see the Petitioner but told the Petitioner that 61 bags of scrap rubber had been purchased by one Kodituwakku and that quality was not inspected by him. 6th Respondent also informed the Petitioner that he would meet him on a subsequent date. In these circumstances the Petitioner requested the 6th Respondent not to present the cheque for payment until the accounts are examined and settled, on the sums payable to him is correctly ascertained to which 6th Respondent agreed. On this arrangement with the 6th Respondent, the Petitioner informed and instructed his bank on 20.01.2011 in writing to stop payment (letter 'H').

It is submitted that despite the request and undertaking obtained by the Petitioner from the 6th Respondent not to present the cheque as stated above, the 6th Respondent surreptitiously tendered the said cheque to the bank on20.01.2011 and the bank had not made any payment to the 6th Respondent, on the cheque.

Petitioner also take up the position that the 6th Respondent had no right to present the said cheque for payment and it is in breach of the undertaking to do so, before accounts were settled between parties. The 6th Respondent had also over the phone inquired about the stop payment of cheque and Petitioner replied stating it was so, as agreed between them.

It is pleaded that the 6th Respondent met the Petitioner to discuss the matter and the Petitioner gave him a statement 'E' showing several transactions between the parties, but the 6th Respondent did not go through the statement and left the factory.

On perusing the Petition I find that thereafter a different turn had taken to this transaction as described in paragraph 19 to 30, where the police involvement is stated. The said averments up to the point of, Petitioner being remanded could be summarised as follows:

(a) 6th Respondent on 25.01.2011 requested the Petitioner to be present at the Weligama police. Petitioner went to the police but the 6th Respondent was not present. Petitioner spoke to the 6th Respondent on the mobile phone. Then a person who identified himself as Officer In Charge, Matugama Police spoke to the Petitioner on the mobile phone and Petitioner told him he would come the next day.

(b) On 26.01.2011 the Petitioner went to the office of the Assistant Superintendent of Police and the 6th Respondent was in conversation with the A.S.P.

(c) The A.S.P (paragraph 21) inquired from the Petitioner about the payment of the cheque and the Petitioner explained the transaction he had with the 6th Respondent. The said A.S.P. observed that this is a civil transaction and directed the officers to record statement.

(d) On 02.03.2011 Petitioner received a call from the 1st Respondent who identified himself as a Court Sergeant requested the Petitioner to come to the police and make a statement.

(e) As described in paragraph 24 of the petition the Petitioner was arrested by the police and placed in the police cell.

(f) Petitioner's employees contacted Attorney-at-Law Seneviratne and he attended the police and saw the Petitioner in the cell with other inmates.

(g) The said Attorney-at-Law questioned the 1st Respondent about the illegal arrest. 1st Respondent told them about recording a statement and Petitioner to be produced before the Magistrate.

(h) Petitioner under arrest was produced before the Magistrate in case No. 70641/11. Police moved to remand the Petitioner without disclosing to court the contents of the statement.

(i) In the Report to court made by the 2nd Respondent, it had been revealed that the Petitioner had committed the offence of cheating and criminal breach of trust.

(j) An application made on behalf of the Petitioner for bail on 02.03.2011 was objected by the police without any reasonable cause. Petitioner was accordingly remanded and kept in the remand prison till 03.03.2011. On the said date on an application made by the Petitioner's Attorney-at-Law,

the Petitioner was released on bail, upon two sureties executing two surety bonds for Rs. 1,000,000/-.

In paragraph 35 of the petition it is averred that 1st to 4th Respondents acted together with the 6th Respondent maliciously without any reasonable cause for the reasons set out in paragraphs 35 (a) to 35 (d) of the petition. Further a letter marked 'J' is annexed from the Bank of Ceylon to indicate that the Petitioner had sufficient credit facilities on his account, at the time of issuing the cash cheque to the 6th Respondent. Supreme Court on 06.05.2011 granted Leave to Proceed for the alleged violation of Articles 12 (1) & 13 (1) of the Constitution by the 1st to 4th Respondents.

I have also perused the affidavit of one Samson an employee of the Petitioner who took delivery of scrap rubber delivered by the 6th Respondent. He also examined the scrap rubber so delivered to be unsatisfactory containing extraneous particles than normal scrap rubber. This employee immediately informed the Petitioner of above. The said employee also states that he was present with the Petitioner on 26.01.2011 at the Assistant Superintendent of Police office, at Matugama, and the A.S.P. observed that the transaction to be a civil matter.

The 1st Respondent a Police Sergeant and the other three Respondents have filed objections to this application. 1st Respondent deny that he acted in a malicious manner towards the Petitioner or breached the Petitioner's fundamental rights. He also pleads that the 6th Respondent is not personally known to him and 6th Respondent complaint was recorded as a civilian. Copy of the complaint is annexed marked 1R1 (a) and 1R1 (b). On such complaint Petitioner was requested to attend the police station and he was kept in police custody and arrested having informed the Petitioner of the reason for arrest. The arrest notes are annexed marked 1R3. He states he acted according to law. He produced the Petitioner before the Magistrate and note pertaining to Petitioner being taken to the Magistrate is annexed marked 1R4.

The 2nd Respondent is the Officer-In-Charge of the Special Crimes Investigation Branch A.S.P's office, Matugama. He Plead inter alia that at the material time he was attending a training programme at the Katana Police Academy, during the period 28.10.2012 to 02.03.2012. On his return to the police station after the training period he became aware whilst inspecting the books in the branch, that a statement of the Petitioner was recorded, and that the Petitioner was produced before the Magistrate on a 'B' Report. He denies

any malicious act on his part towards the Petitioner. Further the 2nd Respondent never acted in a manner to humiliate the Petitioner nor did the 2nd Respondent act in collusion with the 6th Respondent.

The 3rd Respondent is the Court Sergeant who recorded the statement of the Petitioner. His affidavit is supportive of the facts pleaded by the 1st and 2nd Respondents. The 4th Respondent is the Head Quarters Inspector of Weligama Police. It is his position that he was not involved in the investigation of the complaint against the Petitioner. Officer of the Special Crimes Investigations Branch conducted the investigation against the Petitioner. Any malice alleged against him is denied by the 4th Respondent.

The 6th Respondent has never participated in these proceedings, before this court. At the hearing before this court the learned counsel for Petitioner no doubt supported his case. Learned Senior State Counsel who appeared for 1st to 5th and 7th Respondents very correctly submitted to this court that the transaction in question was a civil transaction. I have to hold that the 6th Respondent who was responsible to initiate criminal proceedings, breached the fundamental rights of the Petitioner along with the 1st, 2nd and 4th Respondents. Whatever it may be the Petitioner could not have been arrested and produced before court on the available material as the facts are supportive of a civil transaction. This is a very unfortunate incident, for the authorities

concerned to have deprived the Petitioner of his personnel liberty, by attaching criminal liability to the transaction in question. However law cannot permit this sort of lapses to take place either knowingly or unknowingly and deprive a persons' freedom and personnel liberty.

It is apparent that the Petitioner and the 6th Respondent had been dealing with each other for some time and had transactions on scrap rubber. Petitioner purchased scrap rubber from the 6th Respondent and even made part payment in cash. In that type of business transactions, sometimes parties withhold payment for various reasons. Every such transaction would not amount to cheating. In the instant case the Petitioner in fact tendered a statement of accounts to the 6th Respondent to verify the accounts. It appears that the 6th Respondent had not taken the trouble to check the accounts, instead thought it fit to change the complexion of the transaction from civil transaction to be an act of cheating. The police should have not been so hasty especially where part payment had been made to the 6th Respondent in cash, by the Petitioner. The hurry in which a prosecution was launched by the police is rather suspicious.

This appears to be a simple case of goods sold and delivered, where a buyer would have an option to reject the goods for want of quality. As such the Petitioner is entitled to a declaration that his constitutional rights are violated. Even if the police had a wrong appreciation of the law, yet the infringement would remain. It is essential to comply with the statutory provisions established by law designed to protect the liberty of the subject. State is liable and has to be held responsible for the acts of the police, which appears to have been influenced by the 6th Respondent.

An arrest must be supported by a clear provisions of the law – *Gunawardena Vs. Perera (1983) 1 SLR 305*. It was held in *Piyasiri Vs. Fernando 1988 (1) SLR 173* that a police officer has no right to arrest a person on vague general suspicion, not knowing the precise crime suspected but hoping to obtain evidence of the commission of some crime for which he has the power to arrest.

I hold that Petitioner's fundamental rights guaranteed by Articles 12(1) and 13(1) have been violated, and the 1st, 2nd, and 4th Respondents are liable. It appears to me that 1st, 2nd and 4th Respondents have acted with the 6th Respondent who instigated them, maliciously. There was no legal basis to arrest the Petitioner, this being a pure civil transaction. In these circumstances, I direct the 1st, 2nd and 4th Respondents to pay the Petitioner as compensation a sum of

Rs. 25,000/- each as these Respondents are responsible for arresting and producing the Petitioner in Court.

In this entire episode the 6th Respondent initiated and instigated the above Respondents to violate the fundamental rights of the Petitioners. As such this court Orders the 6th Respondent to pay a sum of Rs.75,000/- as compensation.

Application allowed with costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C.

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 Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC /FR 131 / 2015

Nalin Sandaruwan,
242 / 5, Dambahena Road,
Maharagama.

SC / FR 132 / 2015

Sampath Ranasinghe,
"Ranagiri" Sri Darmarama Road,
Malamulla,
Panadura.

SC / FR 133 / 2015

W. H. A. Sanath Chandrakumar,
"Sinhagiri", Panamura Road,
Middeniya.

SC / FR 135 / 2015

Wasantha Kumari Ambulugala,
Mahahenawatte, Anangoda,
Walahanduwa, Galle.

SC / FR 157 / 2015

Wanni Arachchi Nevil,
No 15A, Summit Flats,
Keppetipola Mawatha,
Colombo 05.

Petitioners

Vs.

1. Hon. RanjithMadduma Bandara,
   Minister of Internal Transport,
   No 01, D.R. Wijewardena
   Mawatha,
   Colombo 10.
2. Dr. Lalithasiri Gunaruwan,

Secretary,
Ministry of Internal Transport,
No.1, D.R. Wijewardena
Mawatha,
Colombo 10.

3. National Transport Commission,
No 241, Park Road,
Colombo 05.
4. Dr. D.S. Jayaweera,
Chairman,
National Transport Commission,
No 241, Park Road,
Colombo 05.
5. Hewawalimunige Wipulasena,
Director Operations (Acting)
National Transport Commission,
No. 241, Park Road,
Colombo 05.
6. Hon Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

BEFORE : PRIYASATH DEP, PC, J. (as he was then)

UPALY ABEYRATHNE, J.

NALIN PERERA, J.

COUNSEL : Faiz Musthapha PC with Faiza Markar for the Petitioner

N. Wigneswaran SSC for the Respondents

ARGUED ON : 28.09.2016

DECIDED ON : 30.05.2017

UPALY ABEYRATHNE, J.

Petitioners are owners of private omnibuses. The 3rd Respondent, who is the authority to issue Passenger Service Permit (PSP) in terms of Section 24 of the National Transport Commission Act No 37 of 1991 has issued PSP bearing Nos. NTCT 13748, NTC 13778, NTC 12949, NTCT 13723 and NTCF 13548 respectively, to the aforesaid Petitioners to operate passenger transport services in the Island.

The Petitioners complained that the usual procedure adopted by the 3rd Respondent under Section 24 of the National Transport Commission Act in the issuance of PSP is that when granting PSP upon the receipt of an application from a registered owner of an omnibus to operate passenger transport service along the route or routes stated therein, the 3rd Respondent would process the application and if satisfied with the application would grant PSP for a period specified therein. Once PSP is granted it is periodically renewed and/or extended. The said periodic renewal/extension is carried out as a matter of formality, unless and otherwise the registered owner has breached any of the terms and conditions set out in Section 30(2) of the said Act which prevents its renewal.

In 2012, with the commissioning of the Southern Expressway the 3rd Respondent called for tenders from interested persons to operate private omnibus along the Southern Expressway. At the inception five (5) persons had been granted PSP and thereafter several other persons had been granted with PSP. On or about 08.05.2014 a committee comprised of 05 members had been formed by the Cabinet of Ministers to submit a report on its observations and recommendations regarding the criteria on selecting bus owners and on issuance of permits for buses operating

in Southern Expressway. On 19.09.2014, the Cabinet of Ministers considered the cabinet paper containing the report of the said committee (P 4) and granted the approval for the recommendations stated in the report of the committee to be implemented subject to observation of the Minister of Transport. Consequent to the said Cabinet Approval (P 5) a paper notice (P 6) had been published in several newspapers calling for applications from the interested persons to operate omnibus along the Southern Expressway by the 04th Respondent.

By the said advertisement (P 6), published in newspapers addressing the owners holding valid passenger service permits along Matara - Colombo road (Rout No 2), the 4th Respondent had called for applications to grant 28 permanent PSPs to operate omnibuses along the Maharagama – Matara Southern Expressway. Accordingly, the persons who already had a valid PSP to operate an omnibus along the Matara – Colombo road (Galle Road) were only eligible to apply.

According to the Petitioners, the 3rd Respondent had issued 28 Passenger Service Permits to operate omnibuses between Maharagama – Matara and 15 Passenger Service Permits to operate omnibuses between Kaduwela - Matara along Southern Expressway, valid for a period of 01 year (P 8). Thereafter on November 2014, by P 9, 30 persons were granted with PSP's. In November/ /December 2014, further 26 persons, including the petitioners, were granted with PSP's.

The Petitioners have averred that, to their utmost surprise, shock and dismay the 3rd Respondent refused to extend the period of validity of the said PSP's when the PSPs were submitted for renewal/extension upon the expiration of the periods of validity. The Petitioners have complained that the refusal of the 3rd Respondent or any one or more of the Respondents to renew/extend the validity of

the Petitioners' PSP's are in violation of their fundamental right guaranteed to them under Article 12(1) and 14(1) (g) of the Constitution, inasmuch;

- No reasons have been given for the said refusal,
- The said refusal/failure to renew/extend the validity of the Petitioners' aforesaid PSP's are *ultra vires* the provisions of the National Transport Commission Act No 37 of 1991,
- The said refusal/failure is not rationally related to any reasonable objective sought to be achieved,
- The said refusal/failure is arbitrary, capricious and unwarranted,
- Then said refusal/failure is in violation of the Petitioners' legitimate expectation to operate omnibus along the route specified in the PSP,
- The Petitioner has expended large sums of money in purchasing the said omnibus obtaining the PSP, enlisting and training its staff and all other incidental expenses thereto and will be adversely affected if the PSP is not extended,
- The Petitioner had to incur additional expenditure in purchasing/leasing an omnibus that as suitable to ply along the Southern Expressway in compliance with the stipulations contained in P 7,
- The Petitioner would not be able to generate an income so as to pay wages of his employees and monthly lease rentals in respect of the omnibus in the event the PSP is not renewed/extended and is unable to operate on the said routes.

When the aforesaid applications were supported for leave to proceed on 12.06.2015, this court granted leave under Article 14(1) (g) of the Constitution.

The 4A Respondent has taken up the position that the said PSP's had been issued contrary to the provisions as stipulated in the National Transport Commission Act No 37 of 1991.

The 4A Respondent in his affidavit dated 13.06.2016, answering to the averments contained in paragraph 14 and 15 of the petitions has stated that;

- As per the document marked as P 9 by the Petitioners, a board paper has been submitted seeking the approval of the National Transport Commission to review the luxury passenger service which existed along certain routes and to allow them to ply along the Southern Expressway, if the need arises, subject to the payment of the relevant charges;
- Permits were granted to the Petitioners to operate omnibuses via the Southern expressway and the said permits had been extended up to April 2015, as reflected in P 11A and P 11 B;
- The Petitioners had been allowed to make the necessary payment by way of instalments in order to ply via the Southern Expressway, contrary to the provisions stipulated in Section 25 of the said Act;
- Section 30 of the said Act had not been followed in granting and/or extending the permit to ply via the Southern Expressway as a permit can only be granted for a minimum period of one year and a maximum period of three years.

As stipulated in Section 24 of the National Transport Commission (NTC) Act, upon the receipt of an application for a passenger service permit, the Commission may having regard to the demand for omnibus services by the public, on the route or routes applied for in the application, either grant or if it is satisfied

that the grant of such, permit would result in the over allocation of omnibus capacity on the route applied for refuse to grant a passenger service permit.

The Respondents have not disputed the fact that by the advertisement in the said paper notice marked P 6, Respondents stipulated that the persons who already had a valid PSP to operate an omnibus along the Matara – Colombo road (Galle Road) were only eligible to apply.

The learned Senior State Counsel for the Respondents submitted that;

- The said PSPs could not have been issued for a period less than one year as Section 25(2) mandates that every passenger permit be in force for such period not less than one year and not more than three years as specified in the permit and, as such, is manifestly illegal.
- No evidence has been placed before this court to demonstrate the basis upon which the publicly stated policy of the NTC in P 6, i.e. the issuance of permit only to persons already plying the Colombo – Matara route; had been change to accommodate the Petitioners.
- No evidence has been adduced to explain how or why the Petitioners would apply for permits when the public advertisement stated that the permits would only be issued to persons who already have a permit for use on the Galle Road (route No 2).
- The Petitioners have also been permitted to make the necessary payments by way of instalments, which is contrary to Section 5 of the said Act, as it does not contemplate the payment of fees on an instalment basis.

According to the averments contained in paragraphs 10, 11, 12 and 13 of the petitions, in terms of the said newspaper advertisement marked P 6 the

Petitioners had not applied for granting of PSPs to them. It is noteworthy that upon the said paper-notice, 58 (fifty-eight) persons had been issued with PSPs to operate omnibuses using the Southern Expressway, valid for a period of one year.

According to the Petitioners in November/December 2014 further 26 persons including the Petitioners were granted PSPs by the 3rd Respondent to operate omnibuses using the Southern Expressway, to destinations beyond the reach of the Southern Expressway.

The Petitioners have produced the said PSPs with the petitions, marked P 11 A. Accordingly, on 28.11.2014, the PSP bearing No NTCT-13748 to the Petitioner in case No SC/FR/131/2015 valid from 28.11.2014 to 04.01.2014; on 25.11.2014, the PSP bearing No NTCT-13778 to the Petitioner in SC/FR/132/2015 valid from 25.11.2014 to 24.01.2015; on 23.10.2014, the PSP bearing No NTC-12949 to the Petitioner in SC/FR/133/2015 valid from 23.10.2014 to 22.12.2014; on 30.10.2014, the PSP bearing No NTCT-13723 to the Petitioner in SC/FR/135/2015 valid from 30.10.2014 to 29.12.2014 and on 23.10.2014, the PSP bearing No NTCF-13548 to the Petitioner in SC/FR/157/2015 valid from 23.10.2014 to 07.04.2015, had been issued by the 3rd Respondent.

It is apparent that the said PSPs had not been issued in terms of Section 25 of the NTC Act, validating for a period not less than one year and not more than three years. Section 25 reads thus;

> 25(1) No passenger service permit shall be granted by the commission to any person under Section 24 except upon the payment by such person to the Commission of such fee as may be prescribed.
>
> (2) Every passenger service permit granted under section 24 shall
>
> (a) be in the prescribed form; and

(b) unless it is cancelled earlier, be in force for such period not less than one year and not more than three.

According to Section 25 (2) b, a PSP issued in terms of said section, be in force for a period not less than one year and not more than three years. Hence it is apparent from Section 25 (2) b, that any PSP, which has been issued in violation of the said validity period, has no force in law. The Petitioners are now seeking an order from this court directing the Respondents to renew/extend the validity of the said PSPs and/or to grant fresh PSPs valid for a period of 01 year at a time. It must be noted that, the said PSPs, when issued for the first time, had not been issued to be in force for a period not less than one year as required by the provisions contained in Section 25 (2) b of the NTC Act. It is clearly seen that the validity of the said PSPs had been limited to a period less than 04 months from the date of issue. On the face of the said PSPs it is seen that it had been issued in contravention of the Provisions contained in Section 25 (2) b of the said Act. It is therefore clear that the Petitioners are now seeking from this court to validate the PSPs which had been issued in contrary to the provisions contained in the said Act.

It is surprising to note that although the said PSPs had been issued in contravention of Section 25 (2) b of the said Act, none of the Petitioners had made any attempt to challenge the 3rd respondent's decision to grant PSPs in the aforementioned style, before a court of law, by way of a fundamental right application or by way of a writ application.

When the circumstances were prevailing as such, according to the Petitioners, the 3rd Respondent had extended the period of validity of the said PSP's bearing No NTCT-13748 from 05.01.2015 to 04.04.2015, the PSP bearing No NTCT-13778 from 23.12.2014 to 22.01.2015 and thereafter from 23.01.2015 to 22.04.2015, the PSP bearing No NTC-12949 from 25.01.2015 to 24.03.2015 and

the PSP bearing No NTCT-13723 from 30.12.2014 to 29.03.2015. It is seen that no extension in the period of validity of the PSP bearing No NTCF-13548 had been granted to the Petitioner in SC/FR/157/2015 in which the validity period was to be expired on 07.04.2015. The Petitioners have produced the said renewals of the said PSPs (P 11A) marked P 11B.

The Respondents contended that the said renewals (P11B) of the PSPs are naturally illegal as they are based on PSPs marked P 11A and, furthermore, P 11B has an additional layer of illegality as it contravenes Section 30 of the National Transport Commission Act as well, since a renewal could also only be made for a period not less than one year and not more than three years. Section 30(1) of the said Act stipulates provisions in relation to the renewal of such PSPs as follows;

> 30.(1) The Commission may subject to subsection (2) and having regard to the availability of adequate omnibus services to meet the demand for omnibus services on the route or routes covered by any passenger service permit granted under section 24 renewal such permit, on application made to it by the holder of such permit for such period not less than one year and not more than three years calculated from the date of expiry of the permit.

It is clearly seen that said renewals marked P 11B had not been made according to the provisions contained in Section 30(1) of the act. It is seen from P 11B that the renewal had been made for a period less than one year. The inequality complained of by the petitioners in the aforementioned cases are only regarding the inequality of Respondents' decision to refuse the renewal of the Petitioners aforesaid PSPs. As I have mentioned above, the issuance of the said PSPs are in violation of Section 25 (1) b of the said Act since it had been issued valid for a

period less than 05 months from the date of issue. On other hand the first renewal of said PSPs too are in violation of Section 30 (1) of the said Act since the same had been renewed for a period less than 03 months. It is emphasized that the Constitution only guarantees equal protection of the law and not equal violation of law.

After the expiration of the said validity periods of the PSPs marked P 11B, the Petitioners had submitted their said PSPs for the renewal of the validity periods for the second time. The 3rd Respondent had refused to extend the validity period of the said PSPs marked P 11B. The Petitioners have complained that the 3rd Respondent, without providing any reason whatsoever, had refused to renew and/or extend the validity of the said PSPs.

Section 30(2) of the said Act stipulates the circumstances where National Transport Commission can refuse to renew PSPs. Section 30(2) read thus:

> 30(2) The Commission may refuse to renew any passenger service permit granted under section 24 if it appears to the Commission that the holder of such permit
>
> (a) has not observed the provisions of this Act or any regulations made thereunder;
>
> (b) has been convicted of any offence under this Act or any regulations made thereunder;
>
> (c) has not paid the prescribed fee for the renewal of the permit.

The Petitioners have complained in paragraph 21 of their Petitions that the refusal and/or failure of the 3rd Respondent to renew or extend the validity of the Petitioners said PSPs are in violation of the Petitioners' fundamental rights guaranteed to them under article 14(1)g of the Constitution.

Article 14(1)(g) of the Constitution provides that every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession trade, business or enterprise.

In the case of Abeywardene vs. Inspector General of Police and Others (1991) 2 Sri LR 349, Amerasinghe, J. stated that, “Article 14(1)(g) is based on Article 19(1)(g) of the Indian Constitution which provides that "All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business." Although that Article does not expressly confine the occupation, trade or business" to *lawful* activities, the Courts have consistently held that the Constitution only protects the right to lawful occupations. ……. One illegality does not justify another illegality”.

In the exercise of the powers of the Supreme Court under Article 126(4) of the Constitution this court can issue a direction to a public authority or official commanding him to carry out his duty in compliance with the law. When the previous acts of the public authority are in violation of the provisions of the relevant statute, this court cannot issue a direction to the public authority to perform the subsequent act, which emanate from the previous illegal act, in contrary to the provisions contained in the relevant statute. In the present case before me, as I have expressed before, both, the issuance and the renewal of the PSPs marked P 11A and P 11B are in contrary to the provisions contained in the NTC Act. Hence this court cannot issue a direction to NTC commanding it to renew the said PSPs marked P 11B in accordance with the law.

In the case of *C. W. Mackie & Co., Ltd. v. Hugh Molagoda, Commissioner General of Inland Revenue and Others* (1986) 1 Sri LR 300 (SC)

Chief Justice Sharvananda stated that “The Supreme Court cannot lend its sanction or authority to any illegal act. Illegality and equity are not on speaking terms".

In the aforesaid circumstances, I am of the view that, acting on constitutional principles, this court cannot give legal recognition to the unconstitutional action of the NTC, in the issuance of the PSPs to the Petitioners and the renewal of the same for the first time, in contrary to the validity period stipulated in the Act. Hence the granting relief to the Petitioners as prayed for in the said petitions would amount to sanctioning and justifying the illegal actions of the 3rd Respondent. This court cannot condone any attempt at frustration of the law by the Executive. It is basic to the Constitution that the Executive should carry out the mandate of the Legislature.

Hence, I hold that by refusing the Petitioners applications to renew the said PSPs marked P 11B, the Respondents have not violated the fundamental rights of the Petitioners guaranteed under Article 14(1)g of the Constitution. Therefore, I dismiss the said applications of the Petitioners without costs.

Judge of the Supreme Court

PRIYASATH DEP, PC, J. (as he then was)

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

S.C (FR) No. 138/2015

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

D.P.L. Sunil Shantha Gunasekara
"Ariya Niwasa", Widya Chandra Mawatha, Digaradda, Ahangama.

PETITIONER

Vs.

1. S.S. Hettiarachchi
   Director General of Pensions,
   Department of Pensions,
   Maligawatte, Colombo 10.

2. Justice Sathya Hettige P.C.,
   Chairman
2A. Dharmasena Dissanayake,
   Chairman.

3. S.C. Mannapperuma, Member
3A. A. Salam Abdul Waid, Member.

4. Ananda Seneviratne, Member
4A. D. Shirantha Wijayatillake, Member

5. N.H. Pathirana, Member
5A Prathap Ramanujam, Member

6. Kanthi Wijetunge, Member
6A V. Jegarasasingam, Member

7. Sunil S. Sirisena, Member
7A. Santi Nihal Seneviratne, Member

8. S. Thillanadarajah, Member
8A. S. Ranugge, Member

9. A. Mohamed Nahiya, Member
9A. D.L. Mendis, Member

10. I.M. Zoysa Gunasekara, Member
10A. A Sarath Jayathilaka, Member

1st to 10th – All of Public Service Commission
No. 177, Nawala Road, Narahenpita,
Colombo 05.

11. T.M.L.C. Senaratne
Secretary, Public Service Commission,
No. 177, Nawala Road, Narahenpita,
Colombo 05.

11A. H.M.G. Senevirathne
Secretary, Public Service Commission
No. 177, Nawala Road, Narahenpita,
Colombo 05.

12. Upali Marasinghe
Secretary, Ministry of Education,
Palawatta, Battaramulla.

13. Jayatissa Block
Provincial Director of
Education-Southern Province.
Provincial Education Office-
Southern Province,
Upper Dixon Road, Galle.

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

RESPONDENTS

BEFORE: B.P. Aluwihare P.C., J.
Anil Gooneratne J. &
Vijith K. Malalgoda P.C., J.

COUNSEL: J.C. Weliamuna P.C with Pasindu Silva
For the Petitioner

Parinda Ranasinghe S.D.S.G for the Attorney General

ARGUED ON: 23.10.2107

DECIDEDON: 08.11.2017

GOONERATNE J.

The Petitioner in this application was the Principal of St. Aloysius College, Galle who retired from service on 12.09.2014 on reaching the age of retirement at the age of 60 years. He complains that his pension and other retiral benefits have been withheld by the authorities concerned. The averments in the petition indicates that the petitioner was formally informed that he has been retired under Section 12 of the Minutes on Pensions on 28.03.2015, i.e more than 6 months after the effective date of retirement. I also find that a charge sheet had been served on him about 1 year after the date of retirement. This court on 26.05.2015 granted leave to proceed under Article 12(1) of the Constitution. On the said day court inquired from the learned Deputy Solicitor

General as to why the Petitioner's commuted pension or a reduced pension has not been paid up to date? Consequently on 08.07.2015 learned Deputy Solicitor General informed court that 50% of the pension would be paid until the inquiry before court is concluded. I observe that in view of the intervention of court the Petitioner received at least 50/% of the pension.

On a perusal of the petition of the Petitioner it is evident that he joined the Public Service as a teacher on 01.02.1977. On 02.01.1995 he was appointed to class 1 of the Sri Lanka Principals Service and served as Principal in several schools and on or about 2004 appointed as Principal of St. Aloysius College, Galle (paragraphs 5 – 7 of petition). Altogether he has served the Public Service for about 37 years up to the date of his effective date of retirement. His achievements on behalf of St. Aloysius College are more fully described in paragraph 8 of the petition. The Petitioner allege that a series of malicious actions were done by the Secretary to the Old Boys' Association of St. Aloysius College which acts are referred to in P6, a complaint made to the Human Rights Commission by the Petitioner. The letter P6 indicates the manner in which he has been harassed by the said Secretary of the OBA who is also a local politician (namely Deshapriya). P6 provides full details as to how the Galle Police took the initiative to get his passport impounded and prevented the Petitioner leaving the island on a frivolous complaint. Petitioner was to leave for Japan with six

students from St. Aloysius College on a SAARC Educational Tour to Japan with other students from various schools and three other Principals. The Magistrate's Court proceedings contained in P3 of P6 indicates that police ultimately informed the magistrate that by an oversight Petitioner was to be arrested as a suspect. Magistrate ultimately made order revoking the order impounding the passport and accordingly informed the Controller of Immigration and Emigration. On perusal of P3 of P6 gives the impression that the above named Deshappriya was all out to harass the Petitioner and deprive the Petitioner of his legitimate dues. The Magistrate's Court proceedings were terminated.

The above seems to be the initial step taken by resorting to unscrupulous methods by the Secretary to the Old Boys' Association of St. Aloysius College to take some form of revenge from the Petitioner which ultimately resulted in depriving Petitioner's pensions' rights. Subsequent to the incidents reflected in P6 as described in paragraph 10 of the petition, Petitioner obtained a transfer to the Provincial Education Office, Galle and he served in that office from 16.05.2014 to 10.09.2014 (date of the retirement) P7(a) & P7(b).

It is pleaded that on or about February 2014, three investigating officers of the Education Ministry came to the college stating that the Ministry has received a complaint regarding admissions of Grade 1 students for the year 2013, and recorded statements from the two Vice Principals and the Principal of

the primary section of the school, other than the Petitioner. On 28.04.2014 Petitioner received a letter requesting for the amended appeal list of students admitted in the year 2013. He was also required to attend a preliminary inquiry (P8a to P8c) and a statement was recorded. In the petition it is pleaded that the following matters were told to the inquiring officers.

(1) During his tenure of 10 years at St. Aloysius College no cases were filed against the school.
(2) Complaint is as a result of Secretary of the school OBA taking revenge from him.
(3) No parent raised any issue as regards admissions of school children for the year 2013.
(4) Ministry of Education has approved to admit school children reaching a maximum of 45 per class, and 225 students were admitted (P9a and P6).

It is further pleaded that by letter of 26.04.2014 the 13th Respondent forwarded the Petitioner's application for retirement under normal retirement (P11).Then on 25.06.2014 Petitioner was informed that in view of the fact that a preliminary investigation is pending the above approval was amended to retire the Petitioner under Section 2:12 of the Pensions Minute (P12).

Petitioner also complain that since he retired from service on 11.09.2014 he had to continuously send letters requesting for retiral benefits by letters dated 15.08.2014, 13.10.2014, 12.11.2014, 19.12.2014 & 14.01.2015

(P13(a) to P13(d). He also complained to the Human Rights Commission. P15(a) & P15(b) , P16(b).

Letter P16 (b) addressed to the Human Rights Commission is a complaint by the Petitioner that the failure of officials to retire him under Section 12:1 of the Pensions Minutes prior to the date of retirement 11.09.2014.

I have also perused the affidavit of the 12th Respondent. Secretary to the Ministry of Education. It stated in the affidavit that a preliminary investigation was conducted in respect of acts of corruption and irregularities committed by the Petitioner during his tenue of office at St Aloysius College, Galle. It is affirmed by the 12th Respondent that it was recommended to issue a charge sheet. The investigation report dated 05.08.2014 (12R1) a draft charge sheet 12R2 and correspondence 12R 3 & 12R 4 are produced along with his affidavit. The preliminary investigation was centred around the following allegations of misconduct.

(a) Acts of corruption and irregularities involving Grade 1 Student Admissions to the year 2013
(b) Proceedings from stage play titled “Booruwa Mahattaya” being credited to Old Boys Association Bank Account instead of depositing the school Development Fund Account.
(c) Producing bogus bills in respect of canteen renovations.
(d) Mismanaging the School Co-operative Lending Society thereby driving it to bankruptcy,

(e) Fraud committed in respect of moneys provided by Singer Sri Lanka for the development of the sport of rugby in the school.

(f) Soliciting sexual gratifications.

It is averred inter alia in the affidavit of the 12th Respondent that the main allegation against the Petitioner was corruption and irregularities committed in respect of Grade 1 students admissions. It is specifically pleaded that the retirement of the Petitioner had been done in terms of Public Administration Circular 29/90.

At the stage of argument before us having heard the submissions of learned President's Counsel for the Petitioner, in reply to same the learned Deputy Solicitor General (senior) submitted to court that the case of *Wilbert Godawela Vs. S.D. Chandradasa and Others 1995 (2) SLR 338* has no application to this case and went on to submit that the said case is no longer authority to be followed. Having said that it was pointed out by learned President's Counsel that in the case in hand paragraph 27 of the affidavit of 12th Respondent specifically state that retirement of the Petitioner had been done in terms of Public Administration Circular 29/90. I do not agree with the submissions of learned Senior Deputy Solicitor General regarding the above point. It is evident that the formal charge sheet was issued to the Petitioner only <u>after one year</u> from the date of retirement of the Petitioner. Petitioner's retirement was earlier

approved to be a normal retirement but later converted to a Section 12 retirement under Clause 12 of the Minutes on Pensions after 6 months from the date of retirement. It is a highly unreasonable and an arbitrary decision of the authorities concerned and or the 1st to 13th Respondents to act in such a manner, and send a charge sheet by delaying the retiral benefit to a public servant who has served the state for 37 years, especially a teacher who later on became a Principal.

Circular No. 29/90 by the Public Administration was issued having considered the plight of a pensioner who has to go through lot of hardships by living on a meagre income. I have to mention at this point of this Judgement that Magistrate's Court proceedings were unnecessarily initiated against the Petitioner which ultimately ended up by a termination of the proceedings. The proceedings initiated on very frivolous grounds. The police in fact could not prefer a charge and admitted that fact before court, as stated above. This indicates that persons concerned were all out to take revenge from the Petitioner.

The allegations made by the Petitioner against one Deshapriya the Secretary of the OBA St. Aloysius College are well founded. On a perusal of the preliminary investigations report dated 05.08.2014 marked 12R1, the opening paragraph states that by letter dated 15.09.2013 by one Rupasinghe, President

OBA to Secretary, Ministry of Education and the letter addressed to His Excellency the President dated 10.11.2013 by the said Deshapriya, preliminary investigations were initiated, as in letter of 18.12.2013 by four persons named in 12R1.

I note that at Pg. 2 of 12R 1, it is stated that the said Rupasinghe the President of the OBA, St. Aloysius College who complained to Secretary, Ministry of Education never came before the Preliminary Investigation Committee to give evidence. The other person 'Deshapriya' who complained to H.E the President who agreed to submit written information to the committee. He failed to submit any written information. This indicates and this court could well draw adverse inferences against the two of them. The admission of students for the year 2013 was also considered by the committee. It is stated in 12R1 that Appeal and Objections papers relevant to the issue were misplaced. On the collection of Rs. 100,000/- for a play or concert, the parents could not be contacted or did not volunteer to give information. No monetary fraud established. Notwithstanding the several short comings stated in the preliminary investigations report 12R1, it has been recommended to issue a charge sheet which had been issued with much delay.

The importance of PA Circular No. 29/90 had been discussed in the *Godawella Case 1995 (2) SLR at Pg. 341*.

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 proposal...”

The preliminary report 12R1 is dated 05.08.2014 which is about 1 month prior to Petitioner’s retirement. The charge sheet was issued (P22) on 29.09.2015. This is 1 year after Petitioner’s retirement. The draft charge sheet had 8 charges. The charge sheet had only 5 counts. The charges on monetary claims seems to have been disregarded.

The counts which are five in number in the charge sheet relates to admissions of students for the year 2013. P24 is the award of pension dated 26.02.2016. All this I state it is highly prejudicial to the Petitioner’s retirement. I agree with the Petitioner that the preliminary inquiry was conducted consequent to a malicious petition submitted by Deshapriya, the Secretary of

the OBA who made a false complaint to the police on 24.08.2015. This led to arbitrary police action to prevent the Petitioner visiting Japan on an official visit, who was to retire on 11.09.2014. Both the Secretary and S. Rupasinghe, the President of the OBA were responsible for falsely implicating the Petitioner. Ultimately the Magistrate terminated proceedings.

Documents 25(a) to 25(d) submitted by the Petitioner indicates that the Secretary to the Ministry of Education has approved the admissions of students to the school for the year 2013. Documents 12R6 is another approval by Secretary to the Ministry of Education. I also find that by letter P27(a), P27(b) the Provincial Director of Education has called from the Secretary, Ministry of Education for the disciplinary order and the charge sheet. This had not been sent. These letters are dated August 2015 and September 2015. It is only on receipt of same that the charge sheet was issued. Even by December 2015 there was no decision to hold a disciplinary inquiry against the petitioner. Letters P28 (a) & P28 (b) also refer to certain lapses of the authorities concerned in connection with the issuance of a charge sheet and its delay. In this regard, I note the contents of paragraph 13 of the petitioner's counter affidavit. It is very unfortunate that by P30 (a) dated 23.05.2016 a disciplinary inquiry was to be held. In reply to P30 (a). I have noted the contents of P30 (b) by the Petitioner. It inter alia refer to 3(i), (ii), (iii), (iv) & (v).

(i) 37 වසරක සේවා කාලයෙන් පසු 2014. 09.12 වන දින මම විශ්‍රාම ගතිම

(ii) මා විශ්‍රාම වැටුප් සංග්‍රහය 2-12 වගන්තිය යටතේ විශ්‍රම ගන්වා ඇත්තේ 2015. 02.23 දිනැති ලිපිය මගිනි. මෙම ලිපිය මා අතට පත් වුයේ 2015 මාර්තු මාසයේදි ය. එනම් විශ්‍රම ගොස් මාස 6 ක් ඉක්ම වු පසුවය.

(iii) ශ්‍රේෂ්ඨාධිකරණ යෝජනාව පරිදි නීතිපති වරයා විසින් විශ්‍රම වැටුපෙන් 50% ක් ගෙවීමට රජයට යෝජනා කරන ලදී. ඒ සඳහා ක්‍රියා මාර්ග ගැනීමේ දී විශ්‍රම වැටුප් අධ්‍යක්ෂ වෙත 2015. 09.29 වන තෙක් චෝදනා පත්‍රයක් ලැබී නොමැති බවට දන්වා සිටි නිසා මට එරෙහිව චෝදනා පත්‍රයක් සකස් කර රාජ්‍ය සේවා කොමිසම විසින් විශ්‍රම වැටුප් අධ්‍යක්ෂ වෙත යැවීමට කටයුතු සළසා ඇත. එම චෝදනා පත්‍රය 2015. 09.29 දින මා වෙත ද එවා තිබිණි. ඒ වන විට මා විශ්‍රම ගොස් වසරක් ඉක්මවා ඇත.

(iv) මා විශ්‍රම වැටුප් ව්‍යවස්ථා සංග්‍රහයේ 2-12 වගන්තියට යටත් කර ඇති බව මා වෙත දැන්වුයේ විශ්‍රම ගොස් මාස 6 ක් ඉක්ම වු පසුවය. මෙය ක්‍රම විරෝධි විශ්‍රම ගැනීම බලරහිත කරන ලෙස ඉල්ලමින් මා විසින් ගරු ශ්‍රේෂ්ඨාධිකරණයේ නඩු අංක 138/2015 දරන නඩුව 2015 අප්‍රේල් මස ගොනු කරන ලදී. නඩුව ගොනු කර වසරක් ගතවී ඇතත් රාජ්‍ය සේවා කොමිසම හෝ අධ්‍යාපන අමාත්‍යංශයේ ලේකම් හෝ අනෙකුත් පාර්ශවයන් හෝ මේ දක්වා කිසිදු විරෝධතාවයක් ගොනු කර නොමැති බැවි සිහිපත් කර සිටිමි.

(v) මෙම නඩුව 2016. 06.16 දින විභාගයට ගැනීමට නියමිතව ඇත.

In all the facts and circumstances of the case in hand, I hold that the entire process of holding a disciplinary inquiry against the Petitioner is tainted with

malice and unacceptable delays by the 1st to 13th Respondents and the authorities concerned. The procedure laid down in PA Circular 29/90 and provision contained in Section 12 of the Minutes on Pensions has not been correctly observed. A public servant who retired in September 2014 is called upon to face a disciplinary inquiry only in June 9th 2016 is ridiculous. This is nothing but an abuse of the process by the authorities concerned. It is nothing but a clear violation of Article 12(1) of the Constitution by the 1st to 13th Respondents. I observe that the persons responsible have in fact abused the available process.

It is no excuse to rely on Section 36:4 of Chapter XLVIII of the Establishment Code in the context of the case in hand. This provision contemplates to give the disciplinary authority to hold a formal disciplinary inquiry irrespective of the retirement of the officer. This does not give the authority concerned absolute power to hold an inquiry according to his whims and fancies. The administrative process has to be fair, reasonable, transparent and in todays' context absence of malice. It appears to court that the process has been abused and it was utilised to deprive a public servant who worked for 37 years his due pension.

I grant relief as per sub paragraphs (b), (c) and (d) of the prayer to the petition of the Petitioner. I further direct the State to pay the Petitioner a sum of Rs. 500000/- as costs.

Application allowed as above.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

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

SC (FR) Nos. 345/2016 with 346/2016, 347/2016 & 348/2016

In the matter of an application under and in terms of Articles 12(1) read with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. L.G.L. Sumithra Menike,
   No. 43, Viharagama Janapadaya,
   Pahala Owala, Kaikawala

2. R.P. Aruna Malini,
   No. 185/1,
   Neluwa Kanda,
   Alwatte, Matale.

3. Subadra Wijekanthi,
   Wijaya Sevana, Kambi Adiya,
   Kaikawala, Matale.

4. P. G. Dharmaratne,
   Maussagolla, Rattota.

5. I. G. Sumanasena, No. 132,
   Neluwa Kanda,
   Alwatte, Matale

6. D.G. Indrani Swarnalatha
   No. 5, Walathalawa, Rattota.

7. H.M. Kumudini Herath,
   No. 193/6, Palleweragama,
   Kaikawala.

8. W.P.M. Sandmal De Silva
   103/6A, Kuruwawa, Rattota.

PETITIONERS

Vs.

1. Commissioner of
   Local Government-Central Province,
   Office of the Commissioner of Local
   Government – Central Province.

2. Secretary,
   Rattota Pradeshiya Sabha,
   Rattota.

3. Director General of
   Establishments, Ministry of Public
   Administration, Local Government and
   Democratic Governance,
   Independence Square,
   Colombo 7.

4. Rattota Pradeshiya Sabha,
   Rattota.

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

RESPONDENTS

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

COUNSEL: J.C. Weliamuna P.C. with Senura Abeywardena
for the Petitioners

Yuresha de Silva S.S.C. for the 1st , 3rd & 5th Respondents

Ranga Dayananda for the 2nd & 4th Respondents

ARGUED ON: 02.06.2017

DECIDED ON: 20.06.2017

GOONERATNE J.

The above applications which are similar in nature were taken up together for hearing. The 8 Petitioners in Application No. 345/2016 were serving the Rattota Pradeshiya Sabha in Rattota served in different capacities and positions. These Petitioners impugn the purported decision marked P7A – P7H read with P8 to temporarily cancel permanent appointments granted to the Petitioners. Paragraph 7 of the petition which is a table prepared for the purpose gives details of permanent positions. By Public Administration Circular P3 employees who are on a temporary, casual or relief basis are to be given permanent appointments. Petitioners were placed on a permanent basis. By letter of 01.12.2014 with effect from 24.10.2014. (P5A – P5H). As described in paragraph 9 of the petition, to the surprise of the said Petitioners the 2nd

Respondent revoked their letters of appointment by letter of 09.11.2014. (as in 'a', 'b' & 'c' as of paragraph 9. Representations were made to 2nd Respondent.

Petitioners plead that decision of the 2nd Respondent referred to in documents P7A – P7H read with document P8 violated Article 12(1) of the Constitution.

The Petitioner in Application No. 346/16 was serving the Yatawatta Pradeshiya Sabha. The Petitioner impugn the purported decisions mark P7 read with P8 as in the above application. Petitioner was made permanent as from 24.10.2014 as a Labourer (P1). By P2 Petitioner was appointed Labourer maintaining Street Lamps within the Yatawatta Pradeshiya Sabha limits. (P2) In the same way as above (P3) all temporary, casual etc. were made permanent. Accordingly Petitioner was also given a permanent appointment (P5) as from 24.10.2014. However the 2nd Respondent as above revoked the Petitioner's appointment by P7 dated 04.12.2015. P7 read with P8 is violative of Article 12(1) of the Constitution. As such this petitioner seek a declaration that the Respondents have violated the fundamental rights of the Petitioners under Article 12(1) of the Constitution. In the same way seeks to declare that P7 and P8 are illegal and null and void, and to declare that the Petitioners are entitled to be appointed to the post in document P5.

S.C. Application No. 347/2016facts are similar to above. So is Application No. 348/2016. All the Petitioners in these Fundamental Rights Applications have suffered the same fate. The Respondents did not seriously object to granting of relief to the several Petitioners in the aforesaid applications, when the applications were taken up for hearing. Most of the petitioners serve as Library Assistants or minor employees. Their employment was terminated on a wrong interpretation given to a Public Administration Circular. Circular P3 grants permanent appointments to those holding temporary, or casual employment in the named Pradeshiya Sabha.

Petitioners in all these applications are entitled to relief sought as in their prayers to the petition. As such this court allow these applications with costs, relief granted as per subparagraphs 'b', 'c' & 'd' of the several prayers to the respective petitions, filed of record.

Applications allowed with costs.

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 SUPEME COURT OF THE LDEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application made under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Mohamed Thalkeen Fathima Sahar
293/B Nagavillu
Palavi

SC/FR/ No. 424/2013
SC/FR/ No. 427/2013

Petitioner

1. **University of Moratuwa,**
   Moratuwa
2. **ProfessorAnanda Jayawardena**
   Vice Chancellor
   University of Moratuwa
   Katubedde, Moratuwa
3. **Hon.Attorney- General**
   Attorney General's Department
   Colombo 12
4. **Professor R A Attalage**
   Chairman and Deputy Vice Chancellor–Board of Residence and Discipline – University of Moratuwa – Moratuwa
5. **Professor P K S Mahanama**
   Co-Chairman– Board of Residence and Discipline – University of Moratuwa – Moratuwa
6. **Major General M Peiris**
7. **Dr. T.A.G.Gunasekera**
8. **Professor U G A Puswewala**

9. Mr. D K Vithanage
10. Mrs. R C Kodikara
11. Archt D P Chandrasena
12. Mr. L D I P Seneviratne
13. Archt U P P Liyanage
14. Dr J N Munasinghe
15. Dr P G Rathnasiri
16. Prof.S M A Nanayakkara
17. Dr C D Gamage
18. Dr A M K B Abeysinghe
19. Dr M P Dias
20. Dr A A Pasquel
21. Professor (Mrs) V M Wickremasinghe
22. Dr S U Adikari
23. Professor T S G Peiris
24. Dr V K Wimalsiri
25. Dr W D G Lanarolle
26. Dr T Sivakumar
27. Mrs K A D T Kulawansa
28. Dr L Ranatunga
29. Mr P M Karunaratne
30. Professor M S Manawadu
31. Professor (Mrs) B M W P K Amarasinghe
32. Professor A A P De Alwis
33. Professor S A S Perera
34. Professor K A M K Ranasinghe
35. Professor L L Ratnayake
36. Professor (Mrs) N Ratnayake
37. Professor K A S Kumarage
38. Professor W P S Dias
39. Professor N D Gunawardena
40. Professor J M S J Bandara
41. Professor N T S Wijesekera
42. Professor S S L Hettiarachchi
43. Professor S A S Kulathilake

44. Professor M T R Jayasinghe
45. Professor S P Samarawickrema
46. Professor (Mrs) C Jayasinghe
47. Professor H S Thilakasiri
48. Professor A A D A J Perera
49. Professor P G V Dias
50. Professor P G R. Dharmaratne
51. Professor J R Lucas
52. Professor H Y R Perera
53. Professor S P Kumarawadu
54. Prof. N Wickramarachchi
55. Professor J A K S Jayasinghe
56. Professor S A D Dias
57. Professor S W S B Dassanayake
58. Professor H S C Perera
59. Professor R G N de S Munasinghe
60. Professor K K C K Perera
61. Professor A S Karunananda
62. Professor M L de Silva
63. Dr U G D Weerasinghe
64. Mrs N C K Seram
65. Professor V S D Jayasena
66. Professor W A S N Wijetunge
67. Mr S C Premaratne
68. Dr S V Rabel
69. Mr. H Madanayake
70. Ms V Kulasekara

6th to 70th Respondents are members of the Board of Residence and Discipline of the University of Moratuwa - Moratuwa

Respondents

BEFORE: **K.SRIPAVAN, C J &**
B.ALUWIHARE, PC, J.

COUNSEL Saliya Peiris for the Petitioner in SC FR. No. 424/2013
H. Hizbullah for the Petitioner in SC FR No.427/2013
Manohara de Silva PC for the 1st and 2nd Respondents.
Indika Demuni de Silva Addl.S.G for the Attorney-General.

ARGUED ON: 01.04.2016

WRITTEN SUBMISSIONS: 29.04. 2016 and 6.05.2016.

DECIDED ON: 02.02. 2017

Aluwihare, P.C. J

When this matter (SC/FR/424/2013) and the connected Application SC FR/427/2013 came up for support on 1st April, 2016 the learned President's Counsel for the 1st and 2nd Respondents raised the following preliminary objections:

1. The amended petition filed on 11.12.2014 is out of time.

2. The Petitioner did not seek permission to amend either the body of the Petition or the prayer to the Petition and therefore the Petitioner's application for the amendment be refused and also for the reason that it was not made within a period of one month from the date of the alleged violation of the Petitioner's fundamental rights.

The learned President's Counsel also submitted that the preliminary objections raised are common to the Application No. SC/FR/424/2013 as well as the connected Application no. SC/FR/427/2013 and invited the court to decide on the preliminary objections raised in relation to both applications, in one order. The learned Counsel for the Petitioner submitted that he has no objection if the court were to deliver one common order in respect of both the Applications.

Before I deal with the Preliminary objections raised on behalf of the Respondents, I wish to refer to the facts that would be relevant and necessary to consider the objections.

The Petitioner, a student reading for a Bachelor's degree in Town and Country Planning of the Faculty of Architecture at the University of Moratuwa, asserts that from the inception, she used to wear the niqab a traditional Muslim dress when she attended the University. She also asserts that she had been wearing the niqab since her admission to the University in 2013.

According to the petition of the Petitioner, the 1st Respondent University had banned students wearing the niqab, with effect from 1st August, 2013 and consequently the Petitioner was stopped by the Security personnel at the gate on the basis that the 2nd Respondent (the Vice Chancellor) had ordered them, not to allow students to enter the University premises wearing the niqab.

The Petitioner takes up the position that the decision by the 1st Respondent University to ban the niqab was taken unilaterally and no written notice was given to the students of this decision.

The Petitioner states that she submitted an appeal dated 4th October, 2013 urging the authorities to re-consider the decision taken with regard to the ban imposed on wearing the niqab (P7).

The 2nd Respondent by his letter of 11th October, 2013, had granted the Petitioner permission to wear the face veil subject to certain restrictions, pending the decisions of the Board of Residence and Discipline (hereinafter also referred to as the BRD) and the University Senate (P8).

On the 24th November, 2013 when the Petitioner came to the University, she was again barred entry by the security personnel, who had informed her that the Board of Residence and Discipline of the University had taken a decision to bar entry to students, wearing the niqab.

The Petitioner, however, on the same day, had met the Vice Chancellor, who had informed the Petitioner that she will be formally informed by post of the decision. (of the BRD).

It is the position of the Petitioner that she was in receipt of the letter containing the decision of the Board of Residence and Discipline (P9) only the 4th of December 2013.

In raising the two preliminary objections aforementioned the learned President's Counsel for the Respondents contended that the original petition was filed on 27th December 2013 and subsequently the Petitioner had moved to amend the caption by adding the members of Board of Residence and Discipline.

In the process of filing the amended caption, it is complained, that the Petitioner made amendments to the averments in the Petition and the prayer of the Petition.

The learned President's Counsel contended that these amendments were made 12 months after the filing of the original Petition, in an attempt to bring the application within the time limit prescribed in terms of Article 126 of the Constitution.

The learned President's Counsel argued that in the case No. SC FR/424/2013, the paragraph 11 in the original Petition corresponds to paragraph 12 of the amended Petition, and similarly paragraph 31 in the original Petition corresponds to paragraph 32 of the amended Petition and these averments referred to documents marked 9A and 9B which were not annexures in the original Petition. In addition, the learned President's Counsel submitted that a new averment in the form of paragraph 40 had been added which referred to the document annexed as P16.

Prayer also had been amended, seeking declarations against "all" Respondents.

It was the contention of the Learned President's Counsel that, the court granted permission, only to amend the caption, when it was brought to the notice of the court that the 1st Respondent University had disclosed the names of the members of the Board of Residence and Discipline, whereupon the counsel for the Petitioner moved to add the members of the said Board as Respondents. The learned President's Counsel argued, therefore, the amended petition is out of time.

In response to the above objection raised on behalf of the Respondents the learned counsel for the Petitioner submitted that the amended petition differs from the original petition only in two respects:

(1) Adding the members of the Board of Residence and Discipline and making necessary amendments in the Petition to give effect to that;
and
(2) Annexing the relevant envelope (P9A) in which the letter P9 was posted to the Petitioner and a letter from the postal authorities (P9B) to confirm that it was delivered to her on the 4th December, 2013.

I shall now deal with the objections raised.

The 1st objection raised on behalf of the Respondent was to the effect that "The amended petition filed on 11th December, 2014 was out of time.

The original Petition was filed on 27th December, 2013 in both applications, i.e., SC FR 424/2013 and SC FR/427/2013.

When this matter came up on 29th April, 2014 the learned President's Counsel for the 1st Respondent raised two preliminary objections:

(1) That the Petitioner has failed to make all the necessary parties as Respondents, namely members of the Board of Residence and Discipline, and
(2) The application is made out of time,

And the matter was re-fixed for further submissions with regard to the preliminary objections for 16th June, 2014.

On 25th September, 2014 Petitioner intimated to the Court that the 1st Respondent University had disclosed the names of the members of the Board of Residence and Discipline and moved to add the members of the same as Respondents, which application was allowed subject to any objections and the Petitioner was directed to file an amended caption. When the matter came up on 16th December, 2014 the learned President's Counsel for the 1st and 2nd Respondents informed the Court that the amended papers were served on the Respondents only on 13th December 2014 and moved that the matter be re-fixed and it was consequently fixed for the 25th March, 2015. On that date the matter went down as the 4th to 70th added Respondents were absent and unrepresented.

The Court re-fixed the matter for support, and directed the Petitioner to support the 'amended Petition' with notice to the 4th to 70th Respondents.

The learned President's Counsel submitted that the amendments made to the body of the original Petition almost 12 months after the date of the original Petition are an attempt on the part of the Petitioner to enhance the purported cause of action and to bring these applications within the time limit prescribed in Article 126 of the Constitution.

It is the contention of the learned President's Counsel that according to Petitioner's own admission the Petitioner was informed by the 2nd Respondent Vice Chancellor that the Board of Residence and Discipline had decided not to allow the Petitioner to wear the niqab and the Vice Chancellor had informed her that the decision of the Board of Residence and Discipline would be communicated to her by post. Thus the Learned President's Counsel argued that by 24th November 2013, Petitioner was put on notice and knew that she would not be permitted to wear the niqab. Hence the 30 day period to invoke the special jurisdiction of this court under Article 126 starts running from 24th November, 2013. The Petition had, however, filed this application only on 27th December, 2013 which the Counsel contended, was clearly out of time.

When one considers the sequence of events commencing from 1st August, 2013 (the day on which the Petitioner was informed by the Security Personnel about the prohibition of the niqab) it is not disputed that the Petitioner was permitted to wear the niqab pending the decision of the Board of Residence and Discipline and the Senate.

According to the Petitioner, she was in receipt of the letter of the 2nd Respondent, communicating the decision of the Board of Residence and Discipline on the 4th December 2013 and the Petitioner was entitled to invoke the special jurisdiction of this court under Article 126 of the Constitution within 30 days therefrom.

The Petitioner by filing the Petition has invoked the jurisdiction of this court on 27th December, 2013 which is well within the prescribed 30 day period.

On the other hand the Petitioner had specifically pleaded in her affidavit (paragraph 43) that she was not aware of the names of the members of the Board of Residence and Discipline of the 1st Respondent University and had reserved the right to add the members of the said Board based on the disclosures made by the Respondents.

It was in this backdrop the court granted permission to the Petitioner on 25th September, 2014 to add the members of the Board of Residence and Discipline of the 1st Respondent University and subsequently directed the Petitioner to support the "amended Petition" on 25th March, 2015.

In the exercise of the jurisdiction under Article 126 of the Constitution, the failure to make a person, who is alleged to have violated a fundamental right a respondent is not fatal defect, for the reason, in the exercise of its jurisdiction in terms of Article 126 of the Constitution, the court would be determining whether the alleged violation of the right of the individual declared and guaranteed by the Constitution has been denied by failure on the part of the State to discharge its complementary obligations; as held in the case of ***Saman Vs. Leeladasa and Another – 1989 SLR 83,*** it is the liability of the State and not that of its servants, agents or the institutions.

As held in the case of ***Jayanetti vs. Land Reform Commission – 1984 28 SLR 172***
"*The remedy for a violation of a fundamental right is enshrined in Articles 17 and 126 of the Constitution and not in any rules. Article 17 is given the importance of being dignified into a fundamental right Itself. This provision is of the utmost importance not only for securing the safety and welfare of the people of this country but stands as an impregnable redoubt protecting the operation of the democratic system of Government in the country. Therefore, if we take our stand on these two provisions as central, we find that any procedural rules must be considered secondary to these constitutional guarantees. We are empowered, and indeed it is our duty, to give full operation to the provisions of Articles 17 and 126. These provisions vest this Court with sole and exclusive jurisdiction to hear and determine any question relating to an infringement of fundamental rights by executive or administrative action. 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 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."(Emphasis added)

As referred to earlier the Petitioner has invoked the jurisdiction of this court within the stipulated 30 day period and the Petitioner was granted permission to file the amended caption adding the necessary respondents.

As such I hold that amended Petition is not out of time and reject the 1st preliminary objection raised on behalf of the Respondents.

The 2nd objection was to the effect that the Petitioner, in the process of amending the caption, amended the body of the Petition and the prayer without first having obtained leave, from this court.

Although it is correct that the Petitioner was only permitted to file an amended caption to add the members of the Board of Residence and Discipline as respondents, the Petitioner had filed an amended Petition. In doing so, the Petitioner had annexed the envelope in which letter P9 was delivered and a letter from the Postmaster of Palaviya stating the date on which P9 was delivered. I do not see this as an attempt on the part of the Petitioner to set up a new case as far as the allegations leveled against the Respondents are concerned. Further, the Respondents are not called upon to meet a position that is different to what was asserted in the original Petition of the Petitioner.

Thus, I am of the view that the addition of the document to the amended Petition is not of sufficient gravity to reject the Petition and as such I over rule the 2nd Preliminary objection raised on behalf of the Respondents as well.

The learned President's Counsel raised the same objections in SC/ FR 427/13 as well. The Petitioner in the said case Mohamed Nizar Aaisha Shahany is also a student of the Moratuwa University and had asserted that as a citizen, she has the right to choose her attire and as such she chose to wear the niqab. The Petitioner had pleaded that on 15th August, 2013, she was prevented entry to the University premises by the Security Personnel at the gate, on the basis that the 2nd Respondent (Vice Chancellor) had ordered the Security Personnel not to allow her into the University wearing the niqab and she was compelled to attend lectures without the

niqab. It is the position of the Petitioner that she had been made to understand that the Board of Residence and Discipline of the 1st Respondent University had purportedly decided to ban the niqab on 4th December, 2013.

From the Petitioner's own assertion, the alleged violation had taken place on 15th August, 2013 and until invoking the special jurisdiction of this court on 30th December, 2013 Petitioner appears to have taken no action. The present Petition had been filed 4 ½ months after the alleged violation and therefor clearly out of time.

Considering the above, I uphold the 1st preliminary objection raised on behalf of the Respondents and dismiss the Petition in Application No. SC/FR/ 427/2013 on the basis that it was filed out of time.

In view of the finding arrived at on the 1st preliminary objection in the Application SC/FR/427/2013, I do not see any purpose in considering the 2nd preliminary objection.

JUDGE OF THE SUPREME COURT

JUSTICE K. SRIPAVAN

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 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC(FR) No. 430/2005

H.A. Manoj Talis,
Lesley Iron Works,
Udawela,
Ibbagamuwa.

Petitioner

-Vs-

1) Inspector Hiriyadeniya,
Officer-in-Charge,
Crimes Branch,
Police Station,
Gokarella.

2) Sub-Inspector Nayanananda,
Police Station,
Gokarella.

3) Sub-Inspector Ellepola,
Police Station, Gokarella.

4) Sergeant Hemachandra
Police Station,
Gokarella.

5) Police Constable Ratnasiri,
Police Station,
Gokarella.

6) Reserve Police Constable Ajith,
Police Station,
Gokarella.

7) Officer-in-Charge,
Police Station,
Gokarella.

8) Inspector- General of Police,
Police Headquarters,
Colombo-01.

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

Respondents

Before: : Sisira J. de Abrew, J

Upaly Abeyrathne, J &

Nalin Perera, J

Counsel: : Shyamal A. Collure with A.P.Jayaweera for the Petitioner.

Uditha Egalahewa PC with Vishwa Vimukthi for the 1st,2nd,3rd,5th and 6th Respondents.

Ms. Nayomi Wickramasekera SSC for the 7th to 9th Respondents.

Argued &
Decided on: : 02.06.2017

Sisira J.de Abrew, J

Heard counsel for both parties in support of their respective cases. The Petitioner complains that the 1st to 6th Respondents came to his house on 24.09.2005 around 9.15. p.m. and arrested the Petitioner. Thereafter the Petitioner was taken to Gokarella Police Station. The Petitioner complains that the 3rd Respondent slapped him, the 2nd Respondent gave a blow to his ear and the 1st Respondent hit him on his face inside the Police Station. This assault according to the Petitioner has taken place in a room of the Police Station. After the said assault, the Petitioner was removed from the said room to another room. In the 2nd room the 1st to 6th Respondents have asked him to kneel down. His hands were tied by some of the Respondents. When the Petitioner was squatting, the 1st, 2nd and 3rd Respondents brought an iron bar and passed the said iron bar between his hands and legs. This has been done according to the Petitioner by the 1st to 3rd Respondents. While the said act was being performed by the 1st to 3rd Respondents, the 5th and 6th Respondents too were inside this room. Thereafter a s-Lon pipe was sent through the Petitioner's rectum and the Respondents assaulted the Petitioner. The Petitioner complains that when he was arrested, the Police Officers did not give him any reason for his arrest. The Respondents have filed objections to this application . When we peruse the objections, and the petition of the Petitioner, we are unable to conclude that the Respondents have given sufficient reasons for the arrest of the Petitioner. The Petitioner was later examined by the Judicial Medical Officer and the report of the Judicial Medical Officer dated 30.11.2009 supports the allegations levelled by the Petitioner against the Respondents. According to the Consultant Judicial Medical Officer, the history of torture was present in the body of the Petitioner.

When we examine the medical reports marked as P1, P2 and P10, there is evidence to suggest that the Petitioner has suffered a rupture in his ear drum. On a complaint made by the Petitioner to the OIC Gokarella (the 7th Respondent), against the Police Officers, Police conducted investigation against the 1st to 6th Respondents. After investigation, the Hon. A.G filed an indictment against the 1st, 2nd,3rd, 5th and 6th Respondents for offences alleged to have been committed under Act No. 22 of 1994. The learned High Court Judge after trial convicted the 1st, 2nd, 3rd 5th and 6th Respondents and sentenced them to pay a crown costs amounting to Rs.1500/- and 02 years Rigorous Imprisonment suspended for 05 years. In addition to the said punishment each Respondent was ordered to pay Rs.1000/- as compensation to the Petitioner.

Learned President's Counsel appearing for the 1st to 6th Respondents submits that he does not resist the application of the Petitioner as the Respondents have been convicted by the High Court. However we note that there is no sufficient evidence against the 4th Respondent to find him guilty for the alleged violation of Articles 11,12(1),13(1) and 13(2) of the Constitution. Learned counsel appearing for the Petitioner too does not press the case against the 4th Respondent. As I pointed out earlier, the Police Officers who arrested the Petitioner have failed to give reasons for his arrest. Considering the aforementioned matters, we hold that the 1st,2nd,3rd,5th and 6th Respondents have violated the fundamental rights of the Petitioner guaranteed by Article 13(1) of the Constitution and further hold that the arrest of the Petitioner was illegal. If the arrest of the Petitioner was illegal, the detention of the Petitioner by the Police Officers inside the Police Station too becomes illegal. Considering all the above matters, we hold that the 1st, 2nd ,3rd,5th and 6th Respondents have violated the fundamental rights of the Petitioner guaranteed by Articles 11, 12(1),13(1) and 13(2) of the Constitution.

We therefore order each of the above Respondent (1st, 2nd,3rd,5th and 6th Respondents) to pay a sum of Rs. 100,000/- to the Petitioner as compensation. For the purpose of clarity, we state here that each Respondent abovenamed (1st, 2nd ,3rd,5th and 6th) should pay Rs. 100,000/- to the Petitioner as compensation. When we consider the facts of this case we are unable to find the 4th Respondent guilty of violation of the fundamental rights of the Petitioner guaranteed by the Constitution.

The 1st,2nd,3th,5th and 6th Respondents are directed to pay the said compensation to the Petitioner within 03 months from today.

The Registrar of this Court is directed to send a copy of this order to the 8th and 9th Respondents. We do not make any order against the State to pay compensation.

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

kpm/-

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

Ekanayake Udaya Kumara Ekanayake,

"Sriyani", Diyambalapitiya,

Kotugoda.

Petitioner

SC /FR/ Application No 556/2010

Vs,

1. Mahinda Balasooriya,
   Inspector General of Police,
   Inspector General's Office,
   Police Headquarters,
   Colombo 01.
2. Officer in Charge,
   Personal Administration, Police Headquarters,
   Colombo 01.
3. Deputy Inspector General, Discipline and Conduct Division, Police Headquarters,
   Colombo 01.
4. Director Legal,
   Police Legal Division,
   Police Headquarters,
   Colombo 01.
5. The Secretary, Police Commission, National Police Commission, 3rd Floor,
   Rotunda Towers,
   No.109, Galle Road,
   Colombo 03.
6. The Secretary, Public Service Commission.
   Carlwill Place,
   Colombo 03.
7. The Secretary, Ministry of Defence,
   Law and Order, 15/5, Baladaksha Mw,
   Colombo 03.

8. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.
9. N.K. Illangakoon,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.
10. Nanda Mallawarachchi,
    The Secretary,
    Ministry of Law and Order,
    Janadhipathi Mw,
    Colombo 01.
11. Sathya Hettige,
    Chairman,
    Public Service Commission,
    No.177, Nawala Road,
    Narahenpita.
12. Kanthi Wijetunga,
    Member
13. Sunil A. Sirisena,
    Member
14. I.N. Soyza,
    Member
    All of the Public Service Commission,
    No 177,
    No.177, Nawala Road,
    Narahenpita.

Respondents

Before: **B.P. Aluwihare PC J**

Anil Goonaratne J

Vijith K. Malalgoda PC J

Counsel: Saliya Peiris PC with Lasitha Sachindra for the Petitioner

Viraj Dayaratne Senior Deputy Solicitor General for the Respondents

Argued on: 21.06.2017

Judgment on: 06.10.2017

Vijith K. Malalgoda PC J

The Petitioner to the present application Ekanayake Udaya Kumara Ekanayake had joined the Reserve Police Service as a Reserve Police Constable on 01.05.1986.

He has applied for the post of Sub-Inspector in the Police Reserve Service, based on his qualifications and was appointed as a Sub-Inspector of the Police Reserve Service on 05.08.1889. According to the Petitioner, ha had served in Wattala, Kandana, Katunayake, Minuwangoda Police Stations and Batticaloa and Negombo Divisions since his appointment as a Sub-Inspector, until his services were suspended on 06.03.1999 on an incident of shooting, where the Petitioner alleged, that he was falsely implicated to the said incident.

However as submitted by the Petitioner, he was acquitted of the charge of attempted murder by the Learned High Court Judge on 23.06.2008 and thereafter he preferred an appeal to the predecessor to the 1st Respondent and to the National Police Commission on 01.07.2008 seeking inter alia that he be re-instated considering the acquittal by the High Court, and to absorb him to the regular cadre based on a Cabinet decision dated 01.02.2006. In this regard he further submitted that, while he was on suspension, other officers of the Police Reserve Service were absorbed to the Regular Service and therefore he too was entitled to be promoted.

On 25.04.2009 the Petitioner had received a letter from the 3rd Respondent, said to have signed by the 2nd Respondent, informing the Petitioner that he has been demobilized and his name had been struck off from the enrollment list with effect from 24.03.2009 on the orders of the then Inspector General of Police.

Being aggrieved by the said decision Petitioner had come before the Supreme Court for alleged violations of his fundermental rights under Article 12(1) and 14(1) (G) of the Constitution, in SC FR application bearing No 412/2009.

As submitted by the Petitioner before us, the said application was withdrawn by the Petitioner on 1st October 2009 before the said application was supported, after considering the fact that the Hon. Attorney General has advised that, an inquiry should be held before disciplinary action is taken against the Petitioner.

However in the absence of any positive reply coming from the Respondents, the Petitioner had filed a motion in the said application, and moved to support the said motion before this court on 27.06.2010. At that stage it was revealed that a decision had been taken not to re- instate the Petitioner after an inquiry. When this position was conveyed to the Petitioner, he moved to withdraw the motion already submitted before court and the said motion too was disallowed by the Supreme Court on 28.09.2010.

The present application was filed before this court on 08.10.2010 alleging violations under Articles 12 (1) and 14 (1) (G) of the Constitution and this court after considering the material placed before court had decided to grant leave on alleged violations under Article 12 (1) of the Constitution on 10.02.2011.

During the argument before this court, the Petitioner heavily relied on three reports, out of which one was prepared by Senior Superintendent of Police Negombo on 30.12.2009. The other two reports were prepared on 19th February and 23rd February 2010 by Superintendent of Police, Negombo II and Senior Superintendent of Police Negombo.

From his petition filed before this court the Petitioner had requested this court to call for the said reports and in fact this court had called for the said reports and they are available before court for our consideration.

As observed by me, all three reports referred to above have been prepared subsequent to the Attorney General's advice to the 1st Respondent in SC FR 412/2009 to conduct an inquiry before action is taken against the Petitioner.

Before considering the said three reports, I would now proceed to consider the position taken up by the Respondents before this court.

The Petitioner who had first joined the Police Reserve as a Reserve Police Constable on 01.05.1986 had left the service and was employed at a private establishment. Upon an appeal submitted by him, he was permitted to re join the Police Reserve in the same capacity with effect from 23.03.1987. Thereafter he was recruited as a Reserve Sub-Inspector with effect from 1989.

During the period between 5th August 1989 and 6th March 1999 the Petitioner was once interdicted by letter dated 24.07.1990 considering the bad reports received against him and was dismissed from the service with effect from 19.09.1990. (1R4)

Even though the Respondents have failed to submit any documentation for his reinstatement thereafter, the Petitioner was once again interdicted on 23rd August 1993 on an allegation of Bribery (1R6) but the Respondents have once again failed to submit any documentation with regard to the reinstatement of the Petitioner but as submitted by the Petitioner he was in service at the time he was interdicted on an allegation of attempted murder on 06.03.1999.

Whilst referring to the said period of interdiction/dismissal, the Learned Deputy Solicitor General who represented the Respondents before this court had submitted that the total period of service of the Petitioner is not more than 4 years and six months when he was interdicted on 06.03.1999. As observed by me, the circular issued by the then Inspector General of Police, on absorption of Reserve Police Officers to the Regular Cadre (P-11) subsequent to the Cabinet decision dated 09.02.2006 (P-10) required the reservist to have 5 years unblemished record and the period under suspension or demobilization will not be considered when considering active service.

In the said circumstances it is observed that the Petitioner has failed to fulfill both the requirements referred to above, to be absorbed to the regular service.

As further observed by me, the Petitioner is silent on his previous conduct between the period of 5th August 1989 and 06.03.1999 and failed to give any explanation with regard to his conduct revealed from the documents produced by the Respondents marked 1R4-1R6 even in his counter objection filed before this court on 30 11.2011. In this regard I am further mindful of the fact that the Petitioner is not a member of the Regular service and is only a reservist.

In all three reports the Petitioner had relied before this court, the authors of the said reports had considered the allegation against the Petitioner.

As discussed by SSP Negombo in his report dated 30.12.2009 addressed to DIG (Western Province-North), SP II Negombo in his report dated 19.02.2010 addressed to SSP Negombo and by SSP Negombo in his report dated 23.02.2010 addressed to Director Legal Division, they have not considered the previous conduct of the Petitioner referred to above but only considered the circumstances under which the Petitioner's name was strike off from the list of reservist on 24.03.2009.

As revealed by the said reports, the Petitioner was produced before the Magistrate Court of Gampaha on a charge of attempted murder by shooting, on Vithanage Sujith Lalinda along with 4 other suspects but it was only the Petitioner who was indicted by the Attorney General for the said offence before the High Court of Gampaha.

However prior to the said case was taken up for trial, the complainant had died and the trial proceeded without the virtual complainant.

At the trial, the evidence given by the deceased virtual complainant at the Non Summary Inquiry was led under the provisions of the Evidence Ordinance and evidence of several other witnesses including some witness who were present at the wedding where the shooting took place and the police officers who conducted the investigation were led before the Learned High Court Judge. At the conclusion of the said trial, the Learned Trial Judge had acquitted the Petitioner of the charge of attempted murder.

As observed by me, the Learned Trial Judge had considered the testimony of eye witnesses who gave evidence before him and the evidence given by the deceased, complainant Vithanage Sujith Lalinda at the Non Summary Inquiry when arriving the said decision to acquit the Petitioner.

During the inquiry conducted by the Superintendent of Police Negombo (Report dated 19.02.2010) evidence of the following witnesses, namely,

1. Gammada Liyanage Sanath Ranjan Liyange
2. Vithanage Johan Benadict

3. Arangallage Sunil Premasighe, who had given evidence at the High Court Trial, had been recorded and according to their statements, none of them had seen the Petitioner at the scene of crime when they rushed to the scene after hearing the gunfire but only seen the injured with injuries.

After considering the said material and the outcome of the High Court Trial, Superintendent of Police Negombo had concluded that the material revealed during his inquiry does not warrant forwarding charges against the Petitioner.

However whilst referring to the reports referred to above the first Respondent had taken up the position that, at the time the said reports were prepared, most of the official documents maintained at the relevant police stations were destroyed and therefore the Senior Officers who prepared those reports were deprived of important evidence. Even though the 1st Respondent had taken up the above position with regard to certain documents which were not available when inquiries were conducted, the officers who conducted subsequent inquiries in 2009 and 2010 had not referred to this difficulty in their reports. As referred to above in this judgment, Superintendent Negombo had proceeded to record the evidence of the eye witnesses at his inquiry before submitting his recommendation.

Beside of the three reports referred to above the 1st Respondent had heavily relied on 1R7 a document produced by the 1st Respondent with his objections where the then Senior Superintendent of Police Negombo (not the same officer who prepared subsequent Report in 2010) had submitted his recommendation on an appeal submitted by the Petitioner, on 04 .11.2008 to the effect that steps should not be taken to re-instate the petitioner considering his involvement to the alleged incident whilst in service.

It is further observed by me, that the above document (1R7) was available at the time when the Attorney General instructed the authorities to hold an inquiry before taking any decision against the Petitioner, and in the said circumstances any decision to discontinue the service of the Petitioner will have to be taken, having considered the subsequent reports submitted by the relevant officials who conducted inquiries with regard to the conduct of the Petitioner.

The only document before this court with regard to the decision to demobilize and strike off the name of the Petitioner from the reservist list is P-13 and as revealed before this court the said

decision was taken on 24.04.2009, prior to SC FR 412/2009 was filed before this court. As referred to above, when the said application was filed, the Hon. Attorney General had advised the 1st Respondent to hold a fresh inquiry before taking any decision against the Petitioner. The Respondents have failed to submit any material to show that a fresh inquiry was carried out before any decision is taken as submitted in the said case. This position is further confirmed from the fact that the 1st Respondent had once again heavily relied on a document prepared by Senior Superintendent of Police Negombo much prior to the advice given by the Attorney General.

In the said circumstances it is clear that the 1st to 4th Respondents have failed to follow the rules of Natural Justice and granting a fair opportunity to the Petitioner by holding a fresh inquiry before taking an administrative decision to demobilize and to strike off the name from the reservist list.

Failure by the said Respondents to hold a fresh inquiry is further confirmed from all three reports before me. In all three reports, the authors of those reports have strongly recommended not to commence disciplinary proceedings against the Petitioner in the absence of any grounds to have such proceedings.

Failure to follow the rules of Natural Justice was discussed in the case of ***Captain Nawarathne V. Major General Sarath Fonseka and 6 others 2009 1 Sri LR 190*** by the Supreme Court as follows;

"Where the Petitioner denies that rules of Natural Justice have not been complied with and the Respondents assert the contrary, a Petitioner can do no more than deny the compliance with the rules of Natural Justice and the burden is on the Respondents to establish that rules of Natural Justice have been complied by producing and acceptable record of proceedings. In the absence of production of a such a record proceedings the court would not have any option other than to accept the Petitioner's version that there has been procedural impropriety leading to a denial of the rules of Natural Justice."

From the material I have already discussed it is clear, that the 1st to 4th Respondents have failed to establish that they hold a fresh inquiry before taking a decision to demobilize and strike off the name of the Petitioner from the reservist list, which leads to a procedural impropriety as discussed in the above case.

In the said circumstances it clear that the above conduct of the 1st to 4th Respondents had been in violation of the Petitioner's fundermental right guaranteed under Article 12-1 of the Constitution

of the Democratic Socialist Republic of Sri Lanka by their failure to hold an inquiry before taking a decision to demobilize and strike off the name of the Petitioner from the reservist list of the Police Reserve Service.

As discussed above in this judgment, the Petitioner has failed to give any explanation with regard to his conduct revealed in the documents 1R4-1R6 produced by the 1st Respondent before this court. The position taken up by the 1st Respondent that the Petitioner does not possess 5 years unblemished record in order to consider under the provisions of the circular P-11 was not disputed before this court by the Petitioner. In the said circumstances I am not inclined to make any order directing the Respondents to absorb the Petitioner to the regular cadre of Sri Lanka Police.

Whilst declaring that the fundermental rights of the Petitioner guaranteed under Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka had been violated by the conduct of the 1st to 4th Respondents. I make order directing the 1st to 4th Respondents to re-instate the Petitioner with effect from 24.03.2009 but make no order with regard to the payment of cost or compensation.

Application allowed.

Judge of the Supreme Court

B.P. Aluwihare PC J

I agree,

Judge of the Supreme Court

Anil Goonaratne J

I agree,

Judge of the Supreme Court

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

In the matter of an application on Fundamental Rights guaranteed by Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR 654/09

1.Everad Anthony Payoe,
Member, Hatton Dick Oya Urban Council, and also at Sirinsaru, Dick Oya.

2. M.I.M. Muhajarin,
Member, Hatton Dick Oya Urban Council, Hatton, Dick Oya.

3. G.L.Kithsiri,
32/25, Hatton House Road, Gaminipura, Hatton.

4. A. A. M. L. Lebbe,
28, Hatton House Road, Gaminipura, Hatton.

5. H. A. Neelarathna,
32/28, Hatton House Road, Hatton.

6. D. W. A. Buddadasa,
32/17, Hatton House Road, Gaminipura, Hatton.

Petitioners

Vs

1. Hatton Dickoya Urban Council, Hatton-Dickoya.

2. A.P.Anura de Silva,
   Member, Hatton Dickoya Urban Council, Hatton Dickoya.
   And also at No. 72, Hatton House Road, Hatton.
3. Gopal Nadesan, No.1, Gaminipura Road, Hatton.
4. A. Nandakumar, Chairman & Member, Hatton Dickoya Urban Council, Hatton Dickoya.
5. Upali Alahakoon,
   Commissioner of Local Government(Central Province), Department of Local Government (Central Province), Secretariat Office, Kandy.
6. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

7. Ms. Singaram Priyadarshini,
   Acting Secretary and Competent Authority of Hatton Dickoya Urban Council, Hatton Dickoya.

Added Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
UPALY ABEYRATHNE J. &
H.N.J. PERERA J.

COUNSEL : J.C.Weliamuna with Pasindu Silva and
Sulakshana Senanayake for the Petitioners
S.Mandaleswaran with P.Peramunagama,
Weerasena Ranepura Hewage and M.A.M.
Haleera for the 2nd and 3rd Respondents
Dushith Johnthasan with Elisha Fernando
for the 1st and 4th Respondents.
Rajitha Perera SSC for the 5th and 6th
Respondents.
The Added 7th Respondent was not represented.

ARGUED ON : 21.02.2017.
DECIDED ON : 23.06.2017.

S. EVA WANASUNDERA PCJ.

The Petitioners who filed this Fundamental Rights Application are two members of the Hatton Dickoya Urban Council and four other citizens of this country who live in their residencies in Hatton House Road, Gaminipura, Hatton. The Counsel for the Petitioners informed court that the 2nd Petitioner is not pursuing this Application any longer. The subject matter is totally with regard to the width of the Sunday Fair Road from the entrance point to upper division of Gaminipura and the unauthorized constructions as alleged to be hindering the upkeep of the width of the road.

Leave to proceed was granted on the 1st of April, 2013 for the alleged violation of Article 12(1) of the Constitution against the rights of the Petitioners by the 1st to 5th Respondents. From the time of the filing of this Application onwards, this Court has done its best to get the Respondents to do the needful to keep this road unobstructed to those who use the same. Due to the said action by this Court the matter had been addressed and partly resolved.

On 05.08.2015 the counsel for the Petitioners had moved to amend the caption to include the Acting Secretary and Competent Authority of the Hatton Dickoya Urban Council, due to the fact that the 4th Respondent had ceased to hold office

and as it was allowed. Amended caption was filed on 29.01.2016. to include the said 'Acting Secretary and Competent Authority' namely Ms. Singaram Priyadarshani as the 7th Respondent. Even though the Petitioners Attorney at Law on record had sent notices to her according to the Rules of this Court on 29.01.2016 , she had failed to get herself represented in these Court proceedings. On 22.06.2016 this Court directed the Registrar to send another notice from court to the 7th Respondent to be present in court or arrange to send a representative to court and " submit the initial plan on which the said Road got initiated to be constructed at the very inception, i.e. around the end of year 2005 or at the beginning of year 2006." This Court sent a copy of the letter P5 (a) dated 05.05.2006 to the said 7th Respondent and directed her to comply with the order contained therein**.** The order given to the Chairman of Hatton Dickoya Urban Council by the Assistant Commissioner of Local Government, Nuwaraeliya was, to comply with the directions therein regarding the road problem. The Chairman had not complied with the said directions at any time.

Ms. Singaram Priyadarshani however, was present in Court on 12.08.2016, in person, on notice from court but to our dismay she said in open court that she can agree to give a roadway only 10 feet wide and added that she spelt that out according to the instructions given to her by 'government authorities'.

This Court thereafter took this case up for hearing on 21.02.2017 before this Bench. The parties moved for time to file written submissions till 21.03.2017 and all parties except the 7th Added Respondent have filed written submissions.

The Petitioners submit that the illegal obstructions made by the 2nd and 3rd Respondents have adversely affected the public in general living in Hatton. The obstructions are : (1) "a sideway near the fuel station which connects the Main Street and the Sayeed Street " and (2) " a building which obstructs the entry point of the Road which starts near the Public Market and the Sunday Fair of the Hatton Town." The Sunday Fair Road leads to the Upper Division of the Gaminipura Housing Scheme. The Petitioners point out that the 1st Respondent which is the Hatton Dickoya Urban Council and which functions under the Chairman of the said Urban Council who was named as the 4th Respondent at the time of filing this Application **have failed to remove and/or to stop the said illegal obstructions causing inconvenience to the public.** It is alleged that the Hatton Dickoya Urban Council and its officers have abused their discretionary

powers acting in collusion with the 2nd Respondent, Anura Silva. It is also alleged and it has resulted in the 3rd Respondent Gopal Nadesan also having engaged in building unauthorized constructions.

As at present, the Petitioners have submitted that the issue with regard to the "obstruction of sideway near the fuel station which connects the Main Street and the Side Street " have got resolved and therefore the only matter to be considered by this Court is the "obstruction of the road leading to the upper division of Gaminipura."

This alleged obstruction starts near the Sunday Fair. It is alleged to be due to a building which has been built by the 2nd Respondent Anura Silva. He had been occupying the shop No. 58B (which exists as at present even today, at the entry point of the Sunday Fair Road which leads to the upper division of Gaminipura) ,at the Central Market of Hatton as a lessee of the said premises. This shop and premises is legally owned by the Hatton Dickoya Urban Council, the 1st Respondent. The 2nd Respondent had been the lessee even prior to the year 2000. On 24th March, 2000 he had entered into a written Agreement with the Urban Council, the 1st Respondent, after having made an application to convert the shop which already existed there, into a three storeyed building. The Building Application No. BA/88/98 dated 15.12.1998 had been approved by the Urban Council. The ground floor had to cover only 136 square feet. His building Plan has been produced with his Objections and according to that also, the ground floor covers exactly 136 square feet and nothing more even though it is alleged by the Petitioners that it is more. After the building was completed also the 2nd Respondent remains to be the lessee of the Urban Council. He has no ownership rights according to Notarially executed agreement No. 566 dated 24.03.2000. This Agreement is produced by the Petitioners marked as P1(b).

The 1st Respondent Urban Council and the 4th Respondent Chairman of the Urban Council have filed objections to the Petition and totally denied the allegations made by the Petitioners. Yet, the **Urban Council has admitted the receipt of the document P5(a)** (in paragraph 13 of its objections filed by way of an affidavit only) **which is the direction and an order given to the Urban Council by the 5th Respondent, the Commissioner of Local Government of the Central Province to discuss the problem with the Villagers and remove the obstructions to pave way for a road 14 feet wide.** The Urban Council states that at the time of filing their

objections , i.e. in 2013, **the road is developed and motorable**. The Objections of the 1st Respondent does not elaborate on how much the road is developed or what steps the Council has taken to get it developed or demonstrate the status of the road by way of any photographs. I feel that the objections contain only a denial and no attempt has been made to show that the Urban Council has done any work at all to resolve the matter.

The 2nd and 3rd Respondents have filed objections together, submitting to court that the 1st Petitioner is a rival of the 2nd and 3rd Respondents and that they have filed this Application against them due to that fact alone. I observe that the 1st Petitioner and the 2nd Respondent are members of the Urban Council of Hatton Dickoya. However they submit that the alleged disputes or **complaints against the 2nd and 3rd Respondents are not amenable to the Fundamental Rights jurisdiction**. They agree that the Petitioners except the 1st and 2nd Petitioners had quite correctly complained to the Urban Council with regard to obstructions of the road. It is the paramount duty of the Urban Council to act according to the provisions made in the Urban Council Ordinance such as Sections 55, 80, 84 etc. which the Urban Council has failed to do. The Urban Council has not acted responsibly and thus failed to take steps to remove the obstructions , if there are any.

This Court has issued orders to survey the particular road and the entry point to the Sunday Fair Road even prior to the granting of leave to proceed. One such survey was done in October, 2010. Within the record of this case, the survey plan done by Licensed Surveyor T.R.De Zoysa dated 19.10.2012 bearing No. 50/20 is filed. According to that Plan, 100 meters of the road from the entry point had been surveyed, based on the Plan No. 066 (L.R.C. No. Co. 883) dated 18.09.1998 which was filed in Court by the Petitioners marked **as P2**. This plan No. 50/20 shows the width of the road as depicted in the older plan **in red lines, which can be assessed by scrutinizing the same to be about 14 feet wide.** It shows that the width of the road at different places are less than 14 feet, more than 14 feet and at the entrance point to the Sunday Fair Road to be 12 feet and 8 inches. The road in existence is marked in black lines.

The 2nd and 3rd Respondents point out in their written submissions that the building which is alleged to have been built encroaching upon the entry point of the road is marked on this plan 50/20 to be **beyond the entry point**.

Thereafter, after granting leave to proceed this Court has issued a fresh commission on 04.06.2014. This survey and the report were submitted to Court with a covering letter by the 5th Respondent, the Commissioner of Local Government dated 08.08.2014. The survey filed of record in this instance is only a sketch and a report to the effect that there is no obstruction to traffic or people. The report further states that the land at the **entry point is part of the Sunday Fair land which belongs to the Urban Council.**

The 5th Respondent filed objections on 10.10.2013. The 5th Respondent had sent **P5(a) dated 05.05.2006** to the Urban Council directing the Council to look into the matter and to remove unauthorized constructions if any. P6, P7(b), P8, P9, P16, and P17 are admitted by the 5th Respondent and the Commissioner of Local Government has done his duty on the complaints made by the Petitioners. The powers of the Minister of Local Government in relation to removal of any chairman and dissolution of any Urban Council is contained in Sec. 184 of the Urban Council Ordinance No. 61 of 1939 read with Sec. 2 of the Provincial Council Act (Consequential Provisions) No. 12 of 1989 and the Enactment of Supervision and Administration of Local Authorities Rule No. 07 of 1990 of the Central Province. The 5th Respondent submits that since the Minister is not a party to this application, the Petitioners cannot complain that the Commissioner has not taken steps to follow up the matter of the Urban Council not complying with the directions given to the Council, since the power to do so does not lie with the Commissioner but with the Minister. I fail to see any violation of a fundamental right by the 5th Respondent.

During the proceedings of this Court all parties have agreed at different times that the width of the road had been 14 feet from the very inception. The first plan done by the Land Reform Commission is dated in the year 1998. Plan 50/20 referred to above which was done on a commission as ordered by this court also shows the width as 14 feet. However the road is seen to be a gravel road in part and a concrete road at different lengths of the same road. This Court has not been able to get at the development plan proposed in 2005/2006 from the Urban Council to ensure the width of the road proposed to be developed and from which point to what point on the road, the development was approved. The 7th Added Respondent mentioned to Court when she appeared in person that it is

only 10 feet ‘according to the instructions given by government officials ‘ , which could be allowed for the Sunday Fair Road.

The Urban Council is duty bound to serve the people of the area which this particular Urban Council has failed to do. Whether the Urban Council is politically with the party of the prevailing Central Government or not, it has to do its duty towards the people of the area. In the case of ***Priyangani Vs Nanayakkara and Others 1996, 1 S.L.R. 399, at pg. 400,*** Justice Mark Fernando stated thus: “Discretionary powers can never be treated as absolute and unfettered, unless there is compelling language; when reposed in public functionaries such powers are held in trust, to be used for the **benefit of the public, and for the purpose for which they have been conferred, not at the whim and fancy of officials, for political advantage or personal gain. “**

The availability of alternative remedies does not bar any citizen from moving the Supreme Court on a fundamental right. It was argued that the Petitioners should have gone to other forums on the same grounds alleged in this application. Every person has a choice in law to follow whatever action he intends to take with regard to his grievance.

I find from the documents filed in this case, that the Hatton Dickoya Urban Council has to commence the development of the Sunday Fair Road as decided and initiated long ago. The Council has to find the files, the plans, the decisions and find out the reason as for not having gone ahead with the development plan which was initiated in 2005/2006. The road, I find , is at different levels of the ground. It is flat in short distances, it is hilly and steep in other places. Moreover, the retaining walls are necessary on the side of the road unlike in Colombo or coastal areas of our country. In plan 50/20, I find that there are many retaining walls along the road. It can be observed that due to these retaining walls along the road which are done by the Urban Council as well as private land owners, the width of the road has got affected. It would not be easy to keep the width exactly at 14 feet all the way from the beginning of the road to the end. It is a difficult task mainly due to these existing retaining walls. It needs the expertise reposed in engineers and planners who are experienced in the subject of developing roads in the hill country.

I find that the 1st Respondent, the Urban Council of Hatton Dickoya has failed to use its authority and discretion in the proper manner with regard to the grievances of the Petitioners as well as the public at large who use this particular road. I hold that the fundamental rights of the Petitioners contained in Article 12(1) of the Constitution have been violated by the 1st Respondent. However, in the written submission filed by the Petitioners, it is specifically mentioned that the relief sought at this stage is only to ensure that the authorities are directed to develop the Sunday Fair Road as a 14 feet wide road. Yet, I find that the prayer to the Petition is to get relief as prayed for in the Petition. I hold that the Petitioners are entitled to **a declaration** that " any construction carried out within the Hatton Dickoya Urban Council Limits circumventing the provisions of the Urban Council Ordinance (as amended), Rules and Regulations thereto, By-Laws and other applicable laws of the country is violative of law and therefore have to be removed and /or demolished".

I make order directing specifically the 1st Respondent and its Acting Secretary and Competent Authority, the 7th Respondent, to take steps accordingly within one year, taking P2 (Plan 066 - L.R.C. Co. 883) dated 18.09.1998 as the basic plan, which leads from the Upper Division of Gaminipura to the Public Market and the Sunday Fair of the Hatton Town, starting from the point of entry at the Sunday Fair.

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

S.C (FR) Application No. 57/2012

In the matter of an Application under and in terms of Article 126 of the Constitution.

1. Dewndara Wedasinghage Manusha Madhurangana
   20/A, Pansalhena Road,
   Wellampitiya.

And 87 others

PETITIONERS

Vs.

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

And 23 others

RESPONDENTS

BEFORE: Priyasath Dep P.C., C.J.,
Sisira J. de Abrew J. &
Anil Gooneratne J.

COUNSEL: Asthika Devendra with Jagath Wickramasuriya for Petitioners

Saliya Peiris P.C. with Thanuka Nandasiri for 1B, 2A - 5A, 6B, 7A, 17B, 21B, 22C & 23A Respondents

Sanjay Rajaratnam P.C., A.S.G. for 8th, to 16th & 24th Respondents

ARGUED ON: 22.03.2017

DECIDED ON: 05.07.2017

GOONERATNE J.

This Fundamental Rights Application has been filed by about 88 Petitioners to obtain National or Provincial Schools for children who have completed their primary education at the Maligakanda Mahinda Vidyalaya. Petitioners describe Maligakanda Mahinda Vidyalaya as a school developed under a project called "Model Primary School Project" in the year 2006. It is a project conducted to resolve problems of the high competitive nature for school children, for school admissions to Grade 6 of the popular and National Schools. Petitioners rely on document P3 to fortify their case to admit children to popular and or National Schools after completing primary education as stated in P3.

P3 is a letter issued by the Provincial Education Director, Western Province to Zonal Director of Education, Colombo. This letter is copied to Secretary, Education and Secretary Chief Minister and some others for their information. Paragraph 2 of P3 states that Vidyawardana Vidyalaya and Maligakanda Vidyalaya would be developed as a model Primary School from the

year 2007. It is stated as regards Vidyawardena Vidyalaya from 2007 for Grade 1 parallel classes to be conducted and those students who pass the Grade 5 examination and the marks obtained at the Grade 5 Scholarship/Competitive Examination would be the criteria to select students to D.S. Senanayake College (10% males) and Devi Balika Vidyalaya (10% females) and the rest to Parakrama Bahu Vidyalaya. It emphasis that these students should be admitted. යන පාසල් වලට ඇතුලත් කල යුතුය. As regards Maligakanda Vidyalaya P3 reads as follows:

බප/කො/මලිගාකන්ද විද්‍යාලය

2007 වර්ෂයේ සිට 1 ශ්‍රේණියේ සමාන්තර පන්ති 04 ක් ආරම්භකළ යුතු අතර 5 ශේණිය සමත් වන සිසුන් 5 ශ්‍රේණියේ ශිෂත්ව විභාගයේ ලකුණු/තරග විභාගයක ලකුණු පදනම් කරගෙන කොළඹ ආනන්ද විද්‍යාලය. කොළඹ නාලන්ද විද්‍යාලය සහ ශාන්ත ජෝන් විද්‍යාලය යන පාසල්වලට පිරිමි ළමයින්ගෙන් 20% බැගින්ද කොළඹ අශෝක විද්‍යාලයට පිරිමි ළමයින්ගෙන් 30% ද සි.ඩබ්.ඩබ්. කන්නන්ගර විද්‍යාලයට පිරිමි ළමයින්ගෙන් 10% ද ඇතුලත් කල යුතුය. 5 ශ්‍රේණිය සමත්වන ගැහැණු ළමයින්ගෙන් 20% බැගින් ගෝතමී බාලිකා විද්‍යාලය, ආනන්ද බාලිකා විද්‍යාලය, රත්නාවලි බාලිකා විද්‍යාලය, සි.ඩබ්.ඩබ්. කන්නන්ගර විද්‍යාලය සහ සියඵ ශාන්තුවරයන්ගේ බාලිකා විද්‍යාලය යන පාසල්වලට ඇතුලත් කල යුතුය. 5 ශ්‍රේණිය සමත්වන සිසුන්ගෙන් කොළඹ ආනන්ද, නාලන්ද සහ ගෝතමී බාලිකා යන පාසල්වලට ඇතුලත් කරනු ලබන්නේ බෙ ද්ධ සිසුන් පමණකි.

The question is whether the above P3 letter stipulates a binding agreement to compel the authorities concerned to admit children to Provincial and National Schools in the manner referred to in P3. Can the Petitioners argue that there is a 'legitimate expectation' for the Petitioners and require the authorities concerned to admit their children in the manner stipulated in P3? There is an expectation to comply with P3 but whether it could be termed a 'legitimate expectation' is another question to be considered very carefully. Especially an admission of students to Grade 1 and the competitive nature of the Grade 5 Scholarship Examination, is being controlled and adopted by circulars of the Education Department and the Ministry of Education. This is so due to the competitive nature of school admissions and to observe transparency in the process of selection, of students to National and Provincial Schools. It should not be done according to the whims and facies of persons in some authority. A consultative procedure may not be available in cases where high competitive aspects of admissions of students to Grade 1 and Grade VI Scholarship Examination is concerned. It may be unfair and unreasonable to adopt different procedures of admissions of students.

The Education Department or the Ministry of Education of the Central Government lays down the criteria for Grade 5 Scholarship Examination. There is a cut-off point of marks and students who score marks above the cut-

off point would be eligible to be selected to popular schools or may be entitled to scholarships. On the other hand students from model primary schools are also considered in terms of letter P3 (provided the required marks are obtained)to be admitted to schools like Ananda, Nalanda, Devi Balika etc. The two procedure available for students may clash in certain respects. P3 contemplates of a certain percentage e.g 30% for male students and 20% for girls in the selection process. Due to difficulties encountered by the authorities P10, MOU had to be issued. It clearly states in its opening paragraph that it has become essential to issue such MOU due to hardships/difficulties faced in admitting children to popular schools, in the Colombo District. A practical approach is being introduced in P10, MOU although certain problems could be envisaged. It is correct that the Petitioners were not privy to P10. Nor was any consultative procedure adopted, prior to issuance of P10. Nevertheless it is a matter for the Education Department and the Ministry of the Central Government to take steps in the best interest of Education and all those involved in the subject. As such a consultative process cannot be made available as it would be impracticable.

P10 MOU was issued in the greater interest of the public and education and Justice to all. Those students who could not obtain the required marks in the scholarship examination cannot have a legitimate expectation of being selected to popular schools in the Colombo District notwithstanding the

material in P3. To describe and explain further the marks list in P11 is thus incorporated as follows:

Petitioners performance at the Grade 5 Scholarship Examination

The results of the Petitioners at the Grade 5 Scholarship Examination has been depicted in the Mark List (P11), which is as follows:

1st Petitioner – 75 marks – not qualified

3rd Petitioner – 96 marks – not qualified

5th Petitioner – 92 marks – not qualified

7th Petitioner – 146 marks – not qualified

9th Petitioner – 110 marks – not qualified

11th Petitioner – 101 marks – not qualified

13th Petitioner – 122 marks – not qualified

15th Petitioner – 127 marks – not qualified

17th Petitioner – 94 marks – not qualified

19th Petitioner – 128 marks – not qualified

21st Petitioner – 117 marks – not qualified

23rd Petitioner – 69 marks – not qualified

25th Petitioner – 87 marks – not qualified

27th Petitioner – 152 marks – not qualified

29th Petitioner – 117 marks – not qualified

31st Petitioner – 123 marks – not qualified

33rd Petitioner – 153 marks – not qualified

35th Petitioner – 130 marks – not qualified

37th Petitioner – 90 marks – not qualified

39th Petitioner – 141 marks – not qualified

41st Petitioner – 115 marks – not qualified

43rd Petitioner – 142 marks – not qualified

45th Petitioner – 118 marks – not qualified

47th Petitioner – 119 marks – not qualified

49th Petitioner – not qualified

51st Petitioner – 120 marks – not qualified

53rd Petitioner – 154 marks – not qualified

55th Petitioner – 145 marks – not qualified

In comparison of marks in P11 with those who scored above the cut-off point of marks, it would be unreasonable and unfair to deprive a National school to other students who faired well in the Scholarship Examination.

In order to clarify the matter in detail, I would refer to that part of the written submissions of 8A, 9D, 10, 11A, 12, 13, 14A, 15A, 16A and 24 Respondents and the MOU (P10) as follows:

(b) the MOU dated 03.11.2009, marks P10 entered into between the Ministry of Education and the Western Province Provincial Ministry of Education specifies the manner in which students from Maligakanda Mahinda New Model Primary School should be admitted to Grade 6 of National and Provincial Schools commencing from 2012.

(c) Clause 5 of the said MOU provides that students who obtain marks above the District cut off marks at the Grade 5 Scholarship Examination would be admitted to Grade 6 of National and Provincial Schools in the Colombo Education Zone. Priority in respect of admission to National Schools in the Colombo Education Zone would be based on the order of merit among such students.

(d) In the year 2012, 7 students were admitted to National Schools based on the marks obtained at the Grade 5 Scholarship Examination pursuant to clause 5 of the MOU, in the following manner.

Ananda College	-	01 student (178 marks)
D.S. Senanayake College	-	01 Student (174 marks)
Mahanama College	-	01 student (168 marks)
Asoka Vidyalaya	-	01 students (167 marks)
Lumbini Vidyalaya	-	03 students (159 marks)

(e) Clause 5.1 of the MOU provides that students who obtain marks below the District cut off marks at the Grade 5 Scholarship Examination would be admitted to Grade 6 of Provincial Schools in the Colombo Education Zone, based on residencies and preferences.

(f) Steps were taken to admit the unsuccessful students of the Maligakanda Mahinda New Model Primary School to Susamyawardana Vidyalaya, Colombo 8 and C.W.W. Kannangara Maha Vidyalaya, Colombo 8, which are Provincial Schools in accordance with Clause 5:1 of the MOU based on preferences indicated by the parents, (vide – 9R3A and 9R3B)

The above Respondents have not violated the fundamental rights of the Petitioners. Equal protection of the law cannot be extended to a case of this nature where selection procedure is geared to recognise the cut-off point of marks obtained in an examination, which is competitive. P10 – MOU recognise this fact. P11 indicates the marks obtained by the Petitioners. It is clear that the Petitioners' marks are below the cut-off point. In my view if the

Petitioners are admitted to the schools mentioned above such an act can amount to violation of the fundamental rights of the others who have obtained more marks than the Petitioners. When I consider all the above matters, I feel that the Petitioners are not entitled to claim that their fundamental rights have been violated as they were not admitted to the schools mentioned above.

In the circumstances of the case in hand, I proceed to dismiss this application without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C. C.J.

I agree

CHIEF JUSTICE

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 and in terms of section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 amended by the Act No. 54 of 2006.

SC HC CA LA No. 127/2014
NWP/HCCA/KURU/111/2005(F)
DC Kurunegala case No. 4897/P

N. Habeebu Mohamedge Masahima Umma
Alias Siththi Raheema (Deceased)
No. 145, Bulugohotenna Road
Akurana

Plaintiff-Respondent-Respondent

1. P.T.G. Mohamed Sifan Najimudeen
2. P.T.G. Fathima Shifani Najimudeen
3. F. Masani Janimudeen

All of No. 145, Bulughatenna,
Palleweliketiya, Akurana

Substituted –Plaintiff-Respondent-Respondent-Petitioners

Vs.

9. Mahagamage Chandrasena alias
Chandrasiri of
Bamunugedera, Kurunegala

Defendant-Respondent-Petitioner Respondent

1. Abdul Hasan Mohomed Iqbal
2. Abdul Hasan Mohomed Sarook
3. Abdul Hasan Mohomed Mursheed
4. Abdul Hasan Mohomed Muneer
5. Abdul Hasan Mohomed Jarjees

All of 188, Dodamgolla, Akurana

6. Habeebu Mohomed Fauziya Umma (Deaceased)

Of 99/1, Bulugohotenna, Akurana

6A. Enderu Tenne Gedera Seyed Mohomed Habeebu Mohomed of 99/1, Bulugohotenna, Akurana.

7. Abdul Kadar Fathima Mafas of No. 41, Bulugohotenna, Akurana
8. Nuwara Gedera Habeebu Mohomedge Sanufa Umma of No. 237, Bulugohotenna, Akurana
10. Nuware Gedera Habeebu Mohomed Misiriya Umma
11. Welimankada Gedera Mohomed Anwar Siththi Afeera
12. Welimankada Gedera Mohomed Anwar Siththi Fariha

All of No. 237, Bulugohotenna, Akurana

Defendants-Appellants-Respondents-Respondents

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

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

SC HC CA LA No. 128/2014
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9. Mahagamage Chandrasena alias Chandrasiri of
Bamunugedera, Kurunegala

Defendant-Respondent-Petitioner-Petitioner

Vs.

1. Abdul Hasan Mohomed Iqbal
2. Abdul Hasan Mohomed Sarook
3. Abdul Hasan Mohomed Mursheed
4. Abdul Hasan Mohomed Muneer
5. Abdul Hasan Mohomed Jarjees

All of 188, Dodamgolla, Akurana

6. Habeebu Mohomed Fauziya Umma
(Deceased)
Of 99/1, Bulugohotenna, Akurana

6A. Enderu Tenne Gedera Seyed Mohomed Habeebu Mohomed of 99/1, Bulugohotenna, Akurana.

7. Abdul Kadar Fathima Mafas of
No. 41, Bulugohotenna, Akurana
8. Nuwara Gedera Habeebu
Mohomedge Sanufa Umma of
No. 237, Bulugohotenna, Akurana
10. Nuware Gedera Habeebu Mohomed
Misiriya Umma
11. Welimankada Gedera Mohomed
Anwar Siththi Afeera
12. Welimankada Gedera Mohomed
Anwar Siththi Fariha
All of No. 237, Bulugohotenna,
Akurana

Defendants-Respondents-
Respondents-Respondents

1. Fathima Shifani Najimudeen
2. Muhammad Sifan Najimudeen
3. Fathima. Masani Najimudeen

All of No. 145, Bulugohotenna
Palleweliketiya, Akurana

Respondents
(Heirs of the deceased Plaintiff-
Appellant sought to be substituted)

Before — Priyasath Dep, PC J
Upaly Abeyrathne, J
Anil Goonaratne, J

Counsel — Lakshman Perera, PC with Upendra Walgampaya and Anjalee Amarasinghe for 9th Defendant-Respondent-Petitioner-Petitioner.

Rohan Sahabandu, PC for 1st to 8th and 10th to 12th Defendant-Appellants-Respondents-Respondents.

A.1 Panditharathna for parties proposed to be substituted as Substituted Plaintiff-Respondents.

Argued on : 15.06.2016

Decided on : 17.02.2017

Priyasath Dep, PC. J

This refers to an application filed by the heirs of the deceased Plaintiff-Respondent in Case No.NWP/HCCA/KUR/110/2005(F) and also the heirs of the deceased Plaintiff-Appellant in NWP/HCCA/KUR/111/2005(F) to set aside the judgment of this Court dated 07-07-2015 as the said judgment was entered per incuriam. This Court heard the submissions of the parties and permitted them to file written submissions. Accordingly the parties filed their written submissions.

In this case the Plaintiff instituted action in the District Court of Kurunegala in case No. 4897/P to partition the land depicted in Plan No. 5052 dated 30.09.1998 made by H.M.S. Herath, Licensed Surveyor marked "X" and containing in extent 08.1 perches between the Plaintiff and 1st to 8th and 10th to 12th Defendants. It is the position of the Plaintiff that the 9th Defendant has no rights to the property which is referred to as Lot 1 in the said Plan marked "X". The 9th Respondent claimed lot 1 on the basis that he has prescribed to that lot. He moved that the action be dismissed .

At the trial parties raised 30 issues. However, the learned District Judge did not answer those issues and raised 4 issues on his own and on the basis of the answers given to those issues he dismissed the plaint. His contention is that predecessors in title to the land sought to be partitioned had transferred divided lots to the parties and that they possessed those lots as divided and defined lots. The learned District Judge held that the properties were not properties co-owned by the parties. As there was no common ownership the question of termination of common ownership does not arise.

Being aggrieved by the judgment of the District Court, 1st to 8th and 10th to 12th Defendants appealed against the judgement to the Provincial High Court of North Western Province holden in Kurunegala in case No. WP/HCCA/KUR/110/2005(F). The Plaintiff and the 9th Defendant were cited as Respondents. Similarly Plaintiff also appealed against the judgement to the Provincial High Court of North Western Province held in Kurunegala in case No. NWP/HCCA/KUR/111/2005(F). Both appeals were taken up together by the Provincial High Court of Kurunegala and two separate judgements were delivered setting aside the Judgement of the District Court. The learned High Court Judges answered the 30 issues raised by the parties and ordered the partitioning of the land and allotted shares to the Plaintiff and to the 1st to 8th and to 10th to 12th Defendants. The 9th Defendant's claim based on prescription was rejected and no shares were allotted to him.

Being aggrieved by the judgement of the High Court, the 9th Defendant - Respondent-Petitioner filed two Leave to Appeal applications to the Supreme Court dated 10th March 2014 numbered HC CA LA No. 127/2014 and SC HC CA LA No. 128/2014.

On 08.05.2014 when the matter was listed for support it was brought to the notice of the Court that the Plaintiff had passed away and steps to be taken for substitution. Then the case was again mentioned on 20.05.2015 and 04.07.2014. On 04.07.2014 and the Court made order to the effect that if the substitution papers are in order to take steps to support for substitution. On 01.12.2014, 1st Defendant filed a motion and moved to dismiss the application as the 9th Defendant –Respondent-Petitioner had failed to exercise due diligence in prosecuting the Application. Thereafter the Attorney-At-law for the 9th Defendant –Respondent filed a motion dated 20.03.2015 along with the substitution papers and moved to list the case for support for substitution and accordingly case was listed for support for substitution on 07.07.2015.

When the case was taken up on 07.07.2015, the learned President Counsel for the 9th Defendant-Petitioner submitted that the Plaintiff had passed away when the appeal was pending in the High Court and therefore, judgement of the High Court is a nullity. He cited several authorities of the Supreme Court and moved to declare that the judgement is a nullity. The learned Senior Counsel for the 1st to 8th and 10th to 12th Defendant was not present in Court as he was held up in the other division of this Court and the junior Counsel did not raise any objections to this application. Accordingly this Court set aside the judgement of the Provincial High Court of North Western Province on the basis that the judgement is a nullity On 24.07.2015 Attorney-at-Law for the 1st to 8th and 10th to 12th Defendants filed a motion and moved that the application be re-listed for support. The Attorney-at-law for the 9th Defendant -Respondent Petitioner filed a statement of objections dated 08.12.2015 and objected to the re-listing of this application. The heirs of the Plaintiff who were substituted in the High Court after the delivery of the judgement as substituted Plaintiff-Respondents in . NWP/HCCA/KUR/110/2005(F) and as substituted Plaintiff-Appellants in . NWP/HCCA/KUR/111/2005(F) filed a petition dated 29th March 2016 and moved to set aside the order dated 07.07 2015 on the basis that it was entered per incuriam. This matter came up before the same bench on 03.02.2016 . The learned Counsel for the heirs of the Plaintiff proposed to be substituted as substituted Plaintiff in this Court and also learned President Counsel for the 1st to 8th and 10th to 12th Defendant-Respondent-Respondent submitted that the order made by the Supreme Court declaring that the judgement in the High Court is nullity is an order made per incuriam and moved to file papers to set aside the order. The Court permitted parties to file papers before 31.03.2016 and made order

that the case record to be submitted to His Lordship the Chief Justice for an order. His Lordship the Chief Justice directed that applications to be supported before the same bench which delivered the order dated 07.07. 2015. Accordingly the applications were supported on 15.06.2016 and after hearing all the parties, Court made order directing the parties to file written submissions before 18.07.2016 and the order was reserved. Thereafter the parties filed comprehensive written submissions.

The learned President's Counsel for the 9th Defendant-Respondent - Petitioner objected to the relisting application and argued that Supreme Court has no power to re-hear, revise, review or vary its orders. He cited the case of Jeyaraj Fernandopulle v De Silva and others (1996) 1 SLR 70 where at page 96, Amerasinghe J. stated that

> " The court has no statutory jurisdiction to rehear, reconsider, revise, review, vary or set aside its own orders. Consequently, the Chief Justice cannot refer a matter to a Bench of five or more judges for the purpose of revising, reviewing, varying or setting aside a decision of the Court. The fact that in the opinion of the Chief Justice the question involved is a matter of general or public importance makes no difference."

I agree with the submissions of the learned President's Counsel for the 9th Defendant Respondent -Petitioner that this Court has no power to review, revise, vary or set aside its orders.

The main question that has to be decided in this case is whether the order dated 07.07. 2015 is an order made per incuriam or not. If it is an order made per incuriam could the Court use its inherent powers to set aside the order.

The learned Counsel appearing for respective parties cited several authorities regarding the question as to whether the order made on 07.07 2015 is an order made per incuriam or not. I will refer to some of the authorities cited by the parties which are relevant to this Application.

In Halsbury, Laws of England 4th edition, Vol 26 para 578 it was stated that;

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> "A decision will be regarded as given per incuriam if it was in ignorance of some inconsistent statute or binding decision; but not simply because the Court had not the benefit of the best argument."

In the case of Morelle Ltd. V Wakeling (1955)1 All ER 708, at page 718 Sir. Raymond Evershed MR states that:

> " As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgement, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, MR, of the rarest occurrence. In the present case, it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case".

The learned Counsel for the heirs of the Plaintiff made submissions based on two grounds:

1. It was not brought to the notice of the Supreme Court the section 81 (9) of the Partition Law No. 21 of 1977 as amended by Act No 29 of 1997.
2. No notices have been served on substituted Plaintiff-Petitioners by the 9th Defendant –Respondent-Petitioner and due to that fact there was no representation on behalf of them when the Supreme Court made the order dated 07.07.2015.

This Court will deal with the second ground submitted by the heirs of the Plaintiff .It was established that there was no substitution effected in place of the deceased Plaintiff when the court made the order on 07.07.2015.The

present application by the heirs of the Plaintiff is to set aside the order dated 07.07.2015 on the basis that the order was made per incuriam. This court has to examine whether or not the order made by this court is an order made per incuriam. Though orders made per incuriam is subjected to narrow definition it includes orders made due to inadvertence, mistake or oversight..

It is to be observed that though the application was filed in 2013 it was never supported for granting of leave. Since the Plaintiff had passed away, the 9th Defendant-Respondent- Petitioner was given time to take steps for substitution . However, substitution was not effected and the 9th Defendant –Respondent-Petitioner is a defaulting party. In fact a motion was filed on behalf of the 1st Defendant to dismiss the application for not exercising due diligence in prosecuting the application. According to the proceedings of this case the date given which is 07.07.2015 is for the purpose of effecting substitution. Heirs of the Plaintiff- Respondents submit that they have no notice of this application and for that reason there was no representation. The Learned President Counsel who appeared for the 1stto 8th and 10th to 12th was held up in another division of this court and a Junior counsel appeared for them. In this background the learned President Counsel for the 9th Defendant –Respondent -Petitioner made submissions to the effect that the judgement of the Provincial High Court of North Western Province held in Kurunegala was a nullity due to the fact that the Plaintiff-Appellant had passed away prior to the delivery of the judgement. The learned counsel who appeared for the 1st to 8th and 10th to 12th Defendant –Appellant-Respondents did not object to the submissions made by the President's Counsel and it appears that there was an acquiescence on the part of the Counsel. On the strength of the submissions and the authorities cited by the learned President's Counsel this court made order setting aside the judgement of the Provincial High Court.

The gravamen of the complaint made by the heirs of the deceased Plaintiff is that they had no notice of this application and had no representation and thereby they were deprived of a right of hearing which they are entitled to in law. It is to be observed that the judgment in the Provincial High Court of Kurunegala was given in favour of the deceased Plaintiff as well as in favour of the 1st to 8th and 10th to 12th Defendants. The judgement of the Supreme Court prejudicially affected the rights of the heirs of the Plaintiff-Appellant and they were deprived of their rights without a hearing. On the other hand 9th Defendant –Respondent –Petitioner obtained the relief

without taking the procedural steps and noticing the heirs of the Plaintiff who are necessary parties to the action. Therefore this court has to consider whether there is a serious flaw in the procedure and violation of the principles of natural justice. This court has to consider whether the order made on 07.07.2015 order made per incuriam or not .

The Court made order on 07.07. 2015 on the basis of submissions made by the learned President's Counsel for the 9th Defendant-Respondent-Petitioner to which the learned junior counsel for the 1st – 8th and 10th – 12th Defendant did not objected to it and there was acquiescence on the part of the junior counsel. Therefore 1st – 8th and 10th – 12th Defendant could not complaint against the order as they have participated in the proceedings on 07.070.2015.The complaint of the heirs of the Plaintiff is on a different ground which should be seriously considered by this Court.

At this stage it is relevant to cite two cases referred to in Jeyaraj Fernandopulle Vs. De Silva and others (supra) which has some relevance to this case.

Ranmenikhamy Vs. Tissera (65 NLR 214) is an application to set aside the order of the Supreme Court rejecting the Appeal as an order made per incuriam.

In this case the Appeal which was preferred to the Supreme Court was rejected, on the application of Counsel for certain Respondents, on the ground that notice of appeal had not been served on one of the other Respondents. It was later proved to the court that the respondent in question was a minor who was represented in the action by a duly appointed guardian-ad-litem on whom notice of appeal had been duly served. It was also conceded that the objection was raised and not resisted as the result of a mistake common to both Counsel and that there had been substantial notice of appeal to the minor respondent.

Held, that, in as much as the order rejecting the appeal was made per incuriam, the Court had inherent jurisdiction to set aside its own order."

This support the proposition that the 'Supreme Court has power to vacate its orders in appropriate circumstances if it is an order made by it per incuriam'.

Menchinahamy Vs. Muniweera (52NLR Page 409) refers to an Application for revision or in the alternative for Restitutio in Integrum.

In the partition action S who was added as a party died , but no steps were taken to have his heirs, namely his widow and children substituted in his place. The case proceeded to interlocutory decree which was upheld by the Supreme Court in appeal. Thereafter, S's heirs moved the Supreme Court by way of revision/ restitutio in integrum.

Held, that the interlocutory decree was irregularly entered and that the case should be sent back for S's heirs to be added and for investigation of the claims of S and the children of N.

This decision was made in a revision application and during the period the Partition Act No 16 of 1951 was in force. However, the principle is the same that if an order was made without notice to the parties it is liable to be set aside.

In the case before us the Court made order on 07.07.2016 on the basis of submissions made by the learned President Counsel for the 9th Defendant-Respondent-Petitioner to which the learned junior counsel for the 1st – 8th and 10th – 12th Defendant-Respondent-Respondent did not objected to it and there was acquiescence on the part of the junior counsel. The Provincial High Court judgement is in favour of the deceased Plaintiff- and the heirs of the Plaintiff are prejudicially affected by this order. As the heirs of the deceased Plaintiff-Respondent were not substituted they were deprived of right of hearing which they are entitled to. Therefore, principles of natural justice were violated. The order was made by this Court under a mistaken belief that all parties were before Court and that they agreed that the judgment of the Provincial High Court was a nullity. Therefore the order made on 07.07.2015 is an order made per incuriam.

It is an established rule that no party should suffer due to an act of court. It is set out in the case of Rodger v Comptoir D'Escompte de Paris (1871) LR 3/1 4C 465 that:

> "One of the first and highest duties of all Courts…. to take care that the act of the Court does no injury to any of the suitors

We hold that the order made on 07.07. 2015 is an order made per incurim and the Court in the exercise of its inherent jurisdiction set aside the order. Applications for re-listing allowed.

Judge of the Supreme Court

Upali Abeyrathne J.
I agree.

Judge of the Supreme Court

Anil Goonerathne J.
I agree.

Judge of the Supreme Court